

CONSTITUTIONAL AMBIGUITIES AND ORIGINALISM: LESSONS FROM THE SPENDING POWER

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ABSTRACT

Proponents of originalism typically acknowledge that some constitutional provisions are ambiguous. No originalist consensus has yet emerged, however, for how a court should proceed in such cases. Some originalists are comfortable permitting courts to announce a determinate meaning for such constitutional provisions, but offer the courts no guidance for how to undertake that project with appropriate (the greatest possible?) fidelity to the Constitution. Other originalists have instructed the courts to uphold legislation challenged as violating an ambiguous constitutional provision. None among this latter group of scholars has provided a sustained explanation for their common prescription, however; each has merely invoked “majoritarianism” by way of justification and support.

In this Article, I propose a new canon of interpretation (with a corollary) for courts confronting ambiguities in the United States Constitution. I argue that this approach to ambiguities is of greater fidelity to the Constitution than the “majoritarian” prescription offered by some originalists. In addition, I explain why advocates of a “living Constitution” and proponents of “exclusive originalism” should all be eager to embrace the proposed canon.

The proposed canon is that, when choosing among plausible interpretations of an ambiguous constitutional provision, the Court should choose the interpretation favored by (or most likely to benefit) the party that is less likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court’s interpretation. The canon, and its justification, are both informed by our nation’s history and experience with the (indisputably ambiguous) Spending Clause of Article I, but neither is in any way limited to that constitutional provision.

The Article begins with a critical analysis of the existing positions taken, and prescriptions offered, by originalist scholars who have discussed the problem of constitutional ambiguities. The remainder of the Article discusses the Spending Clause as an example of how the proposed canon and its corollary would operate, and the benefits to be gained from these particular second-order rules of interpretation.

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INTRODUCTION

Proponents of originalism typically acknowledge that some constitutional provisions are ambiguous.¹ That is, that the original meaning (or understanding or intent)² of some constitutional provisions cannot be

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¹ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 645 (1999); Stanley Fish, *There Is No Textualist Position*, 42 *SAN DIEGO L. REV.* 629, 640 (2005); Lino A. Graglia, “*Interpreting*” *the Constitution: Posner on Bork*, 44 *STAN. L. REV.* 1019, 1043–44 (1992); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 *YALE L.J.* 2037, 2057 (2006).

² There is much debate among self-described “originalists” regarding the proper object of originalist concern. They focus variously on Framers’ intent, ratifiers’ understanding, original public meaning, or some combination of these (and others). See generally Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085 (1989). For my purposes, the chosen object of originalist concern is immaterial.

discerned with a sufficient degree of certainty. No originalist consensus has yet emerged, however, for how a court should proceed in such cases.

Some originalists are comfortable permitting courts to announce a determinate meaning for ambiguous constitutional provisions, but offer the courts no guidance for how to undertake that project with the greatest possible fidelity to the Constitution.³ Other originalists have instructed the courts to uphold legislation challenged as violating an ambiguous constitutional provision.⁴ None among this latter group of scholars has provided a sustained explanation for their common prescription, however; each has merely invoked “majoritarianism” by way of justification and support.⁵

In this Article, I propose a new canon of interpretation, with a corollary, for courts confronting ambiguities in the United States Constitution. I argue that this approach to ambiguities is of greater fidelity to the Constitution than the “majoritarian” prescription offered by some originalists. In addition, I explain why advocates of a “living Constitution” and proponents of “exclusive originalism”⁶ should all be eager to embrace the proposed canon.

This canon is that, whenever possible, the Supreme Court should interpret any ambiguities in the text of the Constitution⁷ such that the party disadvantaged by the interpretation is the party more likely, as matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court’s interpretation. Put differently, when choosing among plausible interpretations of an ambiguous constitutional provision, the Court should choose the interpretation favored by (or most likely to benefit) the party that is less likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court’s interpretation. The ca-

³ These originalists are of the view, however, that the project engaged in by the courts in these situations is not the interpretation of constitutional meaning. See, e.g., Barnett, *supra* note 1, at 646 (describing a “method of construction—as distinct from interpretation—[that] is only appropriate when terms are genuinely ambiguous or when the original level of generality can be satisfied by more than one rule of law”); Fish, *supra* note 1, at 640, 649–50 (discussing “stopping rules” and contending that they “are not rules of interpretation, but rules that tell you when the effort to interpret should cease and something else should take over” in situations in which “the search for meaning is either so difficult that keeping at it paralyzes the system or so subversive of the purposes law is supposed to fulfill that insisting on it would be perverse”).

⁴ See, e.g., BORK, *supra* note 1, at 166–67; Graglia, *supra* note 1, at 1044; Paulsen, *supra* note 1, at 2057.

⁵ See BORK, *supra* note 1, at 166–67; Graglia, *supra* note 1, at 1044; Paulsen, *supra* note 1, at 2057.

⁶ As defined and explained by my colleague, Mitch Berman, “exclusive originalism” holds that “whatever may be put forth as the proper focus of interpretive inquiry (framers’ intent, ratifiers’ understanding, or public meaning), that object should be the sole interpretive target or touchstone.” Berman, *supra* note 2, at 10; see also *id.* at 11 (“[A]ccording to exclusive originalism, that the originalist focus was X is an *exclusive reason* to interpret the Constitution to mean X.”).

