
2011

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Recommended Citation

Sam Camardo, *Clio on Steroids: Historical Silence as a Presumption of Unconstitutionality*, 62 Case W. Rsrv. L. Rev. 523 (2011)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol62/iss2/7>

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CLIO ON STEROIDS: HISTORICAL SILENCE AS A PRESUMPTION OF UNCONSTITUTIONALITY

“We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present.” – Oliver Wendell Holmes¹

INTRODUCTION

Since March 23, 2010, political pundits have inundated us with rhetoric that either demonizes or defends Congress and the Obama Administration’s recent overhaul of the healthcare industry through the Patient Protection and Affordable Care Act² (“PPACA”). Most of the debate revolves around section 1501, which requires, with limited exceptions, all Americans to purchase and maintain a minimum amount of health insurance or pay a penalty.³ Section 1501 has become known as the “individual mandate.”⁴ The breadth of the individual mandate, whether couched in Congress’s power to regulate commerce⁵ or to tax and spend for the general welfare,⁶ is arguably unprecedented.⁷ Indeed, the law’s opponents forcefully assert that it is an unprecedented and therefore an unconstitutional expansion of federal power.⁸ Proponents argue that those claims do not withstand

¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

² Pub. L. No. 111–148, 124 Stat. 119 (2010).

³ Pub. L. No. 111–148, 124 Stat. 242 (2010).

⁴ See, e.g., *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 886 n.2 (E.D. Mich. 2010) (“The term ‘Individual Mandate’ in the pleadings and in this opinion refers to the minimum coverage provision of the Act which requires that all private citizens maintain minimum essential coverage under penalty of federal law.”), *aff’d* 651 F.3d 529 (6th Cir. 2011).

⁵ U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce . . . among the several States”).

⁶ U.S. CONST. art. I § 8, cl. 1 (granting Congress the power to “provide for the . . . general Welfare of the United States”).

⁷ See *infra* note 403 for a discussion of historical facts that are asserted as precedent for the individual mandate.

⁸ See, e.g., Randy E. Barnett, Op-Ed, *The Insurance Mandate in Peril*, WALL ST. J., Apr.

scrutiny.⁹ And the federal government, defending section 1501 in court, dismissed the so-called “unprecedented argument”¹⁰ as “empty rhetoric, not a legal test.”¹¹

The government’s pithy dismissal, however, may be equally rhetorical. At least some federal judges who have reviewed the individual mandate’s constitutionality have been more sympathetic to the unprecedented argument. The United States Court of Appeals for the Eleventh Circuit, finding the individual mandate beyond Congress’s power, noted, “[t]he fact that Congress has never before exercised this supposed authority is telling.”¹² And Senior United

29, 2010, at A19 (noting that “[s]uch a claim of power is literally unprecedented”); Terence P. Jeffrey, *A Tyrannical Act*, HUMAN EVENTS (Mar. 24, 2010), <http://www.humanevents.com/article.php?id=36178> (noting the following exchange with Senator Orrin Hatch, the senior Republican on the Senate Judiciary Committee: “If that [individual mandate] is held constitutional—for them to be able to tell us we have to purchase health insurance—then there is literally nothing that the federal government can’t force us to do,” he said. “Nothing.”).

⁹ See, e.g., Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482, 483 (2010) (“Although opponents will challenge the individual mandate in court, constitutional challenges are unlikely to succeed.”); Judith Solomon, *Efforts to Nullify Health Reform Likely to Fail, But Could Interfere with Law’s Implementation*, CTR. ON BUDGET & POLICY PRIORITIES, 3 (Apr. 7, 2010), <http://www.cbpp.org/files/4-7-10health2.pdf> (“[A]s Yale law professor Jack M. Balkin has pointed out, people who *do not* buy coverage *do* engage in economic activity. When uninsured people get sick they go to emergency rooms, borrow money from family members, buy over-the-counter drugs, or engage in other economic activities as a substitute for paying premiums.” (footnote omitted)); Richard Cordray & Tom Miller, *Why We Won’t File States’ Rights Suits*, POLITICO (Apr. 2, 2010, 3:00 PM), <http://www.politico.com/news/stories/0410/35335.html> (noting that if the commerce power authorizes Congress to prohibit the home cultivation of marijuana, “then surely it authorizes Congress to regulate health care”).

¹⁰ This Note uses the term “unprecedented argument” as shorthand for the argument that the novelty or lack of historical precedent for some governmental action means that the Court should *presume* that the action is unconstitutional or, stated simply, the lack-of-precedent-equals-lack-of-power argument.

¹¹ Reply in Support of Defendants’ Motion to Dismiss at 33, *Florida v. U.S. Dep’t Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10–cv–91–RV/EMT), 2010 WL 3500155.

¹² *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1289 (11th Cir. 2011), *cert. granted* 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–393), and 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–398), and *cert. granted in part*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–400); see also *Thomas Moore Law Ctr. v. Obama*, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring) (suggesting the individual mandate’s novelty is the “most compelling” of the “arguments auditioning to invalidate” it). In the end, Judge Sutton found that the petitioner’s facial challenge must fail because the individual mandate was constitutional in certain applications. See *id.* at 565–66 (arguing that the plaintiffs failed to demonstrate that the individual mandate is unconstitutional “in all of its applications”). But Judge Sutton recognized, citing *Printz*, the strength of the unprecedented argument. *Id.* at 559. But see *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) (citations and footnotes omitted):

The Supreme Court occasionally has treated a particular legislative device’s lack of historical pedigree as evidence that the device may exceed Congress’s constitutional bounds. But . . . novelty cuts another way. We are obliged—and this might well be

States District Judge Roger Vinson, presiding at the trial of the case that the Eleventh Circuit later reviewed, found that while the individual mandate's novelty did "not automatically render it unconstitutional, there is perhaps a *presumption* that it is."¹³ This historic legal dispute is now before the Supreme Court,¹⁴ which will ultimately decide the significance of the individual mandate's novelty.

our most important consideration—to presume that acts of Congress are constitutional.

Judge Silberman of the D.C. Circuit recognized the most powerful argument against the unprecedented argument, discussed *infra* in Parts III and IV—congressional actions should be presumed constitutional, despite any novelty.

¹³ *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1164 n.21 (N.D. Fla. 2010) (ruling on the government's motion to dismiss). Judge Vinson cited *Printz v. United States*, 521 U.S. 898, 907–908 (1997) for that proposition. *See id.* at 1164 (citing *Printz v. United States*, 521 U.S. at 907–08)); *see also infra* notes 273–74 and accompanying text (discussing this proposition). At the motion to dismiss stage, the individual mandate's lack of historical precedent was alone enough for the plaintiff states' success. *See Florida*, 716 F. Supp. 2d at 1164 (“[A]t this stage of the case, the plaintiffs have most definitely stated a plausible claim”) Subsequently, Judge Vinson concluded that the individual mandate is unconstitutional relying, in part, on the lack of historical precedent argument. *See Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1284–85 (N.D. Fla. 2011) (quoting *Printz*, 521 U.S. at 905, 908) (noting that “an ‘absence of [such] power’ might reasonably be inferred where—as here—‘earlier Congresses avoided use of this highly attractive power’”), *aff'd in part, rev'd in part Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted Florida v. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3198 (U.S. Nov. 14, 2011) (No. 11–393), *and cert. granted*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–398), *and cert. granted in part*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–400). Ultimately, based on an interpretation of the Commerce Clause's original meaning and the Supreme Court's “contracted and expanded” Commerce Clause jurisprudence, Judge Vinson held that “because activity is required under the Commerce Clause, the individual mandate exceed[ed] Congress' commerce power.” *Id.* at 1285, 1295. Commentators have since disagreed about the wisdom of Judge Vinson's lengthy opinion. *Compare* Randy E. Barnett & Elizabeth Price Foley, Op-Ed, *The Nuts and Bolts of the ObamaCare Ruling*, WALL ST. J., Feb. 2, 2011, at A17 (“Judge Vinson's decisive rejection of all these theories is another significant victory for individual liberty—the ultimate purpose of federalism—and it lays the intellectual groundwork for every decision on the mandate yet to come.”), *with* Laurence H. Tribe, Op-Ed., *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27 (“There is every reason to believe that a strong, nonpartisan majority of justices will do their constitutional duty . . . and treat this constitutional challenge for what it is—a political objection in legal garb.”), *and* Orin Kerr, *A Comment on District Court Originalism*, THE VOLOKH CONSPIRACY (February 1, 2011, 5:35 PM), <http://volokh.com/2011/02/01/a-comment-on-district-court-originalism> (discussing Judge Vinson's use of the Commerce Clause's original meaning and noting that “[g]iven the gap between the original meaning of the scope of federal power and the case precedents, I don't think this approach is persuasive for a District Court judge to take”).

¹⁴ *See Florida v. U.S. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11–400) (granting petition for certiorari, limited to the question of whether Congress has the power to enact the individual mandate). The Court granted various petitions on various questions and ultimately set five and a half hours of argument for four separate issues. *See* Lyle Denniston, *Court Sets 5 1/2-Hour Hearing on Health Care*, SCOTUSBLOG (Nov. 14, 2011, 11:09 AM), <http://www.scotusblog.com/2011/11/court-sets-5-12-hour-hearing-on-health-care> (reviewing and explaining the Court's various orders).

Framed precisely by the health care debate, the issue that this Note addresses is whether the lack of historical precedent for a governmental action means that the Court should *presume* that the action is unconstitutional. In concrete terms, “[t]he proliferation of Government, State and Federal, would amaze the Framers”¹⁵ During this “breathtaking expansion”¹⁶ of Congress’s power, there has been a first time for countless powers, and ever-evolving technology will undoubtedly continue the trend. A presumption that an unprecedented governmental action is invalid because of its novelty thus appears ill advised. The Supreme Court has, however, long held that history—of both the Constitution’s original meaning and constitutional actors’ practices since the framing—is important.¹⁷ After all, as Judge Posner posits, no legal professional let alone judge would simply assert that “[t]his is what the law ought to be today, regardless of what it was yesterday, because we have new problems and need new solutions.”¹⁸

There is, however, often sharp disagreement about what facts the history books reveal and those facts’ applicability to contemporary issues.¹⁹ The most notorious problem is “law-office” history, a

¹⁵ Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

¹⁶ Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985) (O’Connor, J., dissenting) (“Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress.”).

¹⁷ See, e.g., Myers v. United States, 272 U.S. 52, 175 (1926) (noting “that a contemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given its provisions” and citing cases in support of this proposition); see also Marsh v. Chambers, 463 U.S. 783, 790 (1983) (noting that “historical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean [and] also on how they thought that” it should be applied); Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Holmes, J.) (“If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . .”).

¹⁸ Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 580 (2000) (internal quotation and footnote omitted). Even the landmark privacy case *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which Justice Douglas held “that specific guarantees in the Bill of Rights have *penumbras*, formed by *emanations* from those guarantees that help give them life and substance,” invoked historic overtones to support the far-reaching proposition. *Id.* at 484 (emphasis added). At the close of the opinion, Justice Douglas noted, “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.” *Id.* at 486.

¹⁹ See, e.g., Abdul-Kabir v. Quarterman, 550 U.S. 233, 275 (2007) (Roberts, C.J., dissenting) (“It is a familiar adage that history is written by the victors”); *Seminole Tribe v. Florida*, 517 U.S. 44, 106–07 n.5 (1996) (Souter, J., dissenting) (“This Court’s opinions frequently make assertions of historical fact, but those assertions are not authoritative as to history in the same way that our interpretations of laws are authoritative as to them.”). Dueling opinions frequently invoke (or ignore) history in general to support each opinion’s respective position. That observation, however, is not limited to Justices’ use of *historical* precedent. For instance, in *Parents Involved in Community Schools. v. Seattle School District No. 1*, 551 U.S. 701 (2007), both Chief Justice Roberts’ plurality and Justice Breyer’s dissent claim to be the

practice that historian Alfred H. Kelly first described in 1965 as the selection of historical facts to support a predetermined outcome without regard for context or contradiction.²⁰ The potential for the distortion of the past is compounded when meaning is inferred from historical silence.²¹ If the legislature enacts novel legislation designed to manage today's problems, the Court may, despite that novelty, "indulge some latitude of interpretation for changing times."²² Or, conversely, the Court could confine the legislature to history's strictures—placing a heavy burden on it—when there is no historical precedent for the action.

The former position is more defensible for at least four reasons. First, society evolves and changes over time, making history itself a dynamic construct; stated simply, "tradition is a living thing."²³ Second, the meaning of the past is often ambiguous, which weakens history's authoritativeness over contemporary issues.²⁴ Third, concluding that historical silence—which is itself often questionable—elicits a negative presumption inescapably involves political or policy judgments that frustrate the People's will.²⁵ And lastly, though most importantly, congressional actions—except in rare occurrences—are presumed to be *constitutional*.²⁶ The first two of these reasons are based on the position that when history garners authority over contemporary issues, it should be accurate. The last two are grounded in the philosophy of judicial restraint and deference to the country's public officials who are elected by and for the People, the ultimate source of our nation's sovereignty.

true supporters of the Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Chief Justice opines, "[t]his fundamental principle goes back, in this context, to *Brown* itself." *Parents Involved*, 551 U.S. at 143. Meanwhile, the dissenting opinion of Justice Breyer admonishes, "[t]o invalidate the plans under review is to threaten the promise of *Brown*." *Id.* at 868 (Breyer, J., dissenting).

²⁰ See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP CT. REV. 119, 122 n.13 (defining "law-office" history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

²¹ See *infra* Part III.C for a discussion of the problems with inferring meaning from silence.

²² *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

²³ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

²⁴ See *infra* Part III.B for a discussion of the Court's questionable use of history in *Printz*).

²⁵ See *infra* Part III.C for a discussion of the problems with inferring meaning from silence.

²⁶ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

The argument advanced here is narrow. It does not call on the Court to ignore history. To the contrary, historical facts are often useful and illustrative of a law's purpose and effect. This Note's focus is confined to the unprecedented or, more specifically, the lack-of-precedent-equals-lack-of-power argument. Further, as Part IV discusses, the lack of historical precedent in certain situations can be a factor, albeit a minor one, in the Court's conclusion that the legislature lacks the power for a given action. Most importantly, and perhaps most disconcertingly, a general presumption of invalidity empowers the Court to invade the province of Congress more frequently and fluently, an invasion that is inevitably in tension with a free, democratic society.²⁷ Taken to the extreme, it is judicial activism running riot.²⁸

But at the end the twentieth Century, more than 200 years after the ink on the Constitution dried, the unprecedented argument assumed unprecedented weight in the Court's decisions.²⁹ This argument was

²⁷ Cf. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (Frankfurter, J.) ("To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁸ Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring) (concurring that the National Industrial Recovery Act was unconstitutional under the non-delegation doctrine and noting that the code's grant of power was "delegation running riot"). Commentators have argued, and shown through empirical study, that on questions of first impression ideology is the guiding light. See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1184 (2005) (noting that "ideology plays a substantial role in determining the path of the law via cases of first impression").

To some, however, to not sharply review legislative enactments is an "abdication of . . . duty." *Ohio Grocers Ass'n v. Levin*, 916 N.E.2d 446, 460 (Ohio 2009) (Pfeifer, J., dissenting); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). But see Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955) (noting that Marshall's decision "is not minimized by suggesting that its reasoning is not impeccable and its conclusion, however wise, not inevitable."); *infra* notes 106–21 and accompanying text (discussing judicial restraint). Though *Levin* is an Ohio Supreme Court case, Justice Pfeifer's dissent argued generally against a presumption of validity for any legislative enactments. See *Levin*, 916 N.E.2d at 461 (noting that "[t]he bottom line is that courts are the ultimate arbiters of what is constitutional, and have been since 1803, and we ought not to be saddled with a presumption that restricts our ability to declare a suspect statute unconstitutional." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Ultimately, the strength of a challenger's objection to a statute's constitutionality necessary for any particular judge to vote to strike down the statute is dependent, at least in part, on how convinced that judge is about the propriety of judicial review, a power not expressly granted to the judiciary. This Note's position supports—but is not dependent on—a restrained approach.

²⁹ See *infra* Part II (discussing recent cases that rely on the unprecedented argument to support a finding that a congressional action is unconstitutional).

most pronounced in the Court's anti-commandeering decision *Printz v. United States*.³⁰ Justice Scalia, writing for the slim majority, painstakingly described the novelty of the federal government's "use of [the] highly attractive power" of commandeering state and local executive apparatuses.³¹ That novelty, Justice Scalia held, "tend[ed] to negate the existence of the congressional power asserted [in *Printz*]"³² Around the same time as *Printz*, the Court strengthened the state sovereign immunity defense in *Seminole Tribe of Florida v. Florida*³³ and *Alden v. Maine*.³⁴ Both the *Alden* and *Seminole Tribe* opinions relied on the unprecedented argument to support the conclusion that Congress cannot abrogate state sovereign immunity using its Commerce Clause powers.³⁵ All three of these cases were hotly contested 5-4 decisions with sharp disagreement regarding the appropriate reading of history.³⁶ Use of the unprecedented argument to thwart congressional action was most recently seen in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,³⁷

³⁰ 521 U.S. 898 (1997).

³¹ *Id.* at 905.

³² *Id.* at 918.

³³ 517 U.S. 44 (1996).

³⁴ 527 U.S. 706 (1999).

³⁵ *Id.* at 743-44 (finding that the Court's holding was "supported by early congressional practice" in which the Court "discovered no instance in which [early Congresses] purported to authorize suits against nonconsenting states in these fora"); *Seminole Tribe*, 517 U.S. at 71 (pointing out that "the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court"). Congress may, however, abrogate state sovereign immunity under certain other clauses of the Constitution. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (holding that the Congress's "power to [exercise a preference action] arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute."); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)) ("Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'"). Whether and how *Katz* and *Seminole Tribe* can be reconciled is a question for another discussion. Cf. *Katz*, 546 U.S. at 393 (Thomas, J., dissenting) ("It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent.").

³⁶ The conservatives on the Court were in the majority in these cases. The language in the *Printz* opinion is the most draconian. For an argument that Justice Scalia's decision in *Printz* breaks from his "nationalist leanings" because the "federal government has grown too large and its mandates have become too severe for even an ardent Federalist like himself," see James B. Staab, *The Tenth Amendment and Justice Scalia's 'Split Personality'*, 16 J. L. & POL. 231, 234, 237 (2000). For a criticism of Justice Scalia's use of history in *Printz*, see Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 963-968 (1999).

³⁷ 130 S. Ct. 3138, 3147 (2010). More recently, in April of 2011, the Court acknowledged the unprecedented argument, but rejected it. See *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641-42 (2011) (holding that the *Ex parte Young* doctrine's exception to state sovereign immunity permitted an independent state agency to sue a state official to require the state official to follow federal law). In *Stewart*, Justice Scalia, the author of *Printz* and arguably

where a questionable interpretation of the reasoning behind a 1789 congressional vote factored heavily in the Court's analysis.³⁸ All these decisions not only involved law-office history of the highest order, but also centered around what was *not* said or had *not* been done.

