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Recommended Citation
Sam Camardo, Clio on Steroids: Historical Silence as a Presumption of Unconstitutionality, 62 Case W. Rsvr. 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 Holmes

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 Act (“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. Section 1501 has become known as the “individual mandate.” The breadth of the individual mandate, whether couched in Congress’s power to regulate commerce or to tax and spend for the general welfare, is arguably unprecedented. Indeed, the law’s opponents forcefully assert that it is an unprecedented and therefore an unconstitutional expansion of federal power. Proponents argue that those claims do not withstand

1 Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 474 (1897).
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.
scrutiny. The federal government, defending section 1501 in court, dismissed the so-called “unprecedented argument” as “empty rhetoric, not a legal test.”

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.” And Senior United...
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.” This historic legal dispute is now before the Supreme Court, 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., 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 exceeded 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 . . . .” During this “breathtaking expansion” 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. 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.”

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

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 is 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.\textsuperscript{20} The potential for the distortion of the past is compounded when meaning is inferred from historical silence.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{23} Second, the meaning of the past is often ambiguous, which weakens history’s authoritative over contemporary issues.\textsuperscript{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.\textsuperscript{25} And lastly, though most importantly, congressional actions—except in rare occurrences—are presumed to be constitutional.\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{22} See infra Part III.C for a discussion of the problems with inferring meaning from silence.


\textsuperscript{24} See infra Part III.B for a discussion of the Court’s questionable use of history in Printz.

\textsuperscript{25} See infra Part III.C for a discussion of the problems with inferring meaning from silence.

\textsuperscript{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


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. 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. That novelty, Justice Scalia held, “tend[ed] to negate the existence of the congressional power asserted [in Printz] . . . .” Around the same time as Printz, the Court strengthened the state sovereign immunity defense in Seminole Tribe of Florida v. Florida and Alden v. Maine. 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. All three of these cases were hotly contested 5-4 decisions with sharp disagreement regarding the appropriate reading of history. Use of the unprecedented argument to thwart congressional action was most recently seen in Free Enterprise Fund v. Public Company Accounting Oversight Board.

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31 Id. at 905.
32 Id. at 918.
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. 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.

I. HISTORY IN CONSTITUTIONAL ADJUDICATION

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

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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—for speech regarding violence? Anybody?


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 proximity 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 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. 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: law-office history.

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. 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 historical 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 in 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. 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.” 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.

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

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. 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”).
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).
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.” McCulloch is often cited for the proposition that Congress’s enumerated powers should be given a broad construction. Accompanied by the notion that the Constitution was “intended to endure for ages to come,” the “‘open-ended’ clauses of the Constitution” are in tension with the notion that the text represents an original and identifiable meaning.

Another objection to originalism is that the theory relies on the questionable assumption that there is one objective reading of history. If an originalist concedes that the interpretation of history is partially subjective, the theory—when presented as one of restraint—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—itself, see generally Anonymous, Our Boggling Constitution; or, Taking Text Really, Really Seriously, 26 CONST. COMMENT. 651 (2010).

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).


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”).

McCulloch, 17 U.S. at 415.


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).

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 charted 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.\textsuperscript{78} This Note does not need to resolve arguments about the writtenness 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.\textsuperscript{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.\textsuperscript{80} The pragmatic judge may use history as one interpretive tool but is certainly not bound by it.\textsuperscript{81} Pragmatism, as advanced by Justice Jackson, is a direct rejection of originalist principles.\textsuperscript{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.\textsuperscript{83} Justice Breyer defines the concept of active liberty as “a sharing of a nation’s sovereign authority among its people.”\textsuperscript{84} The philosophy that Justice Breyer advocates seeks to be consistent with the “people’s will,” which includes longstanding historical precedent.\textsuperscript{85} Indeed, “a deep-seated conviction on the part of the people . . . is entitled to great

\textsuperscript{78} See Mitchell N. Berman, \textit{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”).

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

\textsuperscript{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 . . . ”).

\textsuperscript{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.

\textsuperscript{82} See supra note 67 for Justice Jackson’s rejection of originalism.

