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ARTICLE

SPIRIT

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The Founders were not textualists. The letter of the law mattered quite a bit. But, as William Blackstone noted, interpretation also required the consideration of

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purpose, reason, and intent—what he and many others called "spirit." This Article makes several contributions. First, spirit was a potent factor, for it not only helped resolve textual ambiguities, it also could trump the letter of the law. Specifically, spirit could extend the meaning of the law beyond its letter—extensive interpretation. And spirit could restrict the meaning suggested by the letter of the law—restrictive interpretation. Second, spirit was a familiar tool, applicable to constitutions, laws, treaties, judicial precedents, and even executive rules. Third, spirit was not the peculiar province of the courts. Instead, spirit was more democratic, for everyone made free use of it. Early federal legislators, including James Madison, invoked spirit to make sense of the Constitution. Executives, including George Washington, Alexander Hamilton, Thomas Jefferson, and many others, utilized spirit to make sense of the Constitution, laws, and treaties. John Marshall deployed spirit to trump the letter before he was Chief Justice and continued invoking spirit while on the bench. This excavation of Founding-era practices bears on modern debates. To begin with, the Founders eschewed the extreme fixation on text that characterizes modern textualism. Relatedly, given that the Founders routinely considered spirit, textualists should reassess their claim that the Constitution mandates modern textualist precepts. One should not use a late twentieth-century theory to make sense of late eighteenth-century documents, including the Constitution. Lastly, originalists of all stripes should refine their understanding of originalist methodology, for a proper conception of originalism should perhaps reflect the actual practices of the Founders. Public meaning originalists, original methods originalists, and every other species of originalist must reckon with spirit's central role in early American practice. For too long, we have been in the thrall of a textualism that is at war with the pervasive use of spirit at the Founding.

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INTRODUCTION

> [N]ew and perplexing questions on jurisdiction will never be exhausted. That which you mention is one of the strongest possible illustrations . . . *of the necessity in some instances of controuling the letter by the plain spirit of the law*.
>
> —John Marshall to Joseph Story, 1827[1]

Like Mahavishnu, Justice Antonin Scalia had many avatars. He championed rules over standards.[2] He advocated judicial restraint.[3] He

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1 Letter from John Marshall to Joseph Story (July 25, 1827), *in* 11 THE PAPERS OF JOHN MARSHALL 35, 47 (Charles F. Hobson ed., 2002) (emphasis added).

2 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (arguing that rules promote predictability and judicial restraint).

3 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 347-48 (2012) ("The soundest, most defensible position is one that requires discipline and self-abnegation. If judges think no further ahead than achieving justice in the dispute now at hand, the law becomes subject to personal preferences and hence shrouded in doubt.").

exalted American legal traditions.[4] He was a stout originalist.[5] He was a tenacious textualist.[6] He saw no conflict between the last three commitments because, by his lights, the Founders were textualists.[7] With Professor Bryan Garner, Scalia argued that the Great Chief Justice, John Marshall, repeatedly esteemed text above spirit.[8]

Scalia's influence stands undiminished. His textualism dominates conservative thought, to the point that references to intent or purposes often provoke derision from some on the right—both the academic and judicial varietals. The mantra is "text, text, text."[9] Because textualists have stigmatized intent, many discuss a law's meaning without seemingly primitive references to spirits and other ghosts. Furthermore, Scalia embodied the union of textualism *and originalism*. For many, textualism and originalism are twin polestars that are always in sync. Neither guiding star leaves room for an ethereal, flighty concept like spirit.

Yet even when text seems crystal clear, I doubt that one can banish spirit entirely, especially when it comes to the Constitution. Take judicial salaries. Federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[10] In other words, Congress must provide salaries, can never cut the compensation of sitting judges, but may increase their pay. There seems to be no ambiguity here. Nonetheless consider the following: could Congress establish an annual salary of $10,000 for new judges? Unlike some state constitutions, the text does not demand a "reasonable" salary.[11] The text permits a *paltry* salary. Alternatively, could Congress supply a reasonable, fixed salary but subsequently grant raises only to those upholding the constitutionality of federal law? An adequate salary coupled with incentives also coheres with the letter. Yet both a measly salary and enticements to

4 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

5 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

6 SCALIA & GARNER, *supra* note 3, at 16–28.

7 *See id.* at 369-72 (citing various eighteenth-century legal thinkers to support the claim that the "meaning [of a statute] derives from text, not from outside sources such as legislative history").

8 *Id.* at 344.

9 Recall the remarks of Justice Elana Kagan—who is no legal conservative—at the 2015 Antonin Scalia Lecture at Harvard Law School: "We're all textualists now." Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:27 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFToTg [https://perma.cc/X82D-CTFU].

10 U.S. CONST. art. III, § 1.

11 *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 54 (2015) (explaining that some states "dictated that all officers be paid 'reasonable' or 'adequate' salaries" (footnotes omitted)).

decide cases in particular ways seem at war with the provision's *spirit*. The Constitution safeguards a measure of judicial independence. If Congress can pay judges a pittance or dangle money before them, some jurists will be servile.

Consider a constitutional right, the one found within the Takings Clause: "[N]or shall private property be taken for public use, without just compensation."[12] Textually, the Clause regulates the taking of private property put to public use. It says nothing about the taking of property for *private use*.[13] Nonetheless, one might say that the Clause absolutely bars the taking of property for private uses. No matter the compensation paid (even ten times "just compensation"), the Clause's *spirit* bars the compelled transfer of property for private use. Again, the Constitution means more than it says.

This Article argues that the Founders were not Scalian textualists.[14] At the Founding, spirit was a powerful, even decisive factor in interpretation.

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12 U.S. CONST. amend. V.

13 The Court has expanded what constitutes "public use." *See* Kelo v. City of New London, 545 U.S. 469, 489-90 (2005) (concluding that economic development serves a public purpose and accordingly, satisfies the Public Use Clause, even if the condemned land would not be open to use by the general public).

14 This Article contributes to several literatures. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 126-27 (2001) (arguing against the equity of the statute doctrine based upon "the structural policies implicit in the constitutional separation of lawmaking from judging"); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 997 (2001) (arguing that the "original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values"); 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, 788 (2009) (arguing that from the Founding "there is some evidence that interpretation was primarily textualist and some evidence that it was intentionalist" but "little or no evidence supporting dynamic interpretation"); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 10 (2020) (arguing that "[t]he Founding generation understood different types of legislation to entail different methods of interpretation"); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 31 (2018) (arguing that in the eighteenth century "[a]lthough the letter was ordinarily sufficient to resolve a given question, where the letter was obscure and judges confronted a need to choose, judges followed the spirit of the text"); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1953 (2021) (asserting "that the best understanding of constitutional meaning focuses on the meaning communicated by the constitutional text to the public at the time each constitutional provision was framed and ratified"); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO STATE L.J. 1239, 1251 (2007) (arguing that relying on spirit over text to construct the Constitution "reflected the norm in Anglo-American jurisprudence"); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 990-99 (2021) (arguing for courts to consider the "mischief" that a statute was enacted to target); John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1616 (1992) ("Marshall maintained that courts should restrict their task to discovering legislative intent via the statute's text and the canons of construction."); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985) (arguing that intent was to be determined "solely on the basis of

Occasionally, spirit was used as a synonym for the actual meaning of some instrument. In these instances, spirit was not an interpretive factor; it was the goal of interpretation. Far more commonly, spirit was juxtaposed to "letter," i.e., text. In this usage, "spirit" meant purpose, reason, intent, or speculation about what the lawmaker would have done in the face of unforeseen circumstances.[15]

In the eighteenth century, lawyers were quick to assert that the "letter and spirit" favored their reading because that was the best argument one could make. That is the sort of confident assertion that one expects from litigators—every major factor favors my reading. Such rhetoric shed little light on the independent influence that spirit could have. But sometimes spirit played a more significant role. Interpreters commonly used spirit to make sense of an ambiguous text. What does "vehicles" mean in a statutory bar on "vehicles in the park?" Was the legislative concern centered on safety, noise, pollution, or all the above? Spirit also mattered in cases when semantic meaning yielded absurd results. When the text generated absurdities, people shunned the semantic meaning and used spirit to generate more satisfactory meanings and outcomes.

Most crucially, spirit could be so potent that it could trump a text's plain meaning. As William Blackstone put it, sometimes one had to interpret a law "according to the spirit of the rule, and not according to the strictness of the letter."[16] Spirit could trump the letter in two ways. First, interpreters sometimes read instruments as having a broader reach than the text suggested. Following Emmerich de Vattel, we can label this approach "extensive interpretation."[17] Second, interpreters read instruments as having a narrower meaning than the text signaled. Like Vattel, we can style this

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the words of the law, and not by investigating any other source of information about the lawgiver's purposes").

Despite some differences, my claims are most closely aligned with Eskridge's. I also find similarities in work by Jonathan Gienapp and Adrian Vermeule. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 52 (2018) (arguing that the Founders rarely read the Constitution's language to be constitutive of its meaning); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 80-81 (2022) (noting the classical tradition of reading legal texts in light of spirit or intent).

15 After reading a draft of this Article, my esteemed colleague, Larry Solum, discerned five different uses of spirit at the Founding: intentionalism, purposivism, construction, context, and a reference to a law's underlying concepts (e.g., judicial independence). For my part, I principally see the first two and the last one. I agree with his claim that "spirit" referred to multiple concepts.

16 3 WILLIAM BLACKSTONE, COMMENTARIES *430.

17 EMMERICH DE VATTEL, THE LAW OF NATIONS 388 (Dublin, Luke White 1787), https://books.google.com/books?id=tuyXcypQNS8C&newbks=1&newbks_redir=0&pg=PP1#v=onepage&q&f=false.

"restrictive interpretation."[18] When people used spirit in either way, they were saying that while the letter suggested a particular meaning, the spirit was powerful enough to compel a different reading. This was not using spirit to alter the meaning as much as using it to recognize an instrument's true, if partially opaque, meaning. Meaning was a function of, among other things, letter *and* spirit.

Why did commentators disdain a strict textualism and instead champion the use of spirit to supplement or restrict the text? They supposed that because humans were imperfect, their texts did not invariably reflect the will that lay behind them. They further believed that the language that was meant to express the will should never stand as an insuperable barrier to understanding and fulfilling the underlying will or purpose. Finally, commentators understood and embraced the notion that the use of spirit was appropriate to deal with unforeseen circumstances. This last justification rendered certain uses of spirit akin to lawmaking.

The use of spirit was not merely theoretical, to be found only in treatises. Statesmen, litigants, and jurists made ready use of spirit arguments. Invoking spirit to make sense of the law, and in some cases to contravene the letter of the law, affected real persons and powerful entities—litigants before the courts, citizens before the Executive, high officials, and nations. For instance, a treaty barred Dutch "citizens" from committing hostile acts against the United States.[19] American diplomats insisted that the treaty's *spirit* extended the bar to all Dutch residents, whether citizens or not.[20] The spirit extended the treaty's meaning beyond its letter.

This widespread and astonishing practice has repercussions for the debate about interpretive practices at the Founding. Does Article III oblige the federal courts to consider the equity of the statute and related concepts, as Professor William Eskridge has argued?[21] Or is Provost John Manning correct in contending that the Constitution rejected some British conceptions of judicial power, particularly flexible, creative approaches to statutory

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18 *Id.* at 390.

19 *See* Letter from James Madison to John Armstong (Apr. 2, 1805), *in* 9 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 200, 200 & n.3 (Mary A. Hackett, J.C.A. Stagg, Mary Parke Johnson, Anne Mandeville Colony & Katharine E. Harbury eds., 2010), https://rotunda-upress-virginia-edu.proxy.library.upenn.edu/founders/default.xqy?keys=JSMN-print-02-09-02-0221&mode=deref [https://perma.cc/4Q3J-U2TN] ("[T]he letter of the 19th Article of the Treaty with that republic has been violated, and with respect to any other description of inhabitants, the Spirit of that article must be considered as equally violated . . . .").

20 *Id.* at 200.

21 *See* Eskridge, *supra* note 14, at 997, 1011, 1083 (claiming the judicial power under Article III extends to the spirit of the law).

interpretation?[22] Professor Farah Peterson added a new axis, asserting that while spirit played a role in public law, treaties were construed without regard to spirit.[23] Most recently, Professors Randy Barnett and Evan Bernick have maintained that spirit should be used only when the Constitution is ambiguous.[24]

These scholars have enriched our understanding about the Founding. Nonetheless, I respectfully differ in several respects. First, the near-exclusive focus on *judicial* interpretation is misplaced. Executives were the most consequential law interpreters because they routinely made sense of the law in order to execute it and because most of their understandings never gave rise to a litigated case. Further, citizens engaged in interpretation as they sought to honor the law. Because most interpretation took place outside the courts, an obsession with the courts distorts how one perceives interpretation at the Founding.

Second, the focus on the perceived obligations associated with exercises of the Article III judicial power is too narrow. Eskridge argued that the Constitution *compels* the use of a flexible stance towards statutory interpretation.[25] Manning asserted that the Constitution forbids that very approach.[26] But maybe the judicial power does not, once and for all time, prescribe a language, a dictionary, or a set of interpretive techniques. In my view, a modern Congress can utilize words in their modern sense. Likewise, courts should use the interpretive techniques of this century, whatever they are, to interpret this century's legal instruments. Article III does not permanently bar, or forever mandate, a particular set of interpretive techniques for all laws, regardless of when those laws were enacted.

Third, the focus on statutory interpretation is too confining. If we expand the ambit, beyond the equity of the statute, we see a far larger canvas come into focus and can learn much more about interpretation at the tail end of the eighteenth century (and beyond). Spirit was a grand, encompassing concept, one relevant to the universe of legal instruments. An emphasis on statutes, or even the Constitution, obscures that point.

Relatedly, Americans used spirit to interpret treaties. John Marshall used spirit to dismiss French assertions that America had violated a treaty.[27] While

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22 *See* Manning, *supra* note 14, at 8 ("Our constitutional structure certainly drew upon prior English practice in some respects, but it also departed from that practice in important respects.").

23 *See* Peterson, *supra* note 14, at 29 (referring to this idea as "private-act interpretation").

24 Barnett & Bernick, *supra* note 14, at 34 ("When . . . a determinate answer cannot be ascertained through interpretation . . . . that rule must be informed by the Constitution's original spirit.").

25 Eskridge, *supra* note 14, at 997, 1011, 1083.

26 Manning, *supra* note 14, at 8.

27 *See* Letter from American Envoys to Talleyrand (Apr. 3, 1798), *in* 3 THE PAPERS OF JOHN MARSHALL 428, 433-34 (William C. Stinchcombe, Charles T. Cullen & Leslie Tobias eds., 1979)

America had not complied with the text, it had honored its spirit and had therefore not infringed the treaty. Arguments from spirit were common in eighteenth-century treaty interpretation, just as they remain so today.[28]

In sum, where some see discontinuity, from Britain to the United States, I find remarkable continuity. Where some perceive special constraints on federal courts, I see a uniform approach across institutions—everyone used spirit. Where some posit distinctive rules across legal instruments, I discern a consistent approach that encompassed constitutions, treaties, statutes, judicial precedents and orders, and executive rules. Where some see a crabbed role for spirit—use it when the letter is ambiguous—the reality is that spirit was not so tame. Spirit could run wild and control the text, as Marshall noted.[29]

These findings also have profound implications for the relationship between textualism and originalism. First, the Founders eschewed the severe textualism that characterizes the jurisprudence of Justice Scalia and his modern devotees. Second, given that the Founders made frequent recourse to spirit, textualists should reevaluate their assertion that the Constitution somehow mandates modern textualism. In the decades after the Constitution's ratification, Americans did not imagine that the Constitution minimized, much less barred, the use of spirit to make sense of statutes and the law more generally. Third, one should not make sense of Founding-era legal instruments, including the Constitution and early federal statutes, as if they were authored by the textualists of our time. Finally, originalists of all stripes should refine their conception of originalism, for perhaps the theory of originalism ought to reflect the actual practices of the Founders. Public meaning originalists, original methods originalists, and every sort of originalist should come to grips with spirit's pervasive role at the Founding. While originalism has been "working itself pure"[30] for decades—by banishing spirit—this Article aims to reintroduce the impurity.[31]

(explaining that the United States had not complied with the literal terms of the treaty but was acting with its spirit).

28 *See* Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

29 *See supra* note 1 and accompanying text.

30 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO L.J. 1113, 1114 (2003).

31 Defending the impurity has been a long-term project of mine. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

The Article adopts a chronological approach. Part I considers Antonin Scalia and Bryan Garner's textualist arguments in *Reading Law*[32] and briefly addresses the scholarship of Eskridge, Manning, Peterson, Barnett, and Bernick. Part II recounts British and American commentary and practices. Part III reveals that Anti-Federalists *and* Federalists used spirit to decipher the proposed Constitution. In context, this continuity makes sense, for the Constitution never banished spirit. Part IV reveals that, post-ratification, American judges, legislators, and executive officials repeatedly used spirit to make sense of the Constitution, laws, and treaties. Part V argues that textualism yields a rather distorted reading of the Constitution. Part VI addresses some ambiguities and recounts the concerns that the Founders had with spirit. Part VII considers practical concerns, briefly discussing lessons for originalism, textualism, and related topics.

I pray that readers will not be exhausted by this Article's exhaustive discussion of spirit. The length is a tad unavoidable as I seek to catalog an astonishing practice that runs contrary to a widespread ingrained skepticism, even disdain. The depth helps dispel that scorn and ensures that no one doubts that at the Founding spirit was a persistent, pervasive, and potent feature of everyday legal interpretation.

I. A Dispirited Literature

Spirit has few contemporary opponents, perhaps because the concept is obscure to most moderns. This Part considers one prominent critique, part of a broader movement to belittle, or banish, spirit. It then briefly takes up recent scholarship that discusses spirit and adjacent concepts.

A. *Exorcising Spirit*

Justice Antonin Scalia and Professor Bryan Garner denigrate spirit.[33] Towards the end of *Reading Law*, after exalting text but nonetheless endorsing certain (nontextual) canons,[34] they purport to refute "thirteen falsities."[35] The very first is "[t]he false notion that the spirit of a statute should prevail over its letter."[36] They begin with an epigram from Cesare Beccaria: "[t]here is

32 Scalia & Garner, *supra* note 3, at 343-46.

33 *Id.* at 35.

34 For a critique of substantive canons as used by textualists, see generally Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 Harv. L. Rev. 515 (2023).

35 Scalia & Garner, *supra* note 3, at 341-410.

36 *Id.* at 343-46.

nothing more dangerous than the common axiom: *the spirit of the laws is to be considered*. To adopt it is to give way to the torrent of opinions."[37]

According to *Reading Law*, arguments about "spirit," and the like, rest upon "mystical divination."[38] To paraphrase, interpretation should abjure reliance on conjuring and channeling spirits, speaking in tongues, and the like. Scalia and Garner denounce the "viperine interpretation" of *Church of the Holy Trinity v. United States*,[39] its pronouncement 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."[40] Just as vipers are venomous creatures to be shunned, so too spirit. To Scalia and Garner, spirit wrongfully killeth the letter.[41] To indulge in spirit is to open Pandora's box, where there is no right or wrong answer, only the imposition of personal values under the guise of interpretation.[42]

To their credit, *Reading Law* is not a one-sided presentation. Scalia and Garner admit that John Marshall "often referred to the 'spirit' of the . . . Constitution."[43] They cite two Marshall opinions invoking spirit,[44] one of which is *McCulloch v. Maryland*.[45] As Judge Frank Easterbrook writes in the preface, what Marshall said about interpretation matters because the Chief Justice has "a claim to represent the original understanding about interpretive method."[46]

But having made that concession about Marshall, Scalia and Garner strive to minimize it. First, they observe that Marshall said that the "spirit of an instrument . . . is to be collected chiefly from its words."[47] Second, they argue that "[t]he common view in the 18th and 19th centuries closely equated the spirit with the letter,"[48] thereby merging the two. Finally, they take comfort in the fact that the famed author of *The Spirit of Laws* repeatedly said that

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37 *Id.* at 343 (quoting CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 12 (Dublin, John Exshaw 1767)).

38 *Id.* at 10.

39 *Id.* at 11; 143 U.S. 457 (1892).

40 *Holy Trinity*, 143 U.S. at 459; SCALIA & GARNER, *supra* note 3, at 11-12.

41 SCALIA & GARNER, supra note 3, at 11.

42 *Id.* at 11, 343 ("The concept is, in practice, a bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says, leading to 'completely unforeseeable and unreasonable results.'") (quoting Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 542 (1934)).

43 *Id.* at 344.

44 *Id.* at 344 n.5.

45 17 U.S. (4 Wheat.) 316, 421 (1819).

46 Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 3, at xxi.

47 SCALIA & GARNER, *supra* note 3, at 344 (internal quotation marks omitted) (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)).

48 *Id.* at 344.

judges should follow the "letter of the law."[49] Despite his tome's title, Baron de Montesquieu was a textualist, you see.

Their treatment leaves much to be desired. First, they never define what "spirit" is.[50] How can readers reject the assertion that the spirit should prevail over the text if they lack a sense of what "spirit" means? Second, Scalia and Garner never dispute that laws have spirits or that many in the eighteenth century believed that they did.[51] Their discussion sometimes evinces a doleful sense that at the Founding, spirit *was* relevant but, happily, not that potent.[52] Finally, though they seek to prove the falsity of the claim that spirit may overcome the letter of the law,[53] they fail to identify anyone from the Founding, British or American, who endorsed their claim that the spirit cannot trump the text.

As we shall discover, many Founders endorsed using spirit to trump the letter. What Scalia and Garner call "viperine interpretation" had innumerable proponents, including Blackstone, Washington, Hamilton, Marshall, and others.[54] Many colossal vipers spewed venom.

B. *Short-Changing Spirit*

In the recent past, prominent scholars have discussed adjacent concepts. In *Textualism and the Equity of the Statute*, Provost Manning argues that Article III forbids the federal courts from deploying the "equity of the statute" to depart from the plain meaning of statutes.[55] The doctrine provides that "equity should mitigate the defects of generally worded laws."[56] Using this doctrine, British judges would sometimes deviate from a statute's semantic meaning. Examples include "the equitable tolling of [a] statute of limitations" or mitigating the harsh "rigor of the statute of frauds."[57] In essence, British judges could interpret Parliament's laws by the reason or spirit of them, extending or constricting them. This practice reflected the overlapping powers of the legislature and the judiciary, with courts having a share of the

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49 *Id.* at 345 (citing 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 75 (Thomas Nugent trans., 1949) (1748)).

50 *See id.* at 11-13, 21, 103, 343-46.

51 *See id.*

52 *Id.* at 344-45.

53 *See supra* notes 36–37 and accompanying text.

54 Although I am critical of the Scalia and Garner treatment of spirit, I regard Justice Antonin Scalia as a hero. *See* Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 24 (2016).

55 Manning, *supra* note 14, at 29.

56 *Id.*

57 *Id.* at 31.

legislative power.[58] By effectively rewriting statutes, British courts were akin to a subordinate legislature.[59]

According to Manning, the Constitution reflects a desire for a more thoroughgoing separation of powers, where legislatures create laws and courts faithfully execute them according to their plain meaning. The Founders were not literalists, says Manning, for they would utilize context and use other rules, such as the absurdity doctrine.[60] But they did not believe that purpose or reason could expand or contract a statute's meaning—*i.e.*, the reading derived from a semantic meaning.[61] For instance, Manning argues that Chief Justice John Marshall adopted a textual approach.[62] He also contends that due to a stricter conception of the separation of powers, the "judicial power" of Article III bars the use of the equity of the statute to depart from a law's plain meaning.[63] And yet, equity could play a role on the margin: when a word or phrase was ambiguous, the equity of a statute could help resolve the ambiguity.[64]

In *All About Words*, Professor Eskridge builds upon his previous work and responds to Manning.[65] Eskridge defends a pragmatic, "context-sensitive" approach to statutory interpretation.[66] The original understanding of Article III's "judicial power," he explains, disproves strict textualism.[67] Rather than embracing a plain-meaning stance, the Founders "assume[d] an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values."[68] Eskridge identifies three powers that eighteenth-century English judges exercised: 1) the ameliorative power to read words narrowly rather than broadly; 2) the suppletive power to read words broadly to include unprovided-for cases; and 3) the voidance power to nullify statutes.[69] He believes American courts likewise used these powers in a manner that belies a deep commitment to semantic meaning.[70] Finally, he contends that John

58 *Id.* at 43-44.

59 *Id.* at 44, 46.

60 *Id.* at 95-100.

61 *Id.* at 79.

62 *Cf. id.* at 105-06 (suggesting that Marshall's faithful agent theory aligns with a textualist perspective).

63 *Id.* at 70 ("[I]t is difficult to square the separation of legislation from judging with the broadly discretionary powers associated with the equity of the statute.").

64 *Id.* at 107-08.

65 Eskridge, *supra* note 14, at 992-93 (citing William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522-32 (1998)).

66 *Id.* at 992.

67 *Id.* at 997.

68 *Id.*

69 *Id.* at 999.

70 *Id.* at 1012, 1058.

Marshall "expansively applied federal statutes, under a text-based analysis that had room for broader considerations of equity and principle."[71]

Professor Farah Peterson widens the lens to consider the interpretation of other instruments. While the Founders considered spirit in the context of interpreting constitutions and statutes, she argues that they were far more textualist when it came to private law—i.e., international treaties and so-called private bills.[72] By considering different types of legal instruments, Peterson paints a richer picture of Founding interpretational practices.