Part I of this Note addresses the use of history in constitutional adjudication generally and elaborates on the problem of law-office history. Part II reviews the Court's use of the unprecedented argument to justify its conclusions in *Free Enterprise Fund*, *Seminole Tribe*, *Printz*, and *Alden*. Part III argues that, although the language of those cases may support a presumption of invalidity, that presumption is unjustified. Part IV proposes two principles—candor and consistency—that should guide the Court's review of novel actions. Those principles must be applied with a strong sense of judicial restraint. Finally, Part IV concludes that lawyers and judges evaluating the individual mandate should shift their attention away from the unprecedented question. Whether the government's past actions can be sufficiently analogized to the individual mandate or some historical statements can be found suggesting that Congress could force citizens to purchase a commodity, thereby making the individual mandate “precedented,” should not determine the law's fate. Debating history should be left to historians.³⁹

I. HISTORY IN CONSTITUTIONAL ADJUDICATION

Long ago Justice Holmes admonished that “a page of history is worth a volume of logic.”⁴⁰ Perhaps that aphorism explains the Court's reverence for history in constitutional adjudication.

the originator of the unprecedented argument, found it “a weight[y] objection” but insufficient to carry the day. *Id.* at 1641. Justice Scalia reasoned that though novelty “is often the consequence of past constitutional doubts . . .”—an assertion this Note's purpose is to disprove—the situation in *Stewart* was extremely peculiar and likely had never arisen because the conditions necessary for it to arise were likely never present. *Id.* at 1642. Thus, the unprecedented argument carried little weight. *Id.* This Note argues that the Court should come to the same conclusion that it did in *Stewart* much more often.

³⁸ See *Free Enter. Fund*, 130 S.Ct. at 3152 (discussing the debate in Congress at the time of the creation of the first executive departments regarding which branch had the authority to remove executive officers).

³⁹ Even originalists sometimes concede that the “task [is] sometimes better suited [for] the historian than the lawyer.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (“Properly done, the task requires the consideration of an enormous mass of material Even beyond that, it requires an evaluation of the reliability of that material And further still, it requires immersing oneself in the political and intellectual atmosphere of the time It is, in short, a task sometimes better suited to the historian than the lawyer.”).

⁴⁰ *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

Nevertheless, while all judges agree that lessons from the past can be a useful tool, the weight attributed to history is rather controversial.⁴¹

The Court has used history since its inception. Chief Justice John Marshall's conclusion in *McCulloch v. Maryland*⁴² was that Congress had the power under the Necessary and Proper Clause to incorporate a bank.⁴³ In reaching this decision, Marshall observed that "[t]he principle now contested was introduced at a very early period [in] our history [and] has been recognised . . . as a law of undoubted obligation."⁴⁴ But Marshall did not employ the country's "acquiescence" with the act to automatically validate the law.⁴⁵ "These observations belong to the cause," said Marshall, "but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the [C]onstitution."⁴⁶

As a preliminary matter, the question when the Court interprets the Constitution is always whether a congressional or executive action is "incompatible with, and repugnant to, the constitutional laws of the Union."⁴⁷ When the Court interprets a statute, the text is always the

⁴¹ A classic example of this tension, discussed by Kelly in *Clio and the Court*, *supra* note 20, is Justice Frankfurter's concurring and Justice Black's dissenting opinions in *Adamson v. California*, 332 U.S. 46, 59, 68 (1947). A recent example is an exchange between Justices Scalia and Alito in a Supreme Court oral argument that went as follows:

JUSTICE ALITO: Well, I think what Justice Scalia wants to know is what James Madison thought about video games. (Laughter) Did he enjoy them?

JUSTICE SCALIA: No, I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there—there was an exception to it for—speech regarding violence? Anybody?

Transcript of Oral Argument at 17, *Schwarzenegger v. Entm't Merchants Ass'n*, 130 S. Ct. 2398 (2010) (No. 08–1448).

⁴² 17 U.S. (4 Wheat.) 316 (1819).

⁴³ *Id.* at 424.

⁴⁴ *Id.* at 401.

⁴⁵ Marshall used history frequently and is commonly viewed as the technique's originator. See Kelly, *supra* note 20, at 123 (noting that John Marshall "introduced [the] technique very successfully, and the Court has used it ever since"). His method is now employed by justices from all camps of constitutional interpretation. See Posner, *supra* note 18, at 582–583 (discussing various views on the use of history in constitutional adjudication). Modern justices' assertions are, at best, less accurate than the "walking historical 'primary source'" that Marshall was. Kelly, *supra* note 20, at 123–24. Kelly calls Marshall's practice history by "judicial fiat" or "authoritative revelation." *Id.* at 122. Kelly argues that creation of history by "judicial fiat" occurs when the Court simply states the framers' intentions, without an extended essay into other primary sources. *Id.* at 122–23. This practice then allows later Courts to cite the decision rather than the primary source. *Id.* at 123 (noting that "by quoting history, the Court made history, since what it declared history be was frequently more important than what the history might actually have been). Since today's Justices are not "walking primary sources," they typically include an extended essay discussing primary sources. The essay, however, is typically of the "law-office" variety.—

⁴⁶ *McCulloch*, 17 U.S. at 402.

⁴⁷ *Id.* at 425.

beginning of the inquiry and if unambiguous, usually the end as well.⁴⁸ When constitutional texts are interpreted, however, their short phrases are almost always colored by the more than 200 years of history and doctrine.⁴⁹ That is so because the nature of a constitution “requires[] that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”⁵⁰ “[T]o contain an accurate detail of all the subdivisions of which its great powers will admit,” said Chief Justice Marshall, “would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”⁵¹ Marshall concluded that famous discussion: “[W]e must never forget[] that it is a *constitution* we are expounding.”⁵²

As Marshall foreshadowed, the short Constitution, compounded with the framers’ novel experiment of federalism, creates endless questions about its meaning. Because the amendment process is difficult and the provisions are, at best, not self-defining, courts must expound the Constitution’s text using other interpretive tools.⁵³

One of those interpretive tools is history.⁵⁴ The Court’s frequent use of history without offering much justification tends to implicitly

⁴⁸ See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring) (“We do not inquire what the legislature meant; we ask only what the statute means.” (citation and internal quotation marks omitted)); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1997) (discussing the interpretive philosophy of textualism). But if unambiguous texts produce “absurd” results, even the most ardent textualist will deviate from the unambiguous text to consult other sources such as legislative history. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (“I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . .”); see also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”).

⁴⁹ See SCALIA, *supra* note 48, at 39 (noting that in Constitutional law case briefs “you will rarely find the discussion addressed to the text of the constitutional provision that is at issue”).

⁵⁰ *McCulloch*, 17 U.S. at 407.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer to the CLEOs’ challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).

⁵⁴ For example, in the Court’s infancy, Justice Paterson opined, “To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.” *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (holding that Congress had the power and authority to establish and abolish lower federal courts). The objection in *Stuart* was that Supreme Court Justices, who at that time “rode circuit” to hear cases at the lower federal courts, had no right to do so because they were not appointed as such. *Id.* During the 2010 term, the Court, while noting longstanding practice is not conclusive, held that “[a] history of involvement . . . can nonetheless be ‘helpful in reviewing the substance of a congressional statutory scheme,’ and, in particular, the reasonableness of the

legitimize the practice.⁵⁵ Discussion is nonetheless useful to clarify both the reasons behind and justifications for the use of history in constitutional law.

In judicial opinions, historical analysis manifests itself in roughly two forms: (1) original meaning (or intent) and (2) the historical practices of constitutional actors. This Part's first section briefly touches on the use of original meaning in constitutional interpretation and its applicability to the presumption of invalidity. The next section discusses the Court's reliance on the historical practices of constitutional actors. The final section canvases the major problem of history in law:⁵⁶ law-office history.⁵⁷

A. Constitutional Interpretation, Originalism, and Silent History

One use of history—in the quest to find meaning in ambiguity—is to inform present-day interpreters what the constitutional phrases meant when they were written.⁵⁸ That is the heart of the theory advocated in the 1950s and 60s by Justice Hugo Black and today by

relation between the new statute and pre-existing federal interests.” *United States v. Comstock*, 130 S. Ct. 1949, 1958 (2010) (citations omitted). Legislative history is also often used in statutory interpretation. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989) (“Concluding that the text is ambiguous . . . we then seek guidance from legislative history and from the Rules’ overall structure.”). But the history this Note grapples with is not only what the framers said or debated about the text to ascertain its purpose, but also that of legislative practice by the legislature and executive.

⁵⁵ *See* Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 183 (1993) (“Tradition has become one of the few sources of authority in constitutional interpretation that ostensibly need no justification.” (footnote omitted)).

⁵⁶ The problem of law-office history is amplified when the history books are silent. *See infra* Part III.C.

⁵⁷ *See infra* Part I.C (discussing law-office history).

⁵⁸ *See* SCALIA, *supra* note 48, at 38 (“What I look for in the Constitution is precisely . . . the original meaning of the text . . .”). It is important to note that “the original meaning of the text” is different than “what the original draftsmen intended.” *Id.* Using the framers’ intent is inappropriate for constitutional interpretation for a number of reasons. *See* H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659, 664 (1987). Powell argues that not only does using intent fail to address the issue of “group intent” (i.e., the many minds that were involved in the framing and ratifying), but also that “it asserts rather than proves a highly controversial position in the theory of interpretation, namely that ‘meaning’ is equivalent to ‘intent.’ The list of those who have rejected [that] position, at least with respect to the Constitution, includes such worthies as James Madison, John Marshall, and Oliver Wendell Holmes.” *Id.* at 663–64 (footnote omitted). For purposes of this Note, meaning and intent collapse into a single issue: the consultation of primary sources that are over two hundred years old to answer a contemporary question. Also, it is noteworthy that while the scholarship draws a sharp distinction between meaning and intent, *see, e.g., id.* at 664 (rejecting the position that meaning is equivalent to intent), judicial analysis of original meaning often includes a discussion of the framers’ intent (most notably James Madison and Alexander Hamilton), as expressed in writings contemporaneous with the framing such as the *Federalist Papers*. *See, e.g., Printz v. United States*, 521 U.S. 898, 905–16 (1997) (analyzing discussions contemporaneous with the framers, including several originally published in the *Federalist Papers*).

Justices Scalia and Thomas: originalism.⁵⁹ Binding judges to the text's original meaning can serve to "prevent the words . . . from becoming completely empty containers for whatever meaning with which we care to fill them."⁶⁰ History is central to the originalists' understanding of the Constitution. Justice Scalia's intellectual presence and candor about his constitutional theory increased the Court's reliance on history, especially in opinions that he wrote, very early in his tenure.⁶¹

Originalists believe that "the semantic meaning of the written Constitution was fixed at the time of its enactment . . ."⁶² Lawrence B. Solum denotes that belief—which all originalist theories share—the "fixation thesis."⁶³ Though the specifics of originalist theories vary,⁶⁴ the fixation thesis necessitates a historical inquiry.⁶⁵

Critics of originalism argue that the amateurish use of history by originalist judges breeds activism and is plagued by the problem of law-office history.⁶⁶ The "fixation thesis" of originalism is the most

⁵⁹ See generally SCALIA, *supra* note 48, at 39 (discussing the original meaning theory of constitutional interpretation).

⁶⁰ Powell, *supra* note 58, at 696 (noting also that "James Madison . . . thought that contemporaneous expositions of the Constitution were of some value in checking unintended change resulting from the fluidity of language"). In that way, originalism is consistent with the Madisonian view of constitutional interpretation. James Madison, however, likely did not agree with the strict fixation thesis of originalism, given his changed view on the constitutionality of a national bank. See *infra* note 75 (discussing Madison's signing of the bill that chartered the Second National Bank despite the fact that as a Congressman he believed a federally chartered bank was unconstitutional).

⁶¹ See Brown, *supra* note 55, at 179–80 (written in 1993 and noting that "Scalia has personally authored at least fifty-three opinions that relied expressly on tradition to resolve constitutional issues").

⁶² Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011).

⁶³ See Lawrence B. Solum, *Semantic Originalism 2* (Ill. Pub. Law & Legal Theory Research Papers Series No. 07–24, 2008), available at <http://ssrn.com/abstract=1120244> ("Almost all originalists agree, explicitly or implicitly, that the meaning (or 'semantic content') of a given Constitutional provision was fixed at the time the provision was framed and ratified.").

⁶⁴ See *id.* at 18–19 (discussing new originalism, which is generally defined as an inquiry in the original public meaning of the Constitution rather than intent of the framers). Compare Barnett, *supra* note 62, at 71 (arguing that while questions of ambiguity can typically be answered by the semantic meaning of the text, questions of vagueness cannot) with John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009) (disagreeing with Barnett's distinction and asserting that "[u]nder the original interpretive rules, we believe that interpreters were required to select the interpretation of ambiguous and vague terms that had the stronger evidence in its favor").

⁶⁵ See Powell, *supra* note 58, at 660–61 (discussing the turn to history associated with originalism).

⁶⁶ See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 76 (2010) (discussing why the historical approach adopted by originalists "suffers serious problems"); Saul Cornell, Heller, *New Originalism, and Law-Office History: 'Meet the New Boss, Same as the Old Boss'*, 56 UCLA L. REV. 1095, 1124–25 (2009) ("Without a mastery of the elementary

intensely critiqued.⁶⁷ One argument against the thesis is that it seems contrary to Chief Justice Marshall's warning that "we must never forget[] that it is *a constitution* we are expounding."⁶⁸ *McCulloch* is often cited for the proposition that Congress's enumerated powers should be given a broad construction.⁶⁹ Accompanied by the notion that the Constitution was "intended to endure for ages to come,"⁷⁰ the "'open-ended' clauses of the Constitution" are in tension with the notion that the text represents an original and identifiable meaning.⁷¹

Another objection to originalism is that the theory relies on the questionable assumption that there is one objective reading of history.⁷² If an originalist concedes that the interpretation of history is partially subjective, the theory—when presented as one of restraint⁷³—breaks down. In *A Matter of Interpretation*, Justice Scalia

techniques of historical research, and without some grounding in the relevant historiography of early American history, the new originalism will continue to be little more than a rebranded version of the old law office history."); see also Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (noting that history in law "at times fall[s] below even the standards of undergraduate history writing"). For a piece which is less a critique of originalism and more a parody on constitutional interpretation—or the development of new theories at least—itsself, see generally Anonymous, *Our Boggling Constitution; or, Taking Text Really, Really Seriously*, 26 CONST. COMMENT. 651 (2010).

⁶⁷ Perhaps the most pithy rejection of originalism was written by Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952): "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." *Id.* at 634 (Jackson, J., concurring).

⁶⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁶⁹ See, e.g., Michael J. Klarman, *How Great Were the 'Great' Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1126 (2001) (noting that "[a]fter *McCulloch*, it was difficult to imagine a politically plausible congressional exercise of power that would exceed constitutional limitations").

⁷⁰ *McCulloch*, 17 U.S. at 415.

⁷¹ See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1092 (1989) (noting that one "argument against originalism . . . is that the Framers anticipated that the courts would defend human rights beyond those expressly listed in the Bill of Rights").

⁷² Cf. Farber, *supra* note 71, at 1095 ("The difficulties of this historical inquiry are obvious, since the framers are unlikely to have discussed the precise balance between general principles and specific examples."); Geoffrey Schotter, Note, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241, 1277 (2010) (noting that the "liberties" Justice Scalia took in *District of Columbia v. Heller* interpreting the Second Amendment's history "illustrate dramatically the subjectivity and discretion inherent in the originalist search for synchronic meaning"); see also PETER NOVICK, *THAT NOBLE DREAM* 415 (1988) (discussing objectivity in the history profession).

⁷³ The originalist movement gained popularity in the 1980s as an attempt to cabin what proponents such as Raoul Berger and Robert Bork saw as judicial activism to the nth degree. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143 (1990) ("In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."); Raoul Berger, *'Original Intention' in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 297 (1986) (noting Berger's concern "with judicial revision of the Fourteenth Amendment"). More recent commentators, however, argue

criticized theories that are not faithful to the Constitution's original meaning:

[I]t is known and understood that if th[e] logic [of existing case law] fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.⁷⁴

Scalia's argument relies on a thin distinction between distinguishing case law (i.e., common law method) and distinguishing among competing historical facts (i.e., originalism). Often "[a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."⁷⁵ If an originalist judge chooses sides in a historical partisan debate—and in doing so strikes down an act of Congress—he or she is just as guilty as any other activist judge, for example, one who prefers to reference the Constitution's penumbras and emanations to decide the controversy at bar.

Though history is and should be important, when originalist judges elevate ambiguous history⁷⁶ to a level of authority second only to the Constitution's short phrases, the problem of law-office history shines with unparalleled light.⁷⁷ The scholarship in this area is as vast as the

that originalism "does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less." Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 609 (2004).

⁷⁴ SCALIA, *supra* note 48, at 39.

⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

⁷⁶ See, e.g., John Paul Stevens, *Address to the Federal Bar Association*, 19 U.C. DAVIS L. REV. 15, 19–20 (1985) (discussing, in response to Attorney General Meese's comments on originalism, the problem of ambiguities in the historical record such as the fact that James Madison the Congressman believed a federally chartered bank was unconstitutional but James Madison the President signed the bill that chartered the Second National Bank).

⁷⁷ As H. Jefferson Powell noted:

If the founders, as you understand them, always agree with you, it is logically possible that you are in incredible harmony with them. It is considerably more likely that your reconstruction of their views is being systematically warped by your personal opinions on constitutional construction. . . . Justices Hugo Black and William Rehnquist . . . have been equally consistent in their claims that the founders' views coincided with their own, despite historical evidence to the contrary.

Powell, *supra* note 58, at 677.

arguments are intricate.⁷⁸ This Note does not need to resolve arguments about the writtleness of and fidelity to the Constitution. It suffices to say that the originalist method is predisposed to be attracted to the presumption of invalidity.

Other methods of constitutional interpretation are less amenable to the presumption of invalidity. One such theory, espoused by Justice Robert H. Jackson, is pragmatism.⁷⁹ Though a definition of pragmatism is somewhat elusive, a pragmatic judge, mindful of judicial restraint, attempts to arrive at the best result both in the present case and the future.⁸⁰ The pragmatic judge may use history as one interpretive tool but is certainly not bound by it.⁸¹ Pragmatism, as advanced by Justice Jackson, is a direct rejection of originalist principles.⁸²

Another theory less amenable to the presumption of invalidity is the concept of “active liberty,” advanced by Justice Breyer in his recent books concerning constitutional interpretation.⁸³ Justice Breyer defines the concept of active liberty as “a sharing of a nation’s sovereign authority among its people.”⁸⁴ The philosophy that Justice Breyer advocates seeks to be consistent with the “people’s will,” which includes longstanding historical precedent.⁸⁵ Indeed, “a deep-seated conviction on the part of the people . . . is entitled to great

⁷⁸ See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 3 (2009) (noting that since Farber’s article “the literature [on originalism] has grown many times larger, fueled both by the emergence of powerful new scholarly defenders of originalism and by the fact that the current composition of the Supreme Court, most notably Justices Scalia and Thomas, gives originalist arguments a ready and important audience”).

⁷⁹ See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996) (discussing the vagueness of the theory and the Justices who have been called pragmatists).

⁸⁰ See *id.* at 4 (internal quotation marks and citation omitted) (adopting, as a definition of a pragmatist judge, “[a] judge [who] always tries to do the best he can do for the present and the future . . .”).

⁸¹ Judge Posner described a pragmatic approach to history:

The study of other laws, or of world public opinion as crystallized in foreign law and practices, is a more profitable inquiry than trying to find some bit of eighteenth-century evidence that maybe the framers of the Constitution wanted courts to make sure punishments prescribed by statute were proportional to the gravity, or difficulty of apprehension, or profitability, or some other relevant characteristic of the crime. If I found such evidence I would think it a valuable bone to toss to a positivist or formalist colleague but I would not be embarrassed by its absence because I would not think myself duty-bound to maintain consistency with past decisions.