\textsuperscript{83} \textsc{Stephen Breyer}, \textit{Active Liberty} 32 (2008); Breyer, \textit{supra} note 66, at 80. According to Judge Posner, Breyer is also sometimes labeled a pragmatist. See Posner, \textit{supra} note 79, at 2 (adding Breyer to the list of Supreme Court Justices who have been called pragmatists).

\textsuperscript{84} Breyer, \textit{supra} note 83, at 25–26.

\textsuperscript{85} \textit{Id.} at 111.
respect. 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.

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 allocates 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. 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. If an action has been acquiesced in
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.”\footnote{Walz v. Tax Comm’r, 397 U.S. 664, 678 (1970).} In \textit{Walz v. Tax Commissioner},\footnote{397 U.S. 664 (1970).} a New York City property tax exemption for churches was challenged under the Establishment Clause,\footnote{Id. at 667.} a jurisprudence that relies heavily on history.\footnote{See generally Garrett Coyle, Note, \textit{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).} The Court found it significant that “Congress, from its earliest days,” had viewed statutory real estate tax exemptions for religious bodies as valid.\footnote{Walz, 397 U.S. at 677.} 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 . . . .”\footnote{Id. at 678.} The historical practice shed light on the precise question presented: has government sponsored or favored any religion?

Justice Frankfurter, concurring in the \textit{Steel Seizure Case},\footnote{Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).} discussed a position similar to the reliance theory in \textit{Walz}. At issue was President Truman’s power to seize the steel mills without congressional authorization to avert a shutdown during the Korean War.\footnote{Id. at 583 (majority opinion).} Justice Frankfurter, concurring with the majority’s conclusion that Truman did not possess seizure power, nonetheless noted that:

\begin{quote}
[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 \textit{gloss} on “executive Power” vested in the President by § 1 of Art. II.\footnote{Id. at 610–11 (Frankfurter, J., concurring)(emphasis added).}
\end{quote}
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. 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. 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. 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.” This remarkable, and anti-majoritarian, power was not explicitly granted by Article III. 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 was not his best work. Marshall himself was willing to consider bargaining the doctrine away “for security in the judicial office” during Justice Samuel Chase’s impeachment.

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).


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.”  The Court should exercise this incredible power—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.

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. 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.

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.

Judicial restraint requires deference to legislative and administrative actions. 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.” In addition to the counter-majoritarian difficulty, another reason that deference is appropriate is the “oath of office” theory. 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 [e] the Constitution.” One commentator has noted that “the most obvious way for a legislator to support the Constitution is to enact only legislation that is constitutional.”

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).


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”).

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).

U.S. CONST. art VI, cl. 3.

Paul Brust, 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

\(^{117}\) 469 U.S. 528 (1985).
\(^{118}\) Id. at 556.
\(^{120}\) 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.”\textsuperscript{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;\textsuperscript{125} “their professional training and experience leads them to examine language, history, tradition, precedent, purpose, and consequences.”\textsuperscript{126} But the particular weight given to each factor, including history, is a controversial topic.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{129} Indeed, “[m]uch of what passes for constitutional law is a modern construct, but it is defended by reference to ancient . . . texts.”\textsuperscript{130}

Defending a proposition that is truly novel by reference to our enlightened forbearers is common in constitutional law. For example, in \textit{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.\textsuperscript{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.\textsuperscript{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[.]”\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{125} See supra Part I.A (discussing various ways in which judges use history).
\item \textsuperscript{126} BREYER, supra note 83, at 110.
\item \textsuperscript{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”).
\item \textsuperscript{128} Posner, supra note 18, at 593.
\item \textsuperscript{129} Id at 580.
\item \textsuperscript{130} Id at 581.
\item \textsuperscript{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.”).
\item \textsuperscript{133} Posner, supra note 18, at 582 (arguing that this viewpoint is a mistake).
\end{itemize}
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.”

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. Kelly termed this practice “law-office” history. “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.” The two most controversial nineteenth-century cases that the Court decided—*Dred Scott v. Sandford* and the *Income Tax Cases*—foreshadowed the current practice. 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.”

In the early twentieth century, the *Lochner* Court resorted infrequently to law-office history. 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. The Lochner Court had a much more effective tool than law-office history: substantive due process and the infamous “freedom of contract” doctrine. 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. 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. Not long after Frankfurter’s accession, the Court, under the lead of liberal Justices Black, Douglas, and Rutledge, reverted to law-office history to break with precedent and establish partisan rights.