Finally, Randy Barnett and Evan Bernick argue that originalists have been too dismissive of purpose or intent.[73] They claim that the Founders believed that the "spirit" should be used to clarify ambiguous words or phrases.[74] When seeking the original public meaning, originalists ought to consult spirit to make sense of unclear constitutional text.[75]

Each of these learned articles teaches us much.[76] Having said that, my research highlights a few shortcomings. First, Manning reads too much into the Constitution's separation of powers and is too quick to discover a plain-meaning textualism in Chief Justice Marshall's jurisprudence. Manning is using *constitutional spirit* to argue against the use of spirit in statutory interpretation. Second, Peterson describes a private/public divide, in which treaties were subject to a plain meaning approach, but my research reveals that people used spirit to make sense of treaties. Third, Barnett and Bernick's nod to spirit is too timid. My findings demonstrate that, at the Founding, spirit could overcome plain meaning. Finally, Eskridge's focus on judicial interpretation of statutes misses the pervasive use of spirit by many actors across many types of documents—constitutions, treaties, executive rules, and judicial precedents.

II. SPIRIT BEFORE THE CONSTITUTION

The tension between letter and spirit dates to the New Testament—at least the English translation of it. Paul said that God "made [him a] minister[] of the [N]ew [T]estament; not of the letter, but of the spirit . . . ."[77] Why not

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71 *Id.* at 1077.

72 *See* Peterson, *supra* note 14, at 8-10 ("[P]ublic laws received broad, purpose-directed interpretations while private acts received strict, literal interpretations.").

73 *See* Barnett & Bernick, *supra* note 14, at 5 ("The postulate that constitutional construction is inherently nonoriginalist is mistaken and has led to unnecessary division among originalists.").

74 *Id.*

75 *Id.* at 34-36 ("A rule must be applied—either a previously formulated rule or a new one. We hold that that rule must be informed by the Constitution's original spirit.").

76 Needless to say, many other scholars have discussed spirit, particularly in the context of the Constitution. Unfortunately, constraints of time and space prevent a consideration of all of them.

77 2 *Corinthians* 3:6 (King James).

of the letter? "[F]or the letter killeth, but the spirit giveth life."[78] This passage has many possible meanings. Paul was perhaps insisting that a focus on the words ("the letter") will lead one astray, whereas "spirit" would point the way to the true meaning. As an alternative, some suggest that Paul was criticizing Jewish sects for focusing on the letter of God's laws and their supposed failure to consider their spirit.[79] Whatever the case may be—for I must admit that I cannot fathom the spirit of this epistle—some people might have construed this as an exaltation of spirit at the expense of the letter.

Before discussing other pre-Constitutional discussions of spirit, it is useful to sketch the most common sense of "spirit." A definition found in the Oxford English Dictionary (OED), one of many, captures how "spirit" is used in discussions about interpretation: "The general intent or true meaning underlying a law, statement, etc., as opposed to its strict literal interpretation."[80] Most people use spirit as a synonym for purpose, intent, or cause—what the OED calls "general intent."[81] Less often, people use it more as an instrument's "true meaning."[82]

A. *European Commentary*

Blackstone's *Commentaries on the Laws of England* shaped Anglo-American thought in the late-eighteenth century and beyond.[83] In Book I, he laid out the end of interpretation and the tools used in discerning meaning. "The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable."[84] In other words, to grasp the summum bonum of interpretation—"the will of the legislator"—we examine signs from "when the law was made." Those factors were "the words, the context, the subject matter, the effects and consequence, [and] the spirit and reason of the law."[85]

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78 *Id*.

79 *See e.g.*, Duane A. Garrett, *Veiled Hearts: The Translation and Interpretation of 2 Corinthians 3*, 53/4 J. EVANGELICAL THEOLOGICAL SOC'Y 729, 735 (2010) ("Paul repeatedly describes the old covenant as obsolete and carrying death and condemnation. He would hardly have used such language [in 2 *Corinthians* 3:6] if his opponents did not rely heavily upon Torah while teaching the Corinthian Christians.").

80 *Spirit*, OXFORD ENG. DICTIONARY, https://doi.org/10.1093/OED/1697728116 [https://perma.cc/7RRV-X23E] (last visited Aug. 6, 2023).

81 *Id.*

82 *Id.*

83 *See* Wilfrid Prest, *Blackstone as Architect: Constructing the* Commentaries, 15 YALE J.L. & HUMAN. 103, 108 (2003) ("The contemporary impact and persistent influence of Blackstone's greatest work are both indisputable and difficult to exaggerate, even despite the lack of consensus among historians, lawyers, and philosophers on its interpretation and overall significance.").

84 1 BLACKSTONE, *supra* note 16, at *59.

85 *Id.*

Though Blackstone's discussion of the first four signs is well worth dissecting, our focus is on spirit:

> [T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.[86]

In other words, something might perhaps be within the letter yet not within the law because it is not within the spirit. This was a discussion of restrictive interpretation, where the law's meaning was less than the letter signaled.

Blackstone revisited spirit in Book III, observing that the courts of equity *and* courts of law determine cases "according to the spirit of the rule, and not according to the strictness of the letter."[87] Some actions "will fall within the meaning [of a statute], though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted."[88] Put another way, a law sometimes means more than the words suggest and sometimes means less. This point rested on the conviction that the meaning controls, whatever the words might suggest, thus sharply distinguishing the letter of the law from its meaning. He further observed that cases "out of the letter, are often said to be within the equity, of an act of parliament; and so, cases within the letter are frequently out of the equity."[89] Here, Blackstone equated equity with spirit and concluded that equity or spirit must step in when the "words of the law" are "too general [too broad], too special [too narrow], or otherwise inaccurate or defective."[90] In sum, interpreters could conclude that the words did not quite reflect their perception of the legislative will. In that circumstance, the spirit or reason superseded the letter to expand or contract the semantic meaning.

To illustrate, Blackstone cited an example from Cicero, where a statute granted the cargo of a ship to those staying with the vessel during a storm. The reason behind the statute, Blackstone claimed, was "to give encouragement to such as should venture their lives to save the vessel . . . ."[91] A sick man left behind on the vessel during the storm falls outside the "reason" of the statute because the man did not choose to remain behind in a bid to save the ship and, in any event, did not lift a hand to help save it.[92] The

86 *Id.* at *61.
87 3 BLACKSTONE, *supra* note 16, at *430.
88 *Id.* at *431.
89 *Id.*
90 *Id.*
91 1 BLACKSTONE, *supra* note 16, at *61.
92 *Id.*

man, therefore, should not receive anything under the law despite falling within its letter.

The lesson that emerged from Blackstone was that interpreters should not robotically adhere to the meaning arising from the text. Instead, interpreters should also consider the *why*—why did the legislators enact this law. If they were confident about the why—the reason or spirit—they should understand the law in light of its spirit to determine its meaning. When they did this, the meaning might be less or more than what the law's text signaled.

In his note following *Eyston v. Studd*,[93] the noted lawyer Edmund Plowden had likewise argued that what matters is the sense or reason of the law. "[T]he Reader may observe[] that it is not the Words of the Law, but the internal Sense of it that makes the Law . . . ."[94] All law "consists of two [p]arts, viz. of Body and Soul, the Letter of the Law is the Body . . . and the Sense and Reason of the Law is the Soul . . . quia ratio legis est anima legis."[95] He then equated the law with a nut: "[T]he Letter of the Law represents the Shell, and the Sense of it the Kernel."[96] There is "no Benefit by the Law, if you rely only upon the Letter."[97] After all, "the Fruit and Profit of the Law consists in the Sense more than in the Letter."[98] Sometimes the sense is narrower than the letter and other times it is broader. Either way, the sense takes precedence.[99] Since Plowden predated Blackstone, perhaps the former influenced the latter.

In *The Law of Nations*, Emmerich de Vattel likewise endorsed the primacy of reason over text:

> The . . . reason of a law, or a promise [contract], does not only serve to explain the obscure or equivocal terms of the piece, but also to extend or confine the dispositions independently of the terms, and to conform to the intention and views of the legislature or the contracting powers, rather than to their words.[100]

Why was this appropriate? "[A]ccording to the remark of Cicero[], the language, invented to explain the will, ought not to hinder its effect."[101] In

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93 2 EDMUND PLOWDEN, THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN 459a (London, S. Brooke 1816).

94 *Id.* at 465.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 Plowden supplied a catalog of cases, ancient and modern, where interpreters went beyond the text to consider sense and reason. *See id.* at 466-68.

100 VATTEL, *supra* note 17, at 388.

101 *Id.*

other words, the law ought to reflect legislative will, with text but one means of signifying will.

Like Blackstone, Vattel described two forms of spirit claims, which he called "extensive interpretation" and "restrictive interpretation."[102] Regarding the former: "When the sufficient, and only reason of a disposition [a rule or contract]. . . is very certain, and well known, we understand this disposition [a rule or contract] in the case where the same reason is applicable," although not within the letter.[103] That is, we extend the rule or contract beyond its letter. Thus, it is said "that we ought to apply rather to the spirit than to the letter."[104] Vattel cited Emperor Tiberius to illustrate the need for extensive interpretation. A law barred the execution of virgins. So, Tiberius had his executioner rape a virgin and then kill her.[105] Though he had not transgressed the letter, Tiberius had defied its spirit. "To violate the spirit of the law, by pretending to respect the letter, is a fraud no less criminal than an open violation of it."[106] The same reasoning undergirded restrictive interpretation. "[W]e limit a law or a promise, contrary to the literal signification of the terms . . . [because of our sense of the] reason of that law or that promise."[107] If a situation arises, "in which one cannot absolutely apply the wellknown reason of a law or promise, this case ought to be excepted, though, on considering the signification of the terms, it appears to fall under the disposition of the law or the promise."[108] According to Seneca, Vattel explained, "there are exceptions so clear, that it is unnecessary to express them."[109]

Vattel discussed the need for restrictive interpretations in three contexts: to avoid absurdities, to circumvent illegalities, and to avoid obligations that are too severe and burdensome.[110] He supplied a colorful example: The law condemns to death whoever strikes his father. "Shall we punish him who has shaken and given a blow to his father, to recover him from a fainting fit?"[111] In this case "the reason of the law is [e]ntirely wanting," presumably because the lawmaker did not mean to criminalize *every* blow by an offspring.[112]

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102 *Id.* at 388, 390.

103 *Id.* at 388.

104 *Id.*

105 *Id.* at 389.

106 *Id.*

107 *Id.* at 390.

108 *Id.*

109 *Id.*

110 *See id.* at 390-91 ("We use the restrictive interpretation to avoid falling into an absurdity . . . . [and] when a case is presented, in which the law or the treaty, according to the rigour of the terms, lead to something unlawful.").

111 *Id.* at 390.

112 *Id.*

"[S]hall we punish a little infant, or a man in a delirium, who has lifted up his hand against the author of his life?"[113] In the latter two cases, said Vattel, "the reason of the law . . . is not applicable."[114] Again, and again, Vattel described why spirit might trump the letter.

To be sure, there were some wary of spirit. As noted, Cesare Beccaria insisted that "[t]here is nothing more dangerous than the common axiom: *the spirit of the laws is to be considered*. To adopt it is to give way to the torrent of opinions."[115] But while Beccaria seems an implacable opponent of spirit, he could not escape its allure. In later chapters, he described why judges should apply the law by its letter.[116] The Executive, however, in inflicting the punishment after trial ought to adhere to "the true spirit of all laws, which teaches, never to sacrifice a man, but in evident necessity."[117] In other words, all laws should be understood to require the death penalty only when essential.[118] Later, he condemned the execution of a Frenchman who ran afoul of a law that made it a crime to fail to notify the government of a conspiracy.[119] "The *letter* of the law was positive" meaning that the Frenchman had violated the text.[120] But Beccaria "appeal[ed] not only to the lawyers, but to all mankind, whether the *spirit* of the law was not prevented?"[121] These other discussions suggest that Beccaria's stance towards spirit was more nuanced. Perhaps he was against *judicial* consideration of spirit but in favor of the Executive, and the public, consulting a law's reason to expand or contract the semantic meaning.

If Beccaria was equivocal, Reverend Josiah Tucker was implacably opposed. In 1766, Reverend Tucker grew annoyed by those who used the "[s]pirit of the [British] Constitution" to argue against Parliament's power to tax American colonies.[122] Colonials argued that they "ought not to be taxed

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113 *Id.*

114 *Id.*

115 BECCARIA, *supra* note 37, at 12.

116 *See id.* at 30 ("The members of the supreme council are more enlightened, less liable to prejudice, and better qualified than a provincial judge, to determine whether the state require severe punishments," and so "inferior courts [should] judge[] according to the letter of the law, which possibly may be rigorous . . . .").

117 *Id.*

118 Whether Beccaria was referring to the will of the legislator or some notion of natural law is unclear.

119 *Id.* at 40-42.

120 *Id.* at 42.

121 *Id.*

122 DEAN TUCKER, DEAN TUCKER'S PAMPHLET: A LETTER FROM A MERCHANT IN LONDON TO HIS NEPHEW IN NORTH AMERICA (1766), *reprinted in* 25 PA. MAG. HIST. & BIOGRAPHY 307, 310 (1901).

without [their] own Consent" given via representatives in Parliament.[123] Tucker mocked them:

> What is it you mean by repeating to me so often . . . *The Spirit of the Constitution?* I own, I do not much approve of this Phrase, because its Meaning is so vague and indeterminate; and because it may be made to serve all Purposes alike, good or bad. And indeed it has been my constant Remark, That when Men were at a Loss for solid Arguments and Matters of Fact, in their political Disputes, they then had recourse to the *Spirit* of the Constitution as to their last Shift, and the only Thing they had to say.[124]

Tucker pivoted and noted that if spirit mattered, it could be wielded against Americans and their allies. According to Tucker, the spirit of the Constitution, the Magna Carta in particular, demonstrated that all taxes laid by Parliament were legal, including taxes upon the colonies.[125] In a final barb, one worthy of today's stalwart textualists, he asked the reader to put to one side "these shifting, unstable Topics, which, like changeable Silks, exhibit different Colours, according as they are viewed in different Lights; let us [move] from the *Spirit* of the Constitution, [and] come to the Constitution *itself*."[126]

More than Beccaria, here is a fellow traveler for Scalia and Garner, for Tucker eschewed spirit altogether as he mocked Americans and their British allies. But, as you might imagine, his pamphlet triggered responses. Benjamin Franklin rejected the claim about Magna Carta, for Parliament lacked a power to tax everywhere: "[t]his then is the *spirit* of the [British] constitution, that taxes shall not be laid without the consent of those to be taxed."[127] Franklin held fast to the tradition of using spirit to make sense of the law. As we shall see later, his compatriots took this British practice to heart and made it an American tradition.

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123 *Id.* For an example of this, see Silas Downer, *A Discourse at the Dedication of the Tree of Liberty*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 97, 101 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (claiming that the "very spirit of the constitution [is] that the King's subjects shall not be governed by laws, in the making of which they had no share").

124 Tucker, *supra* note 122, at 310.

125 *Id.* at 311 ("*Magna Carta* . . . is . . . the [b]asis of the English Constitution" and "by the [s]pirit of Magna Carta, all [t]axes laid on by Parliament are *constitutional, legal* Taxes.").

126 *Id.* at 312.

127 BENJAMIN FRANKLIN, *A Letter from a Merchant in London to His Nephew in North America—London, 1766*, *in* MEMOIRS OF BENJAMIN FRANKLIN 504, 504 (New York, Debby & Jackson 1859).

B. *British Courts*

Blackstone, Plowden, and Vattel were describing (and defending) an existing practice. First, one must consider the spirit that lay behind the letter. Second, the spirit will occasionally trump the letter. Evidence for both propositions can be found in British cases. Judges not infrequently concluded that the spirit of a pronouncement—a statute, an order, a precedent, an instruction—could trump the text.[128]

In *King v. Everdon*, the question was whether judges could order the removal of paupers from a jurisdiction.[129] The Act provided "in case any poor Person shall from henceforth be brought before any Justice or Justices of the Peace for the Purpose of being removed," the court could order removal.[130] The statute also provided that the court could suspend the removal of diseased paupers.[131] Each justice refused to follow the letter, believing that a court could order the removal of a sick indigent even when he was not brought before the justices.[132]

Chief Justice Ellenborough said he "hope[d] that the apparent justice of one construction, and the great and manifest inconvenience of the other, do not too much warp my mind . . . ."[133] He went on to say, "I hope we shall do no violence to the words, and I am sure we shall not violate the spirit of the Act" by adopting a meaning at variance from the text.[134] The law means "in case a question concerning the removal of any poor person . . . shall be brought before the justices," the court may order removal and also suspend the removal if the person is sick.[135] This reading allowed judges to order removal and temporarily suspend the order, all without having the sickly person brought before them.[136] Otherwise, the judges would be exposed to the disease and might become ill. "This is the plain sense and spirit of the Act, though somewhat straining upon the words of it."[137]

Justice Lawrence said that the Act's authors supposed that most of the time, the indigent would be brought before the Court. "The letter of the Act

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128 Rather than discussing British cases here and then discussing them again after the Founding, I have collected the cases from before and after the American Founding. This is done as a matter of convenience.

129 (1807) 103 Eng. Rep. 512.

130 Poor Removal Act 1795, 35 Geo. 3 c. 101, § 2.

131 *Id.*; *Everdon*, 103 Eng. Rep. at 512.

132 103 Eng. Rep. at 512-14.

133 *Id.* at 513.

134 *Id.*

135 *Id.*

136 *See id.* ("[T]hey should have power to suspend the execution of the order of removal, if it appeared to them, that is by due examination of the facts, that from sickness or infirmity of the party the removal could not then safely be made.").

137 *Id.*

to be sure is confined" to the case of persons brought before the Court.[138] But by ignoring the text "we give effect to the plain intention of it, though the words used are not the most apt to express that intention."[139]

Justice Le Blanc said that he agreed with the Court's construction "for a contrary construction would give effect to the letter by the repeal of the very object of the statute."[140] At the same time, he said he would not endorse "every case where a construction has been put upon a statute, in some instance directly contrary to the words of it."[141] This was a mild critique of spirit coupled with a tacit admission that he endorsed *some* of the cases where courts used spirit to trump the letter of the law. That described the case at hand.

Eyles v. Ward considered a standing judicial order providing that a "Master's report" had to be "filed within four days after the making and signing."[142] The Master did not file the report in a timely fashion. Nonetheless, the court said that the timing did not matter; it was sufficient that the report was filed before any proceedings thereon.[143] The Chancellor said this "was the spirit of the [judicial] order, though the letter seemed otherwise."[144]

What was true for judicial orders was no less true for precedents. *Fisher v. Prince* concerned a defendant who brought property to court in the wake of a trover action.[145] The plaintiff objected, saying that courts "do not keep a warehouse" and cited a case where a court denied a motion to deposit a gold watch.[146] Lord Mansfield and Justice Wilmot sided with the plaintiff but rebuked his reasoning nonetheless.[147] They argued that the particular goods demanded in the trover action before the court made deposit unwarranted, not the letter of some precedent involving a watch.[148] Further, "[t]he reason and spirit of cases make law; not the letter of particular precedents."[149]

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138 *Id.* at 514.

139 *Id.*

140 *Id.*

141 *Id.*

142 (1728) 24 Eng. Rep. 842, 842. The "Master" likely was a judicial official who helped the court, in this case computing interest on a judgment.

143 *Id.*

144 *Id.*; *see also* Bolt v. Stanway (1795) 145 Eng. Rep. 965, 965 (concluding that plaintiff's action against sheriff was perhaps permitted by the letter of a previous injunction but went against its "intent" and "spirit"); Bolt v. Stanway (1795) 145 Eng. Rep. 969, 969 (invoking the "spirit of that [previous judicial] order" issued in the first *Bolt v. Stanway* to allow defendant to sue if plaintiff did not make prompt payment to the court).

145 (1762) 97 Eng. Rep. 876, 876.

146 *Id.*

147 *See id.* ("[B]ut it was not upon that general principle [urged by the Plaintiff] that they denied [deposit of the goods], but upon the circumstances of the case.").

148 *Id.*

149 *Id.*

Rex v. Manning involved the Road Act and an order of the Sessions Court allowing public surveyors to dig up private land to secure gravel and materials necessary to repair the King's roads.[150] The Road Act did not specify how the surveyor was to find materials and the Sessions order allowed the surveyor to dig up any part of the estate. The Justices held that the order should have specified where the surveyors could dig and not convey a right to dig everywhere.[151] This locational requirement was not in the statute. Every Justice objected, one saying calling the order was "very ill penned"[152] and another that it was "very imperfect."[153] One Justice got to the nub of the matter, pithily declaring "[t]he person that drew this order, has kept to the words, but not to the spirit of the Act."[154] This perhaps summed up the reasoning of the other Justices. The prevailing party was John Manning.

As one might surmise judges might differ over the influence of spirit. In *Good v. Elliott*, the question was whether an oral wager about a wagon's ownership was enforceable.[155] Justice Buller read a law that barred certain insurance policies as if it also encompassed oral wagers.[156] The law, as written, barred insurance policies where the insured had no real interest in the underlying matter or peril insured against. Buller said if the Court read the statute as only applying to cases "as in form are [written] policies" that would effectively "repeal[] the statute."[157] After all, no one would reduce their insurance or wager to writing. The better approach, he said, was to further "the spirit of the Act" by covering *all wagers* where the parties had no interest in the underlying matter.[158]

The other Justices disagreed, making extremely familiar moves. Justice Grose observed that if the legislature had intended to make all wagers void, they could have said as much.[159] Justice Ashhurst said that although he agreed wagers are foolish and waste judicial resources, the statute had not intended to regulate all wagers.[160] The right to remedy this foolishness rested with "the Legislature . . . and it would be dangerous if Courts of Justice were to assume such a power."[161] Chief Justice Kenyon agreed with Justice Ashhurst, saying

150 (1757) 97 Eng. Rep. 358.

151 *Id.* at 359-61.

152 *Id.* at 360 (Chief Justice Mansfield).

153 *Id.* (Justice Denison).

154 *Id.* at 361 (Justice Foster).

155 (1790) 100 Eng. Rep. 808.

156 *Id.* at 810.

157 *Id.* at 812.

158 *Id.*

159 *See id.* at 808-09 ("[T]he restraints imposed on certain species of wagers by Acts of Parliament are exceptions to the general rule, and prove it.").

160 *Id.* at 813 ("I think [the statute] cannot be made to apply to all wagers in general, without doing the greatest violence to the construction of it.").

161 *Id.*

"our duty [is] jus dicere, not jus dare."[162] We say what the law is; we do not make it.

One cannot say how often British courts deployed spirit to overcome the letter. The possibility arose only when parties, or the courts, believed there was a tension. When that happened, judges sometimes admitted that they had deployed the spirit to move beyond the letter.

C. *American Commentary and Cases*

As we saw, the American recourse to spirit predated the Declaration of Independence. Besides Franklin's response to Reverend Tucker,[163] others denied that Parliament enjoyed supremacy over the colonies. In 1775, Alexander Hamilton demonstrated, to his satisfaction, that the "spirit of the British Constitution" did not justify parliamentary supremacy over the colonies.[164] Responding to the charge that the Continental Congress was an illegal body, Hamilton said that British law safeguarded petitioning and that if people could not petition in person, they could empower others to do it for them.[165] To support his claim that Americans could petition via agents (Congress), he cited a universal rule: "[a]ll Lawyers agree, that the spirit and reason of a law, is one of the principal rules of interpretation."[166] This was extensive interpretation, with Hamilton arguing that the spirit of the law sanctioning petitioning also simultaneously authorizing the appointment of agents to facilitate petitioning.

Consider the 1776 pamphlet, *The People the Best Governors*, which discussed, among other things, whether losing litigants should be able to appeal their case to the legislature.[167] Arguing for the affirmative, the author said the following: "The cases between man and man, together with their circumstances are so infinite in number, that it is impossible for them all to be specified by the letter of the law."[168] In "many cases," noted the author, judges "are obliged not to adhere to the letter, but to put such a construction on matters, as they think most agreeable to the spirit and reason of the law."[169] In so doing, "they assume what is in fact the prerogative of the legislature, for

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162 *Id.* at 813-14.

163 FRANKLIN, *supra* note 127, at 504.

164 ALEXANDER HAMILTON, *The Farmer Refuted*, *in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 137 (Harold C. Syrett & Jacob E. Cooke eds., Colum. Univ. Press 1961) (1775).

165 *Id.* at 136-37.

166 *Id.* at 137.

167 *The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 390, 399 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

168 *Id.* at 399-400.

169 *Id.* at 400.

those, that made the laws ought to give them a meaning, when they are doubtful."[170] This was his way of saying that when judges deploy spirit, they sometimes seem to enact legislation. But for our purposes, what is notable is that the author observed that judges in "many cases" deploy spirit to depart from the letter.

Spirit featured in discussions of the Articles of Confederation. Per Article IX, a supermajority—"nine States"—had to assent for certain weighty decisions—*e.g.*, war, treaties, and borrowing.[171] But the Articles also authorized the admission of new states.[172] As the number of states grew, it would become far easier to enact ordinances because the threshold—"nine"—was fixed. Some delegates said that a determination of serious matters "by nine states" in the wake of newly-admitted states "would be a manifest departure from the spirit of the Confederation."[173] They proposed something like a three-fourths rule.[174] These delegates had a point about the spirit of the supermajority rule. And yet they did not argue that an amendment was unnecessary because the spirit demanded a supermajority for certain matters and, therefore, any increase in states would necessitate some sort of supermajority beyond nine. Though spirit had signaled a lurking problem, they did not see spirit as supplying an automatic solution.