Id. at 13–14.

⁸² See *supra* note 67 for Justice Jackson’s rejection of originalism.

⁸³ STEPHEN BREYER, *ACTIVE LIBERTY* 32 (2008); BREYER, *supra* note 66, at 80. According to Judge Posner, Breyer is also sometimes labeled a pragmatist. See Posner, *supra* note 79, at 2 (adding Breyer to the list of Supreme Court Justices who have been called pragmatists).

⁸⁴ BREYER, *supra* note 83, at 25–26.

⁸⁵ *Id.* at 111.

respect.”⁸⁶ A long-standing conviction, however, is not the end of the matter, and Justice Breyer’s philosophy looks also at the *present consequences* of the decision.⁸⁷

The methodology and merits of these three interpretive theories is not at issue here. Rather, they illustrate that particular judges’ receptiveness to the presumption of invalidity varies with the authoritativeness that the judge allots to history.

B. Historical Practices of Constitutional Actors

The type of history discussed above is the use of the Constitution’s historic meaning to decide present controversies. A particular judge’s opinion of the authoritativeness of the original meaning of the Constitution determines, in part, his or her responsiveness to the presumption of invalidity for novel actions.⁸⁸ The second type of history often considered in judicial opinions is the historical practices of constitutional actors. The justification used for past historical practice is somewhat different from that of original meaning. Historical practice tends to show constitutionality or unconstitutionality based on the experiences of constitutional actors. The relevance of this historical practice theory to this Note’s thesis lies in the reasoning why historical practice is important: (1) the claim and acquiescence, or reliance, theory; (2) judicial restraint, which requires deference to coordinate branch’s actions; and (3) for general lessons learned or rhetorical flair. Particularly, the theory of judicial restraint contradicts the presumption of invalidity for novel actions. This section discusses each justification in turn.

1. Claim and Acquiescence

The claim and acquiescence theory holds that longstanding congressional (or executive) practice suggests that such practice is consistent with the Constitution.⁸⁹ If an action has been acquiesced in

⁸⁶ *Otis v. Parker*, 187 U.S. 606, 609 (1903) (Holmes, J.), *quoted in* BREYER, *supra* note 83, at 108.

⁸⁷ *See* BREYER, *supra* note 83, at 114 (noting that “consequences may decide a case in a way that radically changes the law. But this is not always a bad thing.”).

⁸⁸ *Cf.* Berman, *supra* note 78, at 21–22 (discussing the differences between strong and weak originalism and that strong originalism contemplates “that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear”).

⁸⁹ *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (discussing “common consent”); *Myers v. United States*, 272 U.S. 52, 175 (1926) (noting the established principle that legislation laid down at the time of the framing and “acquiesced in for a long term of years, fixes the construction to be given its provisions” and citing cases in support of this principle); *cf.* Holmes, *supra* note 1, at 476 (“Sometimes it is said that, if a man neglects to

for a number of years, common consent tends to show that the action is constitutional. “[N]o one acquires a vested or protected right in violation of the Constitution by long use,” but such use “is not something to be lightly cast aside.”⁹⁰ In *Walz v. Tax Commissioner*,⁹¹ a New York City property tax exemption for churches was challenged under the Establishment Clause,⁹² a jurisprudence that relies heavily on history.⁹³ The Court found it significant that “Congress, from its earliest days,” had viewed statutory real estate tax exemptions for religious bodies as valid.⁹⁴ The nature of the Establishment Clause justified the Court’s reliance on two centuries of uninterrupted practice. The Court noted that the pre-Revolution practice has never “given the remotest sign of leading to an established church or religion”⁹⁵ The historical practice shed light on the precise question presented: has government sponsored or favored any religion?

Justice Frankfurter, concurring in the *Steel Seizure Case*,⁹⁶ discussed a position similar to the reliance theory in *Walz*. At issue was President Truman’s power to seize the steel mills without congressional authorization to avert a shutdown during the Korean War.⁹⁷ Justice Frankfurter, concurring with the majority’s conclusion that Truman did not possess seizure power, nonetheless noted that:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a *gloss* on “executive Power” vested in the President by § 1 of Art. II.⁹⁸

enforce his rights, he cannot complain if, after a while, the law follows his example.”).

⁹⁰ *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970).

⁹¹ 397 U.S. 664 (1970).

⁹² *Id.* at 667.

⁹³ See generally Garrett Coyle, Note, *The Role of Tradition in Establishment Clause Jurisprudence*, 65 N.Y.U. ANN. SURV. AM. L. 137 (2009) (discussing the use of history in the Court’s Establishment Clause jurisprudence).

⁹⁴ *Walz*, 397 U.S. at 677.

⁹⁵ *Id.* at 678. The Chief Justice was responding to lone dissenter Justice Douglas’s contention that the exemption is a “long step down the Establishment path.” *Id.* at 716 (Douglas, J., dissenting). See *infra* notes 130–32 and accompanying text for Justice Douglas’s argument dissenting in *Walz*.

⁹⁶ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

⁹⁷ *Id.* at 583 (majority opinion).

⁹⁸ *Id.* at 610–11 (Frankfurter, J., concurring) (emphasis added).

If presidents from Washington through Truman had consistently used the seizure power without congressional authorization, under Frankfurter's reasoning, the case would have come out differently.⁹⁹ By that logic, Congress's inactivity could erode its powers. Frankfurter's reasoning appears to be similar to Justice Scalia's "unprecedented" argument in *Printz*.¹⁰⁰ But the reliance theory is actually more defensible because it involves one branch of government's long acquiescence in another's actions rather than a general negative inference about the meaning of inaction. This theory is considered more fully in Part IV *infra*.

2. Judicial Restraint

In 1788, Alexander Hamilton referred to the judiciary as the "least dangerous" branch of the proposed government.¹⁰¹ Later, James Bradley Thayer, and after him Alexander M. Bickel, would marvel at how the judicial "power to declare legislative Acts unconstitutional, and to treat them as null, c[a]me about."¹⁰² This remarkable, and anti-majoritarian, power was not explicitly granted by Article III.¹⁰³ The story of how Chief Justice John Marshall, despite what today would be a definite conflict of interest, established the power of judicial review need not be elaborated here. At a minimum, Marshall's argument in *Marbury v. Madison*¹⁰⁴ was not his best work.¹⁰⁵ Marshall himself was willing to consider bargaining the doctrine away "for security in the judicial office" during Justice Samuel Chase's impeachment.¹⁰⁶

⁹⁹ There were in fact instances of past Presidents acting as if they possessed an inherent seizure power, such as President Wilson's seizure of Smith & Wesson during World War One. *Id.* at 612 n.20. Frankfurter distinguished the past occurrences to find President Truman overstepped his bounds. *Id.* at 613 (finding that these previous occurrences "do not add up, either in number, scope, duration or contemporaneous legal justification" to other situations in which presidents used this alleged power). A recent book about the Roosevelt Court, of which Frankfurter was a part, noted that Frankfurter's position—i.e., finding against Truman where there he easily could have cited past precedent that would have been consistent with his test—"reflected [his] contempt for Truman." NOAH FELDMAN, SCORPIONS 359 (2010).

¹⁰⁰ See *infra* Part II.B (discussing the unprecedented argument as used in Supreme Court cases dealing with issues of federalism).

¹⁰¹ THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

¹⁰² JAMES BRADLEY THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW 1 (1893); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (2d ed. 1986) ("The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.").

¹⁰³ See BICKEL, *supra* note 102, at 1 (noting that judicial review "does not derive from any explicit constitutional command").

¹⁰⁴ 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁵ See BICKEL, *supra* note 102, at 3–10 (discussing the weaknesses of Marshall's reasoning in *Marbury*).

¹⁰⁶ ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 28 (Octagon Books

The power to declare acts of the *federal* government unconstitutional is likely not *necessary* for the union's perpetuation, acknowledged Justice Holmes: "I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."¹⁰⁷ The Court should exercise this incredible power¹⁰⁸—not explicit in the Constitution and not necessary for the continuance of the union—with a due respect for the will of the People, a will personified in their elected officials.¹⁰⁹

Perhaps the last great champion of judicial restraint was Justice Felix Frankfurter. Frankfurter promoted the principle originally to counter the *Lochner* Court's vested property rights conception of the Due Process Clause and severely limited vision of Congress's commerce power, which was consistent with his political philosophy.¹¹⁰ The vested property rights doctrine frustrated progressive reforms with which a majority of Americans agreed at the state level while the tortured construction of the commerce power frustrated similar reforms at the federal level. Frankfurter, however, consistently applied his theory regardless of the legislative policy at issue.¹¹¹

1979).

¹⁰⁷ *Id.* at 16 (quoting OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295–6 (1920)).

¹⁰⁸ Congress and the President do, however, have certain pressure points, exhibited most dramatically in the Court Fight over the New Deal. See JACKSON, *supra* note 106 *passim* for a discussion of the Court Fight.

¹⁰⁹ The difficulty posed is that when the Court voids a congressional or executive action the practice is "counter-majoritarian." See BICKEL, *supra* note 102, at 16–17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now . . .").

¹¹⁰ See, e.g., Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 372 (1916) (discussing the Court's decision in *Lochner* and noting that "[f]undamental is the need that the profession realize the true nature of the issues involved in these constitutional questions and the limited scope of the reviewing power of the courts.").

¹¹¹ Dissenting in the second flag salute case, which held that a school cannot expel students for refusing to salute the American Flag, Frankfurter declared:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting). *Barnette* overruled *Minersville School District v. Gobitis*, 310 U.S. 586, 600 (1940),

Judicial restraint requires deference to legislative and administrative actions.¹¹² The principle, iterated by the Court in 1827, is that “a decent respect [is] due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”¹¹³ In addition to the counter-majoritarian difficulty, another reason that deference is appropriate is the “oath of office” theory.¹¹⁴ Under Article VI of the Constitution, any public official whose duty involves a lawmaking or interpretive function “shall be bound by Oath or Affirmation, to support th[e] Constitution.”¹¹⁵ One commentator has noted that “the most obvious way for a legislator to support the Constitution is to enact only legislation that is constitutional.”¹¹⁶

which upheld the right of a Pennsylvania school district to force its students to salute the flag against the students’ religious objections. *Barnette*, 319 U.S. at 642 (overruling *Gobitis*).

¹¹² See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”); *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981) (“The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.” (citations omitted)). For a discussion of the “decline of deference in several doctrinal areas” see Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 660 (2000).

¹¹³ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827). The Court further stated that “[t]his has always been the language of this Court, when that subject has called for its decision, and I know that it expresses the honest sentiments of each and every member of this bench.” *Id.*; see also *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting) (noting that “the only check upon our own exercise of power is our own sense of self-restraint”).

¹¹⁴ See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring):

In striking the balance the relevant considerations must be fairly, which means coolly, weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.

see also Schapiro, *supra* note 112, at 665 (recognizing that all branches have an obligation to interpret the Constitution).

¹¹⁵ U.S. CONST. art VI, cl. 3.

¹¹⁶ Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975). Similarly, “[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961). Senator Orin Hatch professed a contrary view in a statement made to the Judges of the Third Circuit, who were testifying at Justice Samuel A. Alito’s confirmation hearings: “[Y]ou know, we pass unconstitutional legislation up here all the time and if it hadn’t been for the courts, we would probably not have preserved the Constitution. So I want to give you all credit for that.” *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 673 (2006) (statement of Sen. Orin Hatch). Senator Hatch’s statement, while professing

More important than the oath of office consideration, the Court should defer to legislatures because the *political process*, the foundation of democracy, is entitled to respect. The power to govern is and must be ultimately derived from the People. *Garcia v. San Antonio Metropolitan Transit Authority*¹¹⁷ held that it was this “political process” that resolves federalism questions.¹¹⁸ *Garcia* overruled *National League of Cities v. Usery*,¹¹⁹ which, less than a decade before *Garcia*, created a reservoir of “traditional governmental functions” that Congress could not regulate under the Commerce Clause.¹²⁰ In *Garcia*, Justice Blackmun exhibited a deferential tone and held that “we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”¹²¹ Deference was due not merely because Congress takes an oath to uphold the Constitution, but because “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹²² The States are heavily involved in the federal political process of making law. Every legislator is accountable to his or her State’s electorate. *Garcia* recognized that fact and deferred to the political judgments of Congress, judgments the Court was not designed to make.

3. History as History

The most appropriate use of history is for the lessons that it teaches future generations. This is likely what Justice Holmes had in mind when he stated that “a page of history is worth a volume of logic.”¹²³ In an article that catalogs the arrival of history in constitutional scholarship, G. Edward White concluded: “The significance of history for current constitutionalists can itself be seen

that he believes Congress passes unconstitutional legislations, does not necessarily imply that his colleagues disregarded their oath to the Constitution. Indeed, congressmen—as well as judges and ordinary citizens—may hold various views on the meaning of the fundamental document, which is not only healthy but necessary in a diverse and evolving democracy such as America.

¹¹⁷ 469 U.S. 528 (1985).

¹¹⁸ *Id.* at 556.

¹¹⁹ 426 U.S. 833 (1976) *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹²⁰ *Id.* at 852.

¹²¹ *Garcia*, 469 U.S. at 550.

¹²² *Id.*

¹²³ *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

as confirming our increased awareness that the past remains an inescapable dimension of our present.”¹²⁴

Other than as an instructive force, there is another role that history prominently plays in the Court’s decisions: as a rhetorical device. Every judge uses history;¹²⁵ “their professional training and experience leads them to examine language, history, tradition, precedent, purpose, and consequences.”¹²⁶ But the particular weight given to each factor, including history, is a controversial topic.¹²⁷ Even a judge who is usually ready and willing to change course will use history as a “useful mask for decisions reached on other grounds.”¹²⁸ In an essay discussing the use of history in adjudication, Judge Posner argues that one of the three principal ways courts use history is rhetorically.¹²⁹ Indeed, “[m]uch of what passes for constitutional law is a modern construct, but it is defended by reference to ancient . . . texts.”¹³⁰

Defending a proposition that is truly novel by reference to our enlightened forebearers is common in constitutional law. For example, in *Walz*, though the practice at issue had been acquiesced in since before the framing, Justice Douglas, the lone dissenter who would have held that the Constitution prohibited the pre-Revolution practice, relied extensively on history.¹³¹ But if history conclusively pointed to the other outcome, how did history help Douglas’s case? He had a notable, revered supporter in the cause, indeed a Founding Father: James Madison.¹³² What does the relevance of one man’s view, even the principal architect of the provision at issue, bear on the present constitutionality of a long practiced action? One answer is that “our ancestors had a freshness of insight or power of thought that is denied to us moderns[.]”¹³³

¹²⁴ G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 633 (2002).

¹²⁵ See *supra* Part I.A (discussing various ways in which judges use history).

¹²⁶ BREYER, *supra* note 83, at 110.

¹²⁷ Compare *id.* at 108 (describing the viewpoint that sees “texts as driven by purposes”), with SCALIA, *supra* note 48, at 37 (applying history to the Constitution to understand the original meaning of the text), and Posner, *supra* note 79, at 12 (arguing that a pragmatic judge is not deterred “when confronted with outrageous conduct that the Constitution’s framers neglected to foresee and make specific provision for”).

¹²⁸ Posner, *supra* note 18, at 593.

¹²⁹ *Id.* at 580.

¹³⁰ *Id.* at 581.

¹³¹ See *Walz v. Tax Comm’n*, 397 U.S. 664, 704–06 (1970) (Douglas, J., dissenting) (discussing Madison’s opposition to a Virginia law that levied a tax to support Christian Churches).

¹³² See *id.* at 704 (“The problem takes us back where Madison was in 1784 and 1785 when he battled the Assessment Bill in Virginia.”).

¹³³ Posner, *supra* note 18, at 582 (arguing that this viewpoint is a mistake).

Given the fact that justices are not historians, expert or otherwise, perhaps history as a rhetorical device should be the end point. There is, however, a role for uncontroverted history as an instructive tool, most persuasively when the history bears on the direct question presented. Nevertheless, Justice Jackson gave a word of caution that the Court sometimes neglects to heed: “Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times.”¹³⁴

C. Law-Office History

In 1965, Alfred H. Kelly charged that the Court was using the history books to cherry-pick facts favorable to its position, particularly when it broke with precedent.¹³⁵ Kelly termed this practice “law-office” history.¹³⁶ “By invoking aboriginal meaning through historical inquiry, the Court managed successfully to achieve paradox: breaking precedence while rendering obeisance to the doctrine of constitutional continuity.”¹³⁷ The two most controversial nineteenth-century cases that the Court decided—*Dred Scott v. Sandford*¹³⁸ and the *Income Tax Cases*¹³⁹—foreshadowed the current practice.¹⁴⁰ Kelly described the historical essays of the Court in those cases: “Each of the historical essays in question was partisan; each used evidence wrenched from its contemporary historical context; and each carefully selected those materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions.”¹⁴¹

In the early twentieth century, the *Lochner* Court resorted infrequently to law-office history.¹⁴² But that Court was no stranger to

¹³⁴ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

¹³⁵ See Kelly, *supra* note 20, at 157–58 (noting that “the present use of history by the Court is a Marxist-type perversion of the relation between truth and utility. It assumes that history can be written to serve the interests of libertarian idealism”).

¹³⁶ See *id.* at 122 n.13 (noting that law-office history is “the selection of data favorable to the position being advanced without regard to or concern for contradictory data or the proper evaluation of the relevance of the data proffered”).

¹³⁷ *Id.* at 126.

¹³⁸ 60 U.S. (19 How.) 393 (1856).

¹³⁹ *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, *aff’d on reh’g*, 158 U.S. 601 (1895).

¹⁴⁰ See Kelly, *supra* note 20, at 126 (noting that “*Dred Scott* and the *Income Tax Cases* . . . anticipate[d] the historical technique that has taken on increasing significance in our time”).

¹⁴¹ *Id.*

¹⁴² See *id.* at 127 (“Resort to the historical essay as an activist device for breaking precedent was not a prominent feature of the Court’s work in the opening decades of the twentieth century.”).

the activist establishment of partisan rights.¹⁴³ The *Lochner* Court had a much more effective tool than law-office history: substantive due process and the infamous “freedom of contract” doctrine.¹⁴⁴ But after the New Deal debacle—the Court packing plan—and Frankfurter’s accession from law professor to justice, the Court was for a short time dominated by a philosophy of restraint.¹⁴⁵ While Frankfurter’s opinions often included a historical essay, not only were his essays accurate, but they were also used to maintain constitutional continuity rather than to break precedent.¹⁴⁶ Not long after Frankfurter’s accession, the Court, under the lead of liberal Justices Black, Douglas, and Rutledge,¹⁴⁷ reverted to law-office history to break with precedent and establish partisan rights.¹⁴⁸

A good example of the Justice Black’s use of “law-office” history is the reapportionment case *Wesberry v. Sanders*.¹⁴⁹ *Wesberry* held that Article 1, section 2 of the Constitution required a rule of “one man, one vote.”¹⁵⁰ Black began his historical discussion with the question presented by *Wesberry*; however, the question is distinct from the issue addressed by the framers:

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. One principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress.¹⁵¹

¹⁴³ The *Lochner* court is infamous for “attempt[ing] to engraft its own nineteenth century *laissez-faire* philosophy upon [the] Constitution . . .” JACKSON, *supra* note 106, at 175.

¹⁴⁴ See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

¹⁴⁵ Kelly, *supra* note 20, at 129.

