

4-2023

Against Political Theory in Constitutional Interpretation

Christopher S. Havasy
Harvard Law School

Joshua C. Macey
University of Chicago Law School

Brian Richardson
Cornell Law School

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Recommended Citation

Christopher S. Havasy, Joshua C. Macey, and Brian Richardson, Against Political Theory in Constitutional Interpretation, 76 *Vanderbilt Law Review* 899 (2023)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol76/iss3/2>

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ESSAY

Against Political Theory in Constitutional Interpretation

*Christopher S. Havasy**

*Joshua C. Macey***

*Brian Richardson****

Judges and academics have long relied on the work of a small number of Enlightenment political theorists—particularly Locke, Montesquieu, and Blackstone—to discern meaning from vague and ambiguous constitutional provisions. This Essay cautions that Enlightenment political theory should rarely, if ever, be cited as an authoritative source of constitutional meaning. There are three principal problems with constitutional interpretation based on eighteenth-century political theory. First, Enlightenment thinkers developed distinct and incompatible theories about how to structure a republican form of government. That makes it difficult to decide which among the conflicting theories should possess constitutional significance. Second, the Framers did not write the Constitution in the image of the philosophy of Montesquieu, Locke, or Blackstone. Instead, they developed a new form of government to meet what they perceived to be the needs of a nascent republic. And third, the Constitution itself departs from the dominant strands of Enlightenment political theory in crucial respects. For example, while some Enlightenment theorists advocated for precisely divided federal powers, the Framers favored a system of procedural

* Climenko Fellow and Lecturer in Law, Harvard Law School; Ph.D. Candidate, Harvard Government.

** Assistant Professor, The University of Chicago Law School.

*** Assistant Professor, Cornell Law School.

The authors wish to thank Eric Posner, Curt Bradley, Akhil Amar, Farah Peterson, Jed Shugerman, Larry Solum, Emad Atiq, Brian Leiter, Jonathan Masur, Mike Dorf, Saul Levmore, Martha Nussbaum, Will Baude, Adam Chilton, Richard Fallon, Brad Wendel, participants at workshops at the University of Chicago and Cornell Law School for their insightful comments and discussion.

checks, not formal separation. Thus, while Enlightenment works can be normatively persuasive or act as a guide to historical meaning, they should be treated as presumptively irrelevant in constitutional interpretation. Unless the party who would invoke an Enlightenment political theorist can produce evidence of consensus or common ground about that theory from an episode of American constitutional debate, the theorist's prescriptions are no more probative than any other work of normative political theory.

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INTRODUCTION

Debates about the meaning of the Constitution are often debates about what a small number of Enlightenment political theorists thought about the ideal structure of government.¹ For example, adherents of the unitary theory of executive power frequently invoke William Blackstone's *Commentaries on the Laws of England* as probative evidence that the Constitution gives the President plenary authority to remove agency officials.² Those who reject the unitary executive thesis, in turn, respond by offering different interpretations of Blackstone.³ The same pattern characterizes debates about the legitimacy and scope of the nondelegation doctrine, where disagreement about a passage in John Locke's *Second Treatise* has become a centerpiece in the debate about the constitutionality of agency rulemaking.⁴ And at less lofty levels of abstraction, the executive

1. We use the phrase "Enlightenment political thinkers" broadly and reductively. What is really happening is that constitutional interpretation is based heavily on a somewhat odd reading of a small number of Enlightenment works—including Montesquieu's *Spirit of the Laws*, Blackstone's *Commentaries on the Laws of England*, and a few others—which, in turn, were based on a misunderstanding of English practice. These are certainly not the only theories of political representation to come out of the Enlightenment. For example, Jean-Jacques Rousseau, who had a different and perhaps more powerful impact in political and legal thought, was skeptical that elected officials could represent the general will of the people. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Oskar Piest et al. eds., Charles Frankel trans., Hafner Publ'g Co. 1951) (1762).

2. MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 33 (2020); Saikrishna B. Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 748–50 (2003); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 607 (1994); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234, 266–71 (2001).

3. For example, in response to adherents of the unitary theory of executive power, Jed Shugerman published a series of papers questioning many of the linguistic and historical predicates of the unitarist position. See, e.g., Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMAN. 125 (2022). Shugerman argues that the unitary theorists "repeatedly misread and misquot[e] [Blackstone's] sentences." *Id.* at 168. Shugerman's critique prompted Michael Ramsey to write a blog post reiterating his view that Blackstone supports the unitarist position. As Ramsey explained, "[I]n considering presidential removal power, it's useful—though not decisive—to start with Blackstone's description of the English system." Michael D. Ramsey, *Blackstone on the Unitary Executive*, TENTH AMEND. CTR. (Dec. 26, 2021), <https://tenthamendmentcenter.com/2021/12/26/blackstone-on-the-unitary-executive/> [<https://perma.cc/NK4X-XGQF>].

4. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT* 87 (Richard H. Cox ed., Crofts Classics 1982) (1690). The passage reads:

The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it, cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have

branch has taken to citing eighteenth-century law-of-nations theorists to contend that the Fourteenth Amendment's Apportionment Clause preserves the "President's discretion to exclude illegal aliens" from the census.⁵

The Supreme Court, too, routinely cites Enlightenment political theorists as authoritative guides to U.S. constitutional meaning. For example, Justice Gorsuch, in his dissent in *Gundy v. United States*,⁶ cited Blackstone and Locke when claiming that the "[F]ramers understood [the legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."⁷ Similarly, Justice Kagan, in her dissent in *Seila Law LLC v. Consumer Financial Protection Bureau*, pointed to Blackstone and Montesquieu when arguing that Congress has authority to limit the President's power to remove agency officials.⁸ Kagan observed that Blackstone, in particular, "influenced the Framers on this subject."⁹

The result is an interpretive back-and-forth not about the Constitution's text or history but a peculiar seminar discussion about the correct meaning of seventeenth- and eighteenth-century European philosophy. The constitutionality of agency rulemaking, of non-Article III courts, and of statutory removal protections all involve disagreement about how to read Enlightenment political theorists who are thought to have written on these subjects and influenced the Constitution's Framers.¹⁰ And even more remarkably, some of the frolics and detours of Enlightenment political theorists—the peculiar

said, We will submit to rules, and be governed by *laws* made by such men, and in such forms, no body else can say other men shall make *laws* for them; nor can the people be bound by any *laws* but such as are enacted by those, whom they have chosen, and authorized to make *laws* for them. The power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands;

see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 307–08 (2021) (arguing that Locke did not use the words "transfer" and "delegate" synonymously); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1490, 1519 (2021) ("Even if this distinction [between 'transfer' and 'delegate'] were valid for Locke—something that is not entirely clear—it is not a distinction that the Founding generation appears to have used."); *id.* at 1519 n.151 ("In section 135, Locke used the word 'transfer' to mean 'delegate.'").

5. Jurisdictional Statement at 27–28, *Trump v. New York*, 141 S. Ct. 530 (2020) (No. 20-366) (quoting chapters from Emmerich de Vattel's *The Law of Nations*).

6. 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

7. *Id.* at 2133 nn.18 & 21.

8. 140 S. Ct. 2183, 2226 (2020) (Kagan, J., dissenting).

9. *Id.*

10. See *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *44); *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting) (quoting BLACKSTONE, *supra*, at *151).

obsessions of their own time and place—that were quite foreign to the political milieu of the early republic have been reverse incorporated into the American constitutional tradition.¹¹ What results is a syllogism of prolepsis: the Framers cited some political theorists for one or another purpose in a fact-bound legal argument; those theorists published other work about many other topics; and so anything in the theorists’ body of work that anticipates today’s constitutional confrontations can be attributed to the ambient public meaning of U.S. constitutional law. To be sure, more careful commentators describe this archive of political theory as “useful—though not decisive,”¹² but those commentators fail to explain why we should find these thoughts of others to be probative of the Constitution’s meaning.

This all raises the question of why Enlightenment political theory should be an authoritative guide to constitutional meaning *at all*. We argue that in almost all cases, the “great ideas” of Enlightenment political theory—as against demonstrated *uses* of those theories in a constitutional dispute—hold no probative value to discerning Founding-era constitutional meaning. We offer both historical and textual reasons to be skeptical of the prevalent interpretive approach. We refer to the three problems with the use of political theory to discern constitutional meaning as the problem of consensus, the problem of ideal theory, and the problem of joinder.

First, Enlightenment political theorists themselves engaged in a vigorous debate about how to distribute government power, and the most self-aware of them saw their collective rumination to be a hall of mirrors. Disagreement among the theorists who are thought to have influenced the Framers—including disagreement over the definitions of legislative and executive power, the permissibility of legislative delegations, and the content of executive power—makes it impossible to identify an Enlightenment consensus about how to structure a democracy. The prevalent disagreement between Enlightenment political theorists at the creation of the republic allows modern scholars and judges to pick and choose among Enlightenment political theorists that appear to support a normative outcome preferred by modern lights.

Second, it is inaccurate to attribute the views of Enlightenment philosophers to the Framers.¹³ Apart from the genuine intellectual

11. See, e.g., Jurisdictional Statement, *supra* note 5, at 27–28.

12. Ramsey, *supra* note 3.

13. Curtis A. Bradley and Martin S. Flaherty have made this point in the context of the President’s foreign affairs power. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 552 (2004) (describing “the complexity

puzzle of proving the reception of a given theory, the Framers rejected—repeatedly and publicly—the type of political theory that plays such a prominent role in modern constitutional discourse. They did so as part of their own practical struggle with one another about whether the Constitution should be adopted. Of particular concern was that an obsession with high theory would fail to stave off tyranny. The practical experience of life under the state constitutions, reflecting a wide variety of experiments in the optimal design of a workable government, was far more salient.¹⁴ The Framers therefore rejected and revised their Enlightenment progenitors and instead invented a system they felt would more effectively check legislative and executive power while supporting effective government. This revisionism extended to core features of the Constitution, including interdepartmental relationships and the powers the Constitution assigns to Congress and the President.¹⁵

And third, the Constitution's settlement departs in important respects from Enlightenment political theory. Montesquieu, for example, is sometimes thought to have embraced a strict separation of powers in which each branch's powers are exclusive. The Constitution, by contrast, consciously rejects the model of formal separation in embracing a theory of mixed government. Similarly, Locke proposed a system of legislative supremacy, but the Constitution created three coequal branches. And while Vattel defined the legislative power as the power of "society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens," he also thought it possible for a branch to vest another with "full and absolute authority" so long as the people acquiesced.¹⁶ How can the Constitution be Vattelien about the census but anti-Vattelien about nondelegation?

Of course, like all philosophic works, Enlightenment political theory can possess the appeal of ordinary normative arguments. To the extent that Enlightenment political theory suggests an attractive form of governmental organization, it can be convincing as a work of political science or political philosophy. And like all historical works, Enlightenment political theory can provide evidence that a term had a particular meaning at a particular point in time. But to have confidence

within eighteenth-century political theory, the experience of state constitutionalism before 1787, and the Founders' self-conscious rejection of the British model of government").

14. GORDON S. WOOD, *POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION* 12–18 (2021).

15. This disagreement included matters like the definition of the terms "legislative" and "executive," and the scope and content of each department's powers. See *infra* Parts III & IV; Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 *TEX. L. REV.* 89, 113–29 (2022).

16. EMER DE VATTEL, *LAW OF NATIONS* § 34 (AMS Press 1982) (1758).

that such meaning ought to bear on the original meaning of the Constitution—not to mention questions of modern constitutional law—will require additional evidence of consensus or common ground—that is, of the theory’s *use* in the hands of constitutional partisans who won a relevant contest. In other words, without specific evidence that a principle of Enlightenment political theory was incorporated into the law, or that it reflects a common vernacular, it is presumptively irrelevant to modern constitutional argument.¹⁷

Thus, as a doctrinal matter, Enlightenment theory is an unusually weak guide to constitutional meaning. Because the Framers expressed such skepticism—sometimes bordering on contempt—of Enlightenment theories, and because the Constitution’s text departs in crucial respects from the high theory of Montesquieu, Locke, Blackstone, or Vattel, those who use Enlightenment political theory as a guide to constitutional meaning bear an unusually high burden in showing that the Constitution’s meaning should follow one’s preferred Enlightenment philosopher.

Yet the authority of inductive reasoning based on the “great books” has gained a special status in today’s constitutional arguments. To better capture the reality and contingencies of the constitutional settlement, and because of its capacity to mislead, Enlightenment

17. Our focus is on developing a burden of proof that should attend any use of historical materials to fix modern constitutional meaning, but we are agnostic about which of many rivalrous philosophical accounts of “meaning” best accords with constitutional argument. Put another way, we aim to be agnostic about the famous question of “the meaning of ‘meaning,’” see Hilary Putnam, *The Meaning of “Meaning,”* 7 LANGUAGE, MIND & KNOWLEDGE 131 (1975). Our evidentiary burden, which presumptively applies to all constitutional arguments advanced in modern litigation, is indifferent to whether “use” of a term determines its meaning; whether meaning is merely “in the head” of the speaker; and, more generally, what menu of contingent facts of history or practice should bear on the question of meaning. Indeed, our evidentiary rule permits the use of Enlightenment political texts as evidence of background understandings of concepts or terms, as well as evidence of what some commentators refer to as “contextual enrichment,” or the pragmatic understanding of how words or phrases were linguistically used by speakers at a certain time period. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 465 (2013). Other theories of meaning might require slightly different evidentiary burdens. If the meaning of a technical concept is not fixed by consensus among language users but by consensus among designated experts, then one might think evidence of consensus should be consensus among the relevant experts. For those who think meaning is not even social in nature, then perhaps the burden of proof should be understood in terms of “evidence of relevant social facts.” But even under this approach to meaning, there must be some further fact (evidence of consensus, evidence of consensus among experts, evidence that a particular theorist is relevant to this particular semiotic fact) that must be established before some Enlightenment political theory can be assumed to be relevant to original ordinary meaning. There is, in other words, always some further burden of proof. Regardless of which theory of meaning appeals to a modern user of the ideas from past, the modern user who wishes to use such ideas in modern constitutional litigation must bear our burden: one must produce evidence of consensus, agreement, or common ground, to overcome our presumption of irrelevance. We are grateful to Professors Solum, Emad Atiq, and Brad Wendel, for drawing this point out.

political theory should be treated as presumptively irrelevant in constitutional argument unless the party who would invoke it can produce convincing evidence of its use in U.S. constitutional history. In doctrinal parlance, this amounts to a clear statement rule: Unless one who uses the work of a political theorist can produce evidence of agreement, consensus, or common ground about that theory from an episode of American constitutional debate, the theorist's prescriptions are no more probative than any other work of normative political theory. In general, this will mean such theory is presumptively irrelevant until an enormous burden of intellectual history is met.