On another occasion, the Continental Congress admonished states to send delegates because the nine-state rule had a pernicious consequence.[175] Whenever there were but nine delegations in attendance, all nine would have to agree to declare war, make treaties, etc.[176] According to Congress, the absence of delegations meant that "the spirit of the Articles" had been violated, for a supermajority rule had become a rule of unanimity.[177] Congress could not say that states had transgressed the letter, because there was no rule requiring states to send delegations. But one can see why Congress supposed that prolonged absences contravened the spirit of the Articles.

Later, some opposed granting Congress a permanent source of revenue on the grounds that it transgressed the "spirit" of the Articles.[178] The argument was that the Continental Congress was an executive body and not

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170 *Id.*

171 ARTICLES OF CONFEDERATION of 1781, art. IX.

172 *Id.* art. XI.

173 25 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 570 (Gaillard Hunt ed., 1922) (entry for Sept. 15, 1783).

174 *Id.* at 571.

175 *Id.* at 791 (entry for Nov. 1, 1783).

176 *See* ARTICLES OF CONFEDERATION of 1781, art. IX. (describing the various powers of the "United States in Congress assembled").

177 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 173, at 791 (entry for Nov. 1, 1783).

178 *Id.* at 907 (entry for Feb. 21, 1783).

a legislative one, so it was wrong to put "the purse and the sword in [its] hands."[179] James Madison denied that Congress was solely executive.[180] But even if it were, it was entirely appropriate for it to receive revenue to redeem debt.[181] Though executives could not issue debt, they could use appropriated funds to retire bonds. Therefore, giving permanent revenues to an executive Congress to redeem debts was not "inconsistent with the spirit of the federal Constitution," said Madison.[182]

Spirit also played a role in treaty interpretation. Countries, America included, had to honor the spirit of treaties. For instance, a member of Congress claimed that American envoys had violated the spirit of the 1778 Franco-American Treaty of Alliance. The envoys had signed preliminary articles of peace with Great Britain without first consulting France.[183] Though the 1778 Treaty barred a separate peace with Britain,[184] it said nothing about signing a preliminary treaty.

The 1783 Treaty of Paris—the peace treaty with Great Britain—was likewise understood by reference to its letter and spirit. John Adams said that the treaty he helped negotiate ought to be complied with, in its "real Sense and Spirit."[185] He also said all state laws concerning Tory debts which "can be impartially construed contrary to the Spirit of the Treaty of Peace [ought to] be immediately repealed."[186] For his part, Sir Guy Carleton asked America to notify him of any "infraction of the letter or spirit of the treaty," so that he could rectify any British violations.[187] Both sides understood that the letter and the spirit mattered.

The many references to a treaty's spirit perhaps reflected a sense that treaty interpretation required a *greater* recourse to spirit. The difficulties of lawmaking across two languages and cultures could make the use of spirit more imperative. Consider, for example, the Treaty of Amity and Commerce

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179 *Id.*

180 *Id.* at 908. For an argument that the Continental Congress was principally an executive institution, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 272-78 (2001).

181 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 173, at 907-09 (entry for Feb. 21, 1783).

182 *Id.* at 909.

183 *Id.* at 940 (entry for Mar. 24, 1783).

184 Treaty of Alliance, Fr.-U.S., art. VIII, Feb. 6, 1778, 8 Stat. 6, 8.

185 Letter from John Adams to Richard Cranch (Sept. 10, 1783), *in* 5 ADAMS FAMILY CORRESPONDENCE 239, 240 (Richard Alan Ryerson ed., 1993).

186 Letter from John Adams to John Jay (May 25, 1786), *in* 18 PAPERS OF JOHN ADAMS 313, 314 (Gregg L. Lint, Sara Martin, C. James Taylor, Sara Georgini, Hobson Woodward, Sara B. Sikes & Amanda M. Norton , eds., 2016).

187 Letter from Guy Carleton to Livingston (Apr. 14, 1783), *in* 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 377, 377 (Washington, Government Printing Office 1889).

with Sweden, which contained a provision that contraband would be proceeded against "according to the spirit" of the articles that followed.[188] The express reference to spirit is curious. Two possibilities come to mind. On one hand, the treaty could be understood as stating the obvious: use spirit as you always would. On the other hand, it could have used "spirit" in the sense of true or genuine meaning. Under either interpretation, interpreters would have to use spirit or reason to make sense of the treaty, including this provision. Given Vattel's discussion of interpretation, much of which focused on treaties, I believe that the use of spirit was a pervasive feature of treaty interpretation.

What was true for treaties was also true for state law. The New York Constitution of 1777 perhaps required the use of spirit. New York created a Council of Revision armed with the veto.[189] The reason for the check? Besides laws contrary to the public good, the legislature might pass statutes "inconsistent with the spirit of this constitution."[190] Presumably, the Council had an obligation to veto such laws.

The Pennsylvania executive council asked judges whether a legislative attainder of a loyalist, Aaron Doan, was consistent with "the letter and spirit of the Constitution of th[e] State" which established the right of trial by jury.[191] The judges replied that it was "compatible with the letter and spirit of the Constitution" because Doan, by failing to surrender, had implicitly admitted his guilt.[192] They seemed to argue that the spirit of the state jury trial right did not demand a jury trial when the accused had fled.

Governor Thomas Jefferson sent a letter to Governor Thomas Sim Lee of Maryland asking the latter to refrain from enforcing the letter of a Maryland statute.[193] Virginia had received permission from the previous Maryland Governor to purchase supplies for its military, but a new Maryland law reserved food for internal use.[194] Jefferson admitted the Maryland statute was "patriotic and laudable."[195] Yet he urged Sims to "consider whether" supplying the Virginia army was within the "spirit of the act," meaning that the act should not be read to require the seizure of supplies meant for Virginia's troops.[196] Lee could not oblige: the "Object of the Assembly being an immediate and full Supply for the Army, we cannot admit your Exposition

188 Treaty of Amity and Commerce, Swed.-U.S., art. VII, Apr. 3, 1783, 8 Stat. 60, 64.

189 N.Y. CONST. of 1777, art. III.

190 *Id.*

191 Respublica v. Doan, 1 U.S. (1 Dall.) 86, 87 (Pa. 1784).

192 *Id.* at 90-91.

193 Letter from Thomas Jefferson to Thomas Sim Lee (Jan. 30, 1780), *in* 3 THE PAPERS OF THOMAS JEFFERSON 279, 280 (Julian P. Boyd ed., 1951).

194 *Id.* at 279-80.

195 *Id.* at 280.

196 *Id.*

of the Law, because it would, in some Degree, counteract the Purpose of it . . . ."[197] Further, "the Intention of the Assembly ought to prevail, which is to be collected from the *Cause* or *Necessity* which induced them to make the Law."[198] That cause was supplying the Army. Jefferson deployed spirit to advance Virginia's interests. Sims countered that the spirit was to provision the Army.

Jefferson invocation of spirit seemed common in Virginia. In *Commonwealth v. Caton*, the question was whether a state statute regarding the pardon power violated the Virginia Constitution.[199] Edmund Randolph argued that the court should read the Constitution with the "liberality, necessary to catch its spirit."[200] St. George Tucker, a member of the bar, also weighed in, invoking "the spirit of our government" and the "spirit of our Constitution."[201] In his opinion, Chancellor Edmund Pendleton expressly declared that the dispute "should be decided according to the spirit, and *not by the words of the constitution*."[202] He also rejected one claim because "it does not reach my Idea of the Spirit of the constitution."[203] This was a robust endorsement of spirit over text.

The 1788 *Cases of the Judges* involved no case at all.[204] Rather, the judges wrote a letter to the Virginia legislature, arguing that a statute that imposed new duties on those judges was void.[205] It was unconstitutional because it gave them new duties but no additional salary.[206] The new statute "appeared so evident an attack upon the independency of the judges, that they thought it inconsistent with a conscientious discharge of their duty to pass it over."[207] According to the judges, the Act was "contrary to the spirit of the constitution."[208]

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197 Letter from Thomas Sim Lee to Thomas Jefferson (Feb. 23, 1780), *in* 3 THE PAPERS OF THOMAS JEFFERSON, *supra* note 193, at 303, 303.

198 *Id.*

199 8 Va. (4 Call) 5, 9 (1782).

200 William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 494, 508 (1994).

201 *Id.* at 522–23, 554.

202 *Caton*, 8 Va. (4 Call) at 5, 13, 19 (emphasis added).

203 EDMUND PENDLETON, *Pendleton's Account of "The Case of the Prisoners," in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON: 1734–1803, at 416, 424 (David John Mays ed., 1967).

204 Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 139-140 (1788).

205 *Id.*

206 *Id.* at 139.

207 *Id.* at 145.

208 *Id.* at 146. As Dean William Treanor has observed, early state court constitutional review of state laws was sometimes atextual and frequently rested on structural considerations. William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 496 (2005) ("[A]ttorneys and judges employed modes of constitutional analysis that went beyond text and typically drew on structural concerns."). Arguments from structure rest on spirit, as the proponent draws inferences about a constitution's intent or purpose from the sum of the myriad constitutional parts.

Legal elites lacked a monopoly on spirit, for everyone could invoke it. Consider George Washington, a Virginia planter and soldier, with no legal training. In 1775, he complained that he and other soldiers were entitled to lands in the West.[209] He told a British Lord that "we were in my opinion entitled, as well from the Spirit, as the express words of [a Gubernatorial Proclamation]" to the lands.[210] Washington sometimes went further, favoring the spirit over the letter. In 1779, Washington condemned a lieutenant for attempting to retain captured property.[211] By New Jersey law, individuals could claim ownership of enemy property that they had captured.[212] The lieutenant had captured horses that the British had previously seized from American civilians.[213] He had refused to hand the property back to the civilians unless they paid him "an exorbitant sum of money."[214] Despite a court martial acquittal of the lieutenant, Washington was upset. "It cannot be supposed that the spirit of the law . . . could comprehend a case of this nature, where the property of the subjects of the State had been stolen away by the enemy . . . ."[215] In other words, the spirit of the state capture law signaled that it did not authorize soldiers to keep recaptured property. In 1780, Washington summoned spirit again, informing officials that he needed 900 bushels of grain and a 100 head of cattle.[216] Though the "strict letter of the [New Jersey] law" did not authorize the magistrates to comply, Washington claimed that if they "consult[ed] its spirit (which aims at the relief of the army)," the public would applaud them.[217] As we shall see, Washington's recourse to spirit continued under the new dispensation. He, along with many others, continued to suppose that spirit mattered and that sometimes, the letter of the law must yield to it.

III. SPIRIT AT THE CREATION

When the Constitution was sent to the states, spirit played a prominent role in deciphering it. Some points are worth bearing in mind. First, discussants made arguments from spirit without defining it. In that era, the

209 Letter from George Washington to Lord Dunmore (Apr. 3, 1775), *in* 10 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES 320, 321 (W.W. Abbot & Dorothy Twohig eds., 1995).

210 *Id.*

211 George Washington, General Orders (May 19, 1779), *in* 20 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 533, 536 (Edward G. Lengel ed., 2010).

212 *Id.* at 536 & n.6.

213 *Id.* at 535.

214 *Id.*

215 *Id.* at 536.

216 George Washington, Circular to the New Jersey Magistrates (Jan. 7, 1780), *in* 24 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 49, 50 (Benjamin L. Huggins ed., 2016).

217 *Id.*

spirit of a law—its purpose, reason, intent—was a known tool or signal of meaning.[218] Indeed, to say that spirit mattered was as banal as saying that the letter mattered. Second, Americans occasionally engaged with arguments grounded on spirit. They typically argued that opponents had *misunderstood* the spirit. Notably, no one argued, in response or otherwise, that the Constitution had banished spirit.

Discussants frequently deployed spirit to interpret *other legal instruments*. This suggests a general recourse to spirit. According to Publius, "the spirit and scope of" every state constitution prohibited "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts."[219] This was a muscular reliance on spirit, for many state constitutions lacked express provisions along these lines. Because some supposed that the delegates to the Philadelphia Convention had exceeded their instructions by proposing a new constitution, one American came to their defense. The delegates had "not gone beyond the spirit and letter of the authority under which they acted."[220]

Of course, Americans most often used spirit to shed light on the proposed Constitution. One American said that the constitutional bar on making bills of credit legal tender applied not only to the making of new laws, but also to existing state tender laws.[221] He conceived that the continuing of the extant bills of credit as "a tender after ratification would operate as strongly against the spirit and meaning of the constitution" as the making of new tender laws.[222] In other words, though the new prohibition might seem to apply to new laws only, the Constitution's spirit nullified existing laws that made bills of credit legal tender.

Every discussion referenced above was on the periphery of the main question, which was whether the states should ratify the Constitution. Spirit played no less a role in that contest. To begin with, spirit mattered because future interpreters would have to consider it when construing the Constitution. The Federal Farmer said that the Constitution would have far-reaching implications: "[w]e must consider this constitution when adopted as the supreme act of the people, and in construing it hereafter, we and our

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218 *Id.*

219 THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

220 *A Dutchess County Farmer*, POUGHKEEPSIE COUNTRY J., Feb. 26, 1788, *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 815, 816 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2004).

221 Letter from William Ellery to Benjamin Huntington (Oct. 13, 1788), *in* 25 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 411, 412 (John P. Kaminski, Charles H. Schoenleber, Gaspare J. Saladino, Richard Leffler, Jonathan M Reid, Margaret R. Flamingo, Johanna E. Lannér-Cusin & David P. Fields eds., 2012); U.S. CONST. art. I, § 10, cl. 1.

222 *Id.* at 412.

posterity must strictly adhere to the letter and spirit of it, and in no instance depart from them . . . ."[223]

This was something of an abstract observation about interpretation, one that did not necessarily cut in favor, or against, ratification. As one might expect, Federalists deployed spirit to bolster ratification, typically to argue for a constrained federal government. Some Virginians had argued that the Treaty Clause permitted the alienation of territory, including the rights to navigate the Mississippi.[224] In response, George Nicholas said that the federal government could "make no treaty which shall be repugnant to the spirit of the Constitution."[225] Nicholas thought that the Constitution's spirit prevented the transfer of territory.[226] In the North Carolina Convention, Archibald Maclaine assured delegates that "[i]f Congress should make a law beyond the powers and the spirit of the Constitution, should we not say to Congress, 'You have no authority to make this law.'"[227] He supposed that the Constitution's spirit constrained Congress's legislative authority. Massachusetts ratifier Francis Dana said that Congress needed a power to override state laws relating to federal elections because states might make laws "not [] agreeable to the spirit of the Federal Constitution."[228] Perhaps he had in mind state laws that created qualifications, or disqualifications, for federal legislative office.[229] An eleventh-hour supporter of ratification said that any constitution might be perverted where vice was predominant, for base leaders might, by "slyly evading the spirit of the Constitution," act to "enrich" themselves.[230] He supposed that exploiting an office to feather one's nest at the public's expense was inconsistent with the Constitution's spirit.

Anti-Federalists made ready use of spirit to oppose the proposed framework. Centinel objected that the Ex Post Facto Clause would bar

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223 Federal Farmer No. 16 (Jan. 20, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 1051, 1056.

224 Debates in Virginia (June 19, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1387, 1387-88 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

225 *Id.* at 1389.

226 *Id.*

227 The First North Carolina Convention Debates (July 29, 1788), *in* 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 367, 375 (John P. Kaminski, Charles H. Schoenleber, Jonathan M. Reid, Gaspare J. Saladino, Margaret R. Flamingo, Timothy D. Moore, David P. Fields, Dustin M. Cohan & Thomas H. Linley eds., 2019).

228 The Massachusetts Convention Debates (Jan. 17, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1230, 1232 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

229 *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (holding that states cannot impose qualifications for prospective members of Congress beyond those the federal Constitution requires).

230 The Massachusetts Convention Debates (Feb. 6, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 1471, 1473.

Congress from collecting monies owed by continental officers and states.[231] He predicted that the courts would bar any statutes seeking to collect previously owed funds.[232] It "would be their [the courts'] sworn duty to refuse their sanction to laws made in the face and contrary to the letter and spirit of the constitution."[233] Other Anti-Federalists were troubled by the army and the militia. One complained that the "spirit of the new constitution admits of a standing army," meaning that it implicitly permitted a standing army.[234] Another observed that the militia should enforce federal law only when the civil power refused.[235] Yet "the spirit of your new Constitution" permitted routine law "inforce[ment] by military coercion."[236]

Some opponents of the Constitution were apprehensive about spirit and adjacent concepts. They worried that spirit-based arguments made it likely that federal institutions would overcome the Constitution's supposed constraints, that national power would reign supreme over the states, and that individual rights would be sacrificed. For instance, the "Federal Farmer" had no problem with judges who "may decide according to the spirit and true meaning of the constitution, as collected from what must appear to have been the intentions of the people when they made it."[237] His issue was with the words "law and equity" in Article III, because they seemed to suggest a mode *that went beyond the spirit and true meaning*.[238] "[I]f these words mean any thing, they must have a further meaning . . . ."[239] Despite the ominous tone, the Federal Farmer said he was unwilling to make a bogeyman of "law and equity."[240] He conceded that the Constitution was not "intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate."[241]

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231 Centinel XVI (Samuel Bryan), *To the People of Pennsylvania*, PHILA. INDEP. GAZETTEER, Feb. 26, 1788, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 217, 218-20 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

232 *Id.*

233 *Id.* at 220.

234 Philadelphiensis VII, PHILA. INDEP. GAZETTEER, Jan. 10, 1788, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 338, 339 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

235 Debates in Virginia (June 14, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 224, at 1258, 1277.

236 *Id.*

237 Federal Farmer No. XV (Jan. 18, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 976, 1051.

238 *Id.* (internal quotation marks omitted).

239 *Id.*

240 *Id.* (internal quotation marks omitted).

241 *Id.*

Whereas the Federal Farmer had no objections to spirit, Brutus seemed opposed to it, at least when it came to the Constitution.[242] In Essay XI, he observed that federal judges "are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[243] Equity, said Brutus, allowed for the "correction" of "deficient" law and that all laws were deficient because legislators were not omniscient and could not pen statutes that took into account all possible states of the world.[244] Hence "in their decisions they [judges] . . . will determine, according to what appears to them, the reason and spirit of the constitution."[245] In Essay XIII, Brutus complained that reading treaties in light of their spirit gave courts the power to "exten[d]" treaties to encompass whatever "they may judge proper," something he deemed "dangerous and improper."[246] Essay XV raised the specter of judicial supremacy. The courts would construe the Constitution using its spirit and there was no means of countering the Court's readings as they issued judgments and opinions.[247] It would have been better had Congress been the ultimate judge of constitutionality; if legislators found, "in the spirit of the constitution, more than was expressed in the letter," the people would check those lawmakers via elections.[248]

Two responses to Brutus were possible. One might use subtle expressions to deflect and obscure. Or one might gamely admit that spirit was inevitably part of interpretation. Hamilton, writing as Publius, chose the first tactic. He paraphrased one of Brutus's complaints about spirit.[249] According to Hamilton, some had complained that spirit would be used to "mould" the Constitution into "whatever shape" the judges "may think proper" and that the Supreme Court would be supreme over Congress.[250] Hamilton's response is worth quoting:

> In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to

242 Brutus No. XI (Jan. 31, 1788), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 234, at 512, 514.

243 *Id.*

244 *Id.*

245 *Id.*

246 Brutus No. XIII (Feb. 21, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 795, 795.

247 Brutus No. XV (Mar. 20, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 871, 873-74.

248 *Id.* at 876.

249 For the view that Hamilton was responding to Brutus, see Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 24-25 (2006).

250 THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State.[251]

The first point is sophistic because Brutus never said that the Constitution *expressly* authorized the use of spirit.[252] The question was whether the Constitution, explicitly or not, authorized the use of spirit. To say that the Constitution did not "directly empower[]" the use of spirit did nothing to refute Brutus's point.[253]

In any event, Publius's second point subtly conceded that the critique was right. To declare that the Constitution did not give the federal courts "any greater latitude in this respect" than state courts could claim, was to admit that the federal courts would use spirit. As noted earlier, state courts used spirit, just as their English counterparts had done.[254] Relatedly, recall that Publius—James Madison—had already declared that parts of Article I, Section 10 were somewhat superfluous, for he had claimed that "the spirit and scope of" every state constitution prohibited "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts."[255] Having used spirit in Federalist No. 44, Publius could hardly deny its relevance when it came to the federal Constitution.[256] An enduring and accepted practice, plus the need for consistency across the Letters to the "People of the State of New York," made it impossible to defeat Brutus's point.

Timothy Pickering eschewed deflection, admitting that spirit would be a factor. In a letter, Pickering observed that "[e]quity (says he B[lackstone] III. Ch. 27.)—is the soul & spirit of all law."[257] Pickering further observed that Blackstone had said that courts of equity and courts of law "determine[] according to the spirit of the rule," for both "are equally bound, and equally profess, to interpret statutes according to the true intent of the Legislature."[258] Pickering's narrow point was that any complaints about spirit applied to all Anglo-American courts because every court employed the spirit of a law.[259] But his principal observation was that Anti-Federalist arguments had no legs because such claims regarded a familiar technique—the use of

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251 *Id.*

252 *See supra* notes 242–248 and accompanying text.

253 THE FEDERALIST NO. 81, *supra* note 250, at 482 (emphasis omitted).

254 *See supra* Sections II.B–C.

255 THE FEDERALIST NO. 44, *supra* note 219, at 282.

256 *See generally id.*

257 Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 193, 199 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (emphasis omitted).

258 *Id.*

259 *See id.* ("There is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law & equity." (internal quotation marks omitted)).

spirit to make sense of the law—as if it were uniquely problematic when applied to the Constitution.

We can end with a telling letter from George Washington. Recall that he had long used arguments from spirit.[260] Because he favored stronger central authority, Washington lent his prestige to the Constitution. Its opponents exasperated him. Washington wrote, "[t]o say that the Constitution may be strained, and an improper interpretation given to some of the clauses or articles" is no less than can be said of any alternative that might be framed.[261] Further, no constitution "can be binding, if the spirit and letter of the expression is disregarded."[262]

He made another criticism, one grounded on spirit: opponents built upon fears and cite "principles which do not exist in the Constitution—which the known and litteral [sic] sense of it, does not support them."[263] They did so, "after being flatly told that they are treading on untenable ground and after an appeal has been made to the letter, & spirit thereof, for proof."[264] In other words, the Constitution's text and the spirit were the proof that the opponents had misread the framework. Ironically, Washington used spirit to refute critics that relied on, among other things, spirit. Such is the nature of spirit—the claims are contestable and will sometimes seem perverse to others who confidently rely upon a different impression of a law's spirit.

Some concluding observations are in order. Participants deployed spirit to make sense of many clauses and such matters as rights, federalism, and the separation of powers. Not all these arguments ring true. But the point is not that spirit-based arguments were usually correct or especially persuasive. Just as one can make unsound textual arguments, one can make thin claims grounded on spirit.

The takeaway is that the Founders supposed that to make sense of a law, one should consult its spirit—purpose, intent, and reason. And although one or two opponents of the Constitution observed that spirit might prove problematic as applied to the Constitution,[265] no one rejected the use of spirit. As far as I am aware, no one argued that the Constitution's text, much less its spirit, barred the resort to spirit to make sense of the Constitution, laws, and treaties. Given the established tradition of consulting spirit, the Constitution's silence on the matter all but guaranteed that interpreters would

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260 *See supra* note 209–218 and accompanying text.

261 Letter to Bushrod Washington (Nov. 9, 1787), *in* 5 PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 420, 423 (Dorothy Twohig ed., 1997) (emphasis omitted).

262 *Id.* at 423.

263 *Id.* at 421.

264 *Id.*

265 *See, e.g.*, Brutus No. XI, *supra* notes 242–245 and accompanying text.

continue to use it to interpret texts, including the Constitution, law, and treaties of the United States.

IV. THE SPIRIT GIVETH LIFE

McCulloch v. Maryland declared that laws must be consistent with the text of the Constitution *and* its "spirit."[266] The Supreme Court gave its imprimatur to the Bank of the United States. Hence, to mention this constraint, one hardly obvious from the Constitution's text, seems like a substantial concession. If Chief Justice John Marshall had left out the reference to spirit, few modern readers would bat an eye. His seemingly gratuitous nod to spirit had long puzzled me.

When read against the era's routine recourse to spirit, however, it becomes evident that Court's nod to spirit was no concession at all. What Marshall said was a basic feature of legal interpretation. People regularly consulted spirit to make sense of an instrument and an interpretation that was inconsistent with the instrument's spirit was a troubled reading. Besides, Federalists like Marshall had nothing to fear when it came to spirit, for the Constitution's spirit could be used to *advance* national power, just as Anti-Federalists had feared it might.

This Part recounts how commentators and members of all three branches continued to speak of a law's spirit. Some writers made the abstract point that the spirit could prevail over the letter. Such claims are telling, for people felt utterly comfortable making such assertions. In other situations, governmental officials, including judges, moved beyond theory and actually deployed spirit to overwhelm the letter of a law. They supposed that the meaning arising from the spirit sometimes prevailed over the meaning suggested by the text. While people might disagree with particular readings that supposedly rested on spirit, no one opposed the use of spirit. Again, given that Americans understood ultimate meaning to be a function of letter *and* spirit, the common recourse to spirit was wholly uncontroversial.