¹⁴⁶ See *id.* at 129–30 n.43 (citing Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30, 47 (Wallace Mendelson ed., 1964)) (noting that “[o]ne particularly able commentator has remarked: ‘It would be a gross understatement to say that Justice Frankfurter would have been a great historian. He has been one.’”).

¹⁴⁷ Black and Douglas, however, would later disagree about how liberal the language of the Constitution would stretch. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas wrote the majority opinion in *Griswold*, which recognized a Constitutional right to privacy. *Id.* at 481–86. Justice Black dissented in *Griswold*, and argued that the text of the constitution does not support the conclusion that the Court sought. *Id.* at 507 (Black, J., dissenting).

¹⁴⁸ See Kelly, *supra* note 20, at 130 (noting that the “reform-minded” Justices’ searched for a theory of judicial review that could sustain their activism).

¹⁴⁹ 376 U.S. 1 (1964).

¹⁵⁰ *Id.* at 7–8 (“We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

¹⁵¹ *Id.* at 10.

Black proceeded to quote numerous members of the Constitutional Convention. For example, James Madison noted: “‘If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all.’”¹⁵² That quote appears to contemplate a “one man, one vote rule,” as do many others Black selectively cites.¹⁵³

Kelly was blunt with his criticism: “Mr. Justice Black, in order to prove his point, mangled constitutional history.”¹⁵⁴ And it was for good reason—the question Black needed answered, representation *within the states*, was not the issue in the debate. The issue was representation *within the union*.¹⁵⁵ Black broke H. Jefferson Powell’s third rule for originalists: “History answers—and declines to answer—its own issues, rather than the concerns of the interpreter.”¹⁵⁶

Kelly’s “law-office” history has not disappeared.¹⁵⁷ The more steam that the originalism movement gains, the more rampant “law-office” history becomes. One issue is the divergent character and philosophies of the professions of law and history.¹⁵⁸ Judges are trained as lawyers, a profession that prizes zealous advocacy. Classically trained historians, on the other hand, attempt to achieve a

¹⁵² *Id.* (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 472 (Max Farrand ed., 1911)).

¹⁵³ *See, e.g., id.* at 10–11 (“[A]s James Wilson of Pennsylvania put it, equal numbers of people ought to have an equal no. of representatives . . . and representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.” (internal quotation marks omitted)).

¹⁵⁴ Kelly, *supra* note 20, at 135.

¹⁵⁵ *See id.* at 135 (“[T]he great debate in the Convention between the proponents of state equality in the legislature and the advocates of what Madison called ‘proportional representation’ as between the states . . . [had] nothing at all to do with the question of representation within the states.”).

¹⁵⁶ Powell, *supra* note 58, at 669 (emphasis removed).

¹⁵⁷ *See, e.g.,* Cornell, *supra* note 66, at 1106 (discussing *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and noting that “*Heller* clearly demonstrates that this method [new originalism] rests on a perverse reading of history that is totally inconsistent with Founding-era practice”).

¹⁵⁸ Mark Tushnet, who recognized that most lawyers who do history use the “law-office” variety (“history-in-law” as Tushnet calls it), argued that “history-in-law” is different than “history” and should be evaluated by different criteria, a claim he makes about interdisciplinary scholarship in general. Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934–35 (1996). “Truly effective law-office history,” said Tushnet, “acknowledges . . . contradictory data and explains them away.” *Id.* at 917–18. If history in law was merely used as “decoration,” *see id.* at 913, (in other words, rhetorically) perhaps Tushnet’s history in law would be harmless. Tushnet’s assessment, however, is oversimplified, principally where the originalist method is concerned. If an originalist applies history as gospel, he or she should be accurate. If, however, the originalist can easily explain contradictory data away—for example, Justice Scalia labeling Alexander Hamilton “the most expansive expositor of federal power,” *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997)—the philosophy breaks down to the “penumbras” and “emanations” of *Griswold*, which originalism’s principal advocates of the 1980s attacked.

level of objectivity about the past.¹⁵⁹ Though judges should remove themselves from the position of advocate when evaluating history, as Kelly's observations illustrate, judges often fall far short of that goal.¹⁶⁰ Federal judges are not selected solely based on their achievements as restrained, objective interpreters; the nominations are invariably politically motivated.¹⁶¹

Law-office history is pertinent to this Note because a presumption of invalidity for novel actions requires a historical inquiry that consists of two questions: (1) whether the legislature or executive has ever undertaken the action before; and (2) whether the Constitution's original meaning contemplates the action. If the Court presumes that novel actions are invalid, the novelty of the action should be uncontroverted, or at least well supported. In practice, the Court's historical discussion is often of the law-office variety. When faced with competing versions of history the Court should, as it did most famously in *Brown v. Board of Education*,¹⁶² deem the evidence to be inconclusive.¹⁶³

II. THE CASE LAW: THE UNPRECEDENTED ARGUMENT

This Part considers the use of history in three divisive areas of constitutional law: (1) separation of powers, specifically the President's removal power; (2) the Court's anti-commandeering principle; and (3) state sovereign immunity. The last two topics are merged into the broader heading of federalism. There are two main themes that bind the three areas of constitutional law. There is no text *directly* related to the Court's holdings, and the unprecedented

¹⁵⁹ See NOVICK, *supra* note 72, at 2 ("The objective historian's role is that of a neutral, or disinterested, judge; it must never degenerate into that of advocate or, even worse, propagandist."). Though the "founding fathers of the historical profession" valued objectivity, Novick describes the polarized period of the 1960s through the present as a crisis in objectivity. *Id.* at 573. That the history profession itself questions objectivity strengthens the objections to the elevation of "history"—whether the founders' intentions, historical meaning, or past congressional practice—to trump judicial precedent and reason, or worse, a decision of the people's representatives.

¹⁶⁰ Novick actually compares the historian's goal of objectivity to the "judicial qualities of balance and evenhandedness." *Id.* at 2. But, in practice, when history and the judiciary mix those qualities seem to be abandoned and the opinions read like that of an advocate, not of an objective historian.

¹⁶¹ See, e.g., LEE EPSTEIN & JEFFREY A SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 143 (2005) ("Since the earliest days of the Republic, the vast majority of federal jurists have been affiliated with a partisan group and, in fact, have shared the party affiliation of the president who nominated them.").

¹⁶² 347 U.S. 483 (1954).

¹⁶³ *Id.* at 489 ("This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.").

argument is rampant in the Court's decisions. How rampant, or more precisely, whether the absence of historical precedent generates a *presumption* of invalidity is the question with which this Part grapples. This Part concludes that the Court's language indeed supports a presumption of invalidity. The following Part, Part III, argues that, despite Part II's conclusion, such a presumption is unjustified and should be avoided.¹⁶⁴

A. *The Decision of 1789: Binding in 2010*

Justice Robert H. Jackson, concurring in the *Steel Seizure Case*, stated that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”¹⁶⁵ Justice Jackson's discussion of implied authorization presupposes the use of historical practice to construe the scope of presidential power.¹⁶⁶ How history should be used, and, at least regarding the President's power to remove non-judicial executive officers, what the history books actually tell us is subject to much debate.¹⁶⁷

The landmark case, *Myers v. United States*,¹⁶⁸ was authored by William Howard Taft, the only Chief Justice who was also President.¹⁶⁹ The question required the Court to interpret Article II's

¹⁶⁴ Whether the Court merely invokes the unprecedented argument as “empty rhetoric” or a mask for a decision reached on other grounds is another question. The inherent flaws of affording such great weight to historical silence and the stark ideological divide in these cases suggest that the Court's invocations are mere rhetoric to disguise a larger theory or plan. The language nonetheless becomes enshrined in the holdings for lower courts to erroneously subject novel actions to an insurmountable hurdle in the form of a presumption of invalidity. See *supra* notes 12–13 and accompanying text (citing and discussing the lower court rulings on the individual mandate's constitutionality, some of which base the conclusion on the unprecedented argument).

¹⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

¹⁶⁶ See *Brown*, *supra* note 55, at 195 (discussing the consent theory of tradition and noting that the “Court allocates governmental rights to the branches based on the same type of claim and acquiescence” as adverse possession).

¹⁶⁷ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3166 (2010) (Breyer, J., dissenting). Justice Breyer, in dissent, disagrees with the majority about the meaning of the lack of a historical record: “Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement.” *Id.*

¹⁶⁸ 272 U.S. 52 (1926).

¹⁶⁹ Whether Chief Justice Taft was at all swayed by his former position is unclear. See Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 735 (1987):

Most commentators explain the broad sweep of the opinion by Taft's unique status as the only member of the Supreme Court ever to have occupied the White House. Yet this fact raises one last ironic question about the opinion: if the requirement of senatorial consent for the removal of postmasters truly were an intolerable

grant of power to the President. There is no express provision regarding the removal of officers appointed by the President.¹⁷⁰ The majority and dissenting opinions in *Myers* extensively reviewed the history surrounding the question of whether the President has the sole power to remove *all* executive, non-judicial officers, or whether Congress may condition removal on the advice and consent of the Senate.¹⁷¹

The Chief Justice recognized that the Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given its provisions.”¹⁷² By using this as its standard to analyze the issue before it, the Court made a historical inquiry necessary and, similar to today’s originalists, binding.¹⁷³ The inquiry, as with all “absence-of-precedent-equals-absence-of-power” cases, involves two questions: the Constitution’s original meaning or the framers’ intent and the historical practices of constitutional actors ever since.

In 1789, the First Congress deliberated and debated about the new government’s structure; it had to fashion a body around the skeleton. One piece was the establishment of “three executive departments—one of Foreign Affairs, another of the Treasury, and a third of War.”¹⁷⁴ On May 19, 1789, Representative James Madison moved to

infringement upon executive power, how did Taft himself manage to ignore it during his four years in the presidency?

¹⁷⁰ See *Myers*, 272 U.S. at 109 (noting that Article II, section 4 deals only with impeachments). Representative William Loughton Smith’s view, in 1789, was to the contrary. See 1 ANNALS OF CONG. 372 (1789) (Joseph Gales ed., 1834) (noting Mr. Smith’s position that the officer was to remain in office until impeached by the Senate). In the Federalist 77, Alexander Hamilton was of the view that “[t]he consent of that body [the Senate] would be necessary to displace as well as to appoint.” THE FEDERALIST NO. 77, *supra* note 101, at 387 (Alexander Hamilton) (Ian Shapiro ed., 2009); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 25 n.114 (1994) (discussing Hamilton’s view and the controversy surrounding it in later publications of the Federalist Papers, some of which included a statement that qualified the position as rejected). Hamilton’s view was not to the extreme of Smith’s, but it illustrates that by no means was there a consensus in 1789 that the President had the sole power to remove non-judicial officers.

¹⁷¹ *Myers*, 272 U.S. at 106.

¹⁷² *Id.* at 175 (citing cases).

¹⁷³ The history used by Taft is indeed “law-office” history of the highest order. Kelly, however, did not see an issue with it because “the essay [was not] heavily activist or interventionist in its political overtones.” Kelly, *supra* note 20, at 127. But see Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 399 (1927) (“In the form in which it today stands, *Myers v. United States* is not only a menacing challenge to an administrative organization which represents years of planning and experimentation in meeting modern conditions—it is a positive instigation to strife between the President and Congress.”).

¹⁷⁴ *Myers*, 272 U.S. at 111.

create a “Department of Foreign Affairs, at the head of which there shall be an officer . . . *to be removable by the President.*”¹⁷⁵ Mr. Smith (of South Carolina) objected and moved to strike “to be removed by the President” because “it declared the President alone to have the power of removal.”¹⁷⁶ Madison disagreed with Smith’s construction that impeachment was necessary for the palpable reason that “[i]t would in effect establish every officer of the Government on the firm tenure of good behavior[.]”¹⁷⁷ That, Madison stated, would be “a fatal error interwoven in the system”¹⁷⁸ Dispute ensued and four different views emerged.¹⁷⁹ Commenting shortly after *Myers*, Edward S. Corwin noted that three separate factions—those, including Madison, who believed, that the removal power was vested solely in the President by the Constitution, those who believed that removal required the advice and consent of the Senate, and those who thought that Congress should decide under the Necessary and Proper Clause—were fairly equal in membership.¹⁸⁰ Smith, who thought removal required an impeachment, was in the minority.¹⁸¹

Myers discussed the dispute and the arguments surrounding it in depth.¹⁸² In Chief Justice Taft’s view, the dispute was resolved decisively in favor of Madison.¹⁸³ That was what the Chief Justice characterized as the “decision of 1789,”¹⁸⁴ a decision that, according to the Court, was binding more than one hundred years later.¹⁸⁵

Despite Taft’s confidence, commentators have been exceptionally skeptical about his view of the events that took place in May of

¹⁷⁵ 1 ANNALS OF CONG. 370–71 (1789) (Joseph Gales, ed., 1834) (emphasis added).

¹⁷⁶ *Id.* at 371.

¹⁷⁷ *Id.* at 372.

¹⁷⁸ *Id.*

¹⁷⁹ See Corwin, *supra* note 173, at 361 (presenting those four views).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 361–62 n.22.

¹⁸² *Myers v. United States*, 272 U.S. 52, 114–15 (1926) (noting “[t]he discussion was a very full one” and “[i]t is convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion”).

¹⁸³ *Id.* at 115 (“James Madison was then a leader in the House, as he had been in the Convention. His arguments in support of the President’s constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House.”).

¹⁸⁴ *Id.* at 145.

¹⁸⁵ See *id.* at 174–75:

It was the Congress that launched the Government. . . . It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.

1789.¹⁸⁶ Corwin, commenting in 1927, noted that “a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative.”¹⁸⁷ Further, “no reliable record of the Senate deliberations exists,”¹⁸⁸ and the Senate’s vote was *equal*, with Vice President John Adams casting the deciding vote.¹⁸⁹

Furthermore, the First Congress did not create all executive offices equally. The Department of the Treasury, unlike the Departments of Foreign Affairs and War, was not denominated as an executive department.¹⁹⁰ And the Secretary of the Treasury was to report to either branch of the *legislature* “all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office.”¹⁹¹ The duties of the Treasury officials were specified at great length, which limited presidential discretion.¹⁹² The Comptroller, an office within the Department of Treasury, was shielded from presidential direction.¹⁹³ At bottom, “the *Myers* Court[] fail[ed] to present the complete story of the Decision of 1789.”¹⁹⁴

The second component of Taft’s decision was Congress’s apparent acquiescence in the unitary executive construction. The Chief Justice declared, “This construction was followed by the legislative department and the executive department continuously for 73 years”¹⁹⁵ But *Myers* was decided in 1927, not 1863, when the statute that broke the trend, the Currency Act, was passed by Congress and

¹⁸⁶ See Entin, *supra* note 169, at 716 (“Others who have reviewed the debates find the evidence of congressional intent ambiguous indeed.”); Lessig & Sunstein, *supra*, note 170, at 4 (“Any faithful reader of history must conclude that the unitary executive, conceived in the foregoing way, is just myth.”); see also *Myers*, 272 U.S. at 177 (Holmes, J., dissenting) (“The arguments drawn from the executive power of the President . . . seem to me spider’s webs inadequate to control the dominant facts.”).

¹⁸⁷ Corwin, *supra* note 173, at 362.

¹⁸⁸ Entin, *supra* note 169, at 716.

¹⁸⁹ *Myers*, 272 U.S. at 115 (noting that the final Senate vote was tied at ten votes in favor and ten votes against, and that the Vice President’s vote was necessary to reach the decision).

¹⁹⁰ Lessig & Sunstein, *supra* note 170, at 27.

¹⁹¹ Act to Establish the Treasury Department, ch. 12 § 2, 1 Stat. 66 (1789).

¹⁹² See *id.* at §§ 1–8 (establishing the duties of Treasury Department officials).

¹⁹³ Lessig & Sunstein, *supra* note 170, at 18 n.71 (quoting Act to Establish the Treasury Department, ch. 12, §§ 7–8, 1 Stat. 67):

The Act contained a general removal clause that stated: ‘if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office.’ . . . Compare this with the removal provision for the Secretary, which stated simply ‘[t]hat whenever the Secretary shall be removed from office by the President,’ without providing any limitations on the President’s removal power.

¹⁹⁴ *Id.* at 24.

¹⁹⁵ *Myers*, 272 U.S. at 175.

signed by President Lincoln.¹⁹⁶ The Tenure of Office Act,¹⁹⁷ which the postmaster statute¹⁹⁸ at issue in *Myers* was modeled after, was the true deviation. That statute barred Vice President Johnson from dismissing members of President Lincoln's cabinet without the advice and consent of the Senate.¹⁹⁹ Chief Justice Taft dismissed the Tenure of Office Act because it was passed "during a heated political difference of opinion between the then President and the majority leaders of Congress."²⁰⁰ These heated differences involved the Reconstruction that followed the Civil War. President Johnson, a Democrat from Tennessee, was seen by the Radical Republicans as a southern supporter. Taft referred to the legislation as "an attempt to re-distribute the powers and minimize those of the President."²⁰¹ The Tenure of Office Act was repealed in 1887, but the postmaster statute—a statute with which Taft the President fully complied—lasted until *Myers* struck it down.²⁰² The President acquiesced in conditioned removals almost as long as Congress acquiesced in the spoils system.

Nevertheless, the *Myers* Court held that by Congress's *early* acquiescence and a selective—to put it politely—reading of a decision made by its first members, Congress lost the power to control presidential removals by conditioning them on the advice and consent of the Senate.²⁰³ The dissenters, Justices Holmes, Brandeis,

¹⁹⁶ Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (1863). The act was an attack on the spoils system that was rampant in the national government. *See Myers*, 272 U.S. at 282–83 (Brandeis, J., dissenting) (noting that the spoils system was the reason Congress did not condition removal on the Senates advice and consent).

¹⁹⁷ Act of Mar. 2, 1867, ch. 154, 14 Stat. 430, *amended by* Act of Apr. 5, ch. 10, 16 Stat. 6 (1869), *repealed by* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500 (1887).

¹⁹⁸ Act of July 12, 1876, ch. 179, 19 Stat. 78. The Act provided that postmasters of the first, second, and third classes could only be removed, prior to their four year term, with the advice and consent of the senate. *Id.* at § 6.

¹⁹⁹ *See* Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (1867):

Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Johnson vetoed the bill, but it nonetheless was passed. Johnson's defiance—firing the Secretary of War—was the subject of his impeachment trial, at which he narrowly escaped conviction.

²⁰⁰ *Myers v. United States*, 272 U.S. 52, 175 (1926).

²⁰¹ *Id.* at 167.

²⁰² *See* Entin, *supra* note 169, at 735–36 (footnote omitted) ("As President, Taft dismissed scores of postmasters. In each instance he scrupulously complied with the law that he found so obnoxious in *Myers*.").