This Essay proceeds in four Parts. Part I describes the significance of Enlightenment political theory in the modern constitutional discourse. Part II provides a taxonomy of how Enlightenment political theory is used in modern constitutional interpretation. Part III shows that the Framers were skeptical of Enlightenment political theory. They questioned not only the general approach to the separation of powers for which Enlightenment political theorists advocated but also the definitions of executive and legislative powers upon which these theorists relied. Part IV shows that the Constitution's text reflects this skepticism in departing from the political theory of Locke, Montesquieu, and Blackstone. The Conclusion argues that Enlightenment political theory should therefore be treated no differently than any other text: it possesses no inherent authority apart from its capacity to persuade.

I. ENLIGHTENMENT POLITICAL THEORY IN CONSTITUTIONAL INTERPRETATION

In light of substantial changes in the ideological composition of the federal judiciary, and the relative coherence of one kind of judicial ideology shared by recent appointments, arguments about the Framers' political thought have newfound salience in modern constitutional interpretation.¹⁸ This new mode of constitutional interpretation often relies on the following syllogism:

Premise 1: A famous Enlightenment Theorist made a claim about how government is (or should be) structured;

Premise 2 (sometimes assumed): The Framers read Famous Enlightenment Theorist and used similar language to Famous Enlightenment Theorist;

18. Curt A. Bradley & Neil S. Seigel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 8 (2020).

Conclusion: Thus, the Constitution’s text and structure should be understood to adopt Famous Enlightenment Theorist’s general theory of government.

In our view, the syllogism is a distinctive development of recent constitutional argument that fails by its own lights.¹⁹

It has, of course, long been true that arguments about the “original meaning” or “Framers’ intent” are taken to express a plausible claim about constitutional interpretation. This is true both of originalists and those who do not think that the Constitution’s meaning was fixed at particular points in time, since it has long been true that there is a legitimate category of constitutional argument that trades on an “account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible.”²⁰

Nonetheless, the ascendance of originalism in the modern judiciary has coincided with a blending of these two modes of interpretation into a new mode of constitutional argument. It is now taken to be a plausible argument to contend both that a coherent vision of the Framers’ political theory can be reconstructed, and that such a theory can be wielded by modern interpreters to answer constitutional questions that are otherwise undetermined by the available historical evidence.²¹ The Framers’ Locke, or the Framers’ Vattel, or the Framers’ Blackstone are taken to settle the indeterminacies unearthed by modern constitutional politics—even if the Framers never brought those sources to bear on the question presented.

This Part shows that debates about immigration, the scope the executive’s removal power, and the constitutionality of agency rulemaking all rely on this mode of interpretation.

19. Although the syllogism is embraced by constitutional partisans of various ideological stripes, its ascendance corresponds to the increasing currency of originalism in the federal judiciary. We do not take our argument to express a comprehensive view on the plausibility of originalism as against other modes of constitutional interpretation. Nor do we take our argument to foreclose all reliance on history—that is, to argue that the required historical facts “are unknown to us, that lawyers and judges are bad at doing history.” See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778 (2022). As originalists have argued, those who espouse an interpretive commitment to originalist methods can remain unbothered by errors in their history, so long as their originalism aspires to a fault-tolerant “standard” rather than a “rule.” See *id.* But we do argue that, absent very strong and specific evidence of use, Enlightenment political theory is a presumptively implausible source of constitutional meaning.

20. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987).

21. See Solum, *supra* note 17, at 458–69 (describing originalism and its variations).

A. Immigration and the Law of Nations

To take a concrete example, consider recent litigation over President Trump's effort to exclude aliens without lawful status from the apportionment base in the decennial census. The Apportionment Clause of the Constitution straightforwardly provides that members of the House of Representatives are to be apportioned by "counting the whole number of persons in each State," and Congress's operative statute provides for apportionment based on "the whole number of persons in each State."²²

Yet the Solicitor General defended the Trump Administration's exclusion of aliens without status from the census principally by arguing that Vattel's *Law of Nations* includes a distinction between "citizens," "natives," and "inhabitants" that permits the executive to exclude noninhabitants from the count. To support this claim, the government contended that "the Founders were familiar with Vattel's definition of 'inhabitants' as 'foreigners, who are permitted to settle and stay in the country,'"²³ and argued that the apportionment scheme's reference to "persons" in each state could be read to exclude those whom the executive could remove from—that is, not permit to stay in—the country.²⁴

Missing from the government's brief, however, is evidence that Vattel's distinction was *used* by any authoritative decisionmaker in this way, or even that Vattel understood the distinction to carry such meaning. Vattel's larger political theory, omitted by the Solicitor General, explains that inhabitants are "[b]ound to the society by their residence, [and] they are subject to the laws of the state, while they reside in it."²⁵ Inhabitants also "enjoy only the advantages which the law or custom gives them," and some may well become "perpetual inhabitants," who are "citizens of an inferior order."²⁶ None of these differences in status between citizens and inhabitants shed any light whatsoever on the Constitution or the statute's reference to "persons in each State." Nor should we expect such distinctions to matter: as other portions of Vattel's treatise explain, the differences between these types of status are matters of "regulation of the [state's own] fundamental

22. U.S. CONST. amend. XIV, § 2; Act of June 18, 1929, ch. 28, 46 Stat. 21 (codified at 2 U.S.C. § 2a).

23. Defendants' Memorandum in Law in Support of Their Motion for Stay of Judgment Pending Appeal at 8, *New York v. Trump*, No. 20 Civ. 5770 (S.D.N.Y. Sept. 16, 2020).

24. *See id.*

25. VATTEL, *supra* note 16, § 213; *see also* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547 (2012) (arguing Vattel's theory does not completely represent how the Framers "understood the law of nations").

26. VATTEL, *supra* note 16, § 213.

law, which limits the power of the [government].”²⁷ In the census case, the relevant fundamental laws required the counting of “all persons.”²⁸

Moreover, Vattel’s own theory of international law provided that a sovereign cannot “without particular and important reasons, refuse permission, either to pass through or reside in the country.”²⁹ Indeed, the sovereign cannot “without some particular and cogent reason, refuse the liberty of residence to a foreigner who comes into the country with the hope of recovering his health, or for the sake of acquiring instruction in the schools and academies.”³⁰ Elsewhere, Vattel explained the “right of habitation.”³¹ Because “every man has a right to dwell somewhere upon earth,” when a person is rejected by every country that person is “justifiable in making a settlement in the first country where they find land enough for themselves,” which is a “right of habitation.”³² Surely the government did not mean to incorporate Vattel’s expansive theory of the sovereign duty to permit immigration into the original meaning of the Constitution? Such blunders are inevitable when one treats Enlightenment thinkers as repositories of canonical constitutional meaning.

The government’s awkward use of Vattel is emblematic of the more pervasive practice of canvassing Enlightenment political theory to pick out one’s friends. Such arguments depend on a syllogism that imagines that Founding-era citations to one political theorist must incorporate the whole of that theorist’s work into our constitutional culture. They also imagine that these ad hoc incorporations, multiplied by the number of modern constitutional contests, will express a coherent set of canonical meanings about the Constitution’s structure. Yet the syllogism evades the reality of contestation and pragmatism that characterized the vigorous debate over the design of the new republic at the Founding.

B. Executive Power

Claims about the scope of the executive power also often turn on claims about the meaning of Enlightenment political theory.³³ Consider

27. *Id.* § 214.

28. *See* U.S. CONST. amend. XIV, § 2; 2 U.S.C. § 2a.

29. *Id.* § 135.

30. *Id.*

31. *Id.* § 125.

32. *Id.*

33. Of course, both adherents and opponents of the unitary executive thesis make other arguments and probe other historical episodes. *See, e.g.,* STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008); Steven G. Calabresi, *Some Normative Arguments for the*

arguments about Article II's Vesting Clause, which provides that "[t]he executive Power shall be vested in a President of the United States of America."³⁴ An influential theory of executive power asserts that the Executive Vesting Clause conveys to the President a long list of residual powers not specifically enumerated in Article II. For example, Saikrishna Prakash and Michael Ramsey, in an influential defense of the executive's inherent power over foreign affairs, assert that "anyone reading Blackstone, Locke, Montesquieu, and other eighteenth-century writers would have understood . . . that the phrase 'executive power' would include foreign affairs powers unless otherwise qualified by particular language."³⁵ And so, they continue, the Constitution's use of the phrase "executive power" amounts to the use of a "common phrase infused with [Blackstone, Locke, and Montesquieu's] meaning."³⁶ They contend that the Constitution thus "establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part"³⁷ of the Enlightenment conceit: "Locke presaged this understanding, and Montesquieu, Blackstone, and others confirmed it."³⁸

Those who defend a more limited theory of executive power often respond by (a) pointing out that different Enlightenment political theorists had different and contested ideas about how to structure a democracy,³⁹ (b) suggesting different interpretations of the Enlightenment theories that are thought to support a strong executive, and (c) arguing that the theorists themselves included more modest definitions of the executive's power over foreign affairs. For example, Curtis Bradley and Martin Flaherty argue that the Executive Vesting Thesis "fails to take account of complexity within eighteenth-century political theory, the experience of state constitutionalism before 1787, and the Founders' self-conscious rejection of the British model of

Unitary Executive, 48 ARK. L. REV. 23 (1994); Calabresi & Prakash, *supra* note 2; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992); *see also* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 31–33 (2017) (describing an "academic attack" on the administrative state); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352 (2020) (situating *Seila Law* within the rise of the unitary executive theory in the 1970s).

34. U.S. CONST. art. II, § 1, cl. 1.

35. Prakash & Ramsey, *supra* note 2, at 272.

36. *Id.* at 234.

37. *Id.*

38. *Id.* at 279.

39. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1190 & n.69 (2019) (describing a professional historians' consensus that the Founding materials reveal "people groping as best they could toward a workable conception of government from which only broad purposes can safely be inferred" (quoting Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996))).

government.”⁴⁰ Bradley and Flaherty make this argument as part of a broader project in which they seek to define the President’s foreign affairs authority. Others have engaged in exhaustive surveys of specific Enlightenment theorists to identify limits on the President’s foreign affairs powers.⁴¹

The Supreme Court has also treated Enlightenment political theories as authoritative sources of constitutional meaning in debates about executive power. Consider Justice Thomas’ partial concurrence in *Zivotofsky v. Kerry*, which argued that the executive’s authority to recognize foreign sovereigns was part of the Framers’ idea of an executive power.⁴² To support this position, Justice Thomas asserted that “Founding-era evidence reveals that the ‘executive Power’ included the foreign affairs powers of a sovereign State.”⁴³ Adopting Prakash and Ramsey’s history, he wrote that “John Locke’s 17th-century writings laid the groundwork for this understanding of executive power.”⁴⁴ Having identified this “groundwork,” he asserted simply that this “understanding of executive power prevailed in America.”⁴⁵

Justice Thomas also canvassed the views of a number of other Enlightenment political theorists, including Blackstone and Montesquieu. For Thomas, the fact that some Enlightenment political theorists understood the executive power to include power over foreign affairs is a compelling reason to think “that those who ratified the Constitution understood the ‘executive Power’ vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution.”⁴⁶

Justice Thomas’s argumentative approach is increasingly representative of the rest of the judiciary and the federal bar, which appear to be adapting to the changing tastes of the Supreme Court’s bench by accepting the invitation to compare interpretations of Enlightenment political theory. For example, in her *Seila* dissent,

40. Bradley & Flaherty, *supra* note 13, at 552; *see also* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016) (canvassing state constitutions and noting that they adopted expressly nonunitarist executive structures while using the same vesting text as the Federal Constitution).

41. *See, e.g.*, Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566 [<https://perma.cc/4M3C-C2KA>]; Mortenson, *supra* note 39; Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

42. 576 U.S. 1, 18 (2015) (Thomas, J., concurring in part and dissenting in part).

43. *Id.* at 35.

44. *Id.*

45. *Id.* at 35–36.

46. *Id.* at 37.

Justice Kagan agreed that “Blackstone, whose work influenced the Framers on this subject as on others,” could be consulted for some justiciable guidance on modern separation of powers disputes.⁴⁷

In all of these cases, we find the same problem of joinder: apart from the question whether the ideas of the dead can be rendered intelligible today,⁴⁸ proponents of these arguments are plagued by a failure to provide evidence that the particular legal question before the Court—and the particular entailment of Enlightenment political theory that is of interest—were ever joined together by any person whose judgment we might find authoritative.

C. *The Nondelegation Doctrine*

The same pattern characterizes debates about whether Congress has authority to authorize agency rulemaking. Here, a passage from Locke’s *Second Treatise* has become a centerpiece in the debate about the nondelegation doctrine, though again, Montesquieu and Blackstone also figure prominently.

Locke’s significance in the nondelegation debate stems in part from the fact that Justice Gorsuch, in his dissent in *Gundy v. United States*, cited Locke’s treatise to support his claim that “[t]he [F]ramers understood . . . that it would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.”⁴⁹ As evidence of the Framers’ intent, Gorsuch quotes Locke’s *Second Treatise*, which says that “[t]he legislative cannot transfer the power of making laws to any other hands.”⁵⁰ Gorsuch emphasized that Locke was “one of the thinkers who most influenced the [F]ramers’ understanding of the separation of powers.”⁵¹

Once again, the argument follows the syllogism described above.

Premise 1: Famous Enlightenment Theorist (Locke) made a claim about how government is—or should be—structured;

47. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part).

48. See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321 (2021).

49. 139 S. Ct. 2116, 2133 (2020) (Gorsuch, J., dissenting).

50. *Id.* (quoting JOHN LOCKE, THE SECOND TREATISE: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT § 141 (1690), in THE SECOND TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 71 (1947)).

51. *Id.*

Premise 2 (sometimes assumed): The Framers studied that Theorist, or inhabited a cast of mind “permeated”⁵² by that Theorist’s ideas;

Conclusion: Therefore, the Constitution should be interpreted as to adopt the same position for which the Enlightenment Political Theorist generally advocated.

Those who reject the nondelegation doctrine tend to attack the first or second premises of the syllogism. For example, in response to Gorsuch’s *Gundy* dissent, Richard Primus pointed out that Gorsuch “cites no authority for the proposition that Locke shaped the dominant Founding conception of the separation of powers.”⁵³ Primus goes on to argue that “there is serious reason to doubt that the Framers had any particular commitment to following Locke on the point.”⁵⁴ Primus is drawing on the work of John Dunn and Mark Goldie, who have argued that “Locke”—understood as a singular claim about the Framers’ political theory—did not exert a particularly strong influence on the Founding generation.⁵⁵ As Primus explains, there is a difference between “riff[ing]” on Lockean themes and the claim that Locke’s political prescriptions exercised a “pervasive[] influen[ce]” on the Founding.⁵⁶ In one partisan’s hands, Locke vindicated the American Revolution or the nascent Federal Constitution; in another’s, he vanquished them.