A good example of the Justice Black’s use of “law-office” history is the reapportionment case Wesberry v. Sanders. Wesberry held that Article 1, section 2 of the Constitution required a rule of “one man, one vote.” 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.

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.'" That quote appears to contemplate a "one man, one vote rule," as do many others Black selectively cites.

Kelly was blunt with his criticism: "Mr. Justice Black, in order to prove his point, mangled constitutional history." 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. 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."

Kelly’s “law-office” history has not disappeared. 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. Judges are trained as lawyers, a profession that prizes zealous advocacy. Classically trained historians, on the other hand, attempt to achieve a

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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. 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. Federal judges are not selected solely based on their achievements as restrained, objective interpreters; the nominations are invariably politically motivated.

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*, deem the evidence to be inconclusive.

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

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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.”).


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. 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.

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.” 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. 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.” On May 19, 1789, Representative James Madison moved to
create a “Department of Foreign Affairs, at the head of which there shall be an officer . . . to be removable by the President.” 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.” 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[.]” That, Madison stated, would be “a fatal error interwoven in the system . . . .” Dispute ensued and four different views emerged. 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. Smith, who thought removal required an impeachment, was in the minority. Myers discussed the dispute and the arguments surrounding it in depth. In Chief Justice Taft’s view, the dispute was resolved decisively in favor of Madison. That was what the Chief Justice characterized as the “decision of 1789,” a decision that, according to the Court, was binding more than one hundred years later.

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

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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. 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. 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.” Further, “no reliable record of the Senate deliberations exists,” and the Senate’s vote was equal, with Vice President John Adams casting the deciding vote.

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. 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.” The duties of the Treasury officials were specified at great length, which limited presidential discretion. The Comptroller, an office within the Department of Treasury, was shielded from presidential direction. At bottom, “the Myers Court[] fail[ed] to present the complete story of the Decision of 1789.”

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 . . . .” But Myers was decided in 1927, not 1863, when the statute that broke the trend, the Currency Act, was passed by Congress and
signed by President Lincoln. The Tenure of Office Act, which the postmaster statute 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. 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.” 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.” 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. 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. The dissenters, Justices Holmes, Brandeis,
and McReynolds, thoroughly disagreed. Both the inferences drawn from and usage of (or the absence of) history were thought to be extremely problematic by the dissenting opinions. 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.”

Soon after Myers, the dissenters prevailed, at least in part. In Humphrey’s Executor v. United States, 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.” 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.” Thus, the requirement that the President must show cause for removal of one of its members did not violate the “decision of 1789.” But the Court, somewhat ominously, stated that for cases that fall between Myers and Humphrey “there shall remain a field of doubt.”

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).

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).

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”).
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
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.”

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. Myers is law-office history of the highest order, and Free Enterprise Fund reinvigorated it. But, as Corwin noted, “what a judge cannot prove he can still decide.”

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.


223 See 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.”).

224 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,” 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...”

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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*.
231 *Id.* at 53–55.
232 *Id.* at 58.
Citizens of another State, or by Citizens or Subjects of any Foreign State.” Thus 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 . . . .” 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

Seminole Tribe overruled that case, deeming it a departure from established law. 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. The majority responded by referring to the dissent’s argument as a “new theory of state sovereign immunity.”

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.” The next case considered, Printz v. United States, involved the 1993 Brady Handgun Violence Prevention Act. 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. Sheriff Jay Printz of Ravelli County, Montana, and Sheriff Richard Mack of Graham County, Arizona, brought suit claiming that the

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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).


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.


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 [this 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).