²⁰³ *Myers*, 272 U.S. at 165. The broad sweeps of Taft's opinion, however, may seem broader than they actually are. Lessig and Sunstein note three concessions made by Taft in *Myers*:

and McReynolds, thoroughly disagreed.²⁰⁴ Both the inferences drawn from and usage of (or the absence of) history were thought to be extremely problematic by the dissenting opinions.²⁰⁵ Justice Brandeis, providing an alternative, more probable explanation noted: “The long delay in adopting legislation to curb removals was not because Congress accepted the doctrine that the Constitution had vested in the President uncontrollable power over removal. It was because the spoils system held sway.”²⁰⁶

Soon after *Myers*, the dissenters prevailed, at least in part. In *Humphrey’s Executor v. United States*,²⁰⁷ the broad sweep of Chief Justice Taft’s majority opinion was confined to “the narrow point actually decided,” which was “only that the President had [the] power to remove a postmaster of the first class.”²⁰⁸ The *Humphrey* Court held that the agency at issue, the Federal Trade Commission, could not be properly “characterized as an arm or an eye of the executive.”²⁰⁹ Thus, the requirement that the President must show cause for removal of one of its members did not violate the “decision of 1789.”²¹⁰ But the Court, somewhat ominously, stated that for cases that fall between *Myers* and *Humphrey* “there shall remain a field of doubt.”²¹¹

June 28, 2010, more than 200 years after Madison marshaled his arguments in the First Congress, the “decision of 1789” still

First, it said that the Civil Service Act, immunizing inferior officers from plenary presidential control, did not offend Article II and the unitariness of the executive branch. Second, the Court agreed that officers with adjudicative duties could be immunized from presidential *influence*, even if those officers operated within the executive branch Third, it said that Congress might be able to prevent the President from “overruling” administrators in certain instances, even if he disagrees with them

Lessig & Sunstein, *supra* note 170, at 23–24. Even Solicitor General James M. Beck, arguing for the executive, suggested that “for-cause” removals would be constitutional, what Beck called a “middle ground.” *Myers*, 272 U.S. at 96 (oral argument).

²⁰⁴ For example, Justice McReynolds, perplexed as to the origin of this Presidential power, noted: “I think there is no such power. Certainly it is not given by any plain words of the Constitution; and the argument advanced to establish it seems to me forced and unsubstantial.” *Myers*, 272 U.S. at 179 (McReynolds, J., dissenting).

²⁰⁵ The dissenting opinions noted that the “decision of 1789” was not even before the Court. *See id.* at 187 (McReynolds, J., dissenting) (noting the issue up for debate is “inferior officer[s]” whereas the “long-continued practice and supposed early legislative construction” dealt with “superior officer[s]”); *id.* at 242 (Brandeis, J., dissenting) (noting “the question involved in the action taken by Congress after the great debate of 1789 is not before us”).

²⁰⁶ *Id.* at 282–83 (Brandeis, J., dissenting).

²⁰⁷ 295 U.S. 602 (1935).

²⁰⁸ *Id.* at 626.

²⁰⁹ *Id.* at 628.

²¹⁰ *Id.* at 631.

²¹¹ *Id.* at 632.

controlled. In 2002, “[a]fter a series of celebrated accounting debacles,”²¹² Congress passed the Sarbanes-Oxley Act of 2002,²¹³ which “established the Public Company Accounting Oversight Board (“PCAOB”) to oversee the audit of public companies that are subject to the securities laws, and related matters.”²¹⁴ The members of the board were appointed for defined terms by the Securities and Exchange Commission and were removable, for cause, by the same.²¹⁵ After the PCAOB began investigation into an accounting firm’s procedures, the firm brought suit for a declaratory judgment, arguing that the way PCAOB members were removed violated separation of powers principles and was unconstitutional.²¹⁶

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,²¹⁷ the Court agreed.²¹⁸ The question was one of first impression, as the Court had never “considered a situation where a restriction on removal passes through two levels of control.”²¹⁹ The Supreme Court took this opportunity to revitalize *Myers*’s erroneous interpretation of the “decision of 1789”: “This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution’s meaning since many of the Members of the First Congress had taken part in framing that instrument. . . . And it soon became the settled and well understood construction of the Constitution.”²²⁰

Undertones and express invocations of the unprecedented (or fixed-construction) argument pervade the majority opinion.²²¹ The

²¹² *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010).

²¹³ Pub. L. No. 107–204, 116 Stat. 745 (2002).

²¹⁴ 15 U.S.C. § 7211(a) (2006).

²¹⁵ *Id.* at (e)(4)–(6) (providing the procedures for appointing and removing board members).

²¹⁶ *Free Enter. Fund*, 130 S. Ct. at 3149.

²¹⁷ 130 S. Ct. 3138 (2010).

²¹⁸ *Id.* at 3147 (holding that “such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President”).

²¹⁹ *Id.* at 3149 (quotation omitted). The idea is that the SEC Commissioners are only removable “for cause” (first level) and the Board members are also only removable “for cause.” Thus, the President conceptually cannot remove the Board members because he lacks control of the SEC commissioners. That logic, however, is inherently flawed. There is no statute that says the SEC commissioners are removable for cause. *See id.* at 3182–83 (Breyer, J. dissenting). Justice Breyer noted that the majority “reads into the statute books a ‘for cause removal’ phrase that does not appear in the relevant statute and which Congress probably did not intend to write.” *Id.* at 3184. That is the Avoidance Doctrine in reverse. *See id.* (“This is not a statutory construction that seeks to avoid a constitutional question, but its opposite.”). But this criticism of the majority may be out of place. Most agree that the SEC is an independent agency, the essential characteristic of which is limited removal power of the President.

²²⁰ *Id.* at 1352 (majority opinion) (quotation omitted).

²²¹ For example, “[t]his novel structure does not merely add to the Board’s independence, but transforms it.” *Id.* at 3154.; “[t]hat is why the Framers sought to ensure that ‘those who are employed in the execution of the law will be in their proper situation, and the chain of

Court was clear that the novelty of the act was practically fatal: “Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.”²²²

Such reliance on history would seem valid only if there was general agreement that in 1789 the First Congress’s opinion was clearly that the Constitution afforded the President unilateral power to remove all non-judicial appointees, a power that could not be qualified by later Congresses. Since the *Myers* decision was issued, the “decision of 1789” and the inferences drawn from it are, at the very least, highly controversial.²²³ *Myers* is law-office history of the highest order,²²⁴ and *Free Enterprise Fund* reinvigorated it.²²⁵ But, as Corwin noted, “what a judge cannot *prove* he can still *decide*.”²²⁶ The numerous logical flaws in the *Free Enterprise Fund* majority’s analysis seem to suggest its reverence for a divisive, narrow decision made by Congress in 1789 was merely a “useful mask for [a]

dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.” *Id.* at 3155 (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of James Madison)); “The Framers did not rest our liberties on such bureaucratic minutiae.” *Id.* at 3156; “The Framers created a structure . . .” *Id.* at 3157. *See also id.* at 3156–57 n.6 (quoting 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834):

Madison’s actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of ‘years, unless sooner removed by the President’; he would thus be ‘dependent upon the President, because he can be removed by him,’ and also ‘dependent upon the Senate, because they must consent to his [reappointment] for every term of years.

The list goes on.

²²² *Id.* at 3159 (quotation and citation omitted). It is noteworthy that, in support of the proposition, the dissenting Judge below cited Justice Holmes: “[A] page of history is worth a volume of logic.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)), *aff’d in part, rev’d in part and remanded*, 130 S. Ct. 3138 (2010). But given Justice Holmes’ dissent in *Myers* it is unlikely that he meant for his statement to transform into a presumption of invalidity for novel actions, especially in the area of presidential power.

²²³ *See supra* notes 167–212 and accompanying text.

²²⁴ *See* Corwin, *supra* note 173, at 369 (“Viewed purely as history, the Chief Justice’s interpretation of the decision of 1789 is without validity.”); Lessig & Sunstein, *supra* note 170, at 32 (“The early Congresses’ practice undermines the claim that the founding vision was motivated by a single organizational ideal.”).

²²⁵ The Court did so, however, with little actual consequence to Congress’s scheme. The strong language and revitalization of *Myers*, and its view of presidential power, may be a sign of what the Court—or some of its members—truly has in store for independent agencies such as the PCAOB.

²²⁶ Corwin, *supra* note 173, at 369.

decision[] reached on other grounds,”²²⁷ namely the unitary executive philosophy.²²⁸

Free Enterprise Fund may state a broader principle. That principle, though misguided, is that of a presumption of unconstitutionality for novel congressional actions. Chief Justice Roberts does not announce that principle. The Chief Justice, however, implicitly acknowledges that the absence of history limits Congress’s powers by preaching the novelty of the statute in question. That argument is expressly invoked in the Court’s federalism decisions, which are considered next.²²⁹

B. Federalism and the Framers

The starkest evidence of a presumption of invalidity lies in the Court’s recent federalism jurisprudence. This Section discusses the Court’s use of history in these cases.

*Seminole Tribe of Florida v. Florida*²³⁰ dealt with the centuries-old doctrine of state sovereign immunity. Florida refused to consent to be sued under the Indian Gaming Regulation Act, which abrogated sovereign immunity pursuant to the Indian Commerce Clause.²³¹ The issue was whether Congress could constitutionally abrogate Florida’s sovereign immunity using its commerce power.²³²

The only text related to sovereign immunity in the Constitution is the Eleventh Amendment, which states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

²²⁷ Posner, *supra* note 18, at 593.

²²⁸ Aside from the Court’s questionable interpretation of both history and federal law, the logic that one for-cause level is permissible but two is not is lacking. Put best by Justice Breyer in dissent, the Court’s logic is “elementary arithmetical logic (*i.e.*, ‘one plus one is greater than one’)” *Free Enter. Fund, v. Pub. Co. Accounting & Oversight Bd.* 130 S. Ct. 3138, 3176 (2010) (Breyer, J., dissenting).

²²⁹ Here, it is important to note that *Myers* and *Free Enterprise Fund* (and Frankfurter’s concurrence in the *Steel Seizure* case) can be distinguished from the federalism decisions discussed next (e.g., *Printz*). In certain cases, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” may justify reliance on the absence of congressional action to infer presidential power. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). In such a case, Congress, with notice of the action, could be deemed to assent to it. *See Holmes, supra* note 1, at 476 (“Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.”). Where the history is *clear* to the point that the President’s power is and has been effectively assumed for a long term of years, a “gloss” on presidential power could be appropriate. The “decision of 1789” and the inferences that should be drawn from it are, however, far from clear. Frankfurter’s “claim and acquiescence” theory is considered more fully in Part IV.A *infra*.

²³⁰ 517 U.S. 44 (1996).

²³¹ *Id.* at 53–55.

²³² *Id.* at 58.

Citizens of another State, or by Citizens or Subjects of any Foreign State.”²³³ Though that amendment appears to prohibit only cases involving diversity jurisdiction against a state, the Court has found that it stands for the “presupposition . . . that each State is a sovereign entity in our federal system”²³⁴ Thus, for a state to be a defendant in federal court it must either consent or answer to a valid exercise of Congress’s power to abrogate sovereign immunity. In 1989, the Court held that Congress could abrogate sovereign immunity pursuant to the Commerce Clause, but without a majority opinion.²³⁵ *Seminole Tribe* overruled that case, deeming it a departure from established law.²³⁶ The conclusion followed that Congress had overstepped its bounds, and the Court had no jurisdiction to hear the claim.

Four Justices disagreed. The dissent argued that state sovereign immunity is a common law doctrine that is appropriately abrogated by a legislature.²³⁷ The majority responded by referring to the dissent’s argument as a “new theory of state sovereign immunity.”²³⁸ For example, the majority remarked that “[t]his sweeping statement ignores the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court.”²³⁹

The next case considered, *Printz v. United States*,²⁴⁰ involved the 1993 Brady Handgun Violence Prevention Act.²⁴¹ The act required local chief law enforcement officers (“CLEO”) to perform background checks on potential hand-gun purchasers for a period of sixty months until a federal regulatory system was operational.²⁴² Sheriff Jay Printz of Ravelli County, Montana, and Sheriff Richard Mack of Graham County, Arizona, brought suit claiming that the

²³³ U.S. CONST. amend. XI. The amendment was passed after the Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) *superseded by constitutional amendment*, U.S. CONST. amend. XI, which held that a state could be sued in federal court by a private citizen of another state. *Id.* at 479.

²³⁴ *Seminole Tribe*, 517 U.S. at 54 (citing *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890)); *see also id.* at 54–55 n.7 (citing numerous cases).

²³⁵ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (plurality opinion).

²³⁶ *Seminole Tribe*, 517 U.S. at 66.

²³⁷ *See id.* at 102 (Souter, J., dissenting) (noting that the majority opinion was “at odds with the Founders’ view that common law, when it was received into the new American legal system, was always subject to legislative amendment”). In an expansive dissent, Justice Souter stakes out this claim in detail and also casts doubt on *Hans*, on which the majority extensively relied. *Id.*

²³⁸ *Id.* at 71 (majority opinion) (citing *Seminole Tribe*, 517 U.S. at 157 (Souter, J., dissenting)).

²³⁹ *Id.*

²⁴⁰ 521 U.S. 898, 903 (1997).

²⁴¹ Pub. L. No. 103–159, 107 Stat. 1536 (1993).

²⁴² *Id.* at 903.

Brady Act impermissibly commandeered their state offices and violated the Constitution's federalism principles.²⁴³

The question before the Court implicated far-reaching, complex concerns about the federal structure of our government similar to those in *New York v. United States*.²⁴⁴ In *Printz*, "Because there [was] no constitutional text speaking to this *precise* question," the Court looked to history, structure, and precedent for the answer.²⁴⁵ To begin the historical analysis, Justice Scalia, writing for the majority, noted:

[C]ontemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions. *Conversely if, . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.*²⁴⁶

That standard explicitly stated what *Seminole Tribe* and *Myers* implied: novel government actions are *presumed* invalid.

The federal government and *Printz* both contended that the history books supported their side.²⁴⁷ The Court, after distinguishing

²⁴³ *Id.* at 904–05.

²⁴⁴ 505 U.S. 144 (1992). *New York* invalidated a federal law that required the New York legislature to comply with the Congress's low-level radioactive waste laws or take title to it because the law was so coercive it impermissibly commandeered the New York legislature. *Id.* at 149, 153–54. The case before the Court in *New York* was arguably different because the CLEO's would not be *mandating* the check but simply *performing* it. Thus, the accountability concerns of *New York* are mitigated. That, however, is the topic for another discussion.

²⁴⁵ *Printz*, 521 U.S. at 905 (emphasis added). The four dissenting Justices, led by Justice Stevens, directly opposed that view. *Id.* at 941 (Stevens, J., dissenting) (noting that "[t]he text of the Constitution provides a sufficient basis for a correct disposition of th[is] case[.]"). The dissenting Justices argued that the Brady Act was constitutional under the Necessary and Proper Clause since it is uncontested, aside from "the revisionist views expressed by Justice Thomas," that the provision is otherwise constitutional under the Commerce Clause. *Id.* Justice Scalia castigated the dissent for resorting to the "last, best hope to those who defend ultra vires congressional action[s]." *Id.* at 923. *But see* *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) (noting "the nature of the Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation"). In *Raich*, Justice Scalia argued that *Printz* is distinguishable because the issue in *Raich* raised no state sovereignty concerns. *Id.*; *but see id.* at 57 (O'Connor, J., dissenting) (noting that "whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.").

²⁴⁶ *Printz*, 521 U.S. at 905 (quotations and citations omitted) (emphasis added).

²⁴⁷ *See id.* (quotation and citation omitted):

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws."

numerous historical incidents similar to the power asserted by the Brady Act, agreed with Printz.²⁴⁸ The Court held that the “utter lack” of affirmative historical precedent “suggests an assumed *absence* of such power.”²⁴⁹ “[T]wo centuries of apparent congressional avoidance of the practice,” said Justice Scalia, “tends to negate the existence” of the power.²⁵⁰

Printz's historical analysis displayed many of the same flaws for which Alfred H. Kelly criticized the Court in 1965. In fact, there was arguably a fair amount of historical precedent for the government's action.²⁵¹ If there was so much contradictory data—indeed Justice Scalia attempted to explain much of it away in footnotes—why was it necessary to muddle through the history to decisively conclude novelty? The Court could have simply extended *New York*, which prohibited Congress from commandeering state legislatures, to include the executive branch of state governments. There were strong arguments, though not as strong as those in *New York*, that the Brady Act provisions violated the Tenth Amendment and “fail[ed] to adhere to the design and structure of our constitutional scheme.”²⁵² The argument was weaker, given that the requirement's temporariness and reduction of the accountability concern, which was reduced because the state officers would only be *performing* the federal mandate rather than *mandating* a concealed federal mandate.²⁵³ On the other hand, if novel actions are presumed invalid, the weaker arguments easily prevail.

A few years later, in *Alden v. Maine*,²⁵⁴ the Court extended *Seminole Tribe* to prohibit Congress from relying on the commerce power to subject states to suits in their own courts for damages. *Alden*, though analytically consistent with *Seminole Tribe*, indeed almost more appropriate under the common law reasoning,²⁵⁵ is nonetheless far more troubling—in terms of historical analysis—than *Seminole Tribe*. A group of probation officers sued Maine for

²⁴⁸ See, e.g., *id.* at 915 (“If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere.”); *id.* at 910 (noting that “none of these statements necessarily implies” the power asserted here).

²⁴⁹ *Id.* at 907–08.

²⁵⁰ *Id.* at 918.

²⁵¹ See *infra* Part III.B for a discussion of the contradictory evidence.

²⁵² *Printz*, 521 U.S. at 936 (O'Connor, J., concurring).

²⁵³ See *supra* note 245 (discussing the mitigation of the accountability concern).

²⁵⁴ 527 U.S. 706 (1999).

²⁵⁵ The King cannot be brought to his own courts without consent. See *id.* at 741 (“In England, the rule was well established that no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord.” (quotation and citation omitted)). But, *Alden* is a bit different because the law is federal, not state. The “King” did not make the law.

violations of the Fair Labor Standards Act in federal court.²⁵⁶ When *Seminole Tribe* was decided, the federal district court dismissed the action on state sovereignty grounds.²⁵⁷ The group of probation officers attempted to pursue their claims in state court, but each court up through the Maine Supreme Court dismissed on the basis of sovereign immunity.²⁵⁸

After determining that the question was one of first impression, the Court, similar to *Printz*, determined that “history, practice, precedent, and the structure of the Constitution” would be the guide.²⁵⁹ That inquiry was necessary because the only textual source of sovereign immunity in the Constitution is ambiguous.²⁶⁰ The first two prongs of the analysis can be distilled to two related questions: (1) was it the intent or understanding at the time of the framing to allow such suits in state court; and (2) until now, has Congress acted as if it had the power? Under the reasoning of *Printz*—which the Court explicitly cites—if both questions are answered in the negative (i.e., historical silence), then a presumption of invalidity follows.

Justice Kennedy first noted that “the historical record gives no instruction as to the founding generation’s intent to preserve the States’ immunity from suit in their own courts.”²⁶¹ The inference drawn from that statement is “that the Founders’ silence is best explained by the simple fact that no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity.”²⁶² *Alden*, contrasted with *Printz*, provided more analysis as to *why* such a sweeping inference was drawn from a blank page. The wartime debts of the states were large.²⁶³ Opponents

²⁵⁶ *Alden*, 527 U.S. at 711.

²⁵⁷ *Id.* at 712.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 741.

²⁶⁰ *See, e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (Scalia, J.) (“Despite the narrowness of its terms, . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . .”).

²⁶¹ *Alden*, 527 U.S. at 741.

²⁶² *Id.* Justice Kennedy, the author of *Alden*, took the same view in oral argument:

Mr. Waxman: . . . I don’t think that there is anything in the Constitutional Convention debates that goes to the question of suits against States in their own courts at all, let alone under Federal law. . . .

[Justice Kennedy]: But—but that’s the point. It’s the dog that doesn’t bark argument. And the anti-federalists didn’t bring this up either. If the Constitution had contemplated it, certainly the anti-federalists would have made the statement.