Julian Davis Mortenson and Nicholas Bagley have taken a slightly different approach by focusing on the first premise: they argue that Gorsuch and other defenders of the nondelegation doctrine misunderstand the theorist they are citing. Mortenson and Bagley argue that Locke would have distinguished between (permissible) revocable *delegations* of authority and (impermissible) irrevocable *alienations* of authority. They argue that for Locke only the latter

52. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (“The political philosophy of John Locke, moreover, ‘permeated the 18th-century political scene in America.’”); *Obergefell v. Hodges*, 576 U.S. 644, 726 (2015) (Thomas, J., dissenting) (“The [F]ounding-era understanding of liberty was heavily influenced by John Locke . . .”).

53. Richard Primus, *John Locke, Justice Gorsuch, and Gundy v. United States*, BALKINIZATION (July 22, 2019), <https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html> [<https://perma.cc/RP8V-SL53>].

54. *Id.*

55. *Id.*; see also Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 546 (1995) (“In this regard, the constitution the Americans advanced was fully consistent with Locke, and at times augmented with Lockean references, though as [John Phillip] Reid has tirelessly argued, it owed little to the philosopher directly.”).

56. Primus, *supra* note 53.

category was antithetical to the separation of powers.⁵⁷ From this redefined first premise, the second two moves still follow. Because Locke, when properly read, would disagree with Gorsuch, the reverse constitutional outcome should follow.

But these interpretations of Locke have themselves been the subject of academic critiques. Before Gorsuch's *Gundy* dissent, Larry Alexander, Saikrishna Prakash, and Philip Hamburger invoked Locke and Blackstone as evidence of a nondelegation doctrine,⁵⁸ and Ilan Wurman has offered a defense of Gorsuch's reading of Locke.⁵⁹

Dead-Political-Theory-as-Constitutional-Interpretation appears in numerous high-stakes constitutional debates. The same pattern characterizes debates about the constitutionality of non-Article III courts,⁶⁰ of the meaning of the Bill of Rights,⁶¹ and of the relationship between states and the federal government.⁶² Of course, that raises the question of why scholars and judges should be so willing to attribute the whole work product of Enlightenment political theorists to the Founding generation. What leads us to believe that the ideological disunity of the present, or the ideological disunity of the Founding, would not also be true of Enlightenment political theorists? And what leads us to believe the corpus of these partisans' work was incorporated, all at once, into the ideological currents of the early republic? It is plainly true that elites were familiar with all of the sources now vaunted as guides to original meaning. But that does not answer the lawyer's question—as against the historian's question—whether the

57. Mortenson & Bagley, *supra* note 4, at 297–300; *see also* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), <https://ssrn.com/abstract=2802784> [<https://perma.cc/7PTV-M4MC>] (critiquing Hamburger's use of medieval sources). Craig and Hamburger's debate about the source material continued. *See* Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939 (2016); Paul Craig, *English Foundations of US Administrative Law: Four Central Errors*, at 40 (Oxford Legal Stud. Rsch. Paper, Paper No. 3, 2017), <https://ssrn.com/abstract=2852835> [<https://perma.cc/65F5-3TW5>].

58. Hamburger seems more focused on pre-Enlightenment thinkers. *But see* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305, 1320, 1329 (2003); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 378–80 (2014).

59. Wurman, *supra* note 4, at 1518; *see also* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 108–18 (2020) [hereinafter Wurman, *In Search of Prerogative*] (offering a more qualified appraisal of Locke).

60. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 466 (2011) (invoking Blackstone).

61. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (“The political philosophy of John Locke, moreover, ‘permeated the 18th-century political scene in America.’” (quoting *Obergefell v. Hodges*, 576 U.S. 644, 727 (Thomas, J., dissenting) (2015))).

62. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30–40 (2020) (Kavanaugh, J., concurring) (denying application to vacate stay imposed by the Seventh Circuit after district court judge extended deadline for reception of absentee ballots).

legal issue before a court today was ever reached by an American mind at the Founding. Was the theory *used*?

II. A TAXONOMY OF POLITICAL THEORY IN CONSTITUTIONAL INTERPRETATION

There are three types of constitutional interpretation based on Enlightenment political theory, which are explored in the following Sections. First, some argue that the U.S. Constitution incorporates background Anglo-American legal traditions. These arguments are divorced from the text or structure of the Constitution and instead assume that the Constitution should be read in light of a consistent and accessible set of background philosophical principles. Second, others appeal to Enlightenment political thinkers to make sense of vague or ambiguous textual provisions. And third, Enlightenment political theory is often used to motivate the stakes of lawyerly questions about interbranch relations (e.g., Is an allocation of power rights-protecting? Does it tend toward accountability? Does it conduce toward republicanism or democratic deliberative norms?). The second and third interpretive strategies often overlap considerably.

A. Political Theory as Extratextual Gloss

An example of the first mode of philosophically infused constitutional interpretation—what we call the Background Principles Approach—is Philip Hamburger’s *Is Administrative Law Unlawful?*. Hamburger offers a sweeping critique of the American administrative state, describing the federal bureaucracy as “soft absolutism or despotism,” a “revival of absolute power,” and a “consolidated governmental power outside and above the law.”⁶³

Hamburger’s critique of the administrative state is based on his view that the Constitution should be read as part of an Anglo-American legal tradition. As Adrian Vermeule has argued, Hamburger “elaborates an English constitutional principle . . . and then offers a few brief pages and perhaps a few citations to connect up that principle with the American Constitution and its original understanding.”⁶⁴ Hamburger cites a large number of historical and philosophical sources—spanning from medieval German philosophers to British

63. HAMBURGER, *supra* note 58, at 493, 508. For a scathing critique of Hamburger’s book, see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015).

64. Vermeule, *supra* note 63, at 1552.

monarchs—to argue that the administrative state is an exercise in “extralegal lawmaking.”⁶⁵ For Hamburger, the terms executive, legislative, and judicial have precise metaphysical definitions.⁶⁶ He also thinks that those words convey exclusive powers that cannot be shared with other branches.⁶⁷ The implication is that the meanings of those terms are discernible once one understands how they fit into the history of European thought. The idea is that the Constitution is made more determinate when read as incorporating these sources.

Hamburger is not the only scholar to distill background constitutional principles from the Anglo-American legal tradition.⁶⁸ That interpretive approach also characterizes important revisionist strands in civil procedure scholarship;⁶⁹ the Court’s recent search-and-seizure first principles;⁷⁰ and an increasing number of Justices’ approach to free-exercise issues.⁷¹

B. Political Theory as Source of Textual Meaning

Enlightenment political theory is also used to glean implied definitions from vague constitutional terms. Because the first sentence of Article II says that “the executive Power shall be vested in a President of the United States,”⁷² theories of presidential power often turn on an elaborate exegesis of the terms “vest” and “executive.” The Constitution does not define those terms or specify that the powers

65. *Id.* at 1554–56.

66. HAMBURGER, *supra* note 58, at 328 n.a.

67. See Vermeule, *supra* note 63, at 1552 (“In [Hamburger’s] vision, legislatures hold the exclusive power to “legislate,” while judges exercise all “judicial” power and exercise independent judgment in the sense that they decide all legal questions for themselves without “deference.”).

68. It is not clear how to decide if a theorist is inside or outside of a legally salient “tradition” from the perspective of legal doctrine. Two generations of professional historians, since at least the time of Bernard Bailyn, have turned their attention to the ideological influences on the American Founding, and they have identified a rich set of ambient (and internally vexed) political theorists who would have been familiar to the Founding generation. But a historians’ list of materials relevant to understand a particular historian’s account of the ideological currents of the Founding moment and a list of materials relevant to legal interpretation of novel questions of public law are two very different things. The latter list might overlap with the former, but we would want proof of something more than “awareness” or even general “influence” before deciding the question. The requisite proof, as we argue below, is specific evidence of the use of a particular theory to answer a question that is similar in kind to a question presented in a given case.

69. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017).

70. *Compare* *Torres v. Madrid*, 141 S. Ct. 989, 996 (2021), *with id.* at 1008–09 (Gorsuch, Thomas & Alito, JJ., dissenting) (offering dueling interpretations of Blackstone’s definition of an “arrest”).

71. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1904 (2021) (Alito, Thomas & Gorsuch, JJ., concurring) (drawing on Blackstone to define what offenses against the peace are sufficiently grave to trump the right to free exercise of religion).

72. U.S. CONST. art. II, § 1.

Article II conveys are exclusive. As a result, to define the executive power and argue that the authority Article II conveys is exclusive, scholars and judges have looked at how those terms were used by Enlightenment political theorists. The assumption, again, is that the Framers used words like “legislative” and “executive” in the same way as Enlightenment political theorists. This is step two of the syllogism—that the Framers modeled the Constitution to give effect to a settled Enlightenment political theory.

For example, those who think that Article II contains a large number of inherent powers—such as the power to remove agency officials and conduct foreign affairs—frequently rely on Enlightenment theories to explicate constitutional meaning. This is the type of interpretation described in Part I.B, where the meaning of the term “executive” is understood by reference to Enlightenment political theorists who used that term. If a political theorist used a word that appears in the Constitution in a certain way, that provides evidence that the Constitution uses the word in the same way.⁷³

This has led to exhaustive studies of how Enlightenment political theorists used the words that play an important role in debates about executive power. For example, Jed Handelsman Shugerman has considered how Blackstone and other political theorists used the word “vest” and understood the term “executive.”⁷⁴ Paul Halliday has pointed out that Blackstone is capable of supporting a broad array of seemingly inconsistent positions and questioned whether it is proper to rely on Blackstone to understand executive power.⁷⁵

C. Political Theory as Source of Structural Meaning

Scholars and judges also use Enlightenment political theory to understand interdepartmental relations. The debate about the nondelegation doctrine is an important example of this interpretive approach. The question the nondelegation and major questions doctrines aim to answer is whether agency rulemaking is an unconstitutional delegation of legislative power to one of the other branches. Based on a claim about the definition of the legislative

73. See Mortenson, *supra* note 39, at 1172–74; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1275–77 (2020). For responses to these arguments, see MCCONNELL, *supra* note 2, at 251–55; and Wurman, *In Search of Prerogative*, *supra* note 59, at 133–37.

74. Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022).

75. Paul D. Halliday, *Blackstone's King*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS 169 (Wilfrid Prest ed., 2014).

power,⁷⁶ and the claim that the legislative branch is the most “accountable” of all the branches,⁷⁷ the nondelegation and major questions doctrines call upon courts to narrowly interpret statutes that appear to “grant” lawmaking power to nonlegislative branches of government. Because the Constitution does not define the legislative power or specify that it is exclusive,⁷⁸ those who advocate for a nondelegation doctrine look to extratextual sources to support their position about the formal content of the legislative power and the functional prescription that only the legislative branch is sufficiently “accountable.”

Enlightenment political theory has become a preeminent source in the effort to cabin Congress’s power to delegate rulemaking authority to executive agencies. Because the Constitution is otherwise silent on the question, proponents of a nondelegation doctrine motivate their critique by drawing on a pastiche of Enlightenment sources to define the legislative power.⁷⁹ Justice Gorsuch, for example, contends that “John Locke, one of the thinkers who most influenced the [F]ramers’ understanding of the separation of powers,” explained why it “would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.”⁸⁰ And he pressed Locke and Blackstone into service to contend that the “legislative power” is “the power to adopt generally applicable rules of conduct governing future actions by private persons.”⁸¹ Finally, after citing Blackstone, Justice Gorsuch asserted that “[t]he [F]ramers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn’t be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch.”⁸²

Having worked their way through the syllogism, proponents of the nondelegation and major questions doctrines have settled on a definition of the legislative power that emphasizes prospectivity, generality, and precision of delegation—so that the people can hold

76. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

77. See, e.g., *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, Thomas & Alito, JJ., concurring).

78. This omission is especially significant since Founding-era state constitutions did stipulate that the legislative and executive powers should be exclusive, and because an early Congress considered and rejected a constitutional amendment that would have made these powers exclusive.

79. See Macey & Richardson, *supra* note 15, at 119–29.

80. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co v. Clark*, 143 U.S. 649, 692 (1892)).

81. *Id.* (citing LOCKE, *supra* note 50, at ch. XI, § 141; and BLACKSTONE, *supra* note 10, at *44).

82. *Id.* at 2135.

their representatives to account.⁸³ And finally, the definition calls upon the Supreme Court to intervene: “To leave this aspect of the constitutional structure . . . undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority.”⁸⁴

III. HISTORICAL PROBLEMS WITH POLITICAL THEORY IN CONSTITUTIONAL INTERPRETATION

There are three problems with constitutional interpretation based on Enlightenment political theory, and these problems are significant regardless of whether one is an originalist or a living constitutionalist. First, the theorists who are thought to have influenced the Framers themselves disagreed about how to structure government and about the meaning of important constitutional terms such as executive and legislative. Individual theorists even offered differing and seemingly contradictory theories in their own writings. Second, the Framers consciously departed from Enlightenment political theory in response to critiques they levied at Montesquieu, Locke, and other political theorists. And third, the Constitution’s text and structure reflect the Framers’ skepticism of Enlightenment theory.

A. Inter- and Intra-theorist Disagreement

The first problem with the original-political-theory syllogism is that it is not clear how to pick among a canonical set of political theories that were often rivalrous. Nor is it possible to pick among rivalrous *receptions* of these political theories. Call this the problem of consensus. The Enlightenment was a period of rich intellectual discussion in which political theorists engaged in heated debate about how to structure a democratic republic. This fomentation demonstrates that all Enlightenment idols—Locke, Montesquieu, or Blackstone among them—were susceptible to multiple interpretations in the hands of those litigating the constitutional settlement. As such, their theories were met with fierce criticism, plagiarism, and misreading.

83. See, e.g., *id.*; see also *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring) (sketching out the nondelegation doctrine, and beginning with a description of John Locke’s *Second Treatise of Government*); *Borden v. United States*, 141 S. Ct. 1817, 1836 (2021) (Thomas, J., concurring) (noting that legislatures alone have authority “to prescribe general rules for the government of society” (quoting *Fletcher v. Peck*, 10 U.S. 87, 136 (1810))).

84. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

Perhaps most importantly, Enlightenment theorists disagreed fiercely about what government should do. Locke and Montesquieu disagreed with each other on how to balance the different governmental powers within a separation of powers system.⁸⁵ Locke was a legislative supremacist⁸⁶ who did not believe in independent judicial powers.⁸⁷ Montesquieu supported a limited government where power was distributed among coequal branches.⁸⁸ Rousseau is surprisingly ambivalent towards democracy,⁸⁹ and is unclear whether representative government should actually speak for the people or instead transform citizen preferences into an independent conception of the common good.⁹⁰ A Lockean government is largely inconsistent with a strong executive,⁹¹ but a Blackstonian government is arguably consistent with a powerful executive.⁹² And a Hobbesian government is certainly consistent with a strong executive, but could possibly be structured as a strong democratic government instead based on recent influential interpretations.⁹³ So when we construe the executive powers to accord with Blackstone's political writings, we are privileging one theorist (Blackstone) over another (Rousseau) who would have rejected

85. See *infra* Part III.C.

86. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 366–67 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“[T]here can be but one *Supream Power*, which is the *Legislative*, to which all the rest are and must be subordinate . . .”).