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.\textsuperscript{256} When \textit{Seminole Tribe} was decided, the federal district court dismissed the action on state sovereignty grounds.\textsuperscript{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.\textsuperscript{258}

After determining that the question was one of first impression, the Court, similar to \textit{Printz}, determined that “history, practice, precedent, and the structure of the Constitution” would be the guide.\textsuperscript{259} That inquiry was necessary because the only textual source of sovereign immunity in the Constitution is ambiguous.\textsuperscript{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 \textit{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.”\textsuperscript{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.”\textsuperscript{262} \textit{Alden}, contrasted with \textit{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.\textsuperscript{263} Opponents

\textsuperscript{256} \textit{Alden}, 527 U.S. at 711.
\textsuperscript{257} Id. at 712.
\textsuperscript{258} Id.
\textsuperscript{259} Id. at 741.
\textsuperscript{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 . . . .”).
\textsuperscript{261} Id. at 741.
\textsuperscript{262} \textit{Alden}, 527 U.S. at 741.
\textsuperscript{263} Id. Justice Kennedy, the author of \textit{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.

\textsuperscript{264} \textit{See} \textit{Alden}, 527 U.S. at 741 (noting “the overriding concern regarding the States’ wartime 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 Chisolm 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 Chisolm, 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.

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.
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.” 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.

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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," 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.

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. 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?” 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

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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. 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. 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. 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. 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. 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 curium) (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 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)).

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

287 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;

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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.
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”\(^\text{304}\) 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.\(^\text{305}\) That incident only shows that the federal government made the political decision to rent a jail in Georgia to house its prisoners.\(^\text{306}\) Asserting that the action implies acknowledgement of a lack of power to compel is identical to “reliance upon unexpressed legislative intent.”\(^\text{307}\) 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;\(^\text{308}\) for determination of the condition of seafaring vessels;\(^\text{309}\) and for requiring state courts and court clerks to perform naturalization services.\(^\text{310}\) To distinguish those acts, the majority narrowed them to mere adjudicatory functions performed by courts rather than the executive functions performed by government agencies.\(^\text{311}\) Justice Stevens in dissent, however, noted that some of those statutes required courts to act like contemporary regulatory agencies.\(^\text{312}\) But
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.”

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.

The Brady Act is not the only modern statute that requires this “cooperative federalism.” 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.”

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. 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” describes the issue well. Ambiguous history, with “more or less apt quotations from respected sources on each side of any question,” 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

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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.”
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.” Unlike the Constitution, the Articles gave the central government no power directly over the people, only over the states themselves. And “[t]o put its laws into effect, the Continental Congress had to impress state officials and local committees.” Indeed, the opponents of the Constitution supported that method. 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? 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. Justice Stevens noted:

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 304, 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]ether 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.
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.” The argument—made by Justice Kennedy in oral argument and again, albeit less explicit, in his opinion—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. 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. That led Holmes to conclude that “the midnight visitor was someone whom the dog knew well.” It was Straker himself who removed Silver Blaze from the stable, not his assailant.

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. 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. Furthermore, “the Framers chose to recognize

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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.

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

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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. Usery354 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.
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 . . . ”).
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).


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, 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.”

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

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.” The disagreement was policy based. 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.” Blackstone’s
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 selfinterested 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.


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. 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. That formulation contemplates the use of Congress’s historic silence to vest power in the President, thereby reducing the powers of Congress. But Frankfurter was clear that “long-continued acquiescence of Congress . . . ” is required a position different than that advanced in Printz and Alden. Here, Justice Kennedy’s “dog that doesn’t bark” argument has more force. 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. 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

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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 Brieief 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).
383 Holmes, supra note 1, at 469.
equal force with respect to the late eighteenth century. 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.”

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.”

The first principle—candor—requires that history is not used as a “mask for decisions reached on other grounds.” But “[g]eneral propositions do not decide concrete cases.” 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.” 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. What happened in the past, when undisputed, is a “convenient

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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”).
387 Posner, supra note 18, at 593.
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.” 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. As Justice Stone instructed in Carolene Products, there are certain situations when that presumption takes a somewhat narrower scope. 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.

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. When a challenger asserts that Congress has exceeded its commerce power, the challenged action is presumed valid. 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?” 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).
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.”).
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.” 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. The majority found that the purported novelty of commandeering state and local executives elicited a presumption that the Brady Act was invalid. 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. 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 past 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.’” 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 jurisprudence, 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. Despite the ambiguity of the actual historical

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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 Act Congress made elaborate findings that the individual mandate is necessary to improve health care for all Americans. 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


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 that the commerce power.


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 contrivance of historical facts when they are used as ammunition in a legal dispute.

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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\(^{409}\) Holmes, supra note 1, at 474.

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