Transcript of Oral Argument at 22, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98–346).

²⁶³ *See Alden*, 527 U.S. at 741 (noting “the overriding concern regarding the States’ war-time debts”).

attacked the Constitution with great “creativity, foresight, and vivid imagination.”²⁶⁴ Some framers “contended that no individual could sue a sovereign without its consent.”²⁶⁵ And, finally, “the furor raised by *Chisholm*, and the speed and unanimity with which the [Eleventh] Amendment was adopted . . . underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States.”²⁶⁶ Those points, according to the Court, made it “difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.”²⁶⁷

The argument, which Kennedy made explicitly in oral argument,²⁶⁸ is that the dog did not bark at a possible intrusion of state sovereign immunity during the founding; therefore, it must have survived. That allusion, stated explicitly, although controversially, in other cases,²⁶⁹ is to Sir Arthur Conan Doyle’s short story *Silver Blaze*, which featured Sherlock Holmes on the trail of a stolen race horse.²⁷⁰ The problems with the “dog that didn’t bark” argument are discussed in Part III.C.2 *infra*.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 742. Justice Kennedy cites 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot, ed., 2d ed. 1901) (remarks of J. Marshall) in support of that proposition. *Id.* That debate, which occurred during the Virginia ratification debates, was discussed in depth by Justice Brennan, dissenting in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 264–65 (1985) (Brennan, J., dissenting). Similar to the infamous “decision of 1789,” the intent that a faithful reader of the debates would glean is less clear. *See id.* at 269–70 (“Even if this adequately characterized the substance of their views, they were a minority of those given at the Convention. Mason, Henry, Pendleton, and Randolph all took an opposing position.”). Another reason to doubt statement’s applicability is that the question that was being debated, suits under state law for debts owed, was grounded in contract law, seemingly a very different question than Congress’s abrogation of state sovereign immunity under its Article I, section 8 powers. *Id.*

²⁶⁶ *Alden*, 527 U.S. at 743.

²⁶⁷ *Id.*

²⁶⁸ *See supra* note 262 for the exchange in *Alden*’s oral argument.

²⁶⁹ *See, e.g., City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 132 (2005) (Stevens, J., concurring in the judgment) (quoting *Chisom v. Roemer*, 501 U.S. 380, 396, n.23 (1991) (“The Court has endorsed the view that Congress’ silence on questions such as this one ‘can be likened to the dog that did not bark.’”). The efficacy of this argument—at least as applied to legislative history—was doubted by the dissenting justices in *Chisom*, including Kennedy, who composed part of the majority in *Alden*. *See Chisom*, 501 U.S. at 406 (Scalia, J., dissenting, joined by Kennedy, J., & Rehnquist, C.J.) (internal citations omitted):

Apart from the questionable wisdom of assuming that dogs will bark when something important is happening, . . . we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. . . . We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.

²⁷⁰ *See* ARTHUR CONAN DOYLE, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 1–29 (Christopher Roden ed., Oxford Univ. Press 1993).

The second question (congressional practice) was similarly answered in the negative. The Court, reiterating *Printz*, held that “‘the utter lack of statutes’ subjecting States to suit, ‘suggests an assumed absence of such power.’”²⁷¹ And the congressional practice of the “last generation” is of “‘such recent vintage that they are no more probative than the [FLSA] of a constitutional tradition that lends meaning to the *text*. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.’”²⁷² The departure, Justice Kennedy held, reflects an “erroneous view.”²⁷³

The remaining two considerations, precedent and constitutional structure, were similarly found—though not uncontested by the dissent—to support Maine’s claim to sovereign immunity.²⁷⁴ *Alden* strongly implied, if not expressly stated, that there is a presumption of invalidity for novel actions:

That we have, during the first 210 years of our constitutional history, found it unnecessary to decide the question presented here suggests a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law.²⁷⁵

Seminole Tribe, *Printz*, *Alden*, and *Free Enterprise Fund* provide lower courts with plenty of language to assert a presumption of invalidity for novel actions. The judge presiding over the challenge to the individual mandate in Florida did just that in ruling on the government’s motion to dismiss.²⁷⁶ The next Part discusses the analytical flaws of the presumption of invalidity and argues that it should be avoided.

III. THE PRESUMPTION OF INVALIDITY IS UNSOUND

*“[W]hat history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . No formula could serve as a substitute, in this area, for judgment and restraint.”*²⁷⁷

²⁷¹ *Alden*, 527 U.S. at 744 (quoting *Printz v. United States*, 521 U.S. 898, 907–908 (1997)).

²⁷² *Id.* (quoting *Printz*, 521 U.S. at 918) (emphasis added).

²⁷³ *Id.* at 745.

²⁷⁴ *Id.* at 754 (noting the “history, practice, precedent, and the structure of the Constitution” supported the Court’s decision).

²⁷⁵ *Id.* at 757.

²⁷⁶ *Florida v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1164 n.21 (N.D. Fla. 2010).

²⁷⁷ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

This section discusses the logical flaws of a presumption of invalidity for novel governmental actions. The first issue, explained by Justice Harlan above, is that tradition is a living thing. It did not die in 1789. American society has changed drastically since then and will continue to change in the future. Second, what the history books actually reveal is debatable, if not completely unclear. Such debate invites the advocate—even the judge—to employ, consciously or not, his or her own values and preferences to resolve it. The problem is most obvious when political questions, purportedly decided long ago, are “constitutionalized” by unelected Supreme Court justices. Resolution of a historic debate about what the founders intended or meant by non-historian Supreme Court justices should not decide concrete cases that deal with today’s issues. That problem is then compounded when the debate is whether the page is blank, which elicits the third issue: As a practical matter, how is silence read? Supreme Court justices cannot read the minds of our ancestors. Nor can they read the collective minds of every member of Congress until the unprecedented action was taken to ascertain *why* Congress waited. Lastly, though perhaps most problematic, a presumption of invalidity inverts the principle that the Court should defer to its coordinate branches’ actions. This section concludes that a presumption of invalidity is untenable and should be avoided.

A. *The Dynamic Conception of Tradition*

That first issue is history’s enduring and dynamic nature—indeed, “tradition is a living thing.”²⁷⁸ This Note does not argue that the Constitution should be construed as a living document. The argument here is narrow: history—which is dynamic and evolves over time—should not be fixed at 1789 by the Court; doing so effectively murders tradition in cold blood. A novel government action subjected to a presumption of invalidity is as dead as the abacus, the typewriter, and the Atari. The difference is that the novel government action is likely to *deal* with *new* issues caused by *new* technology, which was the death knell for things like the Atari.

The case of the Atari provides a helpful example. As one of the first companies to develop a video game system, Atari marketed games such as Asteroids and Pong. Those types of games did not require government regulation regarding distribution of violent content to minors. Fast forward roughly forty years, and there are major concerns with games like Grand Theft Auto and Postal 2.²⁷⁹

²⁷⁸ *Id.*

²⁷⁹ See, e.g., Craig A. Anderson et al., *Violent Video Game Effects on Aggression*,

Those games, which, among other things, allow the user to “pour gasoline over [victims], set them on fire, and urinate on them,”²⁸⁰ are cause for concern when placed in the hands of highly impressionable, young children. Attempting to deal with that problem, California passed a law that prevents children from purchasing, without their guardian’s consent, such violent video games.²⁸¹

Is that law constitutional? Or does it violate the video game maker’s (or the child’s) First Amendment rights? The law is novel and unprecedented: no legislature, state or federal, has ever placed restrictions on the distribution of violent expression. But that fact reveals very little about the law’s constitutionality. Video games that allow the user to perform violent and sadistic actions to virtual humans were not available to our Founding Fathers’ children.²⁸² Indeed, such games were not available until very recently. There is no way of knowing what the founders, or anyone in 1789, would have thought about restricting children’s access to these games.

But that is the precise question the unprecedented argument elicits: “Was there any indication that anybody thought, when the First Amendment was adopted, that there . . . was an exception to it for . . . speech regarding violence?”²⁸³ That question is unhelpful because there is nothing in history, especially in pre-1800, even remotely similar to Grand Theft Auto or Postal 2. A person could make threats or falsely yell fire in a crowded parlor, but those utterances are not

Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review, 136 PSYCHOL. BULL. 151, 171 (2010) (noting that societal “debates can and should finally move beyond the simple question of whether violent video game play is a causal risk factor for aggressive behavior; the scientific literature has effectively and clearly shown the answer to be ‘yes.’”); see also *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 app. at 2771–79 (2011) (Breyer, J., dissenting) (compiling lists of studies that support that violent video games are harmful, in Appendix A, and refute that contention, in Appendix B, with the vast majority of studies supporting rather than refuting the proposition).

²⁸⁰ Transcript of Oral Argument at 33, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 131 S.Ct. 2729 (2011) No. 08–1448 (Roberts, C.J.).

²⁸¹ See CAL. CIV. CODE §1746.1 (West 2009) (“A person may not sell or rent a video game that has been labeled as a violent video game to a minor.”). The Supreme Court held the requirement unconstitutional in *Entm’t Merchs.*, 131 S. Ct. at 2741–42.

²⁸² Justice Alito pointed this out in oral argument when counsel was asked by Justice Scalia if there was any history at the time of the framing to support the law. See *supra* note 41 for the exchange.

²⁸³ Transcript of Oral Argument, *supra* note 281, at 17 (Scalia, J.). Note, that while this Note advocates against using the law’s novelty to strike it down (i.e., not asking the question Scalia asked in oral argument), that point does *not* suggest that the law is constitutional merely because there is a new problem. It may well be overbroad, vague, or simply violate First Amendment principles. See, e.g., *Entm’t Merchs.*, 131 S. Ct. at 2742–42 (Alito, J., concurring in the judgment) (finding that the law was impermissible vague, but leaving open the possibility that a narrower drawn law could be constitutional). There may be issues with line drawing (e.g., are movies next?). But the law should not be dead on arrival merely because it is new.

protected speech.²⁸⁴ One could paint a violent picture or write a violent book, but there was no medium to express—or act out—violence like Xbox or PlayStation, especially one marketed towards the young. The First Amendment rights of the purveyors of such violent expression (or of children playing the games) were never debated. The conclusion follows that laws were never passed to curtail those rights. Despite the historic dearth of violent video games, the Supreme Court found that there was no traditional First Amendment exception for violent expression (analogizing games like *Postal 2* to *Snow White* and *Cinderella*), subjected the California law to strict scrutiny, and invalidated it.²⁸⁵ Whether the law passes constitutional muster should not depend on such an arbitrary inquiry that can only have one answer.

B. Law-Office History Applied

Even if the presumption of invalidity is appropriate, the issue of ambiguous history—and the Court’s struggle with historical accuracy—remains. It is one thing for Justices to debate the meaning and import of the Court’s own decisions.²⁸⁶ That is their expertise. But with respect to historical assertions of fact, there is cause for concern. The problem was recognized by historian Alfred H. Kelly in 1965.²⁸⁷ Judges are ill-equipped to decide historical questions in general. That concern is amplified when the historical assertion is what did *not* happen or was *not* said, especially when there is valid disagreement.

This is not to say there is no place for history. Demonstrated in Part I and reiterated here, history can be extremely informative of, for example, what works, what does not, and what is good, bad, or ugly. The Court, however, must be candid and objective when it uses history as authority.²⁸⁸ If the historical facts are clearly contradicted or ambiguous, the Court should follow the lead of one of its most

²⁸⁴ See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam) (holding that true threats are unprotected speech, but not political hyperbole that contains a threat); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (acting under the pre-*Brandenburg* formulation of the clear and present danger test, noting that a person could not falsely yell fire in a crowded theatre with constitutional immunity).

²⁸⁵ *Entm’t Merchs.*, 131 S. Ct. at 2741–42 (invalidating the legislation because was underinclusive for allowing a parental veto, and overinclusive because it violates the First Amendment rights of young people).

²⁸⁶ See *supra* note 19 (discussing *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) and the majority and dissent’s disagreement over which decision comports with the Court’s famous holding in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

²⁸⁷ See *supra* Part I.C (discussing law-office history).

²⁸⁸ This argument is expanded in Part IV *infra*.

noteworthy opinions: *Brown v. Board of Education*.²⁸⁹ In 1953, when the Court ordered re-argument,²⁹⁰ it asked about the history of the Fourteenth Amendment, specifically, whether the framers of the amendment intended to outlaw segregation or thought that a future Court could do so.²⁹¹ Kelly, who assisted writing the NAACP's brief for re-argument, noted that the result was "elaborate pieces of law-office history" on both sides.²⁹² The Court's response—the correct one—was to dismiss the history as inconclusive.²⁹³ Kelly's "half-educated guess" was "that the competing briefs exposed too grossly . . . the entire fallacy of law-office history."²⁹⁴ Whether or not that was the Court's reasoning, today's Court should take heed. The modern Court's opinions—and attacks in footnotes—demonstrate the embarrassment the Court saved itself from in *Brown*.

For example, in *Printz* the Court took fourteen pages to assert that commandeering state and local executives was a novel exercise of power.²⁹⁵ First, did the framers mention it? In Federalist 27, Hamilton noted: "The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to *employ the ordinary magistracy of each, in the execution of its laws.*"²⁹⁶ Later, in the same paragraph, Hamilton stated:

It merits particular attention . . . that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the *SUPREME LAW* of the land;

²⁸⁹ 347 U.S. 483 (1954).

²⁹⁰ See FELDMAN, *supra* note 99, at 371–405, for an interesting discussion of the reasoning for re-argument. Feldman recounts Chief Justice Warren's wish to issue a unanimous opinion and the need to convince some justices (or outlive them). *Id.* at 399–400.

²⁹¹ See *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (order for re-argument) (stating the first question as, "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?").

²⁹² Kelly, *supra* note 20, at 144.

²⁹³ See *Brown*, 347 U.S. at 492–93 ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."); Kelly, *supra* note 20, at 144 ("[T]he Court rejected history in favor of sociology.").

²⁹⁴ Kelly, *supra* note 20, at 145.

²⁹⁵ *Printz v. United States*, 521 U.S. 898, 905–18. The *Printz* majority's painting of history is criticized elsewhere. See, e.g., Nichol, *supra* note 36, at 963–73 (criticizing the *Printz* majority's use of history); Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1084 (2002) (describing the "seemingly biased interpretation of historical materials considered by the Justices in rendering their decision").

²⁹⁶ THE FEDERALIST NO. 27, *supra* note 101, at 136 (Alexander Hamilton) (emphasis added).

to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.²⁹⁷

Those passages seem clear enough. At a minimum, Hamilton's discussion showed that the governmental action taken in *Printz* was not thought forbidden. The majority discounted Hamilton's essays as coming "from the pen of the most expansive expositor of federal power."²⁹⁸ According to Justice Scalia, writing for the majority, "[t]o choose Hamilton's view, as Justice Souter [dissenting] would, is to turn a blind eye to the fact that it was Madison's—not Hamilton's—that prevailed."²⁹⁹

So apparently the question is: What did Madison think? In Federalist 44, responding to the question of why state executives and legislators must be bound by oath to the Constitution, Madison stated, "The members and officers of the State governments . . . will have an essential agency in giving effect to the federal Constitution."³⁰⁰ Madison went on to note that the election of federal officers necessarily depended on the states.³⁰¹ In Federalist 45, Madison, after discussing the limited number of federal employees, noted, "[i]ndeed it is extremely probable, that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union."³⁰² The position is somewhat ambiguous, but it does not support the assertion that Madison viewed commandeering state executives *prohibited* by the Constitution. Indeed, four Justices—and commentators—read the history quite differently than the *Printz* majority.³⁰³

²⁹⁷ *Id.* at 136–37.

²⁹⁸ *Printz*, 521 U.S. at 915 n.9.

²⁹⁹ *Id.*

³⁰⁰ THE FEDERALIST NO. 44, *supra* note 101, at 233 (James Madison).

³⁰¹ *Id.*

³⁰² THE FEDERALIST NO. 45, *supra* note 101, at 237 (James Madison).

³⁰³ *See, e.g., Printz*, 521 U.S. at 954 n.15 (Stevens, J., dissenting):

Indeed, despite the exhaustive character of the Court's response to this dissent, it has failed to find even an iota of evidence that any of the Framers of the Constitution or any Member of Congress who supported or opposed the statutes discussed in the text ever expressed doubt as to the power of Congress to impose federal responsibilities on local judges or police officers.

see also, e.g., Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 512 (2004) (noting

That “none of these statements *necessarily implies* . . . that Congress could impose the[] responsibilities *without the consent of the States*”³⁰⁴ is true. That formulation, whether the Federalist Papers *necessarily imply* the power, is far too narrow. Even discounting Hamilton’s view, simply because Madison was ambiguous in the Federalist Papers should not strip Congress of a power. Thus, it is appropriate to inquire, as both the majority and dissent did, into historical practice because evidence of historical thought is ambiguous.

As evidence of historical practice to the contrary, the majority cited an early law that recommended state legislatures allow federal prisoners to be housed in state jails with which Georgia refused to comply.³⁰⁵ That incident only shows that the federal government made the political decision to rent a jail in Georgia to house its prisoners.³⁰⁶ Asserting that the action implies acknowledgement of a lack of power to compel is identical to “reliance upon unexpressed legislative intent.”³⁰⁷ Moreover, there are other early statutes that seemed to bolster the government’s position that commandeering was constitutional: for example, for the transportation of fugitives,³⁰⁸ for determination of the condition of seafaring vessels;³⁰⁹ and for requiring state courts and court clerks to perform naturalization services.³¹⁰ To distinguish those acts, the majority narrowed them to mere adjudicatory functions performed by courts rather than the executive functions performed by government agencies.³¹¹ Justice Stevens in dissent, however, noted that some of those statutes required courts to act like contemporary regulatory agencies.³¹² But

that “the national government can legitimately commandeer state officials under the original meaning of the Constitution, because commandeering was a necessary tool under the Articles and because the Framers assumed that the commandeering would continue”); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2004 (1993) (“The ratification history indicates that both the Constitution’s supporters and detractors understood that state officers could be called into federal service. In other words, delegates who voted for or against the Constitution may have been aware that the federal government possessed the authority to commandeer state officers.”).

³⁰⁴ *Printz*, 521 U.S. at 910–11 (emphasis added).

³⁰⁵ *Id.* at 909–10.

³⁰⁶ *See id.* at 910 (noting that when Georgia failed to comply with the request that the federal government rented a temporary jail until the completion of the permanent one).

³⁰⁷ SCALIA, *supra* note 48, at 21 (discussing the ills of searching for legislative intent).

³⁰⁸ Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793).

³⁰⁹ Act of July 20, 1790, ch. 29, 1 Stat. 131 (1790).

³¹⁰ Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (1790).

³¹¹ *See Printz*, 521 U.S. at 908 n.2 (noting that “[n]one of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as executive than judicial . . .”).

³¹² *See id.* at 950–51 (Stevens, J., dissenting) (noting that an early law requiring state

the majority chastised Justice Stevens for “mistak[ing] the copy for the original, . . . [by believing] that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts.”³¹³ But what is a label but a label? If either the twentieth-century agency or eighteenth-century court was *administering the law* it is nonetheless an *executive function*.³¹⁴

The Brady Act is not the only *modern* statute that requires this “cooperative federalism.”³¹⁵ The Court dismissed the modern statutes because “[t]heir persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.”³¹⁶

This Note’s purpose is not to prove the *Printz* majority or dissenting opinion’s view of the history books. That task—if it can even be achieved—is best suited for a professional historian. The objective is to show that the history is unclear. The infamous “decision of 1789” provides another example.³¹⁷ *Printz*, *Alden*, *Myers*, and *Free Enterprise Fund* illustrate the danger of affording historical silence such great weight in constitutional adjudication. The familiar adage that “history is written by the victors”³¹⁸ describes the issue well. Ambiguous history, with “more or less apt quotations from respected sources on each side of any question,”³¹⁹ invites judges to fill in the gaps, or choose sides, based on political or policy preferences.