87. See Peter Laslett, *Locke the Man and Locke the Writer*, in TWO TREATISES OF GOVERNMENT 19–20 (Peter Laslett ed., 1988).

88. MONTESQUIEU, THE SPIRIT OF THE LAWS 156–57 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

89. For discussion on Rousseau's complex and ambivalent relation to democratic government, see Joshua Cohen, *Review: Reflections on Rousseau: Autonomy and Democracy*, 15 PHIL. & PUB. AFFS. 289–93 (1983). For the argument Rousseau was ambivalent about the use of democratic procedures, see Richard Fralin, *The Evolution of Rousseau's View of Representative Government*, 6 POL. THEORY 517 (1978).

90. See DAVID LAY WILLIAMS, ROUSSEAU'S SOCIAL CONTRACT: AN INTRODUCTION 245–70 (2014); see also Christopher Bertram, *Rousseau's Legacy in Two Conceptions of the General Will: Democratic and Transcendent*, 74 REV. POL. 403 (2012).

91. For discussion on the relative strengths of the legislature and executive when they shared in the legislative power in Locke's theory, see *infra* Section III.C.1.

92. For the view that Blackstone argued for a wide degree of executive power, see CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER 139–40 (2009). It is important to note, however, that Blackstone argued the executive gets its most potent powers from extralegal sources. *Id.* at 126.

93. Earlier attempts to argue Hobbes's democratic bona fides erroneously rely primarily on their reading of the *Leviathan*. See generally FRANK M. COLEMAN, HOBBS AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATIONS 85–86 (1977); JAMES MARTEL, SUBVERTING THE LEVIATHAN: READING THOMAS HOBBS AS A RADICAL DEMOCRAT (2007). More recent advocates for Hobbes's acceptance of democracy, however, argue that Hobbes's other major works, such as *Elements of Law* and *De Cive*, must be properly put into context with the *Leviathan* to accurately see Hobbes's acceptance of democratic government. See, e.g., RICHARD TUCK, THE SLEEPING SOVEREIGN 86–103 (2014); Kinch Hoekstra, *Early Modern Absolutism and Constitutionalism*, 34 CARDOZO L. REV. 1073, 1095–98 (2013).

that approach. But who is to say why we should make that decision, especially since in other contexts, constitutional interpreters pick liberally from the other Enlightenment theorist?

Beyond that, there is evidence that all of these theorists influenced the Framers. For example, when Thomas Jefferson served as ambassador to Louis XVI, he would frequently send books to James Madison.⁹⁴ When Madison went to the Constitutional Convention, he brought many of these works Jefferson had sent him, including

works by Gabriel Bonnot de Mably, Jacob-Nicholas Moreau, Jacques Necker, Anne-Robert-Jacques Turgot, Pierre Samuel DuPont de Nemours, Guillaume Le Trosne, Louis-Sébastien Mercier, Le Mercier de La Rivière, the comte de Mirabeau, Jacques-Pierre Brissot de Warville, the marquis de Condorcet, and Jean-Jacques Barthélemy and Charles-Joseph Panckoucke's edition of the *Encyclopédie méthodique*.⁹⁵

In a book list composed in August of 1790, Madison marked all of the books purchased for him by Jefferson in France, with the exception of texts by Condorcet and Raynal.⁹⁶ That certainly suggests that Madison was familiar with Enlightenment political theory and that his constitutional theory was influenced by the works of those theorists. But that only gets us so far. In light of the extent of disagreement among these political theorists, and in the absence of consensus or evidence of incorporation, it is difficult to discern a principled approach to choosing among political theories or among conflicting interpretations of individual theorists, especially when there was demonstrable disagreement about these theorists' claims during the long Founding moment.

B. The Framers Subordinated Enlightenment Political Theory to a Practical Theory of Government

A deeper problem is that the Framers themselves were highly skeptical of the theorists that today are used as a guide to constitutional meaning. Call this the problem of ideal theory.⁹⁷

Consider John Adams' defense of American constitutions from what he perceived to be an "attack" by a French minister named Robert-Jacques Turgot.⁹⁸ Adams wrote a lengthy and ponderous rejoinder to

94. Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WM. & MARY Q. 925, 932 (2002).

95. *Id.* at 932–33.

96. *Id.* at 933 & n.23.

97. See generally Laura Valentini, *Ideal vs. Non-Ideal Theory*, 7 PHIL. COMPASS 654 (2012) (discussing ideal and non-ideal theorization in political theory).

98. See generally Will Slauter, *Constructive Misreadings: Adams, Turgot, and the American State Constitutions*, 105 PAPERS BIBLIOGRAPHICAL SOC'Y AM. 33 (2011). We note that there is a

Turgot that assembled a set of theoretical arguments in defense of the new American experiment in government. Adams took the reader on a wide-ranging tour of his readings in political philosophy but frequently paused to explain the poverty of the past. Indeed, Adams was unyielding in his criticism of the claim that Enlightenment theorists had answered all of the relevant questions.

For example, in a section on Locke, Adams began: “Chimerical systems of legislation are neither new nor uncommon, even among men of the most resplendent genius and extensive learning.”⁹⁹ He noted that “parts” of the revered philosophies of Plato or Thomas More “are as wild as the ravings of Bedlam.”¹⁰⁰ Locke fared no better, in Adams’s view. Even though Locke could “defend the principles of liberty and the rights of mankind, with great abilities and success” in the abstract, when Locke was “called upon to produce a plan of legislation, he may astonish the world with a signal absurdity.”¹⁰¹ Adams specially faulted Locke’s plan for a government in Carolina, which would “g[i]ve the whole authority, executive and legislative, to . . . eight proprietors.”¹⁰² After calling this an “oligarchical sovereignty,” Adams asked: “Who did [Locke] think would live under his government? He should have first created a new species of beings to govern, before he instituted such a government.”¹⁰³

Adams summarized his critique of the Enlightenment canon by noting that “Americans in this age are *too enlightened* to be bubbled out of their liberties, even by such mighty names as Locke, Milton, Turgot, or Hume.”¹⁰⁴ The point is not that Adams spoke for his generation but rather that to read the Framers’ use of Enlightenment theorists is to observe the pugilistic use of political theory: the ideas were relevant only insofar as they were useful fodder to advance one’s position about the practical design of the new government.

As we discuss in more detail below, Locke—like all lawyers and all political theorists—was up to something in writing his *Two Treatises*. Adams, who was up to something too, critiqued Locke. All of

debate on whether Adams’s tract was an “anomaly” in its reflection of the ambient ideological thought of the time. See *id.* at 34 n.4. Whether or not this is true is unimportant to our account, since its seeming repudiation of Locke demonstrates the tendency that interests us: these texts were pervasive as talismans of liberty but were also often useless in answering as-applied questions of governmental design at the Founding.

99. John Adams, *Letter LIV: Locke, Milton, and Hume*, in *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 365 (Budd & Bartram 3d ed. 1797) (1787).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 365–66.

104. *Id.* at 369 (emphasis added).

this ambiguity is reflected in the most broadly informed accounts of Locke's work and its reception. To set out to discern Locke's "meaning" and his "reception" is to be struck by the "heterogeneity of Locke's own political purposes, and the heavily selective character of [his] readers' responses to these over space and time."¹⁰⁵

Turning closer to the core sources used by modern partisans to recover the Founding, we note that authors of the *Federalist Papers* counseled caution about the wisdom of the past. Madison, for example, contended that Montesquieu's proposal to give each social class a certain portion of governmental power was consistent neither with reason nor with republican political philosophy.¹⁰⁶ Madison thus rejected Montesquieu's claim that encouraging conflict of interests in society is beneficial to the equilibrium of the political order.

And while Madison credited Montesquieu with "glimps[ing]" the elegance of the theory underlying the nascent American republic,¹⁰⁷ Madison thought that Montesquieu's understanding of republicanism and the structure of free government suffered from the "disadvantage, of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period."¹⁰⁸ In addition, Montesquieu was unfortunately "warped by a regard to the particular government of England, . . . profess[ing] an admiration bordering on idolatry."¹⁰⁹ Madison similarly critiqued Locke, whose "chapter on prerogative, shews how much the reason of the philosopher was clouded by the royalism of the Englishman,"¹¹⁰ and he accused Locke of being "warped" by his "owed allegiance" to England.¹¹¹

Madison focused his critique on Locke and Montesquieu because he was jousting with a real-life adversary—in this case, Alexander Hamilton—about the lawfulness of George Washington's unilateral

105. John Dunn, *The Reception of Locke's Politics*, 116 *ENG. HIST. REV.* 145, 146 (2001).

106. JAMES MADISON, 14 *THE PAPERS OF JAMES MADISON* 197–201 (Robert A. Rutland & Thomas A. Mason eds., Univ. Press of Va. 1983) (1792).

107. James Madison, *Spirit of Government*, *NAT'L GAZETTE* (1792), reprinted in JAMES MADISON, 14 *THE PAPERS OF JAMES MADISON* 233–34 (William T. Hutchinson et al. eds., Univ. Press of Va. 1983).

Montesquieu was in politics not a Newton or a Locke, who established immortal systems, the one in matter, the other in mind. He was in his particular science what Bacon was in universal science: He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.

108. James Madison, *Helvidius' Number I* (1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 68 (Thomas A. Mason et al. eds., Univ. of Va. Press 1985).

109. *Id.*

110. *Id.* On Locke's purported "royalism" and the prerogative, see *infra* Part III.C.

111. See *infra* Part III.C.

proclamation of neutrality during the country's first presidency.¹¹² Hamilton publicly defended the view that the executive could act unilaterally, while Madison opposed Washington's inherent power to issue the proclamation without legislative authorization.

As discussed below, Locke and Montesquieu could each be read to assign foreign-affairs powers (or "federative" powers in Locke's vernacular) exclusively to the executive. Consequently, in the heat of his own constitutional argument in his own time and place, Madison dismissed the relevance of Locke and Montesquieu. After lambasting their shortsightedness, Madison encouraged his reader to adopt a more practical course: "[L]et us quit a field of research which is more likely to perplex than to decide, and bring the question to other tests of which it will be more easy to judge."¹¹³

Madison then turned to typical arguments about the Constitution's text and structure. And, remarkably, he turned to the *Federalist Papers*, to consult "the doctrines maintained by our own commentators on our own government."¹¹⁴ The *Federalist Papers*, Madison argued, were a better guide to the Constitution's meaning because they gave "systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to the government in the form proposed."¹¹⁵ Crucially, as Madison well knew, Hamilton had participated in drafting them so they presented the opportunity to turn Hamilton's words against him. Madison thus quoted the *Federalist Papers* (and through them, Hamilton) for the proposition that "[al]tho several writers on the subject of government place that power (of making treaties) in the class of Executive authorities"—e.g., Locke and Montesquieu—"this is evidently an arbitrary disposition. For if we attend carefully, to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."¹¹⁶

Thus, on the question of the power to issue a proclamation of neutrality, argument from political theory quickly dissolved. As the debate between Madison and Hamilton revealed, invoking Enlightenment political theory to settle modern disputes leads us very far through the looking glass. First, the issue was not joined between

112. See George Washington, *Neutrality Proclamation, April 22, 1793*, in 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472–474 (Christine S. Patrick & John C. Pinheiro eds., Univ. of Va. Press 2005) (1793).

113. Madison, *supra* note 108, at 68.

114. *Id.* at 72.

115. *Id.*

116. *Id.* at 73 (quoting THE FEDERALIST NO. 75 (Alexander Hamilton)).

the present (i.e., 1793, when Washington's Neutrality Proclamation issued) and the past (i.e., when Locke wrote the *Two Treatises*, when Montesquieu wrote *Spirit of the Laws*, or when Vattel wrote *Law of Nations*). As Madison was at pains to emphasize, neither Locke, nor Montesquieu, nor Vattel, settled the question whether a proclamation of neutrality in a mixed government must inhere in the executive branch. Second, there was no consensus as to the meaning of these canonical thinkers. The posture of the dispute between Madison and Hamilton was that the two opposed each other on the essential question of whether any of these theorists had in fact reached the question presented or whether the theorists were being interpreted properly by the other. And third, this post-ratification debate amounts to evidence *against* the use of the canonical thinkers at the Founding moment: Madison used Hamilton's writing in the *Federalist Papers* to suggest that the Enlightenment canon was rejected in the constitution's design.

The modern tendency to interpret the Constitution in light of Enlightenment political theorists has offered no way to mediate among conflicting theories, and it ignores historical evidence that the Founding generation was skeptical—often to the point of condescension—of the political theorists who are today used as a guide to the historical meaning of constitutional terms.

C. The Constitution Departs from Enlightenment Political Theory

A third problem is that the Constitution departs from Enlightenment political theory in a number of important respects. For example, Locke believed in legislative supremacy,¹¹⁷ yet, as discussed in detail below, the Founding generation was concerned with legislative overreach and expressly rejected legislative supremacy in framing a tripartite structure of government. The Constitution's embrace of three coequal branches of government should thus be understood as a rejection of one of the core tenets of Locke's political philosophy. Like disagreements between specific theorists, the Constitution's frequent departures from Enlightenment political theory creates a sampling challenge: Why should an interpreter privilege particular parts of a theorist who may have influenced the Founding generation but whose views were not used as a model of constitutional meaning? Instead, there must be evidence that the Founders incorporated the thought of an Enlightenment political theorist regarding a particular term or concept into their own understanding of the relevant constitutional

117. See LOCKE, *supra* note 86, at 355 ("Of the Extent of the Legislative Power").

term or concept, or that the theorist's use of a particular concept was uncontestedly accepted, even if by implication, by the relevant linguistic community. Call this the problem of joinder.

To be sure, the relevance of Locke's motivations are contestable: while Locke may have been opposed to a Catholic monarch and expressed antipathy to colonial self-rule, the Framers may not have known, or they may not have cared, or they may have interpreted Locke to their own ends. Thus, recognizing that Locke was responding to a different historical time, and that his political views partly reflected religious animus and xenophobia, may not be directly relevant for contemporary constitutional interpretation. If what matters to contemporary constitutional interpretation is how the Framers understood and incorporated various political thinkers, then what matters is how the Framers understood Enlightenment political theory. From the perspective of constitutional interpretation, the political theory itself is simply evidence of how the Framers interpreted and used the political theory.

Still, we think that situating Enlightenment theorists in their particular historical moments is more than a flight of intellectual fancy, since it should raise the evidentiary burden contemporary constitutional interpreters face when positing that the Framers understood a particular thinker to make a point that the theorist did not in fact make. When someone argues that a theorist, and hence the Constitution, makes Point A, then evidence that the theorist rejected Point A suggests that the text is not so clear as the contemporary interpreter thinks. Given the sampling issues described above—the fact that judges and scholars have a tendency to pick and choose convenient parts of Enlightenment political theory and ignore inconvenient arguments—the fact that these theorists were motivated by specific and distinct political considerations should raise the burden of showing that the theorist and Constitution incorporate some other meaning. When contemporary judges or constitutional law scholars argue that Locke, for example, supports a powerful executive with sweeping inherent powers, then the fact that Locke believed in legislative supremacy should make it more difficult to argue that the Framers understood Locke to mean something different. At the very least, we should insist on strong evidence that the Framers, who were closer to Enlightenment theory than we are, misread Locke and other theorists.