A. *Commentators*

Justice James Wilson had the opportunity to address the nation's highest officials as his first lecture on law, in 1790, was heard by the President and members of Congress.[267] Over the course of his lectures, Wilson addressed spirit twice. His longer discussion tackled the need for spirit, asserting that,

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266 17 U.S. (4 Wheat.) 316, 421 (1819).

267 Mark David Hall, *Bibliographical Essay: History of James Wilson's Law Lectures*, ONLINE LIBR. OF LIBERTY, *https://oll.libertyfund.org/page/the-history-of-james-wilson-s-law-lectures* [https://perma.cc/AC5D-RWEL] (last visited Jan. 31, 2025).

"[i]n making laws, it is impossible to specify or to foresee every case."[268] It therefore was necessary to adopt interpretations that reflected what the lawmaker would do "had he foreseen" the unforeseen.[269] This was a powerful authority; by "indulging it rashly, the judges would become the arbiters, instead of being the ministers of the laws."[270] One needed the "strongest and most convincing reasons" for exercising this authority.[271] One "strong reason for using it is drawn from the spirit of the law, or the motive which prevailed on the legislature to make it."[272] Like Blackstone,[273] Wilson denied that spirit was merely a principle of equity. Some supposed that a court of equity "determines by the spirit, and not by the letter of a rule."[274] But the same was true for a law court. "Is not each equally bound—does not each profess itself to be equally bound—to explain the law according to the intention of those, who made it?"[275]

In an earlier lecture, Wilson deviated from Blackstone. Wilson argued that a penal law *should be construed according to its spirit*.[276] The Justice agreed that a criminal law should never be read beyond its letter, whatever its spirit might suggest.[277] However, Wilson believed that spirit could restrain the text. "[I]t would be an inhuman" rule if "the letter of a penal law may be carried beyond the spirit of it."[278] He insisted that a criminal law should be read narrowly when its spirit suggested a confined ambit, whatever the text might signal.

As a member of the bar, St. George Tucker had cited spirit in open court.[279] He would endorse spirit as a judge in *Kamper v. Hawkins*.[280] In his *Blackstone's Commentaries*, Tucker included Blackstone's extensive discussions about spirit as a means of construing instruments.[281] Tucker also deployed

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268 2 THE WORKS OF JAMES WILSON 123 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *See supra* note 258 and accompanying text.

274 2 THE WORKS OF JAMES WILSON, supra note 268, at 124.

275 *Id.*

276 *Id.* at 70-71.

277 *See id.* at 70.

278 *Id.*

279 *See* EDMUND PENDLETON, *Pendleton's Account of "The Case of the Prisoners," in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON: 1734–1803, at 416, 424 (David John Mays ed., 1967) (noting Tucker's discussion).

280 3 Va. (1 Va. Cas.) 20, 66, 68 (1793).

281 *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 61 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) ("[T]he most universal and effectual

spirit to understand the Constitution. Tucker claimed that its "spirit" prevented the President from declaring war.[282] He meant that though the Constitution's letter does not itself bar the possibility, the intent was to bar executive war declarations.[283] In another instance, Tucker argued that the federal courts were independent of the other branches, because of good behavior protections, salary guarantees, and the Constitution's "spirit."[284] Per Tucker, the latter "forbids any attempt on the part" of the other two branches "to subvert the [courts'] constitutional independence."[285]

Like Tucker, Joseph Story's *Commentaries on the Constitution* also quoted Blackstone's five-part interpretation framework, the last part of which endorsed the use of spirit.[286] Regarding the Constitution, Story claimed that interpretation ought to bear in mind the Preamble's express goals, for otherwise interpretation might "destroy the spirit" of the Constitution.[287] He also noted that the "spirit of an instrument, especially of a constitution" should be respected as much as the letter.[288] Yet if the "plain meaning of a provision" is to be disregarded, the case "must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."[289] This seemed a constrained sense of when it was appropriate for spirit to trump letter.

Later, however, Story endorsed the use of spirit when there was nothing absurd or monstrous. Addressing House apportionment, he said that the Constitution should "be followed out in its true spirit, though unavoidably differing from the letter, by the nearest approximation to it."[290] The Constitution provided that the "[n]umber of Representatives shall not exceed one for every thirty Thousand."[291] Story endorsed a construction that took the nation's population, divided it by 30,000 and then distributed those seats across the States by virtue of their populations.[292] This method meant that

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way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it.").

282 *Id.* at 270.

283 *See id.* (arguing that it "is certainly the spirit of the constitution" that the power to declare war lay with the Legislative branch).

284 *Id.* at 353-54.

285 *Id.* at 354.

286 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 422, at 322-23 (Melville Madison Bigelow ed., 5th ed. 1994).

287 *Id.*

288 *Id.* § 427, at 326.

289 *Id.* Story was borrowing from *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819).

290 *Id.* § 678, at 492.

291 U.S. CONST. art. I, § 2, cl. 3.

292 STORY, *supra* note 286, § 680, at 493.

some states received an extra representative.[293] For instance, a small state might get two representatives even though it only had 50,000 residents. Story believed that this method violated the letter but was necessary to satisfy the Constitution's "true spirit."[294]

Much later, when discussing the Contracts Clause, Story said something else more open to spirit. "Where a case falls within the words of a rule or prohibition, it must be held within its operation, unless there is something obviously absurd, or mischievous, or repugnant to the general spirit of the instrument."[295] To say that interpreters should follow the text except when it was repugnant to an instrument's spirit is to admit that interpretations should, at least sometimes, honor the spirit at the expense of the letter.

Although not as famous as Story, Representative Zephaniah Swift wrote six volumes on Connecticut law and is credited with penning the first American legal treatise. In volume one, he noted that a "common and universal method of ascertaining the meaning of a law, when the words are dubious, is to consider the reason and spirit of the law, or the cause which induced the legislature to make it."[296] Further, "it is a common maxim, that when the reason of a law ceases, the law itself ought to cease."[297] He went on to note that "[t]here may be many instances where a literal construction will do injustice, and many where the case is within the meaning and design of the law, but not within the letter."[298] Hence courts should consider the "spirit of the law."[299] If "the case be within the letter but not within the meaning, that they may so determine," meaning the judges may rule that the law does not apply despite being within the letter.[300] "[O]r if without the letter, but within the meaning, spirit, equity, or mischief, that they [the judges] may extend the law to it."[301] This was Blackstone and Vattel redux.

Occasionally, extensive interpretation led to creative, even aggressive, readings of legal instruments. Samuel Bayard, a former state court judge, claimed that it would be appropriate for courts to extend a federal statute authorizing payments to witnesses in federal court to witnesses in cases

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293 *Id.*

294 *Id.* §§ 678–82, at 492–95. Story also argued that even if one could not follow the text because it was "impracticable," meaning verging on impossible, the interpreter must still stay as close as possible to the Constitution. *Id.* § 682, at 495. "We are to act on the doctrine of *cy près*, or come as nearly as possible to the rule of the Constitution." *Id.*

295 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1395, at 270 (Melville Madison Bigelow ed., 5th ed. 1994).

296 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 49 (Windham, John Byrne 1795).

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.*

301 *Id.*

brought by the federal government in *state court*.[302] The letter of the law only went so far, but the law's spirit took the statute further, said Bayard.[303] Benjamin Oliver, author of a treatise on the rights of American citizens, argued that though there was no excessive imprisonment clause in the Constitution, its spirit forbade excessive imprisonment.[304] If unreasonable bail and unreasonable fines were forbidden, how could it be that the Constitution permitted unreasonable incarceration?[305] Oliver concluded that the Constitution's spirit required proportionality between the offense and the sentence, without regard to the form of the punishment.[306] Finally, William Goodell argued that the Constitution's spirit required the federal government to abolish slavery and Lysander Spooner asserted that the Constitution's spirit signaled that it never actually sanctioned the wicked practice.[307] Needless to say, others argued that the Constitution's spirit protected slavery.[308]

B. *Congress*

Federal legislators understood that their legislation had to honor the Constitution's spirit. In 1789, as the House discussed presidential removal of officers, many deployed spirit-based arguments. Representative William Smith of South Carolina argued that impeachment was the only means of removing officers and that to remove without a trial was "contrary to the spirit of the constitution."[309] James Madison agreed to a point, observing that "[w]e ought to adhere strictly to the spirit and meaning of the constitution."[310]

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302 SAMUEL BAYARD, AN ABSTRACT OF THOSE LAWS OF THE UNITED STATES WHICH RELATE CHIEFLY TO THE DUTIES AND AUTHORITY OF THE JUDGES OF THE INFERIOR STATE COURTS, AND THE JUSTICES OF THE PEACE, THROUGHOUT THE UNION 228 (New York, n. pub. 1804).

303 *Id.*

304 BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 185 (Boston, Marsh, Capen & Lyon 1832).

305 *Id.*

306 *Id.*

307 *See* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 87-88 (2d ed., Utica, Lawson & Chaplin 1845) (arguing that the spirit of the constitution "utterly abjures" slavery); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 193 (Boston, Bela Marsh 1860).

308 *See, e.g.*, SPEECH OF HONORABLE JAMES A. STEWART OF MARYLAND ON AFRICAN SLAVERY 3-4 (Washington, Cong. Glob. Off. 1856) (arguing that opponents of slavery "are at war with the letter and spirit of the Constitution").

309 Gazette of the United States, 20 June 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, MARCH 4, 1789—MARCH 3, 1791, at 851, 853 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992).

310 *Id.* at 854.

However, Madison argued that the Constitution's text and spirit actually proved that the President enjoyed a removal power.[311]

When the Bank bill came up in 1791, Representative Elbridge Gerry endeavored to show that attempts to minimize the Necessary and Proper Clause were inconsistent with the Constitution's spirit. No one could object to spirit, said Gerry, for had not Blackstone showed that "the most universal and effectual way of discovering the true meaning of a law when the words are dubious, is by considering the reason and spirit of it."[312]

When the intersection of the treaty and commerce powers arose in 1796, Madison again emphasized spirit. The "true question" is not whether the Constitution was to be obeyed "but how that will was to be understood."[313] Among other things, "what construction would best reconcile the several parts of the instrument with each other, and be most consistent with its general spirit & object."[314] Madison argued that the Constitution's spirit suggested a more narrow understanding of the treaty power.[315] Representative William Lyman agreed on the methodological point. Certain "rules had always been deemed sound," including a need to "regard the true spirit and meaning, and not merely the letter. It was a maxim very ancient . . . that he who adhered only to the letter [became] stuck in the bark, and never arrived at the pith."[316]

As one might surmise, most legislative invocations of spirit occurred amidst a political battle. Legislators invoked the Constitution's spirit to argue that the following were unconstitutional: (a) a title for the president;[317] (b) property forfeiture for crimes other than treason;[318] (c) a national bank with a monopoly on holding federal funds;[319] (d) members of Congress serving in

311 *Id.* at 854-55.

312 The General Advertiser, 5 March 1791, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, MARCH 4, 1789—MARCH 3, 1791, at 456, 457 (William Charles DiGiacomantonio, Kenneth R. Bowling, Charlene Bangs Bickford & Helen E. Veit eds., 1995).

313 Jay's Treaty, [10 March] 1796, *reprinted in* 16 THE PAPERS OF JAMES MADISON: 27 APRIL 1795—27 MARCH 1797, at 255, 255 (J. C. A. Stagg, Thomas A. Mason & Jeanne K Sisson eds., 1989).

314 *Id.*

315 *Id.* at 261, 262 (explaining that given the spirit of a federal constitution of limited powers, the Treaty power should not be read to authorize any and all treaties).

316 5 ANNALS OF CONG. 603 (1796).

317 *See* The Congressional Register, 11 May 1789, *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, MARCH 4, 1789—MARCH 3, 1791, at 595, 598 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) ("I am against [titles] because they are not very reconcilable with the nature of our government, or the genius of the people.").

318 *See* 5 ANNALS OF CONG. 899-900 (1796) (arguing that permitting forfeiture of real estate for crimes other than treason was "against the spirit of the Constitution").

319 *See* Gazette of the United States, 19 February 1791, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 312, at 362, 363-64 (arguing the plan for a national bank "contravenes the spirit of the constitution").

the state militias;[320] (e) an indefinite duty on imports;[321] (f) the President and Congress sitting in different cities;[322] (g) *any* interference with the international slave trade prior to 1808;[323] (h) treaties that sought to regulate commerce or bind the nation to declare war;[324] (i) a treaty that gave automatic citizenship to British nationals;[325] (j) being appointed a minister abroad after voting as a member of Congress for a bill that caused a vacancy in that position;[326] and (k) delegating to the president the power to raise an army.[327]

Others argued that the Constitution's spirit demanded that Congress pass certain laws. If a legislator sought to enact a measure, asserting that the Constitution's spirit *required* enactment perhaps made passage of the proposal more likely. For instance, the Constitution's spirit apparently required Congress to (a) provide a salary for the vice president;[328] (b) convey a power to remove executive officers to the president;[329] and (c) create district

320 Gazette of the United States, 22 December 1790, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 312, at 72, 79 ("[I]t would counteract the spirit of the constitution to render the members liable to . . . military duties at the moment when their attendance would be necessary in Congress.").

321 The Congressional Register, 15 May 1789, *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 317, at 679, 681 (claiming a bill not limited in duration was "incompatible with the spirit of the constitution").

322 The Congressional Register, 21 September 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 309, at 1492, 1492-93.

323 The New-York Daily Gazette, 23 March 1790, *reprinted in* 12 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, MARCH 4, 1789—MARCH 3, 1791, at 792, 793 (Helen E. Veit, Charlene Bangs Bickford, Kenneth R. Bowling & William Charles DiGiacomantonio eds., 1994).

324 *See* Jay's Treaty, *supra* note 313, at 258 (claiming the text and spirit of the Constitution will decide whether treaties concerning the regulation of trade or declaration of war are permissible).

325 5 ANNALS OF CONG. 1099 (1796) (claiming the naturalization of British subjects disobeys "the spirit of the Constitution").

326 THE SPEECH OF ALBERT GALLATIN, DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ON THE FIRST OF MARCH, 1798, UPON THE FOREIGN INTERCOURSE BILL 43 (2d ed., Philadelphia, Richard Folwell 1798) (noting that the appointment of a representative to an office which could only be filled because of an appropriation the representative voted for was "contrary to the spirit of the constitution").

327 8 ANNALS OF CONG. 1655-56 (1798) (viewing the President's discretion to raise an army as a violation of "the principle of the Constitution" that prohibits one department from exercising the powers of another).

328 The Congressional Register, 16 July 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 309, at 1139, 1146 (arguing that no salary for the vice president would confine the office to the wealthy which "contravenes the spirit of the constitution").

329 The Congressional Register, 18 June 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 309, at 951, 964 (arguing that Congress had duty to conform offices to the Constitution's "general spirit," meaning that Congress should provide that the president could remove officers).

courts.[330] These readings rested upon the belief that the Constitution's spirit imposed implicit duties on Congress.

Some legislators made more refined arguments. The Constitution's spirit was said to permit or encourage: (a) a line of presidential succession that reflected a flexible understanding of the word "officer" in Article II,[331] one that might include state officers;[332] (b) the people selecting presidential electors;[333] (c) recording the votes on nominations;[334] (d) Congress, rather than department heads, setting the salaries of junior personnel;[335] (e) congressional receipt of executive reports and proposals on revenue;[336] (f) insisting that foreigners renounce their titles of nobility prior to naturalization;[337] and (g) defending the government against verbal and physical attacks.[338]

There were some extremely nuanced arguments. James Madison claimed that a bill that called for the forfeiture of real property would, if enacted into law, be unconstitutional. An Indian intercourse bill would penalize those who settled upon, surveyed, or marked Indian land, presumably because such actions often triggered hostilities. The bill authorized a fine and forfeiture of any right to the land in question. Madison "would not say that [the bill] was against the letter, but it was certainly against the spirit of the constitution."[339] Why? Because, according to Madison, the Treason Clause forbade permanent land forfeitures as a punishment for treason. If that was so, its spirit went further to prevent *all* permanent land forfeitures because otherwise Congress might impose permanent land forfeiture "for treason also, by calling the crime

330 Gazette of the United States, 2 September 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 309, at 1348, 1352 ("The district court is necessary, if we intend to adhere to the spirit of the constitution . . . .").

331 U.S. CONST. art. II, § 1, cl. 6 (authorizing Congress to provide which "officer" shall act as president when there is no President and Vice President).

332 The General Advertiser, 21 January 1791, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 312, at 318, 321.

333 The General Advertiser, 24 January 1791, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 312, at 325, 325.

334 Wednesday, 17 June 1789, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789—MARCH 3, 1791, at 78, 79–80 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (arguing that "the Spirit of the Constitution was clearly in favour of ballot" for deciding on presidential nominations).

335 Compensation to Public Officers, *reprinted in* 16 THE PAPERS OF JAMES MADISON, *supra* note 313, at 475, 475 ("This, he said, was conformable to the true spirit of the constitution. It was proper that these salaries should depend on law.").

336 3 ANNALS OF CONG. 717 (1792) (arguing the "spirit of the Constitution" does not preclude receiving reports nor proposals from the Executive).

337 4 ANNALS OF CONG. 1033 (1795) (representing that the renouncement by new citizens of their titles of nobility was "agreeabl[e] to the spirit of the Constitution").

338 8 ANNALS OF CONG. 2146 (1798).

339 Indian Intercourse Bill [9 April 1796], *reprinted in* 16 THE PAPERS OF JAMES MADISON, *supra* note 313, at 307, 308.

by another name."[340] Madison's narrow point was the Treason Clause's constraints could not turn on the label attached to the crime. His broader point seemed to be that the Treason Clause's spirit barred all permanent forfeitures of land.

On one occasion, the idea of spirit found its way into a proposed resolution. Ten Senators endorsed a resolution that insisted that it was "contrary to the spirit of the constitution" for Article III judges to hold other offices at the President's pleasure.[341] This was an attempt to prevent President Washington's appointment of Chief Justice John Jay to serve as treaty negotiator to the Court of St. James. The motion failed when seventeen Senators opposed it. The Senate later consented to the appointment of Jay.[342] One might infer that a Senate majority thought it was constitutional—consistent with the Constitution's spirit—for judges to serve in the Executive.[343]

C. *The Executive*

As compared to Congress, the Executive would be engaged in far more interpretation. Execution of a law necessarily requires construal of it. The Executive would have to make sense of the Constitution, treaties, and federal statutes, including whether the latter two violated the former. As part of that process, the Executive would have to judge when an instrument's spirit ought to trump its text.

In opinions to Presidents, high executive officers repeatedly employed the Constitution's spirit. Henry Knox and Edmund Randolph discussed spirit in the context of House apportionment. This was the same matter that Story would discuss in his *Commentaries*.[344] In 1792, Congress considered a bill apportioning 120 seats across the United States.[345] As noted earlier, the Constitution provided that the number of Representatives shall not exceed one for every 30,000 people.[346] Did that mean that if a state had 55,000 people, the state could only have one representative? Or could the state receive two Representatives under the theory that the 30,000 limit was to be

340 *Id.*

341 JAMES T. CALLENDER, THE HISTORY OF THE UNITED STATES FOR 1796, at 172 (Philadelphia, Snowden & McCorkle 1797).

342 *Id.* at 171-72

343 For a discussion of why it is constitutional for judges to simultaneously serve in the executive branch, see generally Saikrishna Bangalore Prakash, *Double Duty Across the Magisterial Branches*, 44 J. SUP. CT. HIS. 26 (2019).

344 *See supra* note 290 and accompanying text.

345 Opinion on Apportionment Bill *in* 23 THE PAPERS OF THOMAS JEFFERSON 370, 371 (Charles T. Cullen ed., 1990).

346 U.S. CONST. art. I, § 2, cl. 3.

determined on a nationwide level, with some states receiving extra representation because they were the closest to a multiple of 30,000? The bill adopted the latter approach.[347] Knox, the Secretary of War, noted that some supposed "that either construction may be deemed to be within the letter as well as the spirit of the constitution."[348] He then begged off, saying that he was unqualified to give an opinion.[349] Unlike Knox, Attorney General Edmund Randolph could not plead ignorance. He argued that the bill was "repugnant to the spirit of the constitution."[350] The Constitution's letter said no more than one representative per 30,000 and, according to Randolph, its spirit required that this calculation be done on a state-by-state basis.[351] Using the population of other states, say New York and Georgia, to give an extra seat to New Jersey violated the Constitution. Washington vetoed the bill.[352]

The Attorney General invoked spirit again when discussing recess appointments.[353] Randolph took the view that recess appointments were permitted only when the vacancy arose during the Senate's recess.[354] He argued that "[t]he Spirit of the Constitution favors the participation of the Senate in all appointments," with the Recess Appointments Clause "an exception to the general [rule]."[355] Given that spirit, the Clause "ought . . . to

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347 Opinion on Apportionment Bill, *in* 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 345, at 370.

348 Letter from Henry Knox (April 3, 1792), *in* 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 196, 197 (Robert F. Haggard & Mark A. Mastromarino eds., 2002). Hamilton agreed with Knox, saying that the Constitution was equivocal on the point. "[T]here is no criterion by which it can be pronounced decisively that the one or the other is the true construction." Letter from Alexander Hamilton to George Washington (April 4, 1792), *in* 11 THE PAPERS OF ALEXANDER HAMILTON 228, 228-29 (Harold C. Syrett ed., 2011). He said this uncertainty about meaning often existed. *Id.* at 229.

349 Letter from Henry Knox (April 3, 1792), *in* 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 348, at 196, 197.

350 Letter IV (April 4, 1792), *in* 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 348, at 207, 210 (Edmund Randolph opinion).

351 *Id.* at 211. Jefferson agreed with Randolph, saying that "common sense" required using the 30,000 within each state. *See* Opinion on Apportionment Bill, *in* 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 345, at 370, 372-73. Hence a state with 31,000 would have the same representation as a state with 59,000—one. He claimed that this was the "universal understanding" and was reflected in the original bill. *Id.* But "an ingenious gentleman"—by which he meant Hamilton—had discovered "fractions" and used them to inflate the number of representatives and dole them out to the states that were the closest to receiving an extra representative under the 30,000-person formula. *Id.* at 373.

352 *See* George Washington, Veto Message (April 5, 1792), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 124, 124 (James D. Richardson ed., District of Columbia, Gov't Printing Off. 1898) (informing Congress of the reasons motivating his veto).

353 Edmund Randolph's Opinion on Recess Appointments (July 7, 1792) *in* 24 THE PAPERS OF THOMAS JEFFERSON 165, 166 (John Catanzariti ed., 1990).

354 *Id.*

355 *Id.* (footnote omitted).

be interpreted strictly."[356] Because Randolph read the text in light of the spirit—the perceived need for Senate participation—he read the Clause narrowly.

During the Adams presidency, Treasury Secretary Oliver Wolcott used spirit to argue against generic Senate involvement in foreign relations.[357] Senate participation "in matters relating to foreign Affairs" beyond consent to treaties and ambassadorial appointments was inconsistent "with the spirit of the Constitution."[358] In so doing, Wolcott read the Treaty Clause as if it did nothing but give the Senate a check on treaty making.

In 1807, Naval Secretary Robert Smith advised President Jefferson that the latter had a duty to summon Congress.[359] The reason: The Virginia Governor had claimed that the British had "invaded" his state.[360] Per the Constitution, the federal government had a duty of protection.[361] Furthermore, Congress was the institution to decide matters of war and the means of repelling invasions.[362] In this context, the President had an implicit duty to call Congress into session, an obligation "enjoined by the spirit of our Constitution."[363]

The Executive not only had to stay true to the Constitution, it also had to honor treaties and statutes. In the course of faithfully executing both, executive officials sometimes invoked spirit to depart from the letter. Consider treaty interpretation. During Jefferson's presidency, Secretary of State James Madison wrote to our emissary to France, John Armstrong, about Dutch violations of the Treaty of Amity and Commerce.[364] During the Quasi-War, Dutch privateers operating out of Curacao had attacked and captured American vessels.[365] This violated the Treaty in two respects. Depredations committed by those with a permanent allegiance to the Republic infringed "the letter of the 19th Article," said Madison.[366] With respect to other inhabitants of Curacao, "the Spirit of that article must be considered as

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356 *Id.* (footnote omitted).

357 Letter from Oliver Wolcott to John Adams (Apr. 21, 1797), https://founders.archives.gov/documents/Adams/99-02-02-1944 [https://perma.cc/ATR8-SCBE].

358 *Id.*

359 Letter from Robert Smith to Thomas Jefferson (July 17, 1807), https://founders.archives.gov/documents/Jefferson/99-01-02-5983 [https://perma.cc/TL79-M79H].

360 *Id.*

361 U.S. CONST. art. IV, § 4.

362 *Id.* art. I, § 8, cl. 11, 15.

363 Letter from Robert Smith to Thomas Jefferson (July 17, 1807), *supra* note 359.

364 Letter from James Madison to John Armstrong (Apr. 2, 1805), *in* 9 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES, *supra* note 20, at 200, 201 & n.3; *see* Treaty of Amity and Commerce, Neth.-U.S., Oct. 8, 1782, 8 Stat. 32.

365 Letter from James Madison to John Armstrong (Apr. 2, 1805), *supra* note 20, at 200-01 & n.1.

366 *Id.* at 201.

equally violated."[367] While the treaty expressly applied to American citizens *and* inhabitants, by its terms it only applied to Dutch "subjects."[368] Despite the textual asymmetry, Madison believed that the spirit overcame the text.