When the assertion is that the history books are *silent*, there are two gaps that must be filled: the ambiguity (i.e., that in fact nothing was said or done) and the negative inference from the silence (i.e., that the silence means that some action cannot be done). The extra leap compounds the problem of law-office history. If historical silence—indeed, intensely debated silence—yields a presumption of invalidity, then the dead hand of the past assumes an authoritative

courts to “certify[] the seaworthiness of vessels” required those courts “to serve, functionally, like contemporary regulatory agencies” in that “[t]he statute set forth . . . procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity”).

³¹³ *Id.* at 909 n.2 (majority opinion).

³¹⁴ Indeed, the text of the naturalization statute required the court to *administer* the oath and *record* the application. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (requiring courts to administer the oath and the clerk of court to record the application).

³¹⁵ See *Nichol*, *supra* note 36, at 966 n.106 (listing other modern examples).

³¹⁶ *Printz*, 521 U.S. at 918.

³¹⁷ See *supra* Part II.A for a discussion of the “decision of 1789.”

³¹⁸ *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 275 (2007) (Roberts, C.J., dissenting).

³¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

position over the living that cannot be justified in a modern, ever changing society.

C. Law-Office History and Blank Pages

The issue discussed above is the difficulty in determining what the history books actually reveal. That issue is present whenever history is used as authority. Indeed, it is a reason to limit the weight given to history. When history is silent, the concern is amplified. *Printz* and *Alden*, which not only weigh historical silence heavily but also negatively, exhibit the flaws of the unprecedented argument. The conclusion in *Printz*, later reiterated in *Alden*, was that the unprecedented nature of the action “tend[ed] to negate the existence of the congressional power asserted”³²⁰ That conclusion raises two questions: (1) even if the unprecedented nature is uncontroverted, why is the import negative; and (2) how can the import be a *presumption* of invalidity when congressional laws are typically *presumed* to be valid (in other words, why is the import two “clicks” towards invalidity rather than just one)? The former question is addressed here, the latter in the next section and more fully in Part IV.

1. *Printz* and the Highly Attractive Power

If it was clear that the Brady Act was the first time since the Constitution’s ratification that Congress enlisted state executives into service by compulsion, then that novelty could mean one of two things: (1) Congress historically thought that it did not have the power to do so; or (2) Congress has yet to find it necessary and proper to do so. The *Printz* Court found that the historical import was the former.³²¹ But the latter conclusion is both consistent with judicial deference and the presumption of *validity*, and has greater support in the country’s history. To support the conclusion that the lack of historical precedent equals a lack of power, Justice Scalia denotes the power to compel state executives to carry out federal law as a “highly attractive power.”³²² That seems like a reasonable argument: A young child does not drive a car—despite the attractiveness of untamed mobility—because he or she does not have the power or cannot drive the car, perhaps because the child too small, has no license, or is not permitted to do so by his or her parents.

³²⁰ *Printz*, 521 U.S. at 918.

³²¹ See *id.* (finding that the lack of congressional action “tends to negate the existence of the congressional power asserted”).

³²² *Id.* at 905; see also *id.* at 908 (noting “the attractiveness of that course to Congress”).

The attractiveness of driving is obvious. A typical teenager cannot wait until the day her parents let her behind the wheel. The attractiveness of commandeering state and local executives, on the other hand, is less clear. The Constitution was not this country's first attempt to unify the several states. In 1781, the states ratified the Articles of Confederation, which "established a central government for the United States . . . [where] the States retained most of their sovereignty, like independent nations bound together only by treaties."³²³ Unlike the Constitution, the Articles gave the central government no power directly over the people, only over the states themselves.³²⁴ And "[t]o put its laws into effect, the Continental Congress *had to* impress state officials and local committees."³²⁵ Indeed, the opponents of the Constitution supported that method.³²⁶ If the embarrassments of the Articles precipitated the Constitution's ratification, why is a power that proved inefficient and inadequate "highly attractive" to Congress post-1789?³²⁷ If the hypothetical child stole his father's keys and went for a drive, but crashed the car and ended up seriously injured, it is unlikely that driving would be "highly attractive" a few weeks after she left the hospital. It is similarly disingenuous to attach a negative inference to congressional avoidance of a practice that proved inefficient and cumbersome pre-1789.

Justice Stevens, dissenting in *Printz*, provided a persuasive political-process rationale for the purported absence of historical practice.³²⁸ Justice Stevens noted:

³²³ *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964).

³²⁴ *Id.* ("It soon became clear that the Confederation was without adequate power to collect needed revenues or to enforce the rules its Congress adopted.")

³²⁵ Johnson, *supra* note 304, at 484 (emphasis added).

³²⁶ See THE FEDERALIST NO. 27, *supra* note 101, at 136 (Alexander Hamilton) (noting that the league contended for by the opponents only would have authority to "operate upon the States in their political or collective capacities").

³²⁷ Implicit in that question is the question of whether the federal government gave up the power over the states by gaining power over private individuals. On this point compare *Printz*, 521 U.S. at 945 (Stevens, J., dissenting) ("The basic change in the character of the government that the Framers conceived was designed to enhance the power of the National Government, not to provide some new, unmentioned immunity for state officers."), and Johnson, *supra* note 304, at 473 ("The national government was to have all of the powers under the Constitution that it had under the Articles of Confederation, plus more."), with *Printz*, 521 U.S. at 920 n.10 (quoting Prakash, *supra* note 304, at 1972) (asserting that "[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it.") Both accounts are of the "law-office" variety and both are plausible explanations. The inference this Note draws from the transition is simpler: why would a power that everybody concluded was inadequate to fully govern the several states, as sovereigns, be highly attractive shortly after vast new powers are bestowed? Even if the inference that the power would be unattractive is too much, the Court's inference—that the power was highly attractive—is also too much.

³²⁸ *Printz*, 521 U.S. at 953 (Stevens, J., dissenting).

Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise "highly attractive" . . . power. Congress' discretion, contrary to the majority's suggestion, indicates not that the power does not exist, *but rather that the interests of the States are more than sufficiently protected by their participation in the National Government.*³²⁹

The political-process rationale is simple: because Congress represents the people of the several states and is accountable to them "it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents."³³⁰ Whether the political process alone is sufficient to uphold the Brady Act is another question. The point here is that the political nature of the decision to enlist state bureaucracies shows one reason why Congress would shy away from using the commandeering power.³³¹ Either the states' interests in being free from federal mandates or the efficiency of having the federal executive branch administer federal law could have been the reason that Congress has rarely commandeered state executives. Whatever the reason for Congress's hesitation, the Court should not infer that it was because Congress assumed it lacked the power.

2. *Sherlock Holmes and the Constitution*

The Court's state sovereign immunity decision in *Alden* also drew a negative inference from historical silence.³³² There, too, the inference was misguided. In *Alden*, the unprecedented nature of the question is less controversial. The dissent and majority disagreed principally about the import of that historical silence. The majority, citing *Printz*,³³³ decided it was negative.³³⁴

³²⁹ *Id.* at 953 n.12 (citation omitted) (emphasis added).

³³⁰ *Id.* at 956. *But see* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (arguing that recent political and structural changes "have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies").

³³¹ *See* Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355, 379 (1998) (asserting a similar point regarding requisitions and noting, "[w]hether or not a system of requisitions is a good idea—and most founders thought not—it is not necessarily unconstitutional").

³³² *See supra* notes 255–77 and accompanying text for a discussion of *Alden*.

³³³ *Alden* cites *Printz* for the proposition that the absence of historical "practice" elicits a negative inference. *Alden v. Maine*, 527 U.S. 706, 744 (1999).

³³⁴ *Id.* at 745. The import in *Printz* and *Alden*, when looked at from the state's perspective, is actually positive. As in, the import grants the State's rights that are not enshrined in the text of the Constitution or affirmatively granted to them by history.

The Court in *Alden* advanced the following justifications for a negative inference regarding the historical silence in the debate: (1) the heavily indebted states at the time of the framing; (2) the creative opponents to ratification; and (3) “the furor raised by *Chisholm*, and the speed and unanimity with which the [Eleventh] Amendment was adopted.”³³⁵ The argument—made by Justice Kennedy in oral argument³³⁶ and again, albeit less explicit, in his opinion³³⁷—is that the “dog didn’t bark” during the convention and therefore state sovereign immunity must have survived it.

As mentioned earlier, that analogy is to Sir Arthur Conan Doyle’s short story *Silver Blaze*, in which Silver Blaze, a famous race horse, disappeared from its stable and its trainer, John Straker, was murdered.³³⁸ Sherlock Holmes, tasked with solving the crime, soon learned that the dog kept in Silver Blaze’s stable did not bark on the night of the incident.³³⁹ That led Holmes to conclude that “the midnight visitor was someone whom the dog knew well.”³⁴⁰ It was Straker himself who removed Silver Blaze from the stable, not his assailant.³⁴¹

The inference’s applicability to the Founders—as dogs, guarding state sovereign immunity—is tenuous, at best. Justice Kennedy supposes that the anti-federalists would have “barked” if they thought the Constitution altered the doctrine of state sovereign immunity.³⁴² The main flaw is the ambiguity as to why the “dog” stayed silent. One possibility is, as the *Alden* Court concluded, that the Constitution did not alter state sovereign immunity. That conclusion presupposes that there is something (a Silver Blaze) for the anti-federalists (the dog) to protect. For the negative inference to be appropriate, that object must be constitutional or inherent state sovereign immunity, not a common law doctrine that could be modified by later legislators.

But there is no evidence that the framers intended to constitutionalize the common law doctrine of sovereign immunity in the first instance.³⁴³ Furthermore, “the Framers chose to recognize

³³⁵ *Id.* at 741–743. The Court’s reasoning is discussed more fully in *supra* notes 255–77 and accompanying text.

³³⁶ See *supra* note 263 for Justice Kennedy’s assertion in *Alden*’s oral argument.

³³⁷ See *supra* text accompanying note 262–63.

³³⁸ DOYLE, *supra* note 271, at 3.

³³⁹ *Id.* at 23.

³⁴⁰ *Id.* at 27.

³⁴¹ *Id.* Holmes’s ultimate conclusion regarding Straker’s death is that Silver Blaze killed him by a kick when Straker attempted to operate on the horse. *Id.* at 29. Straker was up to no good, and wanted to cut one of the horse’s tendons before a race to pay off a debt. *Id.* at 27–28.

³⁴² See *supra* note 263 for Justice Kennedy’s assertion in *Alden*’s oral argument.

³⁴³ Explained by Justice Souter dissenting:

only particular common-law concepts, such as the writ of habeas corpus . . . and the distinction between law and equity . . . by specific reference in the constitutional text.”³⁴⁴ Indeed, if the doctrine of state sovereign immunity was so well ingrained, two puzzling questions remain. First, how could four justices in *Chisholm v. Georgia*³⁴⁵ conclude that a citizen could sue a state *without* any abrogation of immunity by Congress?³⁴⁶ And second, though *Alden* cited the rapid adoption of the Eleventh Amendment after *Chisholm* in support of the negative inference,³⁴⁷ why were the framers of that amendment not explicitly clear that states have sovereign immunity, and that the sovereign immunity cannot be abrogated by the *supreme* federal government?

Perhaps, as in *Silver Blaze*, the dog stayed silent because it knew the intruder; the anti-federalists knew the Constitution would give Congress the power to abrogate state sovereign immunity. The principal problem with the “dog that doesn’t bark” argument is that it attempts to read our ancestors’ minds from a blank slate and in doing so presupposes the conclusion.³⁴⁸

Extracting hard conclusions from silence suffers from worse analytical flaws than the traditional version of law-office history (i.e., the cherry-picking of favorable facts). Perhaps the “dog” stayed silent because it accepted the Constitution’s revocation of state sovereign

[Such] silence does not tell us that the Framers’ generation thought the prerogative so well settled as to be an inherent right of States, and not a *common law creation*. It says only that at the conventions, the issue was not on the participants’ minds because the nature of sovereignty was not always explicitly addressed.

Alden v. Maine, 527 U.S. 706, 772–73 n.12 (1999) (Souter, J., dissenting) (emphasis added).

³⁴⁴ *Seminole Tribe v. Florida*, 517 U.S. 44, 137–38 (1996) (Souter, J., dissenting) (citing U.S. CONST., art. I, § 9, cl. 2; U.S. CONST. amend. VII).

³⁴⁵ 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

³⁴⁶ *See id.* at 479 (holding, in a 4–1 decision that Georgia was subject to a collection suit by the executor of the creditor’s estate).

³⁴⁷ *See Alden*, 527 U.S. at 743 (stating that “the furor raised by *Chisholm*, and the speed and unanimity with which the [Eleventh] Amendment was adopted . . . underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States”).

³⁴⁸ The “dog that doesn’t bark” argument has been criticized by members of the Court when used to ascertain what *present day* members of Congress intended. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”). *But see City of Rancho Palos Verdes, v. Abrams*, 544 U.S. 113, 132 (2005) (Stevens, J., concurring in the judgment) (quoting *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (“The Court has endorsed the view that Congress’ silence on questions such as this one ‘can be likened to the dog that did not bark.’”).

immunity. Perhaps the “dog” assumed that states had immunity from suits unless Congress said otherwise. Whatever the reason for the “dog’s” silence, the attribution of such a strong state sovereign immunity conception suggests that the conclusion came first, and the argument second. Even if that is not the case, use of the framers’ silence to suppress the current Congress’s power is unwise.

The Court’s negative inference based on historical silence was problematic in both *Printz* and *Alden*. The next Part discusses the magnitude of the inference, a further layer compounding the problem.

D. Presumption of Restraint

In *Blodgett v. Holden*,³⁴⁹ Justice Holmes remarked, “when this Court [undertakes] to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform.”³⁵⁰ Cases like *Printz*, *Alden*, and *Free Enterprise Fund* suggest that the current Court no longer agrees with Justice Holmes. Even assuming that the Court was justified to draw a negative inference in those cases, how can that inference rise to the level of a *presumption* of invalidity when Congress’s actions are “presume[d] in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”³⁵¹ In Justice Stone’s famous footnote in *United States v. Carolene Products Co.*,³⁵² he made no exception for laws that burden states’ rights.³⁵³ Perhaps around 1980, when *National League of Cities v. Usery*³⁵⁴ was not yet discredited, such an exception to the presumption may have been justified if a law infringed on the states as states.³⁵⁵ *Garcia* seems to have laid that question to rest.³⁵⁶ Even if

³⁴⁹ 275 U.S. 142 (1927).

³⁵⁰ *Id.* at 147–48.

³⁵¹ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827); *see also* *Printz v. United States*, 521 U.S. 898, 956 n.17 (1997) (Stevens, J., dissenting) (“Whenever called upon to judge the constitutionality of an Act of Congress—the gravest and most delicate duty that this Court is called upon to perform,” *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)—the Court accords ‘great weight to the decisions of Congress.’ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973).” (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)).

³⁵² 304 U.S. 144 (1938).

³⁵³ *See id.* at 152 n.4 (Stone, J.) (discussing situations when there is a “narrower scope for operation of the presumption of constitutionality . . .”).

³⁵⁴ 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

³⁵⁵ *See id.* at 855 (holding that the federal government cannot regulate an “integral portion of . . . governmental services which the States and their political subdivisions have traditionally afforded their citizens”).

³⁵⁶ *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (“State sovereign interests, then, are more properly protected by procedural safeguards inherent in the

the Court meant for its presumption of invalidity to be limited to federalism issues, the language does not support that conclusion.³⁵⁷

Thus, the issue is, assuming a negative inference could or should be drawn from silence, why does the inference move two “clicks” towards invalidity? A much more defensible position would be to defer slightly less to the congressional or executive judgment when reviewing novel actions. The Court must never forget that:

In striking the balance the relevant considerations must be fairly, which means coolly, weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.³⁵⁸

The next Part elaborates on the competing *presumption of validity* most congressional actions should be entitled to and the appropriate level of doubt, if any, the novelty of a law should carry.

IV. REVIEWING NOVEL ACTIONS: CANDID RESTRAINT

This Part sketches a blueprint for reviewing novel actions. In aid of that task, the first section reviews instances where the Court’s use of historical silence was more justifiable. The next section, with these contrasting situations in mind, discusses the analytical steps a court should take to evaluate the “unprecedented” argument. Analyzed candidly, with the appropriate level of deference and a keen sense of judicial restraint, the “unprecedented” argument loses much of the force allotted to it by *Printz* and *Alden*. This Note concludes by returning to the individual mandate, which opponents of the policy have forcefully contended has no prior precedent,³⁵⁹ and suggests that attention should be shifted away from the unprecedented question.

structure of the federal system than by judicially created limitations on federal power.”).

³⁵⁷ See *Florida v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1164 n.21 (N.D. Fla. 2010) (noting there may be presumption of invalidity for the novel individual mandate, which regulates individuals, not states).

³⁵⁸ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

³⁵⁹ See *supra* note 8 and accompanying text (providing examples of claims by opponents of the individual mandate that it is unprecedented and an unconstitutional expansion of federal power).

A. *Clio's Gentler Side*

In the landmark prior restraint case *Near v. Minnesota ex rel. Olson*,³⁶⁰ the Court was faced with a Minnesota law that imposed a prior restraint on publication. After an analysis of the law's effect and a discussion of uncontroverted historical evidence that prior restraints were considered problematic by the framers, towards the *end* of the opinion, the Court stated: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."³⁶¹

Though Chief Justice Hughes's statement sounds similar to *Printz*, taken in context, it is more justifiable.³⁶² The First Amendment is vague and does not explicitly state: "no prior restraints."³⁶³ Because of that ambiguity, the Court found it necessary to consider "the conception of the liberty of the press as historically conceived and guaranteed."³⁶⁴

The history—the intention of the framers and historical practice—was much less ambiguous than the Court's current expeditions into the history books. Indeed, the dissenters did not argue the majority looked at the wrong history; they argued that "[t]he Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase."³⁶⁵ The disagreement was policy based.³⁶⁶ The Court quoted Blackstone's view: "'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.'"³⁶⁷ Blackstone's

³⁶⁰ 283 U.S. 697 (1931).

³⁶¹ *Id.* at 718.

³⁶² *Near* was nevertheless a narrow majority. But the disagreement was not about the history. Further, it was clear that neither the majority nor dissent would have rested its conclusion on history. The dissent did, however, argue that the Court's decision was without prior precedent. *See id.* at 723 (Butler, J., dissenting) (stating that the decision "put upon the States a federal restriction that is without precedent").

³⁶³ The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

³⁶⁴ *Near*, 283 U.S. at 713.

³⁶⁵ *Id.* at 735 (Butler, J., dissenting).

³⁶⁶ *See* ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 377 (1941) (noting that the "dissenting opinion emphasized the practical need for such legislation"). The dissent did, however, argue that Joseph Story agreed with their formulation that a previous restraint is authorized if the publication is "duly adjudged to constitute a nuisance." *Near*, 283 U.S. at 735 (Butler, J., dissenting).