1. The Motivations and Curiosities of Locke's Political Theory

Supreme Court Justices and academic commentators have extensively utilized the works of John Locke to support many doctrinal

propositions in contemporary separation of powers doctrine. Before explaining the substantive differences between Locke's theory and the form of governance designed by the Framers, it is important to situate the historical context in which Locke wrote his *Two Treatises of Government*.¹¹⁸ This context shows that Locke was motivated by distinctive and historically contingent concerns—perhaps most notably, a concern that the British monarchy would fall into Catholic hands. This historical context sheds light on Locke's motivations and illustrates the extent to which those motivations are inapplicable in a constitutional democracy that rejected many of the concerns that animate Locke's theory.

After being educated at Oxford, Locke spent most of his professional career acting as an advisor to aristocratic British politicians, especially Anthony Ashley Cooper, First Earl of Shaftesbury, whom Locke counseled from the mid-1660s until Lord Shaftesbury's death in 1683.¹¹⁹ During his patronage of Locke, Shaftesbury rose to be one of the most prominent members of the Whigs, which was a movement comprised of a group of opposition politicians that were the intellectual successors to the moderate revolutionaries of the English Civil Wars.¹²⁰ The Whigs, including Locke, believed in widespread religious toleration in England. But this toleration had its limits and did not extend to Catholics and atheists.¹²¹ Locke, too, did not think religious toleration should include Catholics and atheists, and this belief became central to his political and theoretical motivations for *Two Treatises*.¹²²

118. LOCKE, *supra* note 86.

119. Laslett, *supra* note 87, at 17–19, 25–26; Tim Harris, *Cooper, Anthony Ashley, First Earl of Shaftesbury*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004). It was early during Shaftesbury's patronage of Locke that they wrote the first *Fundamental Constitutions of the Carolinas*, which informed Locke's famous labor theory of property to justify how colonists could develop property rights in land forcibly taken from Native Americans within the *Two Treatises*. See generally David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THOUGHT 602, 604 (2004).

120. LAWRENCE E. KLEIN, SHAFTESBURY AND THE CULTURE OF POLITENESS 14 (1994); David McNally, *Locke, Levellers, and Liberty: Property and Democracy in the Thought of the First Whigs*, 10 HIST. POL. THOUGHT 17, 17–40 (1989).

121. JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558–1689, at 58 (2013); JOHN MARSHALL, JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE 17–54 (2006); JOHN MILLER, THE GLORIOUS REVOLUTION 3–6 (2d ed. 2014).

122. Indeed, in other writing published around the same time as *The Two Treatises*, Locke criticizes atheists as unable to uphold promises or oaths because they lack belief in God. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 7, 52–53 (Mark Goldie ed., 2010) (“*Lastly*, Those are not at all to be tolerated *who deny the Being of a God*. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist. The taking away of God, though but even in thought, dissolves all.”). While Locke seems to theoretically allow limited space to tolerate Catholics if they

Locke wrote much of the *Two Treatises* during the Exclusion Crisis that embroiled England during the 1670s and 1680s, and his theory cannot be understood without this context.¹²³ The Exclusion Crisis concerned whether Parliament could pass a law to exclude the succession of King Charles II's brother, James the Duke of York, to the English Throne; Charles II had no direct heir, and as such, the Crown would fall to James upon Charles's death.¹²⁴ But James converted to Catholicism with his wife during their time in France sometime during the late 1660s.¹²⁵ Many prominent Whigs, including Shaftesbury and Locke, were aghast at the prospect of a Catholic ascending to the English Crown, fearing England would become a vassal state to the Vatican.¹²⁶

The original exclusion bill was introduced in 1679 and passed the House of Commons, but King Charles II leveraged his supporters in the House of Lords to kill the first bill. The Whigs gained widespread support for exclusion, however, and Charles exercised his royal prerogative to dissolve Parliament.¹²⁷ Successive efforts to pass the exclusion bill similarly led to Charles subsequently dissolving those Parliaments, and Charles gained the political upper hand by 1681. The Whigs pushing exclusion, including Lord Shaftesbury and Locke, were labeled as subversives and forced to flee England.¹²⁸ Thus, the label of "crisis" and the genesis of Locke's motivation behind the idea of

reject the political authority of the Pope, the degree of Locke's toleration of Catholics is debated. For discussion, see TERESA BEJAN, *MERE CIVILITY: DISAGREEMENT AND THE LIMITS OF TOLERATION* 138–39 (2017); SCOTT SOWERBY, *MAKING TOLERATION: THE REPEALERS AND THE GLORIOUS REVOLUTION* 255–59 (2013); and Mark Goldie, *Introduction to A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra*, xix. See generally David J. Lorenzo, *Tradition and Prudence in Locke's Exceptions to Toleration*, 47 AM. J. POL. SCI. 248 (2003).

123. See *infra* note 124 and accompanying text; Laslett, *supra* note 87, at 35 (asserting that Locke's *Two Treatises* "took shape suddenly" during the years between 1679 to 1680, and emphasizing the importance in considering "the atmosphere in which [] doctrines [are] formulated").

124. For discussions of the Exclusion Crisis, see, for example, J.R. JONES, *THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678–1683* (Praeger rev. ed. 1985) (1961); ANNABEL PATTERSON, *THE LONG PARLIAMENT OF CHARLES II* (2008); and GEORGE SOUTHCOMBE & GRANT TAPSELL, *RESTORATION POLITICS, RELIGION, AND CULTURE: BRITAIN AND IRELAND, 1660–1714* (2009).

125. SOUTHCOMBE & TAPSELL, *supra* note 124, at 79, 94–95.

126. For discussion of the Whigs and the extent of their toleration in this period, see ALAN CRAIG HOUSTON, *ALGERNON SIDNEY AND THE REPUBLICAN HERITAGE IN ENGLAND AND AMERICA* 122–30 (1991); JOHN MILLER, *POPERY AND POLITICS IN ENGLAND 1660–1688*, at 154–88 (1973); and Gaby Mahlberg, *The Republican Discourse on Religious Liberty During the Exclusion Crisis*, 38 HIST. EUR. IDEAS 352, 353–55 (2012).

127. See TIM HARRIS, *POLITICS UNDER THE LATER STUARTS* 68–73 (2014); Miller, *supra* note 126, at 174.

128. Laslett, *supra* note 87, at 30–32, 48.

legislative supremacy arose: Should king or Parliament win in the contest over the Exclusion Bill?

Locke fled to Holland in 1683, shortly after Shaftesbury's death, under suspicion of his involvement in the Rye House Plot to assassinate King Charles II and James.¹²⁹ He remained in Holland until King James II, who took the throne in 1685 upon Charles's death, was overthrown in the Glorious Revolution of 1688.¹³⁰ Locke wrote much of the *Two Treatises*, which was ultimately published in 1689–1690, in the years right before and during his exile.¹³¹ As a result, many political theorists and intellectual historians view the *Two Treatises* not merely as an Enlightenment-driven liberal theory to justify political authority but rather as a plea for revolution to ensure a Catholic could not ascend to the throne of England.¹³² Such circumstances were starkly different from the motivations of the Framers while writing the U.S. Constitution.

As a result, Locke's political theory and institutional design are also quite distinct from the structure of the U.S. federal government created by our Constitution. Considering Locke's belief in the power of the Whigs to pass the exclusion bill over the royal prerogative, Locke was motivated to generate expansive legislative powers within his ideal political state. Indeed, much of Locke's *First Treatise* was explicitly written as both a theological and philosophical rejection of Sir Robert Filmer's patriarchal theory of the Divine Rights of Kings,¹³³ which was used by the royalists during the Exclusion Crisis to justify King Charles's repeated dissolutions of Parliament and to allow King Charles to choose his successor.¹³⁴

To generate his positive theory of political government in his *Second Treatise*, Locke looked to the common Enlightenment theoretical devices of natural rights and social contract theory to

129. There is little to no historical evidence of Locke's actual involvement in the Rye House Plot. *Id.* at 32.

130. *Id.* at 45.

131. While Peter Laslett famously argued that Locke wrote the *Second Treatise* before the *First Treatise* around 1679–1680, subsequent work has shown Locke likely wrote the *Two Treatises* in order during the 1680s. See JOHN MARSHALL, JOHN LOCKE: RESISTANCE, RELIGION AND RESPONSIBILITY 222–24 (1994); RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 14–15, 168, 232–34 (1999); J.R. Milton, *Dating Locke's Second Treatise*, 16 HIST. POL. THOUGHT 356, 356 (1995).

132. Dudley Knowles, *Review*, 106 MIND 181, 181 (1997) (reviewing D.A. LLOYD THOMAS, LOCKE ON GOVERNMENT (1995)); Mark Knights, *Review*, 14 PARLIAMENTARY HIST. 360, 363 (1995) (reviewing JOHN MARSHALL, JOHN LOCKE, RESISTANCE, RELIGION, AND RESPONSIBILITY (1994)); Laslett, *supra* note 87, at 31–32.

133. Laslett, *supra* note 87, at 34, 48.

134. *Id.* at 67.

provide an alternative account as to why men join into society. According to Locke, men mutually agree to join into society to better preserve their natural rights to life, liberty, and property than is possible in the state of nature.¹³⁵ Upon the formation of the state, citizens then retain a right to rebel if the state subsequently deviates from securing these rights of its citizens through systematic malice, mistreatment, or negligence.¹³⁶ Locke's radical use of natural rights and social contract theories to justify an expansive right of citizen rebellion against their government certainly influenced many of the Framers to justify their revolution from the British Crown.¹³⁷ The core problem of interpreting Locke to solve American constitutional puzzles is that he crafted his theory to serve different political ends than the Framers. Like the Framers, Locke constructed a separation of powers-type system of government. But he also unambiguously asserted the supremacy of the legislative power over other governmental powers. This was an argument favoring Shaftesbury, his patron, over Charles, his monarch.

This move makes sense given his political motivation for the *Two Treatises* was to justify the ability of Parliament to pass the Exclusion Bill and to implore his fellow Englishmen to revolt against James's ascension to the throne, which they did in the Glorious Revolution of 1688.¹³⁸ Locke repeatedly refers to the legislative power as the "Supream Power,"¹³⁹ which cannot be transferred to any other institutions once delegated to it by the citizenry.¹⁴⁰ Of course, this is the passage that is often the crux of nondelegation arguments. The point for Locke, however, was not—as it is for modern adherents of the nondelegation doctrine—to inhibit legislative authority but rather to argue that the legislature could extensively interfere with the succession process in a manner that would be entirely incompatible with American electoral design. So, when we accept a nondelegation theory based on Locke, we are assuming that a passage in a treatise that proposes a very different kind of democracy can be applied to the U.S. Constitution.

For Locke, while the legislature is still bound by the citizenry and Laws of Nature, its powers should not be bound by any other

135. LOCKE, *supra* note 86, at 323–24, 330–33, 350.

136. *Id.* at 411–412, 415.

137. See THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 126–28 (1988) (discussing Lockean principles adopted by the Framers); Joshua Foa Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. POL. 985, 1001 (1996).

138. Laslett, *supra* note 87, at 46–47.

139. See, e.g., LOCKE, *supra* note 86, at 355–56, 366–67.

140. *Id.* at 362–63.

political powers.¹⁴¹ The executive power is then, in most situations,¹⁴² the subservient power of enforcing the laws as they apply in specific cases.¹⁴³ Importantly, Locke believed the legislative power should have almost complete oversight of the executive power. The king's prerogative—which had just freshly been exercised to thwart the Exclusion Bill—was limited. It was merely the power of the prince “to provide for the publick good, in such [c]ases, which depending upon unforeseen and uncertain Occurrences, certain and unalterable Laws could not safely direct.”¹⁴⁴ The Crown's discretion to exercise its prerogatives is similarly conditioned on acting for the public good “without the prescription of the Law.”¹⁴⁵ The executive power then, under Locke's separation of powers, is reduced to a gap-filling role of law execution where the law is silent on an issue, or when the legislature is not in session, it may be amended or revoked by the legislative power at any time.¹⁴⁶

Locke's resulting theory is therefore both more politically radical and conservative than the institutional goals of the Framers. It is more politically radical than the Framers because of Locke's belief in the supremacy of the legislative power over the other powers of government. In this respect, Locke does not really advocate for a separation of powers but rather for a hierarchy of powers with the legislative branch's authority to promulgate law at the apex. Locke's theory is also more politically conservative than the Framers because Locke does allow for so-called mixed constitutions in which the legislative power is split between the legislature and the executive (both of which could include the monarch).¹⁴⁷

It is therefore theoretically possible for Locke's theory to operate under a monarchical system whereby the legislature and the Crown would share the legislative power. This allowance is unsurprising given

141. *Id.* at 358.

142. Locke does seem to allow for the executive to enact their power of prerogative, which is the “[p]ower to act according to discretion, for the publick good, without the prescription of the Law,” when the legislature is not in session or when the executive must act quickly for the preservation of the of the entire state. *Id.* at 375. For scholarly discussion of Locke and the power of prerogative, see JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE “TWO TREATISES OF GOVERNMENT”* 116–48 (1969); and ERIC NELSON, *THE ROYALIST REVOLUTION* 13–14, 201 (2014).

143. LOCKE, *supra* note 86, at 368 (“The *Executive Power* . . . is visibly subordinate and accountable to [the Legislative Power] . . .”).

144. *Id.* at 373.

145. *Id.* at 375.

146. *Id.* at 368–69, 374–75. Here we set to one side the question of Locke's “federative” power, which is distinctive and roughly analogous to a foreign-affairs power.

147. *Id.* at 368.

that Locke's political ambition in writing his *Two Treatises* was to call for a particular system of monarchy to be implemented in England. Returning to his radicalism, however, Locke is clear that the result of a mixed constitution is theoretically unappealing because if the executive has a legislative veto that cannot be overridden by the legislature, then the result is a stalemate that cannot be settled by the judiciary.¹⁴⁸ The only way for these institutions to resolve this stalemate is through the unattractive mechanism of an appeal to heaven, less colloquially known as armed conflict, to let God decide which institution is right.¹⁴⁹

Perhaps more fundamentally, Locke's conception of what powers compose the separation of powers system is at odds with how our federal system was constructed. This difference stems from the fact that Locke does not think of powers as being housed under discrete political institutions but rather as powers that serve different functions. Viewing the separation of powers as the separation of functions leads Locke to call his three main powers of government as not the legislative, executive, and judicial, but rather the legislative, executive, and federative powers.¹⁵⁰ Under Locke's account, the federative power is the power to act internationally according to the law of nature.¹⁵¹ As countries remain in a state of nature between each other without any sort of international organization to hold countries accountable during the period, countries can only act according to the powers they hold in the state of nature.¹⁵²

Because Locke focuses on types of powers—not the institutions that implement those powers—he differs from the Framers in several important respects. For example, according to Locke, the power of the executive depends on the type of power that he is exercising. When exercising his royal veto over legislation passed by Parliament, the Crown can be theoretically equal to the legislature depending on whether the legislature has any powers to override the royal veto. When executing the law, however, the Crown's executive powers are fully subservient to the legislature's legislative powers.¹⁵³ Additionally, the judicial power is not a distinct type of power for Locke. Rather, it is subsumed into both the legislative and executive powers as a specific form of interpreting the general law passed by the legislature and applying that law to specific cases by the executive.¹⁵⁴ As a result,

148. *Id.* at 379.