Similarly, a territorial judge wrote to President Madison, arguing that Spain had violated its Treaty of Friendship[369] by "employ[ing]" Indians to attack American posts.[370] "[I]n violation of the spirit of" this Treaty,[371] Spain had showered presents on Indians who professed to be "about to go to war" and on those who had "formally declared war against" the United States.[372] The Treaty admonished both parties to prevent Indian tribes residing within their boundaries from attacking the other nation.[373] But it said nothing about forbidding either party from encouraging Indian tribes *outside* their jurisdictions to attack the other nation.[374] Nonetheless, even in the absence of an express stipulation, the *spirit* of a treaty of friendship forbids the contracting parties from encouraging attacks on the other.

By far, the most common form of federal law execution concerned congressional statutes. Here, I discuss the situation where executives cited spirit to overcome statutory text, either to justify some previous act or to encourage others to act in their favor at the expense of the text.

Perhaps the earliest use of the spirit or reason of the statute to overcome the text is from 1789. In one of its first laws, Congress had imposed a tax on salt imports and had subsidized the export of salted goods, including meats and produce.[375] The subsidy was meant to counteract the impost on salt imports. But in late 1789, Congress suspended subsidies for about a year, concluding that there were no salt imports due to a salt glut, meaning no one had paid the salt impost.[376] The Treasury Secretary, Alexander Hamilton, confronted the question of whether people who had exported salted goods before the suspension statute went into effect were entitled to the subsidy. He said that the "*letter* of the suspending clause [was] *future,*" meaning the suspension applied prospectively.[377] Yet the "*Equity* of" the clause and the

367 *Id.*

368 Treaty of Amity and Commerce, *supra* note 364, art. XIX, 8 Stat. at 44.

369 Treaty of Friendship, Limits and Navigation (Pinckney's Treaty), Spain-U.S., art. V, Oct. 27, 1795, 8 Stat. 138.

370 Letter from Harry Toulmin to James Madison (Oct. 4, 1813), *in* 6 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 670, 671 (J.C.A. Stagg ed., 2010).

371 *Id.* at 671-72.

372 *Id.* at 672.

373 *Id.* at 671-72; Treaty of Friendship, Limits, and Navigation, *supra* note 369, art. V, 8 Stat. at 140.

374 Treaty of Friendship, Limits, and Navigation, *supra* note 369, 8 Stat. at 138-53.

375 Act of July 4, 1789, ch. 2, 1 Stat. 24, 24-25, 27.

376 Act of Sept. 1, 1789, ch. 11, § 37, 1 Stat. 55, 65.

377 Letter from Alexander Hamilton to Benjamin Goodhue (Oct. 29, 1789), *in* 5 THE PAPERS OF ALEXANDER HAMILTON 473, 474 (Harold C. Syrett ed., 1962).

"*general intent* of the Legislature" was to provide a subsidy only when the salt had been imported.[378] Because no salt had been imported, no one ought to receive a subsidy. "In a circumstance in which the equity was palpable" and the "law doubtful," he thought it was his "duty as an *executive servant*" to refuse the subsidy.[379] Hamilton had discovered a spirit within the suspension law, used it to generate a doubt about the law's meaning, and then used it to expand the suspending clause, making it retroactive.

One of the most telling discussions of spirit comes from Oliver Wolcott's letter to George Washington. Among other things, the Treasury Secretary discussed the compensation of customs inspectors.[380] Under federal law, the Executive could hire an "inspector" for each port.[381] The statute's letter provided a payment of no more than $1.25 "for every day [the inspector] shall be actually employed in aid of the customs."[382] This suggested that inspectors would only be paid for those days they worked. Despite the letter of the law, inspectors were paid without regard to whether they worked on a particular day. "[D]oubts may be entertained whether the strict Letter of the Law . . . warrant a payment to an Inspector for any day on which some service was not actually performed."[383] Nonetheless a "different practice" has governed, one "consistent . . . with equity, with the spirit of the Law, and the good of the service."[384] Hence in small ports, with less traffic, inspectors were paid even when there was nothing to inspect. Perhaps this practice of bestowing daily pay without regard to whether the inspector actually inspected any cargo or ships was a means of ensuring the services of competent inspectors.

The Treasury seemed to use spirit regularly. Wolcott wrote to his predecessor, Alexander Hamilton, and observed that the Sinking Fund Commissioners could issue new debt to pay interest on existing debt *and* to retire principal.[385] A 1795 Act gave the Commissioners express authority to issue debt to pay the interest on outstanding federal debt.[386] But Wolcott thought the Commissioners could do more. Reasoning from the "general

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378 *Id.*

379 *Id.*

380 Letter from Oliver Wolcott, Jr. to George Washington (Sept. 1796), *in* 21 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 28, 28-29 (Adrina Garbooshian-Huggins ed., 2008).

381 Act of Aug. 4, 1790, ch. 35, § 53, 1 Stat. 1, 172.

382 *Id.*

383 Letter from Oliver Wolcott, Jr. to George Washington (Sept. 1796), *supra* note 380, at 28-29.

384 *Id.* at 29.

385 Letter from Oliver Wolcott, Jr. to Alexander Hamilton (June 18, 1795), *in* 18 THE PAPERS OF ALEXANDER HAMILTON 379, 381-82 (Harold C. Syrett ed., 1973).

386 Act of Mar. 3, 1795, ch. 45, § 1, 1 Stat. 433, 433.

spirit of the [1795] Act," Wolcott concluded that the Commissioners also could issue debt to pay off principal.[387]

In one instance, the Executive compounded Congress's generosity with its own helping of permissiveness. In the wake of the 1812 Declaration of War against Great Britain, Congress gave Britishers six months to depart with their property.[388] If they stayed beyond, their property would be confiscated.[389] That is what the letter of the law provided. Nonetheless, the Executive invoked a "liberal construction of the spirit of the law" to allow vessels to leave with British property after the expiry of the grace period.[390] James Monroe, the Secretary of State, recounted this use of spirit to American treaty negotiators because he wanted them to secure a "reciprocal provision" for Americans in Britain.[391]

Spirit played a pivotal role even in trivial questions. During the Quasi-War, a law granted double rations to each officer "commanding a separate post."[392] Military personnel received rations that they might consume or sell, making a double ration desirable. A certain captain was the commandant of a fort. But there was also a major who was, according to Alexander Hamilton, the commandant of a district encompassing the fort. The question was which of these two officers was legally entitled to the double rations. Hamilton suggested that "the spirit of the provision on a liberal construction [would] embrace" both the captain and the major.[393]

On another occasion, in the aftermath of the War of 1812, certain warrant officers claimed that they were entitled to extra pay under a statute passed by Congress.[394] Federal law expressly provided extra pay for "commissioned

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387 Letter from Oliver Wolcott, Jr. to Alexander Hamilton (June 18, 1795), *supra* note 385, at 381.

388 Letter to John Quincy Adams, James A. Bayard. Henry Clay, Jonathan Russell, and Albert Gallatin (Jan. 30, 1814), *in* 6 THE PAPERS OF JAMES MONROE 568, 568 (Daniel Preston ed., 2003); *see* Enemy Trade Act, ch. 129, § 6, 2 Stat. 778, 780 (1812) (enabling the President to issue passports to British subjects for the safe transfer of ships and property for a six-month period).

389 Enemy Trade Act, ch. 129, § 6, 2 Stat. 778, 780 (1812).

390 Letter from James Monroe, Secretary of State, to the Plenipotentiaries of the United States, at Gottenburg (Jan. 30, 1814), *in* 9 STATE PAPERS AND PUBLICK DOCUMENTS OF THE UNITED STATES FROM THE ACCESSION OF GEORGE WASHINGTON TO THE PRESIDENCY, EXHIBITING A COMPLETE VIEW OF OUR FOREIGN RELATIONS SINCE THAT TIME 366, 366 (Boston, Thomas B. Wait 1819).

391 *Id.*

392 An Act to Amend and Repeal, in Part, the Act Intitled "An Act to Ascertain and Fix the Military Establishment of the United States," ch. 16, §4, 1 Stat. 507, 508 (1797); Letter from Alexander Hamilton to William Simmons (Aug. 19, 1799), https://founders.archives.gov/documents/Hamilton/02-01-02-0875 [https://perma.cc/JX3K-TU27].

393 Letter from Alexander Hamilton to William Simmons, *supra* note 392.

394 Letter from Samuel S.S. Hoyt and Others to James Madison (July 22, 1816), *in* 11 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 230, 230 (J.C.A. Stagg ed., 2010); An Act Fixing the Military Peace Establishment of the United States, ch. 81, § 6, 3 Stat. 224, 225 (1815)

officers," a category that at the time excluded warrant officers. Despite the apparent lack of statutory authority to give extra pay to non-commissioned officers and soldiers, the Executive had granted such pay anyway.[395] Warrant officers sought the same treatment, asserting that they were "as fully Comprehended in the *Spirit* of the *Law*, as are any other Officers."[396] This was a use of spirit to further the presumed intent of Congress that *all* military personnel, whether commissioned or not, ought to receive additional pay.

Executives even appealed to the spirit of their own rules as a reason to bypass their letter. During the Quasi-War, Major General Alexander Hamilton had issued rules barring the recruitment of foreigners.[397] After these rules went into effect, but before their distribution, two foreigners had enlisted.[398] One had resided in the country for nine years and the other for fourteen.[399] Were they to be discharged as improperly enlisted? A military official urged Hamilton to give him "a little discretion."[400] The officer promised to "usefully and prudently" exercise that discretion to honor "the intent and spirit of the general order."[401] The officer was saying that he might allow the foreigners to continue. The Secretary of War told Hamilton that foreigners who had not naturalized were outside "the letter of the regulation" because they were still foreigners and cautioned against giving officers a discretionary power.[402] But he favored flexibility, saying that officers could seek "special permission" to enlist particular aliens.[403] Hamilton subsequently gave permission to enlist a foreigner, therefore honoring his sense of the spirit, rather than the letter, of the regulation.[404]

We can end with the construction of the Supreme Court's chamber. Benjamin Henry Latrobe oversaw the construction of the U.S. Capitol

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(granting three months' pay to "each commissioned officer, who shall be deranged by virtue of this act").

395 Letter from Samuel S.S. Hoyt and Others to James Madison, *supra* note 394, at 230.

396 *Id.* at 230-31.

397 Alterations & Additions to the Recruiting Instructions, Enclosure in Letter to James McHenry (Mar. 15, 1799), *in* 22 THE PAPERS OF ALEXANDER HAMILTON 543, 543 (Harold C. Syrett ed., 2011).

398 Letter from Aaron Ogden to Alexander Hamilton (July 8, 1799), https://founders.archives.gov/documents/Hamilton/02-01-02-0658 [https://perma.cc/AG65-4MZC].

399 *Id.*

400 *Id.*

401 *Id.*

402 Letter from James McHenry to Alexander Hamilton (July 13, 1799), https://founders.archives.gov/documents/Hamilton/02-01-02-0694 [https://perma.cc/M8ZB-UCJ9].

403 *Id.*

404 Letter from Alexander Hamilton to James McHenry (July 15, 1799), https://founders.archives.gov/documents/Hamilton/02-01-02-0701 [https://perma.cc/8BAF-YNDW].

building.[405] Per his design, the Senate would sit atop a room that would house the Court. While Congress funded the Senate chamber, it deleted the appropriation for the Supreme Court's courtroom.[406] Nonetheless, Latrobe built the courtroom anyway. Per the "letter of the Law," there were no funds for the courtroom.[407] If he followed the law as written, he would be forced to "discharge[] all my Workmen, & await[] the next Session" of Congress and an appropriation.[408] Yet Latrobe concluded that "the Spirit of the Law required all things to be done, without which the Senate Chamber could not be begun."[409] So, despite the failure to fund the construction of a courtroom, Latrobe built it out of general funds for the Capitol's North Wing. Latrobe's use of spirit led to the construction of a room meant to help enforce the law's letter and spirit, for as discussed below, the Supreme Court also employed spirit to make sense of the law.

D. *Federal Courts*

Given the Anglo-American tradition, we should be little surprised that the federal courts also consulted spirit. *Chisholm v. Georgia* witnessed the first invocation of spirit by a Justice.[410] The issue was whether the Constitution honored state sovereign immunity.[411] The plaintiff's counsel, Edmund Randolph, twice claimed that the spirit of the Constitution favored the view that citizens could sue their own states for damages.[412] Chief Justice John Jay's opinion cited the Preamble to argue that the Constitution's spirit abrogated state sovereign immunity.[413]

In *Ware v. Hylton*, the question was whether the 1783 Treaty of Paris had revived a debt owed to a Britisher.[414] Justice William Paterson wrote that the "[t]reaties must be construed in such manner, as to effectuate the intention of the parties."[415] Their intention should "be collected from the letter and spirit of the instrument, and may be illustrated and enforced by considerations deducible from the situation of the parties; and the

405 *Benjamin Henry Latrobe: Second Architect of the Capitol*, ARCHITECT OF THE CAPITOL, https://www.aoc.gov/about-us/history/architects-of-the-capitol/benjamin-henry-latrobe [https://perma.cc/94Z5-EXCQ] (last visited Feb. 16, 2025).

406 Letter from Benjamin Henry Latrobe to James Madison (Dec. 15, 1809), https://founders.archives.gov/documents/Madison/03-02-02-0154 [https://perma.cc/QZN4-6ECB].

407 *Id.*

408 *Id.*

409 *Id.*

410 2 U.S. (2 Dall.) 419, 477 (1793).

411 *Id.* at 430.

412 *Id.* at 421, 428.

413 *Id.* at 474–75.

414 3 U.S. (3 Dall.) 199, 199-202 (1796).

415 *Id.* at 249.

reasonableness, justice, and nature of the thing, for which provision has been made."[416] This partly replicated Blackstone's multifactor test.[417] Per Paterson, the treaty's letter and spirit revived the debts owed and preempted a state law that had discharged the debts.[418]

During the Quasi-War with France, there was no formal declaration of war. Instead, Congress exercised its power to declare war by gradually escalating the conflict via a series of statutes.[419] In 1799, Captain Silas Talbot captured a ship, the *Amelia*, manned by French sailors.[420] The first question was whether the capture was legal under federal law. In July of 1798, Congress authorized the seizure of any "armed French vessel . . . on the high seas . . . ."[421] Previously, Congress had authorized private citizens to seize any "armed vessels sailing under authority or pretence of authority from the Republic of France . . . ."[422] Though manned by French marines, the *Amelia* was not an actual French vessel. Rather, the *Amelia* was said to be a Hamburgh ship.[423] Could it nonetheless be captured? The American captors argued that federal judges in construing American laws "will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature."[424] When the Court did that, the Justices would realize that the acts of Congress gradually *broadened* the authority to fight and seize French vessels and that the *Amelia* was seizable despite not being a true French vessel.[425] Because the French had captured her and the vessel would now be used against America, it did not matter who legally owned her.[426] Writing for the Court, Chief Justice Marshall agreed. The "real intent of congress" was to authorize the capture of all vessels under the control of the French, without regard to legal ownership.[427] "There must then be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will

416 *Id.*

417 Letter from Oliver Wolcott, Jr. to George Washington (Sept. 1796), *in* 21 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 28, 28-29 (Adrina Garbooshian-Huggins ed., 2020).

418 *Ware*, 3 U.S. (3 Dall.) at 249-51, 256.

419 For a list of statutes, see JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 5-6 & nn.10-11 (2014).

420 Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 1-2 (1801).

421 Act of July 9, 1798, ch. 68, 1 Stat. 578, 578.

422 Act of May 28, 1798, ch. 48, 1 Stat. 561, 561.

423 *See Talbot*, 5 U.S. (1 Cranch) at 2 ("[D]uring her voyage, and at the time of her capture by the French, [*Amelia*] and her cargo belonged to . . . citizens of Hamburgh . . . .").

424 *Id.* at 8.

425 *Id.*

426 *Id.*

427 *Id.* at 32.

authorize likewise."[428] The Court deployed the spirit of the laws to make sense of the piecemeal and poorly worded laws of Congress.

There are other cases that reference the spirit of federal law, most notably *McCulloch v. Maryland*[429] and *Cohens v. Virginia*.[430] As noted earlier, *McCulloch* declared that federal statutes reliant on the Necessary and Proper Clause must cohere with the spirit of the Constitution.[431] Yet it was evident that spirit was a general factor. All federal statutes were to be judged against the Constitution's spirit.

So common was the resort to spirit, that federal judges would interpret state laws and use their spirit to decide cases. In *Vanhorne's Lessee v. Dorrance*, Justice William Patterson, sitting on the Circuit Court, said that it was contrary to the "spirit of the [state] Constitution" to take property from one person and give it to another.[432] Though there was no express bar in the 1776 Pennsylvania Constitution,[433] the Justice declared the act unconstitutional.[434]

In *Faw v. Marsteller*, the question was whether a rent contract was subject to a Virginia debt law regulating payments.[435] One party argued that the contract was within "the letter and spirit" of the state law.[436] The other party denied that the rental contract was within the "letter or the spirit."[437] Both parties cited the object of the law to determine its spirit. Chief Justice Marshall averred that though one side had not convinced him that the letter was unequivocally in its favor, they had a strong case:

> [Y]et so much weight is admitted to be in the[ir] [textual] argument, that if they succeed in showing the case to be out of the mischief intended to be guarded against, or out of the spirit of the law, the letter would not be deemed so unequivocal as absolutely to exclude the construction they contend for.[438]

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428 *Id.* at 33. It must be said that in *Little v. Barreme*, the Court pointedly refused to expand a capture law beyond the text. 6 U.S. (2 Cranch) 170, 178-79 (1804).

429 17 U.S. (4 Wheat.) 316, 421 (1819) (noting that powers of the government are appropriate when consistent with "the letter and the spirit of the constitution").

430 19 U.S. (6 Wheat.) 264, 379-80 (1821) (noting that any case that falls under the jurisdiction of the Court by the letter of the Constitution must only be exempted if the "spirit and true meaning of the constitution" demands such an exemption).

431 *See supra* notes 43–46, 266 and accompanying text; *McCulloch*, 17 U.S. (4 Wheat.) at 421.

432 2 U.S. (2 Dall.) 304, 310, 1 L. Ed. 391 (C.C.D. Pa. 1795).

433 PA. CONST. of 1776.

434 *See Dorrance*, 2 U.S. (2 Dall.) at 320 ("The confirming act is unconstitutional and void.").

435 6 U.S. (2 Cranch) 10, 13-14 (1804).

436 *Id.* at 13.

437 *Id.* at 15.

438 *Id.* at 24.

In other words, if they prevailed on spirit, they won the case. The Court ultimately concluded that the rental contract was encompassed within the spirit of the Virginia law.[439]

More must be said about the Chief Justice. Marshall came to the Court after service in Congress and the Executive. In these other posts, Marshall used spirit, sometimes deploying it to overcome the letter. In Congress, he claimed that "it was more in the spirit of the constitution" for the House to refuse to appropriate funds for a ratified Jay Treaty as opposed to voicing their objections *before* treaty ratification.[440] In other words, though the House had a role to play, the spirit of the Constitution favored the House staying silent prior to action by the institutions charged with making treaties.[441] Later, Representative Marshall argued that the Executive's proposed extradition of Thomas Nash (aka Jonathan Robbins) to Great Britain was within "the letter, and the spirit," of the Jay Treaty.[442]

As one of three envoys to France, Marshall (and his colleagues) rejected Foreign Minister Talleyrand's demand for a "literal construction" of the French Treaty of Amity.[443] Under the terms of the Treaty, no shelter or refuge was to be given to any ships who "have made [a] [p]rize" of the allies.[444] Accordingly, so long as France was at war with Britain, America was not to give refuge to any British prize takers. Yet America had rejected a "textual sense" and adopted what the envoys said was the rule's "spirit."[445] In practice, America had refused refuge to any British prizes and any British ships that came into port with prizes.[446] This construction did not "conform[] entirely to the letter" because it was both less than the treaty's letter required and, paradoxically, more.[447] It was less because under the Administration's reading some British ships could come into American ports even though they had

439 *Id.* at 27.

440 Letter from Thomas Mann Randolph to Thomas Jefferson (Nov. 22, 1795), *in* 28 THE PAPERS OF THOMAS JEFFERSON 534, 534 (John Catanzariti ed., 2000) (relaying his account of a speech by John Marshall).

441 Similar comments were made by Daniel Webster. He opposed Andrew Jackson's suggestion that the President ought to have been consulted on the Bank Bill before Congress voted on it. THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 333 (Edwin P. Whipple ed., 1923). Webster believed that the opportunity for presidential input existed at presentment alone and not while the bill was before the chambers. *Id.*

442 *See* John Marshall, Speech on the Resolutions of the Hon. Edward Livingston (Mar. 17, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 94 (Charles T. Cullen ed., 2014).

443 Letter from American Envoys to Talleyrand (Apr. 3, 1798), *supra* note 27, at 428, 429, 435.

444 Treaty of Amity and Commerce with France, Fr.-U.S., art. 19, Feb. 6, 1778, 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1 (Miller ed., 1931) (annulled by act of Congress of July 7, 1798, ch. 67).

445 Letter from American Envoys to Talleyrand (Apr. 3, 1798), *supra* note 27, at 433, 434.

446 *Id.* at 446.

447 *Id.* at 435.

taken French ships; it was more because no British prizes were permitted into port even though the Treaty imposed no prohibition on the entry of the prizes. This stance perhaps reflected the difficulty of deciding whether a ship was a prize taker. If a ship came into port without a prize, it might be hard to say that it was a prize taker. If a vessel came with a prize, however, its status was perhaps more evident and, in that case, excluding both ships made sense. In any event, Marshall's use of spirit was a rare example of simultaneous extensive *and* restrictive interpretation.

Once on the bench, Marshall would continue to use spirit. Sitting as a circuit court judge, Marshall defined "spirit of the law" as the "intention of the legislature, to be collected from the general language of the act, the scope of its provisions, and the objects to be attained."[448] He further said that the "primary object, in the construction of statutes, was, to ascertain from the letter and spirit of the acts, the true meaning of the Legislature."[449]

When the spirit and letter came into conflict, the Chief was hardly opposed to reading the spirit to overcome the text. Consider *Bank of the United States v. McKenzie*.[450] Virginia imposed a statute of limitations of five years for certain actions.[451] It also provided an exception that tolled the limitation for certain disabilities or situations.[452] Marshall concluded that the five-year limitation applied to the Bank's suit against McKenzie, unless the exception held.[453] The exception was for those "person or persons" under twenty-one, feme covert, *non-compos mentis*, imprisoned, or overseas or out of the country.[454] The Bank said that it was covered by the exception because its residence was in Pennsylvania and hence it was out of the "country" of Virginia.[455] Marshall held that he had "no doubt that the courts of the state would" read the first part of the exception to encompass corporations and, indeed, any "plaintiff actually affected by the impediments it recites."[456] So, the Court "extended" the statute and concluded that the Bank qualified as a person. But then Marshall held that the Bank could not avail of the exception, because it had a bank branch in Richmond and this precluded a finding that

448 Thompson and Dickson v. United States (Dec. 11, 1820), *in* 9 THE PAPERS OF JOHN MARSHALL 76, 79 (Charles F. Hobson ed., 2014).

449 United States v. Twitty (Nov. 14, 1811), *in* 7 THE PAPERS OF JOHN MARSHALL 274, 275 (Charles F. Hobson ed., 2014).

450 Bank of the United States v. McKenzie (May 29, 1829), *in* 11 THE PAPERS OF JOHN MARSHALL, *supra* note 1, at 252.

451 *Id.* at 252.

452 *Id.* at 253.

453 *Id.*

454 *Id.*

455 *Id.*

456 *Id.* at 254.

the Bank was out of Virginia.[457] In other words, Marshall went out of his way to say that the "spirit" or "equity" of the provision covered the Bank only to later hold that the rest of the exception was inapplicable.[458] Given the ultimate decision, this reliance on spirit seems remarkable.

In a letter to Justice Joseph Story, Marshall praised Story's District Court opinion in *United States v. Greene*.[459] The letter of a federal statute barred both district and circuit courts from hearing any suit to recover on a promissory note.[460] By its terms, the act covered promissory notes held by the United States. Story had said the federal statute was "exceedingly broad and strong" and seemed to cover the case.[461] But there were other considerations which "might induce one to pause and to inquire, whether such could have been the legislative intention."[462] Story perhaps wondered why Congress would bar the United States from suing in its own courts to recover on an assigned note. Despite its unequivocal letter, Story read the statute as if it contained an exception and concluded that it did not bar the government from suing in the district courts.[463]

The excerpt found at the beginning of this Article supplies Marshall's reaction. He (correctly) characterized Story as following the spirit rather than the letter. Story's opinion was "one of the strongest possible illustrations . . . of the necessity in some instances of controuling the letter by the plain spirit of the law."[464] Why? Because "[i]t is impossible that a suit brought by the U.S. can be within the intention" of the law limiting federal jurisdiction.[465] Though there was a "great difficulty in taking the case out of the letter," Story's argument was "very strong," and Marshall was "much inclined to yield to it."[466] Per the "plain spirit" of the law, and despite the statute's broad letter, Congress had not forced the United States to sue in state court.

In a letter to Senator John Randolph, Marshall complained that the Senator had been barred from debating a bill in the Senate by a previous question motion.[467] "I will not say the letter of the rule was infracted, but certainly the spirit of the whole fabric of rules was entirely disregarded."[468]

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457 *Id.* at 254-56.

458 *Id.*

459 Letter from John Marshall to Joseph Story (July 25, 1827), *supra* note 1, at 35.

460 United States v. Greene, 26 F. Cas. 33, 34 (C.C.D. Me. 1827) (No. 15,258).

461 *Id.*

462 *Id.*

463 *Id.* at 35 ("Upon this view of the matter I am of opinion, that the jurisdiction of the district court is well founded upon the first count, founded on the negotiable note.").