³⁶⁷ *Near*, 283 U.S. at 713 (quoting 5 WILLIAM BLACKSTONE, *COMMENTARIES* *151–52).

formulation was echoed by Madison.³⁶⁸ The Court's well-supported conclusion was: "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."³⁶⁹

Another reason less deference should be afforded to the legislature is that the action was challenged under the First Amendment. The presumption of *validity* takes a narrower scope when laws that directly infringe on explicit constitutional rights, such as the freedom of the press, are reviewed.³⁷⁰ The Minnesota law in *Near* allowed public officials to suppress "charges against public officers of official dereliction . . . unless the owner or publisher is able . . . to satisfy the judge that the charges are true and are published with *good motives and for justifiable ends*."³⁷¹ Not only is that law vague, but it is the antithesis of a free press. One principal purpose of the press is to expose and bring to light dereliction of duty by public officials.³⁷² Less deference to the legislature—one group of public officials the law would protect—is entirely appropriate. It would not go too far to say that the Minnesota law was a self-interested transaction by the legislature.

Third, and perhaps most importantly, the Court's reasoning was clear that the decision did not hinge on the novelty of the act in question. The novelty of Minnesota's law did not render it

See also CHAFEE, *supra* note 367, at 9–12 for a discussion of how Blackstone's theory "dies hard," and noting that the conception is inadequate on two fronts: an unlimited freedom from previous restraints "goes altogether too far in restricting state action," and "[o]n the other hand, . . . the Blackstonian definition gives very inadequate protection to the freedom of expression." Chafee does, however, note that "nobody has objected that immunity from previous restraints does not deserve special emphasis." *Id.* at 379.

³⁶⁸ See *Near*, 283 U.S. at 714 (noting Madison's view that freedom of the press requires freedom from previous restraints).

³⁶⁹ *Id.* at 716.

³⁷⁰ See *United States v. Carolene Products Co.*, 304 U.S. 144, 153–54 n.4 (1938) (citing *Near*, 283 U.S. at 713–714, 718–720, 722) (recognizing less deference when the law is a "restraint[] upon the dissemination of information").

³⁷¹ *Near*, 283 U.S. at 713 (emphasis added).

³⁷² See *id.* at 718–20 (noting that "[p]ublic officers[]" . . . character and conduct remain[s] open to debate and free discussion in the press"); *id.* at 719–20:

[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in the great cities.

presumptively invalid; the fact that the law operated as “the essence of censorship” was the nail in the coffin.³⁷³ The novelty of the action was merely the last layer of dirt on the grave.

Justice Frankfurter, concurring in the *Steel Seizure* case, asserted that:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a *gloss* on “executive Power” vested in the President by § 1 of Art. II.³⁷⁴

That formulation contemplates the use of Congress’s historic silence to vest power in the President, thereby reducing the powers of Congress.³⁷⁵ But Frankfurter was clear that “*long-continued acquiescence* of Congress . . . ” is required,³⁷⁶ a position different than that advanced in *Printz* and *Alden*. Here, Justice Kennedy’s “dog that doesn’t bark” argument has more force.³⁷⁷ If Presidents have acted as if they possess a certain power for a long period, Congress would undoubtedly be aware of it. That awareness would alert Congress that it is in danger of losing the power to control that aspect of the executive branch.³⁷⁸ Such awareness is presupposed by acquiescence.

When matters of national policy are concerned, there is no alert that Congress could lose a power by failing to use that power. For example, in *Printz* there was no reason for Congress to believe that by not commandeering state and local executives it would lose the power to do so in the future. Further, there was nobody (i.e., society, a branch of government, or the states) relying on Congress’s lack of exertion. Questions regarding the balance of power between Congress

³⁷³*Id.* at 713.

³⁷⁴ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (emphasis added); see also *supra* Part I.B.1 (discussing the claim and acquiescence theory, which holds that long standing congressional or executive practice suggests that the practice is constitutional).

³⁷⁵ The loss of power is also different than a scope of federal power case. If the “gloss” was inferred onto the President’s powers, thereby removing an aspect of control from the Congress’s ambit, the federal government as a whole is not precluded from exercising some power. Congress is only restricted from controlling the President.

³⁷⁶ *Steel Seizure*, 343 U.S. at 613 (Frankfurter, J., concurring) (emphasis added).

³⁷⁷ See *supra* note 263 and accompanying text for Justice Kennedy’s assertion in *Alden*’s oral argument.

³⁷⁸ Cf. *Steel Seizure.*, 343 U.S. at 635–636 (Jackson, J., concurring) (noting the possibility of implied powers of the President).

and the President are far more complex. As Frankfurter noted at the beginning of his concurring opinion in the *Steel Seizure* case:

Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully.³⁷⁹

Frankfurter's position, in conjunction with his expertise in history and stalwart sense of judicial restraint, is a defensible position indeed.

The Supreme Court's conception of and inferences drawn from the "decision of 1789" provides an example of Frankfurter's reasoning gone awry.³⁸⁰ The original meaning and Congress's historic practice is far from clear. The Court's recent revival of the *Myers* Court's questionable conception of the "decision of 1789" exhibits the flaws of law-office history. It also shows the need for the principles of candor, consistency, and restraint when the Court elevates history—especially the absence thereof—to have a binding effect.

B. Candid Restraint

This Note proposes two principles for reviewing novel actions: candor and consistency. Those principles, applied with a philosophy of judicial restraint, are exceedingly important in a time when society is evolving and changing more rapidly than ever before. Amazing advancements in technology and communications have figuratively reduced the size of the World.³⁸¹ Human interaction is different than at the time of the framing. The problems we deal with today are different from those dealt with in 1789, 1889, or even 1989. And they are different from problems that future generations will deal with in 2089 or 2189. "[T]radition is a living thing."³⁸² Indeed, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."³⁸³ Justice Holmes's logic has

³⁷⁹ *Id.* at 593 (Frankfurter, J., concurring).

³⁸⁰ See *supra* Part II.A for a discussion of the infamous "decision of 1789."

³⁸¹ See generally Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-first Century* 51–200 (1st updated and expanded ed. 2006) (discussing recent events that have figuratively "flattened the world," such as the fall of the Berlin Wall, the invention of the World Wide Web, and the proliferation of wireless technology).

³⁸² *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

³⁸³ Holmes, *supra* note 1, at 469.

equal force with respect to the late eighteenth century.³⁸⁴ Writing in 1789 to James Madison on the subject, Thomas Jefferson stated, “it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”³⁸⁵

As a threshold matter, both principles must be applied with a sense of restraint and “a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”³⁸⁶

The first principle—candor—requires that history is not used as a “mask for decisions reached on other grounds.”³⁸⁷ But “[g]eneral propositions do not decide concrete cases.”³⁸⁸ Candor, as a general proposition, requires a judge to start at the beginning when looking at history without a conclusion already in mind. If the judge has predetermined on policy grounds what the disposition of a case should be, candor is a “fleeting inhabitant of fairyland.”³⁸⁹ It is dubious when half of the Court (and commentary) has one interpretation of words said or actions taken and the other half of the Court (and commentary) holds another usually diametrically opposite view. That alignment, which usually coincides with the ideological divide on the Court, may be the first clue that candor is lacking.

The first question a reviewing court should ask is whether the action is *incontrovertibly* unprecedented. If not, the Court should *not base its decision* on one interpretation of the history. Disputed novelty should absolutely not presume invalidity. Truly disputed novelty—or history in general—should not play into the analytical equation at all.³⁹⁰ What happened in the past, when undisputed, is a “convenient

³⁸⁴ See Posner, *supra* note 18, at 580 (asserting that referring to ancient laws “isn’t fundamentally different from the belief held by a great many modern American lawyers, judges, and law professors that the answers to modern questions of constitutional law can be found in the text or background of the Constitution, a documentary palimpsest most of which was drafted more than two centuries ago”).

³⁸⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776–1826*, at 634 (James Morton Smith ed., 1995).

³⁸⁶ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827); see also *supra* Part I.B.2 (discussing judicial restraint).

³⁸⁷ Posner, *supra* note 18, at 593.

³⁸⁸ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

³⁸⁹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

³⁹⁰ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (“This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”).

body of relevant data.”³⁹¹ But when the question is what did not happen in the past, there is danger that the pages of history will be narrowed and contorted to support a decision based on other grounds. Candor on the Court must transcend ideology.

The second principle—consistency—builds on the first. Candor must be present for any standard to be consistently applied.

Consistency requires Courts to first concretely ascertain the level of deference due to a challenged governmental action. Thus, a court should look at the basis upon which the action is challenged. This question looks directly at the rights involved and the constitutional principle in question. At bottom, and concededly oversimplified, there are three possible approaches: (1) presumed valid; (2) no presumption; and (3) presumed invalid. It is (or should be) a generally accepted principle that in a democratic society congressional actions are presumed valid.³⁹² As Justice Stone instructed in *Carolene Products*, there are certain situations when that presumption takes a somewhat narrower scope.³⁹³ For example, when considering suspect classifications reviewed under strict scrutiny, the Court begins with a presumption of invalidity and the novelty of a given law is irrelevant.³⁹⁴

The purpose of the first question is to determine where the analysis begins. The challengers to the individual mandate aver that Congress has exceeded its constitutional authority under the commerce power.³⁹⁵ When a challenger asserts that Congress has exceeded its commerce power, the challenged action is presumed valid.³⁹⁶ Thus, challenges to the individual mandate should begin in position one before the novelty of the act is assessed.

Next, a reviewing court must ask two questions, candidly, and in sequence: (1) Is the action truly novel, in practice and historic intent or meaning?; and (2) If so, have “the conditions on which the practice depended . . . changed in a constitutionally relevant way?”³⁹⁷ If the

³⁹¹ Posner, *supra* note 18, at 589.

³⁹² See *supra* note 113 and accompanying text.

³⁹³ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that there are certain situations where less deference to the majoritarian legislature is appropriate).

³⁹⁴ See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.”) (internal quotation marks omitted)).

³⁹⁵ The government also has attempted to defend the individual mandate as a tax; however, for purposes of this analysis, either provision of the constitution would yield the same outcome as the law is essentially regulatory in nature.

³⁹⁶ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (citing cases) (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

³⁹⁷ *Alden v. Maine*, 527 U.S. 706, 805 (1999) (Souter, J., dissenting). The relevant

action is not truly novel, the import of history was well stated by Judge Posner: “[I]t is the information itself that should shape our response to current problems, rather than the past as such; the past is just a data source.”³⁹⁸ Because all questions are a matter of degree, if there is genuine dispute about the novelty the Court should find that the history is inconclusive. What little evidence there is could, however, help illuminate the outcome.

To elaborate on the middle ground, *Printz* is an example of what the Court should *not* do when the history is ambiguous.³⁹⁹ The majority found that the purported novelty of commandeering state and local executives elicited a presumption that the Brady Act was invalid.⁴⁰⁰ One interpretation of disputed history should not be so authoritative. For example, merely deeming Hamilton “the most expansive expositor of federal power” does not remove his statements from the history books.⁴⁰¹ In a situation, such as in *Printz*, where the historical record is contradictory and ambiguous, the Court should not narrow and contort the facts to support a finding of novelty. What evidence there is should either be: (1) deemed inconclusive, which would not elicit any presumption; or (2) used as a data source, which depending on the information’s content could support or refute Congress’s assertion of power.

For disputed history to help *refute* a power, the history *must not be silence*. Put differently, in the “middle ground,” where there is disagreement about what the history books say, any history used as a data source should be *affirmative historical evidence*, not *silence or novelty*. For example, if in *Printz* there were some statements that suggested commandeering was pernicious but that the historical record was still ambiguous, those statements could have been used to increase judicial skepticism of the Brady Act.

“condition” Justice Souter refers to in *Alden* is the principle that Congress may not infringe on traditional areas of state sovereignty using the commerce power. *Id.* at 806 (“Today . . . in light of *Garcia*, the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty.”) (citation omitted). With *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), on the books, that test is no longer applicable and state sovereignty concerns are taken care of by the political process. Thus, “the dearth of prior private federal claims entertained against the States in state courts does not tell us anything, and reflects nothing but an earlier and less expansive application of the commerce power.” *Alden*, 527 U.S. at 806.

³⁹⁸ Posner, *supra* note 18, at 589.

³⁹⁹ See *supra* Part II.B for a discussion of *Printz*.

⁴⁰⁰ See *Printz v. United States*, 521 U.S. 898, 918 (1997) (finding that the novelty of the act “tend[ed] to negate the existence of the congressional power asserted” to exist in the case).

⁴⁰¹ *Id.* at 915 n.9.

If the governmental action is undisputedly novel, a second query is warranted. Is there a *reason*—social, technological, political, or legal—that Congress has not taken the action in the past⁴⁰² and has Congress rationally concluded that the action is now necessary? If both questions are answered in the affirmative, then the base presumption regarding the action should not change. For example, in *Printz* Congress passed “[t]he Brady Act . . . in response to what Congress described as an ‘epidemic of gun violence.’”⁴⁰³ The temporary time period of the Act also illustrates its practical nature. Even if the Brady Act was truly novel, the presumption of *validity* should not have changed.

This is not to say that every law passed can merely include a congressional finding that “society has changed, and so we needed to do this” to be held constitutional. That would eviscerate any true consideration of the law’s constitutionality. Even in the “new era” of the Commerce Clause jurisprudence⁴⁰⁴ the scope of the federal government’s power continues to be enumerated unless and until a police power amendment is added to alter Article I, section 8. The only significance of the question is to determine the *weight* that the *novelty* of the action receives in the analytical equation. Even if Congress rationally advances a reason for the novelty and shows a compelling need, the action may nonetheless lie beyond its reach. But, if Congress does rationally advance a reason, or such a reason is apparent, then novelty cannot be the basis of the Court’s decision to strike the act down.

The foregoing discussion of a “standard” is meant to illustrate that the unprecedented argument is, in the majority of situations, not a very good one. Imagine, however, that Congress passed a law that required every person, who can afford it, to carry a smart phone with internet and email capabilities. The basis of this law could be that since Congress finds its members enjoy theirs; everyone ought to enjoy one. And this law would likely increase productivity, and therefore positively affect the economy. Congress has arguably never forced every citizen to purchase or keep an item relying on its commerce power.⁴⁰⁵ Despite the ambiguity of the actual historical

⁴⁰² For example, the action was forbidden or impossible, it could not garner the votes, or there simply was no need.

⁴⁰³ *Id.* at 940 (Stevens, J., dissenting) (citing H.R. Rep. No. 103–344, at 9 (1993)).

⁴⁰⁴ *Gonzales v. Raich*, 545 U.S.1, 16 (2004).

⁴⁰⁵ Proponents of the individual mandate have asserted that there is nothing novel about a forced purchase requirement. See, e.g., Reply in Support of Defendant’s Motion to Dismiss at 19–20, *Florida v. U.S. Dep’t Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. Oct. 14, 2010) (No. 3:10–cv–91–RV/EMT), 2010 WL 3500155 (arguing that federal requirements targeting market participants to carry insurance are nothing new); Press Release, Ohio Attorney

question, assume that the hypothetical statute was a novel exercise of Congress's commerce power. The unprecedented argument could alter the presumption of constitutionality because Congress cannot rationally assert a *reason* for the new exercise of its commerce power—enjoyment of new technology by its members does not suffice. On the other hand, in section 1501(a) of the Patient Protection and Affordable Care Act⁴⁰⁶ Congress made elaborate findings that the individual mandate is necessary to improve health care for all Americans.⁴⁰⁷ Such findings are entitled to respect by the judiciary, even if a particular judge's subjective judgment—and a large portion of the country, or an entire political party that has since gained

Gen. Richard Cordray, Ohio Will Not Challenge Health Care Law (Mar., 29, 2010) (on file with author) (explaining that Congress forced Americans to purchase guns, ammunition and gunpowder to be prepared for military service).

The government notes that it is not novel for Congress to require market participants to carry insurance. See, e.g., 42 U.S.C. § 4012a(e) (2006) (borrowers in flood hazard areas); 30 U.S.C. § 1257(f) (2006) (coal mine operators). The leap in logic, however, is that everyone who is alive is a participant in the health care market. On that point the Government claims that there is “[a]bundant empirical evidence [that] shows that nearly everyone consumes health care.” Reply in Support of Defendant’s Motion to Dismiss, *supra* note 406, at 17. The government also avers that eminent domain is similar to the forced purchase of health care. *Id.* at 20. Those actions, though similar in a general sense, are not the same. The individual mandate forces all citizens to purchase insurance whether or not they intend to enter the market voluntarily.

Former Ohio Attorney General Richard Cordray asserted that the Second Militia Act of 1792 “required many Americans to make an economic purchase of a gun, ammunition, gunpowder and a knapsack.” Press Release, *supra* note 406. The mistake Cordray made is that the power under which Congress acted was its power to raise and support armies, the nature of which is much different than the commerce power.

Others have argued that a 1798 act “authorized the creation of a government operated marine hospital service and mandated that privately employed sailors be required to purchase health care insurance.” Rick Ungar, Congress Passes Socialized Medicine and Mandates Health Insurance—In 1798, *Forbes*, (Jan. 17, 2011, 9:08 PM), <http://blogs.forbes.com/rickungar/2011/01/17/congress-passes-socialized-medicine-and-mandates-health-insurance-in-1798/> (discussing the Act of July 16, 1798, ch. 77, 1 Stat. 605). All is true, except Ungar liberally uses the phrase “required to purchase.” The act taxed merchant ships coming into port, remitted the tax to the treasury, and the treasury spent the money to build hospitals and care for sick seaman. Act of July 16, 1798, ch. 77, 1 Stat. 605 §§ 1–3. David Kopel on the Volokh Conspiracy noted as much: “The Act is a solid precedent for federal involvement in health care, and no precedent at all for a federal mandate to purchase private products.” David Kopel, An Act for the Relief of Sick and Disabled Seamen, The Volokh Conspiracy, (Apr. 2, 2010, 6:24 PM), <http://volokh.com/2010/04/02/an-act-for-the-relief-of-sick-and-disabled-seamen/>.

Which side of the above dispute is correct is a question that needs to be assessed objectively by a historian. It is noteworthy that each commentator and politician referenced alleged the history books supported their predetermined position without regard to contradictory data or the context of the facts. This Note does not attempt to resolve the dispute, nor could it. The purpose of the above discussion is to show the ills of relying on novelty, one of which is the difficulty of being an objective reader of the history books, another of which is the contortion of historical facts when they are used as ammunition in a legal dispute.

⁴⁰⁶ Pub. L. No. 111–148, 124 Stat. 119 (2010).

⁴⁰⁷ 42 U.S.C.A. § 18091 (West 2010).

popularity—is to the contrary. And because the findings are rational, the presumption of *constitutionality* should not diminish.

Even a novel and unsupported exercise of power (e.g., the hypothetical cell phone law) should only operate to increase judicial skepticism, particularly if the law is regulatory in nature. True novelty of regulatory laws could increase judicial skepticism, but courts must accept rational justifications proffered by Congress. Even if the action is novel and Congress offers no rational reason for the novelty, a *presumption of invalidity* is unjustified.

CONCLUSION

Courts should resist the temptation to presume that novel actions are invalid. That position is analytically flawed and “resemble[s] . . . the *Lochner* era’s industrial due process.”⁴⁰⁸ When courts use history authoritatively, the history should be accurate. An accurate reading of history requires objectivity. The argument advanced in this Note was put best by Justice Holmes: “We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present.”⁴⁰⁹

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⁴⁰⁸ Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting).

⁴⁰⁹ Holmes, *supra* note 1, at 474.

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