149. *Id.*

150. *Id.* at 364–66.

151. *Id.* at 365.

152. *Id.*

153. *Id.* at 368.

154. *Id.* at 325.

contrary to our system of judicial supremacy to interpret the constitution, Locke provided no freestanding judicial powers to courts or other judicial bodies.¹⁵⁵ Rather, it is likely the case that Locke believed that the legislature must always have the ability to override judicial decisions made by magistrates or courts.

Given the extent to which our constitutional democracy departs from Locke's theory, it is difficult to understand why Locke should ever be cited as an authoritative gloss on constitutional meaning. Locke believed in legislative supremacy, designed a separation of functions rather than separation of powers, and created a starkly different institutional design than the U.S. Constitution. Locke thus endorsed a wholly different government structure and allocation of powers. A constitutional interpreter who cites Locke as evidence of original constitutional meaning thus bears a heavy burden in showing that the Founding generation incorporated that part of Locke when drafting the Constitution.

2. The Role of Despotism and the Simplistic Executive in Montesquieu's Political Theory

Compared to Locke, Charles-Louis de Secondat, Baron de Montesquieu's motivations and institutional design within *The Spirit of the Laws* bare closer resemblance to the republican governance designed by the Framers. Like some of Framers, Montesquieu's overarching theoretical concern was avoiding despotic and arbitrary governmental power.¹⁵⁶ Unlike Locke, Charles-Louis de Secondat spent much of his early professional career enmeshed with his country's legal system. Charles-Louis graduated from the University of Bourdeaux's Faculty of Law in 1708 and then practiced law in Paris.¹⁵⁷ In 1716, his uncle died and left Charles-Louis the barony of Montesquieu and his

155. See John Kilcullen, *Locke on Political Obligation*, 45 REV. POL. 323, 334 (1983) ("Locke's argument tells not only against absolute monarchy but against the absolute independence or supremacy of any organ of government, for example, of an independent judiciary."); Alex Tuckness, *John Locke and Public Administration*, 40 ADMIN. & SOC'Y 253, 256 (2008) (describing Locke's three sources of power and pointing out the absence of a judicial power).

156. This is not to say that Locke did not care about arbitrary or despotic government. On the contrary, he deeply cared about arbitrary power and argued that the arbitrary power to make laws must reside in the legislature, which is unsurprising given his political motivations for the treatise. LOCKE, *supra* note 86, at 359–60. That being said, the rule of law itself arguably lacked the theoretical motivating force for Locke that it served for Montesquieu, for Locke's central concern was to justify political authority in a manner that pled for revolution. For discussion of the rule of law in Locke and Montesquieu and their relation to Framers on this point, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 47–54 (2004).

157. Anne M. Cohler, *Introduction* to MONTESQUIEU, *supra* note 88, at xiv.

position as deputy president of the *Parlement* of Bordeaux.¹⁵⁸ In this capacity, now Baron de Montesquieu, Charles-Louis presided over the criminal division of the *Parlement*.¹⁵⁹ After having achieved literary fame from his first publication, *Persian Letters*,¹⁶⁰ Montesquieu sold his office in 1728 and commenced on the traditional European Grand Tour, albeit a decade or two later in life than most European aristocrats.¹⁶¹ Driven by his familiarity with the French legal system and his decades-long personal study of the legal systems of non-Western societies, Montesquieu's concern with how to substantiate and institutionalize the rule of law in government to avoid despotism was an overarching theme of his works throughout his career.

Indeed, in *The Spirit of the Laws*, first published in 1748, Montesquieu does not divide forms of government by the degree to which the people are involved in government but rather by the overarching questions of: (1) the principal emotional basis of government and (2) whether a nation is structured according to laws or despotism.¹⁶² In using these frames, Montesquieu adopts a surprising ambivalence about whether government should take the form of a democratic republicanism, aristocracy, or monarchy. This ambivalence comes from Montesquieu's nonideal and realistic view of the aim of political theory, as well as his personal sympathies for the nobility as a moderating influence on society.¹⁶³

Taking his theory at face value, Montesquieu's aim was to generate a system of government that is stable and nondespotic such that its citizens could enjoy a large degree of liberty to live their lives according to their personal preferences. In doing so, Montesquieu accepts that the governments will take different forms in different countries based upon many sociological and historical variables that affect a given citizenry.¹⁶⁴ In this respect, Montesquieu's motivations are much more politically conservative than those of Locke; his goal is

158. *Id.*; Mauro Cappelletti, Address, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U. L. REV. 1, 11–12 (1985).

159. Cohler, *supra* note 157, at xiv.

160. MONTESQUIEU, PERSIAN LETTERS (John Davidson trans., George Routledge & Sons Ltd. 1923) (1721).

161. Cohler, *supra* note 157, at xv, xviii–xx.

162. MONTESQUIEU, *supra* note 88, at 21 (“There is this difference between the nature of the government and its principle: its nature is that which makes it what it is, and its principle, that which makes it act.”).

163. *Id.* at 24 (“Aristocratic government has a certain strength in itself that democracy does not have. In aristocratic government, the nobles form a body, which, by its prerogative and for its particular interest, represses the people . . .”).

164. *See id.* at 21 (discussing the principles of various governments).

to advocate for moderate governance, not to incite a rebellion.¹⁶⁵ In contrast to Locke, Montesquieu believes that while one society may operate best under democratic republicanism, others may operate best under monarchy. As a result, revolutionaries across America, England, and France during the late eighteenth century all claimed Montesquieu as their inspiration despite their widely divergent political goals,¹⁶⁶ and Enlightenment contemporaries criticized him because they interpreted him as not sufficiently republican.¹⁶⁷ Therefore, even though both Locke and Montesquieu are seminal figures in Enlightenment liberal thought, their theoretical and personal motivations lead to quite different forms of liberalism.¹⁶⁸

The centrality of the rule of law so permeates Montesquieu's thought that it informs his very definition of democracy. Rather than considering democracy in its aggregative or sovereignty-based forms, which was more common in Enlightenment liberal thought, Montesquieu believed a government cannot properly be called a democracy unless the citizenry contains a certain political virtue to "love [] the laws and the homeland."¹⁶⁹ Democracy, according to Montesquieu, slips into despotism if citizens no longer identify their own interests as consonant with the interests of the citizenry, or if citizens begin to reject representative democracy and instead advocate for complete direct democracy.¹⁷⁰

An additional difficulty in maintaining a democracy, however, comes from the fact that humans do not naturally possess political virtue.¹⁷¹ This motive-based account of politics combined with his fear

165. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 85 (Liberty Fund, 2d ed. 1998) (1967) ("For although Montesquieu claimed to be disinterested, his affection for moderate government shines through the whole work, whether it be a moderate monarchy or a moderate republic he is describing.").

166. *Id.*

167. See, e.g., M. Condorcet, *Observations on the Twenty-Ninth Book*, in A COMMENTARY AND REVIEW OF MONTESQUIEU'S SPIRIT OF THE LAWS 274 (Antoine Louis Claude Destutt de Tracy ed., Phila.: William Duane 1811) (1807) ("Such new principles of admeasurement, should be exclusively adopted by the government, the assemblies of the state, the communities . . ."); Helvetius, *Letter 1*, in A COMMENTARY AND REVIEW OF MONTESQUIEU'S SPIRIT OF THE LAWS, *supra*, 285 ("Is it the people who complain, that are dangerous? No: but *those who are not heard*: in such circumstances, the only persons to be dreaded in a nation, are those who hinder others from being heard.").

168. Some scholars even argue that Montesquieu's political particularism inherently conflicts with his liberalism. See, e.g., CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 113 (1932); GEORGE SABINE, *A HISTORY OF POLITICAL THEORY* 552 (3d ed. 1961) (explaining that Montesquieu's writings gave hope to both "reactionaries" and to "liberals").

169. MONTESQUIEU, *supra* note 88, at 36.

170. *Id.* at 112–14.

171. *Id.* at 36 (describing the "love of the laws" that is necessary for democracy as "requiring a continuous preference of the public interest over one's own").

of despotism leads Montesquieu to devise his famous *trias politica*, whereby the three main powers of government (legislative, executive, and judicial) are correspondingly placed within three separate respective institutions (legislature, magistrates, and judiciary).¹⁷² Montesquieu's time in England during the early 1630s is informative here, as he based his *trias politica* on a simplistic and—frankly incorrect—view of the English political system from his discussions with English theorists and statesmen about their separation of powers.¹⁷³ As Locke pointed out nearly a half century earlier, different institutions within the English system actually shared these powers. Nonetheless, Montesquieu's *trias politica* served as the basis for his strict separation of powers theory—for he believed that if one institution were to gain the ability to control multiple governmental powers, then the likely result would be for the government to slide into despotism given humanity's desire to pursue selfish ends when given the opportunity to do so.¹⁷⁴

As Italian jurist and comparative law scholar Mauro Cappelletti has noted, Montesquieu's separation of powers formulation was “miles away from the kind of separation of powers which . . . was adopted by the American Constitution. Separation of powers in America is better described as ‘checks and balances’; under this principle.”¹⁷⁵ Further, one might assume, given the centrality of the rule of law within Montesquieu's thought, that he would have an expansive conception of judicial power, but his personal experiences with the law in France led him to hold a somewhat dismissive view of judicial power exercised by courts.¹⁷⁶ Instead, the rule of law for Montesquieu is primarily expressed as a political virtue held by the citizenry and other political institutions.

172. *Id.* at 156–57.

173. On how Montesquieu spent his time in England, see Cohler, *supra* note 157, at xix–xx. “Montesquieu's famous description of English politics and of the possibility of a government based on separated and balanced powers has its source in his observations of this government.” *Id.*

174. MONTESQUIEU, *supra* note 88, at 157. It is important to note that Montesquieu did not invent the separation of powers term or discussion. In fact, scholars believe he owes a great debt to Henry St. John, First Viscount of Bolingbroke, with whom Montesquieu spent a great deal of time while in England, for his discussion of separation of powers in *The Spirit of the Laws*. See generally Robert Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 FRENCH STUD. 25, 29–30 (1949) (arguing that Montesquieu based his separation of powers theory on writings of Bolingbroke).

175. Cappelletti, *supra* note 158, at 14 (footnote omitted).

176. MONTESQUIEU, *supra* note 88, at 160 (“Among the three powers of which we have spoken, that of judging is in some fashion, null.”); see Cappelletti, *supra* note 158, at 13–14 (explaining that under the French conception of separation of powers, the judicial branch should be “subservient” to the “political branches”).

While widely lauded and hugely influential across Europe and America during the second half of the eighteenth century,¹⁷⁷ cracks in Montesquieu's theory became harder to ignore for critics in the ensuing decades. Importantly for our purposes, Montesquieu had a simplistic view of what the executive power entails compared to the active and vigorous executive contemplated by some of the Framers. This simplicity stems from the fact that ideally, according to Montesquieu, the legislature would craft laws so perfectly that anyone could follow them, for the people cannot love their laws if they do not understand them.¹⁷⁸ While Montesquieu envisions the executive power as strong in foreign affairs and warmaking policy,¹⁷⁹ the role of the executive in administering the laws becomes minimized even more so than Locke theorized decades ago with his personal and theoretical distaste of royal power.

While Locke acknowledged the importance of executive administration to resolve interpretive and implementation gap-filling problems that arise when applying general laws to particular circumstances, Montesquieu believed in a minimal need for executive administration in domestic governance. In this respect, Montesquieu's executive power more closely resembles Locke's federative power.¹⁸⁰ For Montesquieu, what minimal domestic administration is required resembles what he calls "[m]atters of police,"¹⁸¹ by which he means frontline magistrates making instant decisions, "which usually amount to but little."¹⁸² Even as early as the 1760s, European judges and theorists, responding to the rise of executive administrative powers in France and Prussia during this period, already started to criticize Montesquieu for this important oversight within his otherwise groundbreaking *The Spirit of the Laws*.¹⁸³

177. For a brief discussion of contemporary praise of Montesquieu and his subsequent influence, see Cohler, *supra* note 157, at xxiv–xxviii.

178. MONTESQUIEU, *supra* note 88, at 66 ("In moderate countries law is everywhere wise; it is known everywhere, and the lowest of the magistrates can follow it.").

179. *Id.* at 156–57.

180. See VILE, *supra* note 165, at 95 ("[Montesquieu] affirms that he intends to use the term 'executive power' exclusively to cover the function of the magistrates to make peace or war, send or receive embassies, establish the public security, and provide against invasions.").

181. MONTESQUIEU, *supra* note 88, at 517. For discussion of Montesquieu's use of the term "police" to mean administration, see Anne M. Cohler, Basia C. Miller & Harold S. Stone, *Translators' Preface* to MONTESQUIEU, *supra* note 88, at xxxv.

182. MONTESQUIEU, *supra* note 88, at 517.

183. See, e.g., JOHANN HEINRICH GOTTLÖB VON JUSTI, GRUNDRISS EINER GUTEN REGIERUNG 217 (1759); MARTIN ALBROW, BUREAUCRACY 16 (1970) ("The real spirit of the laws of France is that bureaucracy of which the late M. de Gournay . . . used to complain so greatly . . ." (quoting a 1765 letter from Baron de Grimm)).

This Part has demonstrated how difficult it is to properly interpret the conflicting political theory of various Enlightenment political theorists. First, properly interpreting their political theories requires situating the socio-political circumstances in which they wrote as well as their internal theoretical motivations driving their theoretical work. In addition, Enlightenment theorists conflict with each other on many important issues that are central to constitutional separation of powers discussions, such as the relative strength of the legislative and executive powers and whether the judiciary should have its own independent judicial power. Making things even more difficult for their use in constitutional interpretation, sometimes the Framers consciously chose to depart from previous Enlightenment theory when drafting the Constitution.

This creates a selection issue that makes it difficult to understand why a particular element of a particular Enlightenment political theory should be treated as an authoritative source of constitutional meaning. Any attempt by a constitutional lawyer, judge, or scholar to use Enlightenment political theory should give careful consideration to the sociopolitical environment and personal motivations of each particular theorist discussed, reconcile disagreements between the seminal Enlightenment theorists on the issue in question, and determine which theorist(s) the Framers consciously chose to accept or reject on each particular constitutional separation of powers question at issue. After that, the interpreter would need to show that the Founding generation understood the theory in that way, accepted the theory's approach to government, and incorporated that theory into the text and structure of the Constitution. This is a challenging task even for those properly trained in the history of political thought.