464 Letter from John Marshall to Joseph Story (July 25, 1827), *supra* note 1, at 47.

465 *Id.*

466 *Id.*

467 Letter from John Marshall to John Randolph (June 26, 1812), *in* 7 THE PAPERS OF JOHN MARSHALL, *supra* note 449, at 334, 334.

468 *Id.* at 335.

Marshall said that there had been no debate on the bill and that was an "indecorum, a want of self respect in thus silencing" a Senator.[469] "If the letter of the rules justify this proceeding I should apply to the construction *a dictum*" of an old and respected gentleman . . . "*Qui haeret in litera, haeret in cortice*."[470] This quote was from Edward Coke and roughly connotes "he who considers merely the letter of an instrument goes but skin deep into its meaning."[471] Marshall understood that spirit had to be part of inquiry, for superficial understandings that rested solely on the letter of the law would not do.

Lest one get the wrong impression, Marshall sometimes evinced wariness about spirit. In one circuit court opinion, Marshall said that his "general rule of construction . . . is to adhere to the letter of the statute" even when the "literal construction" is against its "spirit, and would defeat, in part, the object of the legislature."[472] In another case, he said that the letter must be followed in a case unless there is "some plain and strong reason for excluding" it from the case.[473] There must "be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument."[474] In *Sturges v. Crowinshield*, he claimed that the spirit of a law is to "be collected chiefly from its words."[475] Why? It would be "dangerous in the extreme to infer from extrinsic circumstances" to create an exemption from what the words expressly provide.[476] If the "plain meaning" is to be "disregarded" because "the framers of that instrument could not intend what they say" it must be because the "absurdity" or "injustice" would be so "monstrous, that all mankind would, without hesitation" unite in endorsing the deviation from the text.[477] In another case, he rejected an argument rooted in spirit by saying there was nothing "extravagantly absurd" in adhering to the letter of the law.[478]

I think it fair to say that Marshall approached spirit with a certain caution. Despite what he said, he did not require absurdity before he endorsed the use of spirit to trump text. He certainly did not require a monstrosity. Yet on some occasions, he claimed to be strongly wedded to the letter. What he said in one situation, or another, reflected the outcomes he reached. In cases where

469 *Id.*

470 *Id.*

471 *Id.* at 335 & n.3.

472 Coates v. Muse, Opinion (June 12, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL, *supra* note 448, at 210, 213-14.

473 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 644-45 (1819).

474 *Id.* at 645.

475 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

476 *Id.*

477 *Id.* at 202-03.

478 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 423 (1821).

he hewed closely to the text, he declared a fealty to the letter and deemphasized spirit. Where he approved the use of spirit to control the letter, he spent less time extolling text and showed less concern for the letter of the law.

Perhaps this equivocation was inevitable. When one uses a multi-factor test, one which includes text, spirit, and other factors, sometimes the letter will ultimately prevail over a weak spirit, and other times spirit will trump the text. When one ultimately concludes that the letter ought to prevail in the face of claims from spirit, one may be tempted to declare that one simply *had to follow the text*. But the truth of the matter is that once one concedes the significance of spirit, as Marshall did several times, that admission makes it impossible to stubbornly insist that the letter always must prevail over spirit. Indeed, his "general rule" of following the letter over the spirit,[479] which may seem cut and dry, actually left the door open to spirit, for to say that he had a *general* rule was to admit that there were exceptions.

E. *Popular Discussions*

Because spirit was hardly the exclusive province of judges, much less government officials, citizens used it as well. While out of office, Thomas Jefferson pledged that once he became Vice President, he would stay out of executive matters.[480] He would exclude himself from the cabinet because of the Constitution's "principle" of a "separation of legislative executive and judiciary functions, except in cases specified."[481] Though not "expressed in direct terms, yet it is clearly the spirit of the constitution . . . ."[482] After he left the Presidency, Jefferson argued that the spirit of the Constitution was in tension with the cabinet system, where presidents sought oral opinions from Secretaries in a meeting.[483] Gathering cabinet heads together made the Executive a plural "Directory" rather than leaving the decision to the President, as the Constitution required.[484] In his views, written opinions given without a meeting were "more constitutional."[485]

While a private citizen, John Taylor, a proponent of States' rights, wrote to Thomas Jefferson arguing that federal "protecting duties"—high duties

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479 Coates v. Muse, Opinion (June 12, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL, *supra* note 448, at 210, 213-14.

480 Letter to James Madison (Jan. 22, 1797), *in* 29 THE PAPERS OF THOMAS JEFFERSON 270, 271 (Barbara B. Oberg ed., 2002).

481 *Id.*

482 *Id.*

483 Letter to Walter Jones (Mar. 5, 1810), *in* 2 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 272, 272-73 (J. Jefferson Looney ed., 2005).

484 *Id.* at 273.

485 *Id.*

designed to protect domestic industries—were inconsistent with the Constitution's spirit.[486] If America laid high duties on British goods, Britain would do the same. Given the expected reaction, the federal duties would effectively constitute "a [federal] duty on or a prohibition of" American items that Britain taxed.[487] That would be unconstitutional, said Taylor, for Congress could not tax American exports.[488] Taylor lost the argument in the sense that most no longer suppose that high import taxes are unconstitutional notwithstanding the predictable foreign retaliation on American exports.

Mathew Carey, a publisher, wrote that President Jefferson's failure to submit a negotiated treaty to the Senate violated the "spirit of the constitution."[489] Jefferson had sent emissaries to Britain and when he disapproved of their handiwork, he sent them back for renegotiation.[490] Carey seemed to imagine that having sent envoys to negotiate a treaty, the President had a duty to submit the proposed treaty to the Senate even if he opposed it.[491]

Sometimes citizens had personal interests at stake. Noah Webster wrote to Secretary of State Madison about his copyright on a revision of his book, *The Prompter*.[492] An 1802 statute provided that to secure a copyright, certain text needed to appear on the title page or the succeeding page.[493] *The Prompter*, however, placed the language at the end of the book. Webster admitted that this was not "within the letter of the Law."[494] However, "it may . . . be agreeable to the spirit of the law & answer the purpose intended."[495] Perhaps so, although one must wonder whether Congress had a particular reason for why the material should be at the beginning of books.[496]

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486 Letter from John Taylor to Thomas Jefferson (Dec. 23, 1808), https://founders.archives.gov/documents/Jefferson/99-01-02-9386 [https://perma.cc/E95R-2Z9N].

487 *Id.*

488 *Id.*

489 MATHEW CAREY, THE OLIVE BRANCH: OR, FAULTS ON BOTH SIDES, FEDERAL AND DEMOCRATIC 47 (7th ed., Middlebury, William Slade 1816).

490 *Id.*

491 *Id.*

492 Letter from Noah Webster (June 7, 1803), *in* 5 THE PAPERS OF JAMES MADISON: SECRETARY OF STATES SERIES 78, 78 (David B. Mattern, J.C.A. Stagg, Ellen J. Barber, Anne Mandeville Colony & Bradley J. Daigle 2000).

493 Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171.

494 Letter from Noah Webster (June 7, 1803), *supra* note 492, at 78.

495 *Id.*

496 Some thirty years later the Court seemed to reject Webster's argument about spirit and adhered to the letter of the 1802 copyright statute "complete with often draconian penalties for failure to comply." Craig Joyce, "*A Curious Chapter in the History of Judicature:*" Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 367 & n.164, 388-89 (2005). In the seminal case *Wheaton v. Peters*, the Court turned a blind eye to the claim that compliance "within the spirit of the law" was sufficient. 33 U.S. (8 Pet.) 591, 612 (1834) (argument of Elijah Paine, for appellant); Joyce, *supra* note 496, at 368-69.

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In the wake of the Constitution's ratification, Americans continued using spirit or reason to interpret the law. Sometimes this was done to cast light on some ambiguous text. Other times it was used in a more muscular way to trump the meaning suggested by the text. One important takeaway is that Americans did not imagine that the Constitution dictated a fierce focus on the letter at the expense of spirit. They continued the old ways, a practice that came from Britain and continued in newly independent America.

While recourse to spirit to trump texts seems, to my mind, surprisingly common, it is impossible to say how often spirit generated an ultimate meaning that departing from the semantic meaning. We would have to have some sense of the universe of situations requiring interpretation, as well as the instances where people used spirit to depart from the semantic meaning. We know neither. My search criteria generally focused on the use of "spirit" in letters, debates, pamphlets, lectures, etc. This method of discovery is likely underinclusive. This technique omitted situations where interpreters used spirit but failed to use that precise word in their writings, choosing to use a synonym, say reason or purpose. Furthermore, this method obviously could not discover instances where interpreters used spirit (or an adjacent concept) but that decision was never memorialized into writing. I am confident that if one searched for synonyms of spirit, one would unearth more instances of the use of spirit to trump the text. But more examples are perhaps unnecessary. There already is copious evidence from which to conclude that the Founders were not fierce textualists.

Why did the Founders continue the practice of eschewing the letter and embracing spirit? While some moderns may imagine that this practice signaled a certain unfaithfulness on their part, this perception fails to recognize that in honoring the law, spirit was to be considered no less than the letter. In choosing to occasionally supersede the letter, Americans saw themselves as honoring the law's deeper meaning, one not grounded in the letter alone. The Founders did not equate the law with the text, as many modern scholars and judges do. Hence interpreting the law sometimes required looking beyond, or behind, the letter and utilizing a perceived spirit to discover a law's true meaning.

V. SPIRIT AND THE CONSTITUTION

From time to time, textualists apply their methods to the Constitution and find existing judicial doctrine woefully mistaken. John Manning has written that precisely worded texts should be given the meaning that arises

from their precise wordings.[497] He made this argument with respect to the Eleventh Amendment and to criticize the Court's state sovereign immunity jurisprudence.[498] He has a powerful and undisputable point, for the text is far narrower than the doctrine that the Court has erected. A lean text has cast an outsized shadow, where the penumbra is infinitely more important than the amendment's letter, leading the Court to construct a vast and sprawling doctrine.

But the rigorous textualism that Manning expertly and fairly deploys is out of step with the eighteenth century that birthed the Eleventh Amendment. The letter mattered, quite a bit. It was the most important factor. Nonetheless, the people of that era were willing to look beyond the words to consider context, consequences, and spirit. And when Americans sensed that the words did not match their perception of the spirit, they favored the spirit over the letter.

Readers of the Constitution have long understood this. The letter matters, but not to the exclusion of purpose, intent, subject matter, context, and consequences. As a result, sometimes the Constitution means more than the letter signals and sometimes it means less.

A. *More—The Case of Extensive Interpretation*

Consider anti-evasion principles. An anti-evasion principle has the effect of taking some provision and expanding its import beyond what the text suggests.[499] Sometimes anti-evasion principles are express. The Constitution has at least one explicit anti-evasion rule, found in the Presentment Clause.[500] Call an unenacted bill whatever you wish, but "[e]very Order, Resolution, or Vote to which the Concurrence" of the two chambers is requisite must be presented to the President before it "shall take Effect."[501]

I believe that the Constitution has other anti-evasion principles that are implicit. All revenue-raising "bills" must originate in the House.[502] What of a revenue-raising "resolution?" Despite the absence of an express anti-evasion

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497 *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1722-25 (2004) ("If [an] Amendment's carefully drawn text reflects an implicit judgment that the contemplated limits . . . should go so far and no farther, then the balance struck by the Amendment might properly displace whatever general authority the Court had possessed . . . .").

498 *Id.*

499 For a general discussion of anti-evasion rules in constitutional law, see generally Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773 (2012).

500 U.S. CONST. art. I, § 7, cl. 3.

501 *Id.*

502 U.S. CONST. art. I, § 7, cl. 1.

rule, no one supposes that the Senate can evade the constraint via mere labels. What of "resolutions" or "orders" that limit "the freedom of speech?"[503] Though the Amendment mentions that "Congress shall make no law,"[504] Congress cannot dodge the First Amendment constraint by artful use of words.

There are other such anti-evasion rules that go beyond concerns with labeling. For instance, the Treasury Clause requires that all withdrawals from the "Treasury" must be done by "Appropriations made by Law."[505] But the salutary rule would be meaningless if there was no implicit directive that all revenues—all received monies—had to be deposited in the Treasury in the first place.[506] After all, the Treasury Clause would be toothless if one could stash money outside the Treasury and evade the obligation that Congress must appropriate prior to expending funds.

Returning to the point about potentially long shadows, no one should doubt that certain rights have penumbras.[507] The Takings Clause, as mentioned earlier, implicitly prohibits takings put to private use, whatever generous compensation the government might provide.[508] The First Amendment does not mention a "Freedom of Association," but the meaning of "to assemble" connotes a collective action, one involving people acting in concert to protest or lobby.[509] Of greater relevance, the spirit of the First Amendment surely safeguards some collective actions in the service of religious rituals, a free press, and freedom of speech. That is to say, people can gather together to worship, print newspapers, and speak collectively. Finally, I believe that Judge Samuel Bayard was right that the spirit of the Eighth Amendment bars excessive corporal punishment,[510] for I cannot fathom why the Founders would prohibit excessive fines but leave disproportionate incarcerations, physical punishments, and executions

503 U.S. CONST. art. I, § 7, cl. 3; U.S. CONST. amend. I.

504 U.S. CONST. amend. I.

505 U.S. CONST. art. I, § 9, cl. 7.

506 *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

507 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . The right of association contained in the penumbra of the First Amendment is one, as we have seen."). Griswold can be right about penumbras whatever one thinks about its claims regarding contraception.

508 *See* U.S. CONST. amend. V.

509 U.S. CONST. amend. I; *see, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 523 (1959) ("[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause . . . .").

510 SAMUEL BAYARD, AN ABSTRACT OF THOSE LAWS OF THE UNITED STATES WHICH RELATE CHIEFLY TO THE DUTIES AND AUTHORITY OF THE JUDGES OF THE INFERIOR STATE COURTS, AND THE JUSTICES OF THE PEACE, THROUGHOUT THE UNION 228 (New York, n. pub. 1804).

unchecked. If some exceptions are left unstated, as Seneca observed, so too some extensions.[511]

Let me give an example from the original Bill of Rights.[512] The Treason Clauses, found in Article III, regulate the definition, conviction, and punishment of treason.[513] The Constitution carefully defines this heinous crime—one must wage war or give aid and comfort to enemies.[514] It supplies precise rules for conviction—one must confess in court or have two eyewitnesses.[515] It limits punishment—no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.[516] Evidently, the Founders were particularly concerned with treason and the possibility that federal officials might abuse their various powers to create and enforce crimes to wrongfully punish those accused of betraying their country.

The rules seem significant, precise, and narrow. Nonetheless, they have a reach that goes beyond their letter. To begin with, suppose that Congress created a crime, "Treachery." Treachery has the same *actus reus*—either levying war against the United States or giving aid and comfort to the enemy—but is punishable with only *one* witness. I do not believe that Congress can do this. They cannot evade the Clause's constraints by creating a crime that is treason by another name. One can make a similar point about punishment. Though the Treason Clause does not expressly limit the punishment of other crimes, there is an implicit constraint arising from its spirit. If Congress cannot permanently corrupt blood to punish heinous traitors, it cannot so corrupt the blood of thieves. Put another way, one might conclude that a provision designed to prevent "extending the consequences of guilt beyond the person of its author"[517] implicitly reflects a *general rule* barring the punishment of other parties for the sins of a criminal.

Representative James Madison saw the need to use spirit to make sense of the Treason Clause. In 1796, there was an Indian Intercourse bill that provided for the permanent forfeiture of land for certain offenses.[518] According to Madison:

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511 *See supra* note 109 and accompanying text.

512 THE FEDERALIST NO. 84 (Alexander Hamilton) (claiming that the Constitution contained a Bill of Rights, scattered throughout its text).

513 U.S. CONST. art. III, § 3, cl. 1.

514 *Id.*

515 *Id.*

516 U.S. CONST. art. III, § 3, cl. 2.

517 THE FEDERALIST NO. 43, at 270 (James Madison).

518 *See* 5 ANNALS OF CONG. 894 (1796) ("[T]he bill . . . enacts a forfeiture of all right to the land ceded to the Indians by the late Treaty, in case any person entitled to any right in it shall go upon it for purpose of marking it out . . . .").

> [The bill] was against the spirit of the Constitution; he would not say that it was against the letter, but it was certainly against the spirit of the Constitution; for, if they allowed the [permanent] forfeiture of real estate in any case besides treason, they might do it for treason also, by calling the crime by another name.[519]

If Madison was correct in concluding that the Treason Clause barred permanent forfeitures of real estate, he was likely right that Congress could not enact permanent forfeitures as a punishment for other offenses.[520] Again, to bar certain punishments for one of the most infamous crimes is to perhaps imply that Congress cannot attach such penalties to other offenses.

Let me end with a power long exercised by the federal government but nowhere expressly granted: the mail delivery power. Under the Articles, the Continental Congress had the power to create post offices and to charge postage for mail delivery.[521] Per the Constitution, Congress has the power to establish post offices and post roads.[522] There is no express power to deliver mail. But as Marshall said in *McCulloch*, "[F]rom this [grant to create post offices and roads] has been inferred the power and duty of carrying the mail along the post road, from one post office to another."[523] And, of course, the federal government continues to charge a user fee (postage) for using the system. Spirit makes sense of the practice, for having carried mail before the Constitution and having previously charged for the service, the federal government could continue to deliver mail for a fee. The spirit and reason of the Postal Clause extend its meaning beyond its bare letter. To borrow Marshall's word from another context, it was not "within the intention"[524] of the Founders to have eliminated the delivery power or the related power to charge for delivery.

B. *Less—The Case of Restrictive Interpretation*

As noted, the Presentment Clause has an anti-evasion rule. And that rule seems rather broad. Whatever matters require the "Concurrence" of both

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519 *Id.* at 900.

520 Two Representatives earlier argued that the permanent forfeiture violated the Constitution and the "spirit of our Government." *Id.* at 896-97.

521 *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 ("[E]stablishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expense of the said office . . . .").

522 U.S. CONST. art. I, § 8, cl. 7.

523 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819).

524 Letter from John Marshall to Joseph Story (July 25, 1827), *in* 11 THE PAPERS OF JOHN MARSHALL 35, 47 (Charles F. Hobson ed., 2002) (emphasis added).

chambers must be presented to the President.[525] The rule was so broad that the Founders included an express carve out: questions of adjournment do not require presentment.[526]

But no one should doubt that there are other exceptions, ones not stated but to be inferred from the spirit. No one supposes that veto overrides need to be re-presented to the President for his approval or disapproval. Having presented the underlying bill to the president, the subsequent congressional override is not re-presented to the president even though the "Concurrence" of both chambers is necessary for an override to "take Effect."[527] If the veto override had to be presented, there would be an infinite presentment loop, as the president might veto the congressional override and then veto the subsequent override, and so on.

So far as I know, the Court has never said that veto overrides are outside the Presentment Clause. But it has considered an adjacent topic: proposed constitutional amendments. To send a proposal to the states, both chambers must concur. It might seem to follow that Congress must present proposed amendments to the President. The President might voice valuable objections that cause some in Congress to change their minds about the proposal. Despite the potential utility of presenting amendments to the President, the modern rule is that presentment is unnecessary. In *Hollingsworth v. Virginia*, a party argued that the Eleventh Amendment had not been properly presented to the President and hence could not take effect.[528] Justice Samuel Chase apparently rubbished the claim. "The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution."[529] The case now stands for the proposition that the Presentment Clause does not apply to amendments.[530]

Here is a list of other restrictive interpretations: Despite Article III, Section 2, Clause 2, the Supreme Court does not have original jurisdiction over all cases where a state is a party,[531] even when the case is found within

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525 U.S. CONST. art. I, § 7, cl. 3.

526 *Id.*

527 *Id.*

528 3 U.S. (3 Dall.) 378, 379 (1798).

529 *Id.* at 381.

530 *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) ("At an early day this court settled that the submission of a constitutional amendment did not require the action of the President."). For a thorough critique of the modern view of *Hollingsworth*, see generally Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

531 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398-99 (1821) ("[T]he original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which . . . jurisdiction might be exercised in consequence of the character of the party, and an original suit might be

the list supplied by Article III, Section 2, Clause 1. Despite the jury trial right mentioned in Article III, Section 2, Clause 3, and confirmed in the Sixth Amendment, soldiers may be tried without ordinary juries in courts-martial.[532] Notwithstanding the Birthright Clause of the Fourteenth Amendment, untaxed Indians, though born within the United States and though subject to the jurisdiction of the United States, were not regarded as citizens.[533] The Full Faith and Credit Clause does not require that states invariably enforce the laws of sister states. A state can often prefer its own laws at the expense of the laws of another state, thereby making "Full Faith and Credit" more like "Partial Faith and Credit."[534] More examples could be adduced, but the point is made.

C. *Too Much/Too Little Spirit*

Spirit can be carried to excess and, of course, be given short shrift. In the Introduction, I raised the question of whether the spirit of the salary and good-behavior protections signaled that Congress could not use salary increases to incentivize judges to decide cases in particular ways. Part IV mentioned the claim that the spirit of the Constitution barred judges from holding another office at the pleasure of the Executive.[535] Certain Senators proposed a resolution to disapprove of Washington's proposed appointment of Chief Justice John Jay as treaty negotiator. They lost, suggesting that a Senate majority rejected that spirit claim.

Was the Senate majority right? It is hardly obvious because the use of spirit, to expand or restrict, is a matter of degree and judgment. If we agree that the spirit of the salary protections is to foster judicial independence, should we read Article III as barring additional or new offices for federal judges on the theory that the prospect of a plum posting and a promotion,

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instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a federal Court.").

532 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) ("Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts [by jury]."). In *Ex parte Quirin*, the Supreme Court noted that "'cases arising in the land or naval forces' are . . . . deemed excepted by implication from the Sixth [Amendment]." 317 U.S. 1, 40 (1942).

533 Elk v. Wilkins, 112 U.S. 94, 99, 102 (1884) ("Indians born within the . . . United States . . . owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government . . . .").

534 *See, e.g.*, Alaska Packers Ass'n v. Indus. Accident Comm. of Cal., 294 U.S. 532, 547 (1935) (stating a "rigid and literal enforcement" of the Clause would lead to an "absurd result").

535 *See supra* notes 341–343 and accompanying text.

either within Article III or otherwise, would tend to corrupt judges? One can see why some might suppose that Article III judges will improperly seek to curry favor with Presidents, Senators, and the public by deciding cases to avoid contentious landmines and to signal support for certain agendas.

Consider an adjacent question. The Incompatibility Clause reflects a concern that legislators should not serve in the executive or judicial branches lest the Executive use such appointments to corrupt legislators.[536] So Chuck Schumer cannot be in the Senate and serve as Secretary of State. But Senator Schumer can easily be corrupted by related means. His spouse or children can be appointed by the Executive, and thereby secure additional salary and power for the family.[537] Will not Schumer be more prone to favor the Executive under such circumstances? Does the spirit of the Incompatibility Clause bar the appointment of family members of federal legislators? We perhaps have given insufficient attention to the matter.[538]

One final matter concerns speech and constitutional structure. The Constitution authorizes the President to propose legislation and return a bill with objections. Until the Jackson administration, I am unaware of any suggestion that a President could supply feedback on a bill not yet presented to him. When Andrew Jackson suggested that Congress ought to have sought his advice before presenting the Bank bill to him, if only to hear his objections at an earlier stage,[539] Daniel Webster denounced the suggestion as improper.[540] Today, what Webster thought was unconstitutional is a regular

536 U.S. CONST. art. I, § 6, cl. 2; *see* Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047-48, 1050, 1052 (1994) (noting that the separation of powers is largely understood to include a "one person, one office codicil" and that "[u]nwritten traditions" disfavor holding multiple offices).

537 Elaine Chao, wife of Senator Mitch McConnell, served in the Trump administration as Secretary of Transportation. *Elaine L. Chao*, TRUMP WHITE HOUSE ARCHIVES, https://trumpwhitehouse.archives.gov/people/elaine-chao [https://perma.cc/5MHS-8G4C] (last visited Feb. 3, 2025). News reports raised concerns about her service and potential favoritism for Senator McConnell. *Elaine Chao's Family Business and Kentucky Favoritism*, AMERICAN OVERSIGHT (Nov. 12, 2021), https://www.americanoversight.org/investigation/elaine-chaos-family-business-and-kentucky-favoritism [https://perma.cc/S55X-8NYD].

538 Interbranch practices seem to focus on the letter of the Incompatibility Clause and pay little heed to its possible spirit. Contrast that with the Court's adherence to the perceived spirit of the Speech and Debate Clause. *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975) ("Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes.").

539 PRESIDENT JACKSON'S VETO MESSAGE (Philadelphia, Mifflin & Parry 1832) ("Had the Executive been called upon to furnish [a Bank of the United States], the duty would have been cheerfully performed.").

540 *See supra* note 441.

practice. The Executive routinely gives advice to Congress on bills well before presentment.[541]

Of course, nothing in Article I, Section 7 signals that presentment is the only time to voice objections to pending legislation. This seems a powerful point, one that likely moved President Jackson. But, of course, a similar argument could be made about the federal courts. Nothing in the Constitution bars judges from opining on the constitutionality of pending bills. Article III does not say that the only opportunity for judges to opine on constitutional matters is during a case. Nonetheless, many suppose that it would be constitutionally improper for federal judges to inform Congress that portions of a pending bill are, or might be, unconstitutional.[542] Is the spirit of Article III stronger in that it more clearly bars extrajudicial opining on bills? Or has the spirit of Article I, Section 7, been wrongfully overwhelmed by a steady and familiar practice that makes us forget a more restrained conception of the presidency, one that implicitly bars interventions into the internal deliberations of Congress? My point is not to answer these questions but to note that giving too much (or too little) weight to spirit is an age-old and inescapable feature of our legal discourse.