3. Blackstone's Internal and External Theoretical Tensions

Blackstone, too, was largely responding to a peculiar historical moment. Contrary to his canonical place in elite American constitutional argument, William Blackstone was not the first to take on the Sisyphean task of writing a general treatise on the British common law.¹⁸⁴ In fact, Blackstone heavily utilized some of these

184. For prominent examples of earlier attempts by English lawyers to provide structure and rationality to the English common law that Blackstone himself utilized in his work, see, for example, THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* (1720); MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND, AND AN ANALYSIS OF THE CIVIL PART OF THE LAW* (1713); and HENRY FINCH, *LAW, OR A DISCOURSE THEREOF* (1613). For discussion of how Blackstone fits into this intellectual tradition, see S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1

previous works for both the structure and content of his writings.¹⁸⁵ Further, compared to Locke and Montesquieu, Blackstone was never much of a theorist at all. Most of Blackstone's political and legal theory derived from Enlightenment sources, including Hobbes, Locke, Montesquieu, and Burlamaqui, among others.¹⁸⁶ Nor was Blackstone a particularly adept practicing lawyer.¹⁸⁷ It is natural, then, to wonder why Blackstone has become regarded as one of the most influential thinkers in American legal history. Blackstone's great skill instead was his ability to coalesce diverse legal sources and simplify complex legal issues for a lay audience.

Lurking beneath his magisterial summation of common law, however, Blackstone also spun an antiroyalist political project of parliamentary sovereignty through a nationalist retelling of English history. As we discuss below, Blackstone wrote what today would be regarded as an introductory textbook for a nonlegal audience, and he was not nearly as descriptive and value neutral as first meets the eye. As a result, for constitutional doctrines in which there is evidence that the United States did not depart from the British, there is reason to think that Blackstone provides a useful starting point from which to glean Founding-era legal understandings. But because the Constitution departs from the eighteenth-century British legal system in important respects, and because an introductory textbook was not the authoritative source of British constitutional meaning, Blackstone's work should be understood to provide useful historical context about the meaning of British law during the eighteenth century. When (as is sometimes the case) there is evidence of incorporation, then Blackstone is a valuable interpretive guide. But as discussed below, the Constitution departs from Blackstone in important respects, and the

OXFORD J. LEGAL STUD. 1, 7–8 (1981); and Wilfrid Prest, *The Dialectical Origins of Finch's Law*, 36 CAMBRIDGE L.J. 326, 326–27 (1977).

185. See generally John W. Cairns, *Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 336–38 (1984); Michael Lobban, *Rationalising the Common Law: Blackstone and His Predecessors*, in BLACKSTONE AND HIS CRITICS 1, 1–22 (Wilfrid Prest & Anthony Page eds., 2018).

186. Lobban, *supra* note 185, at 2 (“He was not an original or sophisticated theorist: rather than working out a coherent theory of law of his own, he borrowed from a variety of disparate theorists in order to make a particular argument about the nature of the English constitution.”); see also DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 48–53, 154–66, 169–70, 206 n.89 (1958); Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 312, 325 (1987); Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L.J. 399, 406–07 (1959).

187. See WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 52–74 (2008) (discussing the years that Blackstone practiced law in London); Harry T. Dickinson, *Review Article: Comments on William Blackstone's Commentaries on the Laws of England*, 104 HISTORY 710, 713–14 (2019).

Framers relied on numerous legal sources. As a result, contemporary constitutional interpretation should exercise caution when assuming that Blackstone provides decisive evidence of the Framers' meaning.

Blackstone's most famous and celebrated work, his *Commentaries on the Laws of England*, which were first published between 1765 and 1770, drew heavily from lecture notes that he had developed and revised while teaching English law at Oxford since 1753.¹⁸⁸ But the finished product was not for elite legal practitioners: Blackstone adapted his lecture notes for publication because student notes had begun circulating across England and there was rumor of an unauthorized edition being assembled for publication in Dublin.¹⁸⁹ Unlike many previous treatise writers, Blackstone wrote his lectures and the *Commentaries* for a nonlawyer audience. In fact, his primary audiences were the lay-propertied elites of England and students training to become lawyers. Blackstone targeted lay elites and law students because he believed that those who were to be guiding the development of British law in Parliament and the courts should have an introductory understanding of the law and government of the United Kingdom.¹⁹⁰ His goal, therefore, was not to directly influence English law but rather influence the men who would be lawmakers and judges, so that they would craft better laws.¹⁹¹

By the 1750s, when the *Commentaries* first appeared, introductory education in the common law, which was the province of the Inns of Court,¹⁹² had fallen into disrepair.¹⁹³ As Blackstone put his aim in a letter to his patron Lord Shelbourne in 1761, his goal was to effect "some improvement in the methods of academical education, by retaining the useful parts of it, stripped of monastic pedantry, by supplying its defects, and adapting it more peculiarly to gentlemen of rank and fortune."¹⁹⁴ All of this is to say that Blackstone did not take himself to be providing a comprehensive or detailed account of English common law and government in his *Commentaries* but rather a general overview for lay elites who were hungry to learn the basics of the law.

188. Dickinson, *supra* note 187, at 714; I.G. Doolittle, *Sir William Blackstone and His Commentaries on the Laws of England (1765-9): A Biographical Approach*, 3 OXFORD J. LEGAL STUD. 99, 111 (1983).

189. Dickinson, *supra* note 187, at 714.

190. *Id.* at 714-15.

191. See David Lieberman, *Blackstone's Science of Legislation*, 27 J. BRIT. STUD. 117, 121 (1988); Doolittle, *supra* note 188, at 108-09; Milsom, *supra* note 184, at 2-3.

192. Cairns, *supra* note 185, at 333; Lobban, *supra* note 185, at 6.

193. 12 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 15-17 (1938) (noting that the Inns of Court had "ceased to be educational institutions").

194. Letter from William Blackstone to Lord Shelburne (Dec. 27, 1761), *reprinted in* Doolittle, *supra* note 188, at 102.

He was writing the modern equivalent of a contemporary undergraduate textbook, not a magisterial analysis of English common law.¹⁹⁵ This crucial fact, more than the brilliance of his exegesis, accounts for his popularity.

Blackstone did, however, have one axe to grind regarding a protracted debate about the proper sources of law in England. During the *Commentaries* period, the principal sources of English law were in a period of transition. Because English lawyers had been trained only in civil law at university for centuries,¹⁹⁶ civil law had seeped into English law through countless pores—such as admiralty, ecclesiastical, and chivalry courts, which exclusively applied Roman law.¹⁹⁷ By Blackstone's time, however, the question of which sources of law should compose English law took on a distinctly ideological character. Civil law became associated with royal absolutism, standing in contrast to a common law that protected the civil liberties of the English people.¹⁹⁸ This fight over sources thus echoed wider political feuds, and to elevate the status of the common law was to ally with one group over another.

Blackstone thus sought in his lectures and *Commentaries* to persuade others that the common law was the true national law of England. In this respect, his *Commentaries* are also an explicitly nationalist project.¹⁹⁹ The principal appeal of the civil law was its perceived clarity and unity. In contrast to the common law's precedential morass, the civil law proceeded from a series of common premises and yielded predictable conclusions. Accordingly, Blackstone's focus on the common law's elaborate structure and order in the

195. Ruth Paley, *Modern Blackstone: The King's Two Bodies, the Supreme Court and the President*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS, *supra* note 75, at 188, 194 (“[W]hat we have in the *Commentaries* is an undergraduate text, and like any undergraduate text it synthesises and organises what was in effect already available in existing literature.”).

196. See 4 WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 228–37 (1938); Cairns, *supra* note 185, at 328, 331.

197. See HOLDSWORTH, *supra* note 196, at 237–38. For general discussions of the civil law in England, see, for example, BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603–1641: A POLITICAL STUDY* (1973); and Charles P. Sherman, *A Brief History of Medieval Roman Canon Law in England*, 68 U. PA. L. REV. 233 (1920).

198. Charles Donahue, Jr., *The Civil Law in England*, 84 YALE L.J. 167, 167 (1974); see LEVACK, *supra* note 197, at 150–57.

199. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 658 (1981) (remarking that “[a] spirit of nationalistic self-satisfaction permeates the *Commentaries*”); Cairns, *supra* note 185, at 354 (“Blackstone . . . emphasized that the common law was the national law superior to all other systems and claimed that the common law was uniquely English.”). Blackstone himself critiqued the use of civil law and foreign languages within English law. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* *317–22.

Commentaries sought to persuade his audience that the common law, too, could govern through structured rationality. As Blackstone put his ambitions upon being appointed the first Vinerian Professor of Common Law, “[W]e must not carry our veneration [of the civil law] so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English [P]arliament”²⁰⁰

So strong was Blackstone’s nationalist ambitions that he bent history in numerous glaring places to fit his historical narrative.²⁰¹ History was not the only thing that Blackstone bent to suit his tale, as Blackstone portrayed multiple areas of common law as more ordered than they really were at the time to heighten the common law’s perceived rationality.²⁰² Blackstone’s *Commentaries* thus tells a particular political history by engaging in the twin projects of justifying the development of English political arrangements and rationalizing the common law. Each goal supported the other.

Because of these commitments, the *Commentaries*’ categorical pronouncements about English public law must be approached with caution. For example, Blackstone’s political purpose and theoretical

200. 1 William Blackstone, *On the Study of Law*, in BLACKSTONE, *supra* note 10. Blackstone did acknowledge the potential applicability of civil and canon law in specific courts and circumstances. But he argued that both civil and canon law should only be included in English law when it was embraced by the common law. *See id.* at 14–15.

201. For discussion of Blackstone bending history to suit his arguments, see, for example, Dickinson, *supra* note 187, at 715–17; Cairns, *supra* note 185, at 355–56; Lieberman, *supra* note 191, at 128–29; and Lobban, *supra* note 185, at 16–17. In no place was this more evident than in his argument that the common law was the true ancient law of England by attempting to argue a continuous link between the pre-Norman law and then-contemporary common law. On Blackstone’s account, the common law was the true ancient law of England since time immemorial. To show this link, Blackstone argued that the Norman imposition of feudalism on England after 1066 was therefore acquiesced to by the English people, rather than imposed upon them after their conquest by the Normans. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *33, *42. Later in Volume IV, however, Blackstone contradicts himself by stating that the Norman imposition of feudalism was “the badge of foreign dominion.” *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *431. For discussion of this contradiction, see Lobban, *supra* note 185, at 16–17. The critique that Blackstone engaged in Whiggish history to justify the status quo has dogged him since Jeremy Bentham first made the point in his scathing critique of the *Commentaries*. JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 399–400 (J.H. Burns & H.L.A. Hart eds., 1977). In the twentieth century, Blackstone scholars argued for a more nuanced position—that Blackstone engaged in Whiggish history but he also earnestly sought legal reform in a number of areas, especially in the criminal law. *See, e.g.*, Albert W. Althuscher, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 40–41 (1996). For a brief discussion of the shifting scholarly views on Blackstone’s place in Whig history, see Dickinson, *supra* note 187, at 710.

202. Lobban, *supra* note 185, at 10–11 (describing how Blackstone’s simplifications of the common law in multiple areas, such as trusts and contracts, left the reader a picture of contemporary English common law that “was unrepresentative of the legal system his readers would encounter in the world in which they lived”).

devotion to the preservation of English civil liberties explain why he argues that the British government is one of legislative supremacy where the King-in-Parliament²⁰³ holds the sovereignty of the British people. Thus, on Blackstone's account, Parliament served as the vanguard of the people's civil liberties against the king. The king, in turn, was the greatest threat to arbitrary and despotic rule.²⁰⁴ Blackstone is unequivocal within the *Commentaries* that the King-in-Parliament holds both legislative supremacy and sovereignty. As he puts the matter, the "legislature . . . is the greatest act of superiority that can be exercised by one being over another."²⁰⁵ He continues, "Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."²⁰⁶

On Blackstone's account, the legislative power is so absolute that it approaches omnipotence. As he put it, "[W]hat they do, no authority upon earth can undo."²⁰⁷ It is in Parliament "where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."²⁰⁸ Yet Blackstone is confusing in his defense of legislative supremacy. The history and the theory run at cross-purposes and are never resolved: Blackstone simultaneously argues that historically the king has been prone to despotic rule and therefore the Parliament must be empowered to fight against him, but Blackstone gives despotic power to the King-in-Parliament to pass any law that they so desire.

On this shaky foundation, many modern constitutional arguments have been built. Some contemporary legal scholars have utilized Blackstone—not to bolster the power of Congress, as Blackstone's encomium to the King-in-Parliament would suggest, but rather to argue the presidency should have expansive inherent

203. "King-in-Parliament" here refers to the legislative combination of the House of Commons, House of Lords, and the king each holding part of the legislative power when operating to pass legislation. See WILLIAM BLACKSTONE, 1 COMMENTARIES *183 (Wilfrid Prest et al., Oxford University Press 2016) (1765). For discussion, see Halliday, *supra* note 75, at 180; Howard L. Lubert, *Sovereignty and Liberty in William Blackstone's "Commentaries on the Laws of England,"* 72 REV. POL. 271, 289–90 (2010); and Lieberman, *supra* note 191, at 132.

204. See Lubert, *supra* note 203; see also Cairns, *supra* note 185, at 356 (describing how Blackstone's political history fit within a Whig political history intellectual tradition during the seventeenth and eighteenth centuries).

205. BLACKSTONE, *supra* note 203, at *46.

206. *Id.*

207. *Id.* at *157.

208. *Id.*

powers.²⁰⁹ Blackstone's political ends and his choice of means in the *Commentaries* invite this mistake. The first sentence of Blackstone's chapter, "Of the King, and His Title," states that "[t]he supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen."²¹⁰ Blackstone immediately qualifies the executive power, however, by saying that this "supreme executive power" is "declared by statute."²¹¹ Blackstone goes on to state that "the powers which are vested in the crown" are only vested in him "by the laws of England."²¹² Blackstone is more explicit about Parliament's powers over the king in a previous chapter when he states, "An act of [P]arliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land . . . nay, even the king himself . . ." ²¹³ Consistent with his broader project, Blackstone linked statutory control of the king as a hallmark benefit of common law over the civil law, which, on Blackstone's nationalist telling, would grant the king unchecked executive power.²¹⁴ For Blackstone, the legislative power can alter, check, or diminish the executive power through any method, at any time, and for any reason. Legislative supremacy was the citadel of English liberty.

A motivated reader can thus find convenient passages in Blackstone and use those passages to support a particular position. But a reader with different normative views is likely to be able to identify positions that support her point. Given Blackstone's internal inconsistencies about the separation of powers, it is difficult to determine whether Blackstone's theory of separation of powers has anything to teach American constitutional lawyers who are accustomed to talking about checks and balances.

For Blackstone, checks and balances are largely internal to each distinct political power; much less attention is paid to the relationship between those political powers. Take the legislative power. Even though the legislative power has almost despotic power in the state, Blackstone argues that the various political institutions that compose the legislative power—the House of Commons, House of Lords, and the King—check each other during the legislative process to preserve civil

209. See Halliday, *supra* note 75, at 169–70 ("It is hardly surprising then that Blackstone's king has provided the basis for some of the more lavish claims made about the powers of American presidents.")

210. BLACKSTONE, *supra* note 203, at *183.

211. *Id.*

212. *Id.* at *230.

213. *Id.* at *179.

214. *Id.* at *235.

liberties.²¹⁵ As Blackstone put the matter, “In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both”²¹⁶ Given that the assent of each institution is required to pass new law, each institution holds the power to check the other from *within the legislative process*. Blackstone believed that only positive law was binding on political officers and the citizenry in the political state: there is no other source of positive law that can bind the hands of the King-in-Parliament.²¹⁷

One result of Blackstone’s theory is that he did not believe, contra the American founding, that the citizenry retained natural rights that were binding on the state once the political state was formed. This position entailed that Blackstone believed the citizenry did not hold a practical right to rebellion if the king or Parliament crossed any sources of law, including natural law.²¹⁸ Indeed, during his time in Parliament, Blackstone strongly supported parliamentary control over the colonies, including Ireland and the American colonies.²¹⁹ He opposed the repeal of the Stamp Act in 1766 on the ground that the colonies were subordinate to Parliament.²²⁰ To allow them to willingly violate English law was tantamount to transferring sovereignty to them.²²¹

While the *Commentaries* was influential among American lawyers and played an important role in their legal education,²²² Blackstone’s theoretical positions and actions while in Parliament

215. See, e.g., *id.* at *172–73.

216. *Id.* at *150.

217. See *id.* at *43–46. While natural law did serve as a nonbinding moral guide to legislators and other political officials when they crafted laws, it was not, in a strict sense, binding the citizenry. *Id.* at *39–46.

218. *Id.* at *157. Blackstone also appears on this page to opaquely believe that the citizenry continued to hold a theoretical right to rebellion, but he never draws out the theoretical interaction between theory and practice on a right to rebellion. See *id.* This being said, he is quite clear that, in practice, the citizenry of a political state holds no justification to rebel. *Id.* at *157–58.

219. Blackstone served in the House of Commons, first as MP for Hendon in 1761 and then Westbury in 1768. Dickinson, *supra* note 187, at 713. For discussion of this period in Blackstone’s life, see PREST, *supra* note 187, at 183–255.

220. PREST, *supra* note 187, at 225, 292. Blackstone also supported the exclusion of radical journalist and politician John Wilkes from the House of Commons, who ardently denounced England’s treatment of the American colonies. *Id.* at 237–41.

221. See Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

222. For discussion of Blackstone’s massive influence on American legal education before and after the Founding, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5–6 (1996); William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 6–10 (1994); and Nolan, *supra*, note 221, at 737, 760–67.

placed him in a complicated intellectual relationship with many Framers. Some Framers sharply criticized his theoretical views on natural law, legislative supremacy, and parliamentary sovereignty. Most extensively, James Wilson published a pamphlet, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*,²²³ which rejected Blackstone's entire political theory. Within the work, Wilson took Blackstone and others to task for failing to recognize the natural law origins of the positive law,²²⁴ which meant that political sovereignty continued to reside in the people within the political state and thus their consent was necessary for the creation of law.²²⁵ As a result, Wilson argued the American people must have some mechanism to withdraw their consent when a law violated their interests, meaning American colonists must hold the right to remove representatives from Parliament when those representatives failed to represent them.²²⁶ Given Blackstone's legislative sovereignty, Wilson flatly stated later in his *Lectures on Law* that Blackstone "deserves to be much admired but . . . ought not to be implicitly followed."²²⁷

Once James Wilson took a position on the U.S. Supreme Court, he wasted no time in repudiating Blackstone's views in *Chisholm v. Georgia*,²²⁸ which ruled the states were under the jurisdiction of the Court.²²⁹ Justice Wilson argued that Blackstone's principle that the king held immunity from suit must be rejected because it is the people who hold sovereignty over him.²³⁰ Wilson argued such a position of royal immunity was emblematic of the "systematic despotism" that has befallen England, and as a result, the king holding any form of immunity from suit must be rejected on "the basis of sound and genuine jurisprudence."²³¹

Wilson's express repudiation of Blackstone was possible because the issue of a subordinate institution's political sovereignty was joined between the *Commentaries* and *Chisholm*. But the Framers were also frequently befuddled by Blackstone's tortuous theoretical and historical

223. JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT (1774), reprinted in 1 COLLECTED WORKS OF JAMES WILSON 3, 3–31 (Kermit L. Hall & Mark David Hall eds., 2007).

224. *Id.*

225. *Id.* at 5, 9 (on sovereignty residing in the people); *id.* at 14–15 (on the consent of the people to create law).

226. *Id.* at 15.

227. JAMES WILSON, LECTURES ON LAW, reprinted in 1 COLLECTED WORKS OF JAMES WILSON, supra note 223, at 427, 444.

228. 2 U.S. 419 (1793).

229. *Id.* at 430–31.

230. *Id.* at 458 (Wilson, J.).

231. *Id.*

accounts. For example, Thomas Jefferson viewed Blackstone as a courtly Tory who gave the king too much power in his system of government; while James Wilson, Archibald Maclaine, and Alexander Hamilton, among others, viewed Blackstone's parliamentary supremacy as contrary to the American experience.²³² This lack of coherence behind how the Framers viewed Blackstone was also evident during the ratification debates, as both the Federalists and anti-Federalists often used Blackstone selectively for their own ideological or political purposes.²³³ Some Framers even supported some of Blackstone's positions while simultaneously rejecting others. Alexander Hamilton, for example, rejected Blackstone's views on legislative supremacy in one breath²³⁴ while he praised Blackstone's views on the civil rights of the citizenry in another.²³⁵

Indeed, many Framers saw the creation of the United States of America as heralding a basic change from the law that the *Commentaries* explained.²³⁶ For example, Framer and Professor of Law at William & Mary St. George Tucker published an influential U.S. edition of Blackstone's *Commentaries* in 1803 in which he added over one thousand annotations and appendices to systematically criticize Blackstone's theoretical positions and point out where Blackstone's legal pronouncements ran counter to American law.²³⁷ In his edition, Tucker stated that Blackstone was expounding *English* law, not *American* law, and as a result, he felt that it was his duty to heavily

232. For discussions of the various criticisms lobbed at Blackstone by the Framers, see Horst Dippel, *Blackstone's Commentaries and the Origins of Modern Constitutionalism*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS, *supra* note 75, at 199–214, discussing the criticisms of Wilson, Maclaine, and Hamilton, among others; Dickinson, *supra* note 187, at 721, discussing Jefferson's criticisms; Nolan, *supra* note 221, at 748–50, same; and Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS, *supra* note 75, at 215–38, discussing the criticisms of Wilson and Jefferson.

233. See Dippel, *supra* note 232, at 203–04 (“[W]hile supporters of the Federal Constitution relied on Blackstone to support their case, the anti-[F]ederalists also appealed to [Blackstone's] ideas.”); Nolan, *supra* note 221, at 745–56.

234. THE FEDERALIST NO. 84 (Alexander Hamilton).

235. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 472–73 (1911).

236. See Alschuler, *supra* note 222, at 2 (“Blackstone's reception in America reveals that Americans were determined to make their own law . . .”).

237. 1 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND THE LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803) [hereinafter *Tucker's Blackstone*]; Davidson M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1112–1113 (2006).

annotate the book to fit it into the American legal environment.²³⁸ For example, Tucker rejected that Congress or the President was the sovereign authority and argued that sovereignty resided in the American citizenry.²³⁹ In Tucker's mind, the American Revolution was a "revolution not only in the principles of our government but in the laws which relate to property and in a variety of other [laws],"²⁴⁰ and therefore, many areas of American law were "irreconcilable [sic] to the principles contained in the *Commentaries*."²⁴¹

In sum, the Framers held a complicated intellectual relationship with Blackstone. While his *Commentaries* served as a seminal educative work for many Framers during their legal studies, they were cognizant of that fact that they rejected many parts of Blackstone's political theory. Therefore, the Framers were not above deploying Blackstone's thought for their own political purposes during the constitutional drafting and ratification processes. Further, the Framers recognized Blackstone's nationalist ambitions to pronounce English common law and grappled with the fact that the American legal project fundamentally departed from the English common law in Blackstone's *Commentaries*. Therefore, while Blackstone was wildly influential during the Founding period for legal educative purposes, interpreting which of Blackstone's theoretical positions were embraced by any one Framers, let alone the Framers as a collective, is an assiduously difficult historical and theoretical task.

IV. HOW ENLIGHTENMENT POLITICAL THEORY SHOULD BE USED IN CONSTITUTIONAL INTERPRETATION

So, what is the proper relationship between Enlightenment political theory and constitutional meaning? In our view, the default assumption should be that Enlightenment theory should not be used as a guide to constitutional meaning absent specific evidence of its use in American constitutional politics. Our evidence is as follows: that the Founding generation treated the idea of a uniform Enlightenment theory with skepticism, it is acutely difficult to choose among competing general Enlightenment theories to answer specific legal questions, and

238. St. George Tucker, *Preface to Tucker's Blackstone*, *supra* note 237, at iii, vi–vii. Given Tucker's goal of situating Blackstone as palatable for American audiences, he added over one thousand annotations and appendices systematically criticizing Blackstone's theoretical positions and pointing out where his legal pronouncements ran counter to American law. *Id.* at vi–ix. For further discussion, see Robert M. Cover, Book Review, 70 COLUM. L. REV. 1475, 1475–76 (1970).

239. St. George Tucker, *Appendix to Tucker's Blackstone*, *supra* note 237, at 1, 4–6.

240. Tucker, *supra* note 238, at iv–v.

241. *Id.* at v.

that the Constitution departs from Enlightenment theory in significant respects.

Given the extensive disagreement Enlightenment theorists had with each other, lawyers engaging in constitutional interpretation who base their interpretations on the views of Locke, Montesquieu, or Blackstone can pick among theories that support their point. We have shown, for example, that the passage from Locke that is used to support the nondelegation doctrine is better read as making a descriptive point that it is not possible for the legislature to give up certain powers, and that this view is based on Locke's particular concern about a Catholic monarch. Read out of context, however, it can support a nondelegation doctrine. To reach that conclusion, one must first ignore the peculiar historical period in which Locke wrote and Locke's particular political motivations in crafting his conception of the legislative power. Then, one must additionally assume that the Constitution impliedly embraces elements of Locke's theory of legislative power despite rejecting Locke's more foundational view of legislative supremacy. Finally, one must privilege Locke's theory of legislative power over those of Rousseau, Montesquieu, and other conflicting Enlightenment theorists. This process of adapting Locke's view of the legislative power dangerously strips the historicity and historiography of Locke's account when adapting his argument to suit constitutional interpretation and argumentation.

One could perhaps respond by acknowledging that Enlightenment political theory is a fraught interpretive enterprise and by arguing that Enlightenment political theory should be a guide in the absence of proof that a particular theory was rejected by the Framers. But that approach would ignore the Framers' skepticism of Enlightenment political theory, it would overlook the many ways the Constitution departs from the work of Enlightenment theorists, and it would fail to offer a way to mediate disagreements among political theorists.

Of course, enlightenment political theory can provide general background evidence regarding the different substantive ways in which a particular concept or term was understood at a certain period in time. But in this usage, enlightenment political theory is no different than other potential sources of persuasive evidence. Additionally, enlightenment political theory can also still provide evidence regarding what some commentators have called the pragmatic or "communicative enrichment" of how specific concepts or terms were utilized at a certain

period in time.²⁴² When used in either of these manners, no extra evidentiary or justificatory weight is, or should be, attributed to a source of background evidence simply due to the fact that it is derived from enlightenment political theory absent further evidence of consensus and joinder as described previously.²⁴³

The better approach, in our view, is to rely on text, history, and structure to discern constitutional meanings and to assume that Enlightenment political theory can be used as a guide to constitutional meaning in only exceptional circumstances. Proving that a modern legal question falls within such exceptional circumstances is a complex question of joinder that should require at least three analytic and historical steps before a justice or legal scholar looks to Enlightenment political thought to interpret the meaning of the Constitution. The first question that must be answered is whether the legal issue presented in each modern case is the same issue that motivated constitutional partisans at the Founding. This question must be answered to establish that the Framers and the relevant Enlightenment theorist were discussing the same specific constitutional question at issue.

Second, if the issue is joined, then there should be specific evidence of the use of Enlightenment political thought. That is to say, there should be persuasive evidence that the victors of American constitutional politics at the Founding specifically incorporated a specific theory from a political theorist (or a group of theorists) to answer the constitutional question at issue. This question must be answered to establish that the Framers actually looked to the particular Enlightenment theorist in question when structuring the relevant part of the Constitution.

And finally, there should be persuasive evidence of consensus about what the Framers took a specific theorist (or group of theorists) to be saying. As previously discussed, explicating Enlightenment political theory is a difficult interpretive task that requires understanding of the background political thought of the period and the political circumstances and motivations of each theorist, as well as determining the proper usages of terms during the time in which each theorist wrote. Even European contemporaries of Enlightenment theorists diverged on their interpretations of each theorist, such as when the Marquis de Condorcet criticized Montesquieu for not actually believing in republican government.²⁴⁴ The Framers were no different

242. *Solum, supra* note 17, at 465.

243. *See supra* Part III (describing the problems of consensus and joinder when using Enlightenment political theory to interpret constitutional meaning).

244. *See Condorcet, supra* note 167, at 274.

in this regard, as they actively disagreed on how to interpret different Enlightenment theorists to suit their political goals.

Given these complexities when using Enlightenment political theory to interpret our Constitution, our overarching goal of this Essay is to urge historical caution and interpretive humility at every stage of this analysis by judges and our academic contemporaries.

CONCLUSION

High-stakes constitutional debates are increasingly characterized by claims that the Founding generation understood a constitutional term in a particular way, and the evidence marshaled to support this interpretation is frequently a statement from an Enlightenment political theorist. But, as discussed, these interpretive moves tend to ignore the fact that the theorist had particular motivations and embraced a constitutional structure that would have looked radically different from the American Constitution. In addition, theorists themselves disagreed with each other, and Enlightenment-Political-Theory-as-Constitutional-Interpretation has not offered a way to choose among these conflicting views. These problems are only compounded by the fact that the Founding generation expressed a great deal of skepticism towards the Enlightenment political theorists who are frequently cited as evidence of original constitutional meaning.

Given the difficulties with this interpretive approach, we suggest a clear statement rule when using political theory in constitutional interpretation: Absent clear evidence of consensus and incorporation, the views of Enlightenment political theorists should be presumptively irrelevant to those trying to discern original constitutional meaning.