D. *Did Spirit Have a Greater Role in Constitutional Interpretation?*

Chief Justice Marshall famously said in *McCulloch* that "we must never forget, that it is *a constitution* we are expounding."[543] Perhaps he was referring to the Constitution lacking the "prolixity of a legal code."[544] What may have been true in the eighteenth century is not true of our era's constitutions. Some American constitutions ramble,[545] and look akin to a legal code in their specificity.

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541 *See generally* MEGHAN M. STUESSY, CONG. RSCH. SERV., R44539, STATEMENTS OF ADMINISTRATION POLICY (2016), https://sgp.fas.org/crs/misc/R44539.pdf [https://perma.cc/8ABX-LCQ9] (explaining that Statements of Administration Policy (SAPs) are often the first public document outlining the Administration's views on pending legislation and are designed to signal the Administration's position on scheduled legislation). *See* Laurie L. Rice, *Statements of Power: Presidential Use of Statements of Administration Policy and Signing Statements in the Legislative Process*, 40 PRESIDENTIAL STUD. Q. 686, 700-03 (2010) (discussing the Bush administration's practice of using SAPs to identify the "objectionable provisions and . . . constitutional objections" it had for pending legislation).

542 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96 (1968) ("When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.")

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

544 *Id.*

545 *See, e.g.*, ALA. CONST. Alabama has the longest state constitution, with an estimated length of over 402,000 words. 53 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 7 (2021).

Did Marshall also mean to suggest that spirit had a greater role in constitutional interpretation? No confident answers are possible. Recall that one reason to rely upon spirit was the sense that the text will not perfectly convey the "will" of the legislature. Another reason was that spirit was necessary to deal with unforeseen events or circumstances. On one hand, one might suppose that the Constitution is the product of extraordinary care and skill, perhaps reflecting the considerable time and effort that went into its composition. The Constitution took over four months to compose.[546] That might suggest that spirit is less necessary or apt.

On the other hand, one might conclude that the possibility of misunderstanding legislation will be greater the shorter the text, particularly where the short text—the Constitution—is meant to deal with consequential matters of state. Edmund Randolph argued that "[t]here is a real difference" in how one ought to interpret statutes and constitutions.[547] Constitutions are "to be construed with a discreet liberality" while statutes are to read "with a closer adherence to the literal meaning."[548] Further, spirit might seem more powerful the further we are removed from the act of creation, for more unanticipated events will arise. On balance, it might be that spirit should have greater sway when it comes to our terse Constitution, as we are quite removed from the era and the concerns that gave birth to it.

A highly reliable source informs me that in a class at Harvard Law School held decades ago, a student posed a query to the late Charles Fried. The student earnestly asked, "but what about the spirit of the law?" Professor Fried's response was a tad sarcastic, I am told. "Ah, yes, Constitutional Law is positively haunted by spirits." I concur with the letter of the Professor's response. The Constitution *is* haunted by spirits. If one fails to attend to them, one's readings will be deracinated and lifeless.

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546 But while the convention as a whole worked from May to September, more than half of the Constitution's text was drafted over the course of little more than a week near the end of July by the five person Committee of Detail. *See* William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 209 (2012). Crucially, this late and intensive drafting process included many of the provisions that have demanded the most interpretative attention, including the enumeration of federal powers, the Necessary and Proper Clause, the jurisdictional provisions of Article III, the restrictions on the powers of the states, and the supremacy clause. *Id.* at 259-78.

547 *See* Edmund Randolph, Enclosure: Opinion on the Constitutionality of the Bank (Feb. 12, 1791), https://founders.archives.gov/documents/Washington/05-07-02-0200-0002 [https://perma.cc/4K5T-MN3D] (introducing a distinction between federal and state constitutions and arguing that federal constitutions should be construed more strictly).

548 *Id.*

VI. Their Practices and Concerns

After this extensive treatment of spirit at the Founding, it is appropriate to clarify and refine our sense of the practices of that era. A focus on the criticisms and misgivings is especially necessary as I do not wish to convey the impression that reliance on spirit was carefree, much less unthinking. Further, I seek to anticipate questions and clarify potential ambiguities or doubts.

A. *Did Anyone Deny the Utility of Spirit?*

From my review of American discussions, what is conspicuously absent from the Founding, and the early decades, is a thoroughgoing early American critic of spirit, in the vein of Reverend Tucker.[549] Having said that, I found one jurist from Kentucky, Chief Justice Ninian Edwards, who came closest to being a proto-Scalia. In an 1808 opinion for the Court of Appeals, Edwards railed against discretion, intent, spirit, and the judicial aversion to following "plain and unambiguous language."[550] The opinion is well worth reading, for like Scalia, Edwards had a way with words. Edwards railed that judges "have made the legislature mean any thing, every thing[,] and almost nothing, as suited the particular case before them; and this will ever be the case, whilst this arbitrary field of discretion is assumed and exercised by judges."[551] If a law is defective, courts should refrain from correcting it and leave it to the legislature to "remedy those defects"[552] in time. "[N]othing is more easy than to decide to-day, that such is the spirit of the law; such was the intention of the legislature; such alone the evil intended to be remedied."[553] Eventually, however, the same court would return to the law in a subsequent case, where the subject would present itself in a different light, and then honor the letter over the spirit.[554] This led to great variation across cases. Indulging in spirit, intent, and reason "encroaches on legislative authority" and was an "illegitimate dispensing power over the acts of the legislature," he claimed.[555] In the actual case before the Court, the letter was plain and the Court therefore said "*ita lex scripta est*,"[556] meaning "thus the law is written."

549 *See supra* notes 122–126 and accompanying text.
550 Hardin v. Owings, 4 Ky. (1 Bibb) 214, 214-16 (1808).
551 *Id.* at 216.
552 *Id.*
553 *Id.* at 217.
554 *Id.*
555 *Id.* at 216-17.
556 *Id.* at 217.

But Edwards did not speak for the Court of Appeals for long. He left the bench in 1809 to become the territorial governor of Illinois.[557] That year, the Court invoked spirit twice in one case.[558] A party subject to a judicial order and a bond objected on appeal that neither was "literally and strictly . . . conformable to the act of assembly."[559] The Court replied that they were "substantially and essentially" conformable and that to sustain his objections "would be to require a technical precision, not . . . warranted by the genius and spirit of the law."[560] Later, the Court said that it would award costs because it had long read the "laws of costs" with an eye to their "reason."[561] Cases "within the reason, though not within the letter" are covered by the Kentucky law of costs, said the Court.[562]

This volte-face may seem odd. But the truth is that Chief Judge Edwards had not wholly interred spirit. In the 1808 case in which he denounced spirit, he also discussed the "convenient and pliant common law maxim, *qui hoeret in litera hoeret in cortice*"—he who goes by the letter goes but skin deep into its meaning—and admitted that with "great limitations, [it] may be correct and not without its use."[563] Later Edwards added that "the principle . . . ought to be circumscribed within a very narrow compass."[564] All this meant that Edwards had not truly banished spirit. So, while Edwards was the closest to Scalia, he remained open to the idea that in narrow circumstances spirit should control the text.

B. *When The Founders Considered Spirit*

Occasionally, people observed that reliance on spirit is appropriate when the text is unclear. Blackstone said that the "most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."[565] John Marshall noted that when the letter suggested something absurd, mischievous, unjust, or monstrous, then a consultation of spirit was appropriate.[566] Story endorsed these views in his *Commentaries*.[567]

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557 NINIAN W. EDWARDS, HISTORY OF ILLINOIS, FROM 1778 TO 1833; AND LIFE AND TIMES OF NINIAN EDWARDS 27 (Springfield, Ill. State J. Co. 1870).

558 Schooler v. Commonwealth, 16 Ky. (1 Litt. Sel. Cas.) 88, 89 (1809).

559 *Id.*

560 *Id.*

561 *Id.* at 89-90.

562 *Id.* at 89.

563 Hardin v. Owings, 4 Ky. (1 Bibb) 214, 216 (1808).

564 *Id.* at 217.

565 1 BLACKSTONE, *supra* note 16, at *61.

566 *See supra* notes 475–478 and accompanying text.

567 *See supra* notes 288–295 and accompanying text.

Yet ambiguity was not a precondition. Strictly speaking, Blackstone's statement meant no more than when the text is ambiguous, spirit is useful. He did not quite say that spirit was valuable *only* when the letter is dubious. Ironically, one would have to use spirit to derive that latter meaning from what he wrote. In any event, his later discussion of the salutary use of spirit was not limited to situations where the letter is dubious, for he spoke of the spirit controlling the letter. He observed that some acts "will fall within the meaning [of a statute], though not within the words . . . ; and others, which may fall within the letter, may be contrary to [the legislator's] meaning, though not expressly excepted."[568] Perhaps more importantly, the practices of the era do not support a requirement of ambiguity, because many a time an interpreter freely admitted that the letter was rather contrary to the meaning they discovered in the law, a meaning derived primarily from the spirit and other considerations.[569]

If ambiguity was not a precondition, what about absurdity, mischief, injustice, or monstrosity? Was spirit to be summoned and deployed only when the letter generated destructive, unjust, or outrageous results? Recall that Blackstone said that the "effects and consequence" were to be considered in legal interpretation.[570] I do not think the practice was to deploy spirit only when necessary to overcome such consequences. Marshall who spoke of such consequences also said, in the same sentence, that one could use spirit to overcome the letter when the textual reading seemed "repugnant to the general spirit of the instrument."[571] Indeed, Marshall had praised Justice Story's use of spirit to override the text in a context where there was nothing absurd, mischievous, unjust, or monstrous.[572]

The ideal method was to consider every Blackstonian sign: letter, spirit, consequences, subject matter, and context. Of course, some people would interpret a law on the quick; they would read the letter and come to a swift conclusion. This made sense given time constraints and the reality that most often the meaning generated from the letter was the best approximation of the true meaning. But the ideal practice was to consider all the relevant factors and then reach a conclusion. In other words, *spirit always mattered* even if it only sometimes trumped the text.

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568 3 BLACKSTONE, *supra* note 16, at *431.

569 *See supra* Section I.B.

570 1 BLACKSTONE, *supra* note 16, at *59.

571 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 645 (1819).

572 *See supra* note 1.

C. *Letter and Spirit*

It was common for people to declare that one should honor the law's "letter and spirit."[573] To some moderns, this statement may seem problematic, for it prizes the spirit or reason of the law, perhaps putting it on par with the letter. In fact, there were some from that era who seemed to suggest that the letter ought to be given somewhat limited weight. More precisely, some supposed that the letter was only useful insofar as it reflected the legislative will. The references to shell versus kernel and bark versus pith, where the kernel and the pith (spirit) are the ultimate goals, suggest a certain impatience, even exasperation, with the assertion that the letter of the law simply is the law.[574]

When one concludes that letter and spirit point to the same reading, honoring both is easy. This is a happy place, for the guiding lights are aligned. But what happens when they were not in harmony? When they point towards different readings, honoring both might be impossible. Consider expansive interpretation. If one settles upon a broader reading than the text suggests, is one truly honoring the letter which suggests a narrower reading? For example, one might say that the requirement of a "compensation" for federal judges[575] does not logically refute the idea of an implicit requirement of a *reasonable* salary. In other words, on one account, to read in that requirement does little to no violence to the text. Yet others might say that to discover an obligation to grant a *reasonable* compensation is to dishonor the letter, because the text nowhere imposes a requirement of reasonableness. Reasonableness as a constitutional standard is found elsewhere in the Constitution, most notably the Fourth Amendment,[576] but it is not found within the letter of Article III, Section 1.[577]

Restrictive interpretations perhaps pose an even greater difficulty. It is harder, if not impossible, to harmonize letter and spirit if one settles upon a restrictive interpretation. For instance, to say that military personnel may suffer punishment via court martials and without a jury trial is to admit that we will not be honoring the letter of the law found in Article III, Section 2, Clause 3 and the Sixth Amendment.[578] Rather, we are esteeming the spirit at the expense of the letter.

Given the occasional tension between letter and spirit, admonishing people to honor both is akin to advising a person to obey their mother and

573 *See, e.g.*, *supra* note 220, 228 and accompanying text.
574 *See supra* notes 96, 316, 494 and accompanying text.
575 U.S. CONST. art. III, § 1.
576 U.S. CONST. amend. IV.
577 U.S. CONST. art. III, § 1.
578 U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

father. Where two parents are in sync, there is no difficulty. But if they are at cross-purposes, one may wonder whether it is possible to honor the wishes of both. This tension is perhaps inevitable. In any multi-factor test, there will be occasions where the factors suggest different results, in which case one will be unable to conclude that all factors have been satisfied or point in the same direction.

To my mind, it is noteworthy that some interpreters freely admitted that the letter of the law did not support their reading, choosing to rest their reading entirely on spirit.[579] It must be especially remarkable to those wedded to modern textualists precepts. But what may be just as striking is the apparent absence of the claim that though the letter favors my preferred interpretation, the spirit does not. The absence of such admissions quite likely reflects the reality that as compared to making an argument from the letter, *it is always easier to make an argument from spirit*. That being the case, while one might occasionally concede that the letter disfavored one's preferred reading, one would never concede that the spirit was in opposition. Spirit was a forgiving, welcoming interpretive factor, because one might always assert that spirit, properly unearthed and understood, favored one's preferred reading.

D. *When Spirit Prevailed Over the Letter*

If spirit always was a factor, when did it move the needle and lead the interpreter to use it to overcome the text? For his part, Blackstone did not say much about when spirit should be permitted to overcome the text. But, as discussed later, he did make clear that too great an indulgence of spirit would be intolerable, thereby acknowledging an outer limit to the use of spirit to prevail over the text.

Vattel set a seemingly high standard. To begin with, he recognized that multiple reasons might lay behind a provision of law. When the combination of reasons was necessary to generate the provision, the "interpretation and application ought to be made in a manner agreeable to all these united reasons, and none of them ought to be neglected."[580] When each reason could have independently generated the provision, the "words ought to be interpreted and applied in such a manner as they may agree with these reasons separately taken."[581]

Vattel's theoretical point seemed to have had little real-world influence, for I found but one discussion of multiple reasons. It came from a lawyer

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579 *See, e.g.*, *supra* note 494 and accompanying text.

580 VATTEL, *supra* note 17, at 386 (emphasis omitted).

581 *Id.* at 377 (emphasis omitted).

arguing a case before a Virginia court. The counsel admitted that there "are cases . . . where it is justifiable to take liberties" with the "words" of a law by invoking "the spirit of the proviso."[582] But there should be "an apparent necessity" for doing so.[583] If the other party supplied a sound "reason" for following the letter and rejecting the claimed spirit invoked by the other party, then the court should eschew the spirit because of the plausibility of an alternative spirit.[584]

Perhaps most people lacked Vattel's sophistication or perhaps they were certain, in their own minds, that there was only one reason for the provision, the spirit they envisioned. In any event, one can agree with Vattel's test but also see why interpreters might be drawn to the simplicity of a single spirit or reason, one that the interpreter could then deploy to recognize exceptions or extensions.

A closely related matter concerned the level of confidence one needed to reach before one concluded that spirit ought to overcome the text. Vattel said that "[w]hen the sufficient, and only reason of a disposition . . . is very certain, and well known," we extend that provision to cases to which the same reason is applicable.[585] Later he said that if a case arises, "in which one cannot absolutely apply the wellknown reason of a law or a promise, this case ought to be excepted . . . ."[586] In every case, "[w]e ought to be very certain, that we know the true and only reason of the law or of the promise."[587] These discussions suggest that Vattel did not believe that interpreters should use spirit to trump text unless the reason behind the law was "is very certain, and well known."[588]

Some prominent Americans echoed Vattel's need for being certain. In *Cohens v. Virginia*, the Court confronted Virginia's claim that there were some cases arising under the Constitution, laws, and treaties over which the Court lacked appellate jurisdiction.[589] This was a request for an exception to the letter. Rather than dismissing the argument out of hand, as some contemporary jurists might, Chief Justice Marshall said that "those who would withdraw any case . . . from [our] jurisdiction, must sustain the exemption . . . on [a] spirit and true meaning [that is] . . . so apparent as to overrule the words which its framers have employed."[590] The spirit, and the

582 Norton v. Rose, 2 Va. (2 Wash.) 233, 246 (1796).

583 *Id.*

584 *See id.* (explaining that contemplating the spirit of a statute in its interpretation should only be done sparingly).

585 VATTEL, *supra* note 17, at 388 (emphasis omitted).

586 *Id.* at 390 (emphasis omitted).

587 *Id.* at 388.

588 *Id.*

589 19 U.S. (6 Wheat.) 264, 290-91 (1821).

590 *Id.* at 379-80.

resulting meaning, must be seen as "apparent" before one departs from the letter.

Did interpreters faithfully adhere to these constraints, deploying spirit to overcome text only when the spirit was "thoroughly convinc[ing]" or "so apparent"? It is hard to say. Most people using spirit did not also supply a framework specifying when it would be appropriate to invoke spirit to prevail over the letter. And, of course, many people utilizing spirit were motivated to reach a particular outcome and hence were perhaps less than meticulous in applying any standard formula. Nonetheless, a test meant to constrain the ability of spirit to control the letter could have been the orthodoxy even if not everyone scrupulously applied it.

E. *Summoning the Spirit*

Sometimes the spirit or purpose could be found in the text, in a preamble, title, or otherwise. Joseph Story supposed that the Preamble ought to matter in interpreting the Constitution because it told us something about the purposes that lay behind the rest of the Constitution.[591] One might make similar claims about particular provisions. The Patent and Copyright Clause suggests that the Clause exists to promote science and the useful arts.[592] The Second Amendment's preamble[593] has generated disagreement about what role it should play in interpreting the rest of the Amendment.[594] The Amendment means more if we take its preamble to supply *a* purpose rather than the sole reason for the Amendment. For his part, Vattel thought a stated purpose barred the inference of other purposes. "[W]hen the author of a piece has himself there made known his reasons and motives," we ought not attribute some secret reason that permits us to move beyond the text.[595]

More often, readers had to infer the purpose of laws and their various provisions. This was "conjecture," said Vattel, and he admonished readers to adopt the purpose that "is most probable."[596] Interpreters would read the text, weigh the context, consider the subject matter, and ponder the consequences to develop a sense of a law's spirit. The text was a particularly powerful factor in discovering the spirit. As Marshall put it, the spirit should be "collected

591 *See* 1 STORY, *supra* note 287, at 322-23 (highlighting the necessity of interpreting the Constitution in a way that does not "defeat" the objectives of the Constitution set forth in the Preamble).

592 U.S. CONST. art. I, § 8, cl. 8.

593 *Id.* amend. II.

594 *See e.g.*, D.C. v. Heller, 554 U.S. 570, 610-11 (2008) (rebuking the dissent's view that the amendment merely protects "the right of the people of each of the several States to maintain a well-regulated militia" despite the preamble's reference to the militia).

595 VATTEL, *supra* note 17, at 386.

596 *Id.*

chiefly from [a law's] words."[597] But "chiefly" also implied that in conjuring the spirit, the letter of the law was not the *only* factor.

Whenever one had to infer spirit, different people often could conjure up different purposes or intents. Spirit could be said to be in the eye of the beholder. That of course was an unavoidable difficulty, one that led some to critique the use of spirit. As we have seen, a reader of the Constitution could come away with rather different senses of its spirit: it separated powers, it mingled them; it abrogated state rights; it safeguarded them; it protected individual liberties; and it abrogated them in some respects. Furthermore, even if there was a consensus regarding a provision's spirit, there might be profound disagreement about how far to extend (or restrict) the meaning that emerged from the letter. To return to judicial independence, does the Constitution's spirit (implicitly) bar inadequate judicial salaries, incentive pay, holding an office within the executive branch, or all of the above?

In *Henry IV*, Owen Glendower says "I can call spirits from the vasty deep."[598] Henry Hotspur's response was comical. "Why, so can I, or so can any man; But will they come, when you do call for them?"[599] My sense is that most interpreters had Glendower's confidence. Every time, the spirit came forth with ease and it always favored those who summoned it.

F. *Spirit, Delegation, and Creation*

When invoking spirit and expanding or restricting the meaning derived from the text, interpreters typically did not comment on the creative aspect of this sort of enterprise. They would use spirit, make their claim, and not pause to comment on whether they were interpreting the law rather than participating in its creation. Occasionally, however, interpreters discussed the juris-generative features of the practice and how when using spirit they might be understood as not merely interpreting. In *Commentaries*, Blackstone seemed to discuss a process that, at least sometimes, went beyond a narrow interpretation of text.

> For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.[600]

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597 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

598 WILLIAM SHAKESPEARE, HENRY IV act 3, sc. 1, l. 55.

599 *Id.* l. 56-57.

600 1 BLACKSTONE, *supra* note 16, at *61 (internal citations omitted).

Blackstone then quoted a Latin phrase from Grotius: "[T]he law does not define exactly, but leaves something to the discretion of a good man."[601] Apparently, the "good man" is the interpreter, most likely a judge or an executive. Both Blackstonian statements discuss a discretion in the hands of the subsequent interpreter. The creative discretion is to be guided by the lawmaker in the sense that the interpreter must try to adopt the lawmaker's perspective.

Vattel also endorsed the practice of interpreters adapting standing law to unforeseen circumstances.

> In unforeseen cases, that is, when the state of things are found such as the author . . . has not foreseen, and could not have thought of, we should rather follow his intention, than his words, and interpret the act as he himself would have interpreted it, had he been present, or conformably to what he would have done if he had foreseen the things that happened.[602]

Vattel thereby endorsed a model of interpreting that goes beyond the text to generate rules (or exceptions) that are not themselves grounded in the text, except in the loosest sense.

Infrequently, courts were described as a secondary lawmaker. Some Americans spoke of courts in these terms, particularly where courts were engaged in what we might call "WWLHD"—what would the legislator have done. As noted, the 1776 pamphlet, *The People the Best Governors*, discussed judges resorting to spirit. In arguing for a legislative power to review judgments, the author adverted to the practice of courts and how they resembled legislatures.

> The cases between man and man, together with their circumstances are so infinite in number, that it is impossible for them all to be specified by the letter of the law. The judges, therefore, in many cases, are obliged not to adhere to the letter, but to put such a construction on matters, as they think most agreeable to the spirit and reason of the law. Now, so far as they are reduced to this necessity, they assume what is in fact the prerogative of the legislature, for those, that made the laws ought to give them a meaning, when they are doubtful.[603]

To our ears, this sounds like a critique. In fact, the author is describing a judicial practice in order to justify appeals of cases to the legislature. He was not critiquing the practice, much less calling for its abolition. Judges were

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601 *Id.*

602 VATTEL, *supra* note 17, at 394 (emphasis omitted).

603 THE PEOPLE THE BEST GOVERNORS: OR A PLAN OF GOVERNMENT FOUNDED ON THE JUST PRINCIPLES OF NATURAL FREEDOM 12-13 (n.p., n. pub. 1776).

"obliged" to consult the spirit "in many cases," and when they used it to depart from the text, their actions approached the act of legislation.

The description of the customary practice of using spirit to manage situations not foreseen by the legislator calls to mind Judge Richard Posner's idea of "Imaginative Reconstruction."[604] Posner was defending a practice that seems to have existed in the eighteenth century. Judge Frank Easterbrook criticized it on grounds that also were quite familiar in the eighteenth century.[605]

What are we to make of this aspect of spirit? From one angle, it is the judicial usurpation of legislative functions. In this light, it might seem wrongful, even unconstitutional. But from another angle, the critique is misplaced. First, if spirit was a common feature of legal interpretation, then the usurpation critique applies to all the interpreters who use spirit, including foreign nations, the Executive, and the American people. Second, one can conceive of legislators as lawmaking against the backdrop of the rule that spirit must be consulted, and the more particular rule that sometimes interpreters ought to consider what the legislator would have done had he known of the unforeseen circumstances. If one understands legislation as occurring in the shadow of this practice, then one can suppose that the legislator has implicitly delegated this authority to interpreters. If there is a delegation, then there is no *usurpation* by the courts, the Executive, or anyone else.

G. *The Perils of Spirit*

As alluded to earlier, people understood that spirit was not a panacea and, in fact, could be problematic. Blackstone knew of its hazards. He was a judge, after all, and could see how spirit might be abused.

> [T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; [the latter] would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many

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604 Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983). Posner associated the practice with Judge Learned Hand. But he also knew that Blackstone had defended the practice. *See id.* at 817 & n.60 (citing Blackstone).

605 *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 551 (1983) ("Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them.").

> different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[606]

Too great a reliance on spirit obliterates the idea of standing law, one that predates a live dispute. If one had to choose but one method—either literalism or spirit-run-riot—literalism would win this battle of extremes. While always following the letter could lead to harsh results, no one would choose to have the judge invariably eschew the letter for the spirit in deciding the content of the law, for the courts would generate countless rules and infinite confusion. But, of course, one does not have only these two choices. Blackstone endorsed the use of spirit in conjunction with other factors, most prominently the letter. That multifactorial approach was preferable to either extreme, or so Blackstone and others thought.

Americans saw the perils as well. Judge Zephaniah Swift, who had endorsed spirit, also warned that this mode "gives too great latitude to judges" and should "be admitted with great caution, and practiced upon with great prudence." Too much spirit, he warned, would destroy the "essence of law."[607] Despite Swift's point, most Americans used spirit without discussing its hazards. It was an accepted feature of interpretation and people used it to advance their argument with little handwringing.

H. *Barring Spirit*

How could lawmakers curb invocations of spirit? I did not unearth a discussion from the era, a how-to manual describing how to prohibit the use of spirit. Nor did I find a legal instrument that expressly barred the use of spirit. But I suppose that if a legal instrument said it was to be "strictly construed," or some such, that might suggest a tight or unyielding embrace of the letter at the expense of the perceived spirit.

For instance, the Articles of Confederation declared that "[e]ach state retains . . . every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States."[608] Perhaps that barred the use of spirit when it came to deciding which powers the states retained. An Act from 1790 provided that commercial sailors were entitled to some portion of their wages whenever the ship docked, unless the contract "expressly stipulated" otherwise.[609] Per this statute, spirit could not be used to infer that a seaman's contract implicitly permitted withholding pay until

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606 1 BLACKSTONE, *supra* note 16, at *62.

607 1 SWIFT, supra note 296, at 49. Farah Peterson argues that Swift's caution faded over time. *See* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 757 (2018).

608 ARTICLES OF CONFEDERATION of 1781, art. II.

609 Act of July 20, 1790, ch. 29, § 6, 1 Stat. 131, 133.

the end of a multi-port voyage. A 1791 Act provided that the Census Act applied to Vermont, save for where the 1791 Act "expressly provided" otherwise.[610] This 1791 Act ensured that spirit would not be utilized to discover additional exceptions to the Census Act.

The Constitution contains a rule designed to bar the use of a particular spirit. The Constitution of 1789 never declared that the listing of certain rights meant that there were no others. Nonetheless, many deemed it useful to append a rule of construction designed to reject that construction. The Ninth Amendment bars the inference of a certain purpose: the enumeration of many rights in the Constitution should not be read as denying the existence of other rights.[611] Or, put another way, the assertion that the Constitution only recognizes the catalog of express rights found within it is inconsistent with the Constitution's true spirit.

In sum, I believe that a legal instrument could declare that spirit was out of bounds or, more narrowly, that certain possible inferred purposes or reasons were forbidden or mistaken. In both situations, lawmakers would have used the letter to constrain the potential for spirit running riot and to limit interpreters who might otherwise be tempted to favor their policies at the expense of policies reflected in the letter of the law.

VII. OUR CONCERNS AND PRACTICES

Readers may wonder what effect this excavation has on modern disputes about text, purpose, intent, and interpretation more generally. Obviously neither Founding-era practices, much less my perspective on them, have any necessary implications for what we do today in interpreting legal texts, ancient and modern. Nonetheless, this Article's claims about spirit should prompt a reassessment, and recalibration, of how originalists go about interpreting old laws, including the Constitution. Originalists should care about how people, at the time of enactment, found meaning in the law.

A. *The Letter and Spirit of Article III*

Recall that Professor Eskridge concluded that Article III obligated federal judges to consider factors like purpose or the equity of the statute. Specifically, he argued that Article III's grant of judicial power constitutionalized extant judicial practices, including the use of non-text-based factors.[612] In this way, he defended modern non-textualist techniques as applied to statutes and, to an extent, the Constitution itself. Ironically,

610 Act of Mar. 2, 1791, ch. 13, § 5, 1 Stat. 197, 197.

611 U.S. CONST. amend. IX.

612 *See* Eskridge, *supra* note 14, at 1096–1100.

Eskridge made something of a textualist claim about judicial power in a bid to defeat some modern textualist precepts about how to interpret federal statutes.

I agree with much of Eskridge's description of the interpretive practices of the Founding Era. In many ways, I go further. These methods were a far more general phenomenon, one that was trans-document and trans-institution. All manner of documents were read in light of their spirit—constitutions, treaties, statutes, executive rules, judicial precedents, judicial orders, and contracts. Further, this methodology was a general feature of interpretation, deployed by legislatures, executives, nations, and the public.

Having said that, let me discuss some areas of disagreement. First, I do not think the case for spirit is so *textual*. Most texts do not come with their own rules of interpretation, their own decoder ring. And even if they did, we would still have to make sense of those interpretive rules by reference to things external to their letter. Like many originalists, I believe the interpretive rules for any document come from the interpretive context that gave it birth. For instance, the Constitution contains little about its interpretation, save for Article IV, Section 3,[613] and the Ninth,[614] Tenth,[615] Eleventh,[616] and Seventeenth Amendments.[617] Nonetheless, for many originalists, the rules of interpretation applicable to the Constitution arise from their reading of eighteenth-century materials that discuss legal interpretation.[618]

Second, there is a narrow sense in which the Constitution implicitly constitutionalizes rules of interpretation. For instance, the Constitution arguably requires the use of spirit to make sense of itself, just as it implicitly constitutionalizes eighteenth-century meanings to make sense of the Constitution's words and phrases.[619] Lawmakers do not spend months

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613 U.S. CONST. art. IV, § 3, cl. 2 ("[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

614 *Id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

615 *Id.* amend. X ("[P]owers not delegated to the United States . . . are reserved to the States respectively, or to the people.").

616 *Id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any . . . .").

617 *Id.* amend. XVII, cl. 3 ("This amendment shall not be so construed as to affect the election or term of any Senator . . . .").

618 *See e.g.*, John O. McGinnis, *The Contextual Textualism of Samuel Alito*, 46 HARV. J.L. & PUB. POL'Y 671, 674 (2023) (suggesting that constitutional originalism and statutory originalism both require an understanding of the legal context at the time of enactment of the constitution or text respectively).

619 *See e.g.*, Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 447 (1830) ("By *common law* [as used in the Seventh Amendment], [the founders] meant . . . suits in

crafting text, and then over a year discussing whether to make it law, without implicitly seeking to constrain how "[they] and [their] posterity"[620] will make sense of the law meant to convey their will. The act of lawmaking is dull and vain pageantry if subsequent interpreters can ascribe to the law meanings, and interpretive practices, that better suit their purposes. Lawmaking is not typically an enterprise meant to delegate to the future the power to create law via the introduction of novel interpretive techniques and definitions. Hence, I believe that the original Constitution requires the use of letter, spirit, etc., to make sense of it.

Nonetheless, I do not believe that the Constitution demands that we employ eighteenth-century word meanings and techniques to make sense of twenty-first century documents. When it comes to Article III, I would say that when judges hear a case, the Constitution requires them to "take Care that the Laws be faithfully executed."[621] In faithfully executing various forms of federal law, each of which was made by others, courts should attempt to divine the will of the relevant lawmakers. The precise signals to be used may vary with the times. They may change because I do not think the Constitution establishes rules of interpretation that courts, and others, must follow, now and forever. Article III does not mandate the use of spirit for the interpretation of modern statutes. Whether to use spirit, and adjacent techniques, to interpret modern legal instruments is a function of modern legislative will and interpretive practices, not anything grounded in the Constitution. Article III does not constitutionalize a language, a dictionary, or a set of techniques. An executive can make a treaty in multiple languages, each version equally definitive. Congress can enact laws using Spanish or, if continuing to use English, incorporate modern understandings of English words rather than eighteenth-century definitions. And relatedly, Congress can mandate that its texts be construed without regard to purpose or spirit, no matter what was done in the eighteenth century.

In essence, every lawmaker enacts a law against a backdrop of interpretive rules, and it is those rules that ought to be used to understand their enactments. Because those rules can change from era to era, there may be multiple appropriate sets of interpretive rules, each one suitable for a particular period. Needless to say, this may make intergenerational interpretation a tricky and intensive process.

Third, if we suppose that Article III required a set of techniques, even for modern statutes, some oddities emerge. Consider the state courts. Were

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which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.").

620 U.S. CONST. pmbl.

621 *See id.* art. II, § 3.

eighteenth-century state courts free to disregard spirit or the equity of the statute if they lacked express grants of judicial power? One must also wonder whether federal and state executives may ignore spirit or the equity of the statute because they lack judicial power. As compared to the courts, the executive branch interprets federal law far more often. After all, most executive branch readings of statutes never end up in court, meaning that most such interpretations stand as the law on the ground.[622] In short, if the judicial power of Article III does the work of incorporating spirit and related concepts, as Professor Eskridge argues, we must wonder if anything compels other institutions to use the non-textual factors that he endorses.

As noted, there is an irony in Professor Eskridge's heavy reliance on text to insist upon the use of non-textual factors. Provost Manning's claims also are marked by a certain irony, for he deployed a dose of spirit to shield modern statutory textualism from Professor Eskridge's criticisms. Recall that Manning's claim is that late eighteenth-century interpretational practices were more textual and barred the use of reason or purpose to overcome the text. Yet at the same time, Manning does not completely bar the use of the equity of the statute, for he admits that it may be deployed to make sense of ambiguous text.[623] Interpreters are allowed to infer a purpose and use that to resolve textual ambiguity.

At one level, Manning's claim is textualist. By the time of the Constitution, judicial power had become more distinct from legislative power and executive power, and hence certain features of judicial practices, in Britain and early America, were forbidden by Article III.[624] At another level, however, Manning uses history and structure to maintain that the Constitution forbade the consideration of the equity of the statute and related concepts.[625] One way of understanding Manning's claim is that the spirit of the Constitution—the perceived need for a greater separation of judicial and legislative power and a sense that bicameralism and presentment now demanded a greater textualist methodology—signals that Article III barred too great a reliance on intent.

Manning's point about bicameralism and presentment[626] seems powerful. But if bicameralism and presentment did not bar the use of spirit to overcome

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622 *See supra* Section IV.C.

623 *See supra* notes 60–64 and accompanying text.

624 *See* Manning, *supra* note 14, at 56 ("Because the structure of the U.S. Constitution departs in important respects from that of the English government, English judicial practice is sometimes, but not always, a relevant model for American judicial power.").

625 *See id.* at 78-102 (describing historical attitudes toward the equity of Article III).

626 *See id.* at 70-77 (analyzing how the bicameralism and presentment requirements of Article I, Section 7, contradict the use of equity considerations).

the letter in Britain,[627] I do not see why they bar the use of spirit to trump the letter under the Constitution. To my mind, bicameralism and presentment have implications for whether there are *other* means of making federal statutes but they do not have much to say about the interpretive techniques that others will use to make sense of the laws that emerge from bicameralism and presentment.

His argument about a more formal and unyielding separation of powers[628] is less grounded in the text. The idea that the Constitution generally separates the powers of the federal government is a sound structural inference, or so I suppose. But there are exceptions. Why is the power to appoint exclusive while the power to interpret the Constitution shared?[629] Why is the power to regulate foreign commerce exercisable by treaty or federal statute,[630] but the power to make appropriations thought to be outside the treaty power?[631] Claims about separation and overlap rest on contested intuitions about spirit, it seems to me. The same is true of our federalism. Why is the power to tax concurrent with the states, but the power to regulate foreign commerce exclusively with Congress?[632] Again, many assertions in the federalism arena rest on claims about the purpose (the spirit) of the various provisions.

In my opinion, Provost Manning skillfully deployed some spirit-based arguments in asserting that Article III bars the use of spirit to overcome the text.[633] If I am accurate in this characterization, I believe that he is right to use spirit to make sense of the Constitution but mistaken in concluding that Article III mandates modern textualism, for all time. Further, I agree with his claim that constitutional structure matters.[634] But many arguments from

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627 Britain also had bicameralism and presentment, except that the Crown had an absolute veto over all legislation. *See* PRAKASH, *supra* note 11, at 418 & n.141 (observing that the Crown was a third chamber because all bills were presented to it for its approval).

628 *See* Manning, *supra* note 14, at 58-70.

629 In *Buckley v. Valeo*, the Court held that Congress could not appoint officers of the United States. 424 U.S. 1, 132-33 (1976).

630 *See e.g.*, text accompanying note 315; U.S. CONST. art. I, § 8, cl. 3.

631 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §111, cmt. i, Reporters' Note 6 (AM. L. INST. 1986) (asserting this view).

632 *Compare* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."), *with id.* §8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ."); *see also* Henderson v. Mayor of New York, 92 U.S. 259, 270, 272-74 (1875) (noting a New York statute purporting to regulate foreign commerce is void under the Commerce Clause).

633 *See* Manning, *supra* note 14, at 78-105 (cataloging the debates between the Federalists and Anti-Federalists to discern the spirit of Article III).

634 *See id.* at 58-78 (describing various ways in which the structure of the Constitution divides judicial and lawmaking powers).

structure are not tightly tethered to the letter, but are instead grounded in spirit—reason, purpose, intent.[635]

Finally, to the extent that Manning relies upon Article III to minimize the use of spirit and related concepts, the claim is subject to the same criticism voiced against Professor Eskridge. If Article III barred federal courts from using spirit to overcome the letter, may the executives and legislatures, federal and state, continue to use spirit to trump the letter? The same question could be asked about state courts. Given that these other entities will sometimes have the final word when it comes to interpreting the Constitution, laws, and treaties, using Article III as the vehicle to constrain the use of spirit permits the free reign of spirit via other institutions.

B. *Living Spirit and Mutating Laws*

Does consideration of spirit permit or authorize changes in meaning over time? In considering this question, we enter speculative territory, at least where the history is concerned. I did not find discussion of this possibility. Nonetheless, I very much doubt that the interpretive tools at the Founding authorized a change in meaning, where the actual meaning of a word, phrase, clause, or section, drifts over time.

There is a sense in which there will be legal change without a change in meaning. As is well known, text can have a fixed meaning whose application to the world changes over time. A federal constitution that refers to "[s]tates" and "[federal] Territory" will have a different application as the number of states change and the size of territories shrinks or expands.[636] Similarly, a law that quarantines people with "communicable diseases" may have a different application over time as scientific knowledge accumulates.[637] Some ailments will seem communicable at time one but not at time two. And the list of perceived communicable diseases might expand over time.[638]

Second, Blackstone's multifactorial approach to interpretation may well cause the perceived meaning and application of a legal text to drift over time.[639] What words and phrases mean varies over time, which will inevitably influence how later people read the text. Perceptions about a law's original subject matter and context will change because time erodes earlier understandings and conceptions about both. Opinions about purposes or

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635 *E.g.*, *id.* at 78 ("[T]he broad judicial lawmaking power implicit in the equity of the statute would potentially undermine the federalism *objectives* of bicameralism and presentment.") (emphasis added).

636 *See* U.S. CONST. art. I, § 2, cl. 1; *id.* art IV, § 3, cl. 2.

637 42 U.S.C. § 264(a).

638 The Executive has changed the list of communicable diseases from time to time. *See e.g.*, Exec. Order No. 13,295, 3 C.F.R. § 220 (2003), *reprinted as amended in* 42 U.S.C. § 264.

639 *See* 1 BLACKSTONE, *supra* note 16, at *430-31.

intents will change as the set of plausible and acceptable purposes and intents changes over time. And, of course, perceptions about outcomes and effects may transform over time. Something that seems terrible at time one, may seem rather desirable at time two. Changes in morality will inevitably affect what the reader perceives as a plausible reading of the text at times two, three, and beyond. All in all, there is something inherently dynamic in interpreting old texts. The older the text, the more dynamism that is introduced, either inadvertently or, sometimes, mindfully.

C. *The End of Originalism?*

Some have suggested that this excavation of spirit buries the originalist enterprise. That was not my goal. But purposes and outcomes do not invariably harmonize. The doctor who tries to save a bedridden man may find that, after ministrations, she has killed her patient.

If by originalism one means the view that one should ask what a reasonable, informed person would take the Constitution to mean at the time of its creation,[640] that conception survives. If modern originalists accept the conclusions of this article, then they should ask what the reasonable person at the Founding would conclude about the meaning of the Constitution in light of its text, context, subject matter, consequences, and spirit.[641]

Having said that, a consideration of spirit (and at least some of the other factors) perhaps makes originalism less attractive, insofar as it seems less capable of generating easy answers to constitutional questions. Can the President pardon himself? Discerning the answer involves more than reading the text of the Pardon Clause and noting that it contains only one exception,

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640 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94-95 (2004) ("'[O]riginal [public] meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J. dissenting) (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-93 (2003)) ("[P]roper statutory interpretation asks 'how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.'").

641 I believe this claim should resonate with original methods originalists and public meaning originalists. For a discussion of the former view, see McGinness & Rappaport, *supra* note 14, at 788. They believe, as do I, that original methods are necessary to determine the original meaning. Public meaning originalists should care about methods too because I cannot fathom why their hypothetical original reader must have access to the ancient meanings of ancient texts but be made blind to the ancient techniques of legal interpretation. The hypothetical member of the public must be cognizant of original meaning, original grammar, and other means of interpretation, or so it seems to me. *See generally* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019).

relating to impeachment.[642] Can the Speaker of the House be in the line of presidential succession?[643] Maybe, if one considers the spirit of the Constitution. Do the states have power to regulate interstate or foreign commerce? Again, a reading of the text is not sufficient, for one purpose of the Commerce Clause might have been to disable the states in these areas.[644] Once we foreground factors like spirit to make sense of the Constitution, originalism becomes far more complicated and loses some of its luster.

Originalists need not fret. Originalism is akin to a horror-film villain, like Chucky or Freddy Krueger. You can give it a thousand cuts. But originalism will not die. It is too familiar, too intuitive. Originalism tracks people's instincts about how to understand texts.[645] We ought to make sense of texts with an eye to what the authors were trying to accomplish and not as if they were generated mindlessly without any intended meaning.[646] Should pro-choicer lawmakers insert a "right to abortion" into a constitution, pro-life interpreters should not, decades later, read that amendment as if it protected a right to terminate rocket launches,[647] or as a reference to botany.[648]

D. *The End of Textualism?*

Some may suppose that this research casts doubt on textualism. I disagree. *I believe that legal texts should be understood in context.*[649] That is perhaps an unchanging rule of interpretation. The relevant context includes the interpretive conventions of the era of enactment. So, if an era used spirit,

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642 *See* U.S. CONST. art. II, § 2, cl. 1. ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

643 *Compare id.* art. II, § 1, cl. 6 (making the Vice President first in the line of succession and allowing Congress to provide by law for cases in which neither the President nor Vice President can serve), *with id.* art. I, § 6, cl. 2 ("No . . . Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . .").

644 *See supra* notes 632 and accompanying text.

645 *See* RICHARD H. FALLON JR., IMPLEMENTING THE CONSTITUTION 13 (2001) (saying that originalism has "intuitive appeal" and supposing that most law students and citizens would "reflexively" wish for the Supreme Court to adopt originalism).

646 *See generally* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529 (1998).

647 *See Abort*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/abort [https://perma.cc/MK9E-VUA9] (last visited Jan. 23, 2025) (defining "abort" as "the premature termination of a flight (as of an aircraft or spacecraft), a mission, or an action or procedure relating to a flight").

648 *See* ABORTION, A DICTIONARY OF GENETICS (Robert C. King, William D. Stansfield & Pamela K. Mulligan eds., 7th ed. 2007), https://www.oxfordreference.com/display/10.1093/acref/9780195307610.001.0001/acref-9780195307610-e-0013?rskey=sc3LK2&result=16 [https://perma.cc/2YU5-AJPG] (supplying one definition as a "termination of development of an organ, such as a seed or fruit").

649 *See supra* notes 598, 618, 627 and accompanying text.

purpose, intent, then we should use these signals to make sense of laws from that era.

As noted earlier, I think we must use spirit to make sense of the original Constitution. But our twenty-first century Congress can use this century's interpretive conventions, whatever they are, to draft and codify legal enactments. When seeking to understand those enactments, we ought to understand them using this century's interpretive conventions. I will leave to others the question of whether our conventions endorse the use of spirit.

Put another way, if an era did not use spirit, then we ought not use it to make sense of a legal text from that era. For instance, if we lived in an era where legislatures, executives, and judges subscribed to the Manning/Scalia/Easterbrook approach, then it would be a misstep for some later interpreter to utilize spirit to make sense of the laws generated in that hypertextual era.

Vattel made a similar point about the meaning of words. "Languages vary incessantly, and the signification and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms, at the time when it was written."[650] What is true for words is no less true for the constellation of interpretive signals. If we are to make sense of old texts, enacted in contexts where spirit was a relevant factor, then we should use spirit to make sense of them. And by the same token, modern definitions and techniques should be applied to modern statutes.

E. *Liberal Proponents of Spirit v. Conservative Textualists*

For the last half century, spirit versus text has played out against a familiar backdrop, where liberals generally favored spirit and conservatives generally favored text. I believe the Warren and Burger Courts, more than anything else, explain why some modern textualists scorned anything that fostered judicial discretion, including factors like spirit and purpose. A sense that liberals were smuggling in their political preferences under the guise of pursuing spirit, intent, and purpose led to a conservative counterreaction.[651] Justice Scalia and Judge Easterbrook led the judicial charge and provided some intellectual underpinning to textualism. Provost John Manning is its most methodical and fair-minded proponent. On the other side, Judge Posner was a trenchant and early detractor of textualism and Professor Eskridge is its most effective and persuasive critic.

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650 VATTEL, *supra* note 17, at 375.

651 *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.").

There is nothing progressive about devotion to spirit just as there is nothing conservative about adherence to text. Conservatives and libertarians may use the perceived spirit of the Constitution to advance their ends—federalism, separation of powers, broad protections of property rights, the non-delegation doctrine. Liberals can use textualism to advance their goals—the expansion of privacy rights, constraints on punishment, etc. The Supreme Court's liberal cohort joined the profoundly textualist opinion of Justice Neil Gorsuch in *Bostock v. Clayton County*.[652] And the progressive wing has used textualism to castigate the Court's repeated invocation of the major questions doctrine as a means of minimizing statutory grants of power to federal agencies.[653]

This has always been true. As noted earlier, nationalists read the Constitution and discovered expansive powers necessary to make a more perfect union and ensure domestic tranquility. Those favoring states' rights read the Constitution and beheld a spirit that protected the states from federal intrusion.[654] Later, abolitionists and slavocrats both deployed spirit to reach radically different conclusions.[655] I would venture to say that there is nothing about modern textualism that makes it permanently appealing to conservatives and libertarians and there is nothing about spirit that ensures that progressives will be eternally attached to it.

CONCLUSION

This project began as a voyage of discovery. Marshall's reference to spirit in *McCulloch* intrigued me to no end, for I did not understand what he meant by it. During my research, I discovered the recurrent use of spirit—intent, purpose, reason—to make sense of the law. The text mattered. It mattered the most, in fact. But sometimes an interpreter would read the text and consider the context, subject matter, and the consequences, and discern a spirit that would move them to endorse a meaning that moved beyond the text.

Sometimes the interpreter would read the law expansively, meaning that the reader would take the meaning that emerged from the text and expand

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652 140 S. Ct. 1731 (2020).

653 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting) ("For years, this Court has insisted that the way to keep judges' policy views and preferences out of judicial decisionmaking is to hew to a statute's text. The HEROES Act's text settles the legality of the Secretary's loan forgiveness plan."); West Virginia v. EPA, 142 S. Ct. 2587, 2633-34 (2022) (Kagan, J., dissenting) ("The majority today goes beyond [the] sensible principles [of textualism]. It announces the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules.").

654 *See supra* Part III.

655 *See supra* notes 307–308 and accompanying text.

upon it. Other times the interpreter would read the law restrictively, in the sense that the reader would conclude that the meaning arising from the letter ought to be constrained in some way, as if there were exceptions to the text. And in a rare case, a law might mean more than, and less than, the letter suggested.

John Marshall was the interpreter who pulled that rabbit out of the hat.[656] And he would go on to do similar things as a judge, concluding that the law sometimes meant more than its text suggested and sometimes meant less. My sense is that the practice described by Blackstone and Vattel, and practiced by Washington, Hamilton, Madison, Jefferson, Marshall, and many others, continues at least to some extent to this day. It perhaps accounts for the expansion of the Takings Clause to regulatory takings.[657] And it possibly explains why a statute granting a tax credit for insurance purchased on an "[e]xchange established by the State" was read to authorize the same subsidy for insurance purchased on an exchange created by the federal government.[658]

Justice Scalia rejected spirit in his work with Professor Bryan Garner. But his earlier opinions were not so opposed. He occasionally discussed the spirit of the law and juxtaposed it to its letter.[659] He had perhaps learned of the spirit of the law at Harvard Law School, and one might speculate that it took a concerted effort to unlearn it. His belated exorcism of spirit was unjustified, for it was inconsistent with Blackstone, with Marshall, and with the steady practices of the Founders.

Should we continue to use spirit today? Modern lawmakers are taller, wealthier, and more knowledgeable than their Founding-era counterparts. But they continue to make laws that do not perfectly align with their will, for expressing one thing but meaning something else remains common. Every parent who calls out the name of one child but means another knows this too well. And legislators continue to lack foresight, for their laws still fail to anticipate all the future states of the world. If the reasons for spirit still exist, we should not be surprised that interpreters—the courts, executives, legislators, and the people—continue to use it. The spirit that giveth life, lives on.

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656 See text accompanying notes 454–457.

657 *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that a regulation of property that goes too far is a taking).

658 *See* King v. Burwell, 576 U.S. 473, 474 (2015).

659 *See, e.g.*, Brogan v. United States, 522 U.S. 398, 404-05 (1998) (asserting that neither the letter nor the spirit of the Fifth Amendment protects a right to lie); Comm'r v. Bollinger, 485 U.S. 340, 348 (1988) (noting that neither the spirit of a Kentucky Law nor its letter ran contrary to a practice).