⁷ Although I refer to the “text” of the Constitution, neither what is meant by the “text” nor what one believes the proper object of interpretation to be (e.g., Framers’ intent, ratifiers’ understanding, or public meaning) affects my analysis.

non and its justification are both informed by our nation's history and experience with the indisputably ambiguous Spending Clause of Article I,⁸ but neither is in any way limited to that constitutional provision.

The Article begins with a critical analysis of the existing positions taken, and prescriptions offered, by originalist scholars who have discussed the problem of constitutional ambiguities. Part I then sets out my own prescription for the courts and its underlying justification.

The remainder of the Article discusses the Spending Clause as an example of how the proposed canon and its corollary would operate, and the benefits to be gained from these particular second-order rules of interpretation. Part II summarizes the "original understandings" of the Spending Clause from the Philadelphia Convention until the Supreme Court entered the discussion in 1936, and concludes that no single "original understanding" was ever agreed to have prevailed. Part III summarizes the evolution of the Supreme Court's understandings of the Spending Clause from its decision in *United States v. Butler*⁹ to its current view that the Clause is not justiciable.¹⁰

Part IV begins by explaining how the unfettered spending power inevitably results in systematic fiscal redistribution among the states—for which there is no compelling justification—and presents new empirical data to support that theoretical claim. This Part concludes by explaining why those systematically harmed by the Court's interpretation of the Spending Clause as nonjusticiable will not be able to obtain a constitutional amendment to "correct" the Court's interpretation.

The Article concludes by applying the proposed canon and its corollary to arrive at a possible spending power doctrine that would be consistent with one plausible original meaning of the Spending Clause while also mitigating the unjustified redistribution described in Part IV.

I. CONSTITUTIONAL AMBIGUITIES AND ORIGINALISM

It has long been understood that there are many "flavors" of originalism, which can be categorized in a variety of ways.¹¹ One might, for example, distinguish along the dimension of the object or focus of inquiry—that is, Framers' intent originalism, ratifiers' understanding originalism, or orig-

⁸ The Spending Clause states: "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

⁹ 297 U.S. 1 (1936).

¹⁰ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987); *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam).

¹¹ See, e.g., Berman, *supra* note 2, at 8–16 (discussing possible categorizations of originalism based upon the "object or focus," "strength," "logical status," or "subject" of the inquiry); Farber, *supra* note 2, at 1085–87; David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 484–85 (1988).

inal public meaning originalism.¹² For present purposes, however, the most useful distinction is along the dimension of “strength.”

As Mitch Berman has cogently explained, “weak originalism,” at one end of the strength continuum, “maintains merely that the proper originalist object (whatever it may be) should count among the data that interpreters treat as relevant.”¹³ At the other end of the continuum, “exclusive originalism” contends that “whatever may be put forth as the proper focus of interpretive inquiry (framers’ intent, ratifiers’ understanding, or public meaning), that object should be the sole interpretive target or touchstone.”¹⁴ One would expect interpretive methodologies at the “exclusive originalism” end of this continuum to have the greatest difficulty with constitutional ambiguities. If the object of one’s interpretive inquiry—whether original meaning, understanding, or intent—cannot be discerned with sufficient certainty (however defined and measured), that object cannot serve as “the sole interpretive target or touchstone”¹⁵ mandated by exclusive originalism. So what is to take its place? And why?

Numerous exclusive originalists have explicitly acknowledged the existence of constitutional ambiguities and the difficulties they pose.¹⁶ But how one should proceed when confronting such an ambiguity is a matter of

¹² See, e.g., Berman, *supra* note 2, at 9–10. As Vasan Kesavan and Michael Stokes Paulsen have noted, there has been an historical evolution in originalist theories on this dimension, with Robert Bork and Raoul Berger exemplifying the “Framers’ intent” school; Professor H. Jefferson Powell spurring the movement toward “ratifiers’ understanding” originalism with the publication of his 1985 *Harvard Law Review* article, *The Original Understanding of Original Intent*; and Justice Antonin Scalia being pre-eminently associated with “original public meaning” originalism. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003).

¹³ Berman, *supra* note 2, at 10; see also *id.* at 11 (“According to weak originalism, that the originalist focus was X is a reason to interpret the Constitution to mean X.”).

¹⁴ *Id.* at 10; see also *id.* at 11–12 (“[A]ccording to exclusive originalism, that the originalist focus was X is an exclusive reason to interpret the Constitution to mean X.”). Between weak and exclusive originalism, in Berman’s strength categorization, are “lexical” and “moderate” originalism. *Id.* at 10–11. Lexical originalism is slightly weaker than exclusive originalism and holds that “interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence.” *Id.* at 10. Moderate originalism is positioned between weak originalism and lexical originalism and maintains that “‘ordinarily’ or ‘presumptively’ the contemporary interpreter ought to follow the originalist object, even though that object is not lexically prior to all other objects of inquiry, let alone that it should be pursued to the exclusion of other objects.” *Id.* at 11.

¹⁵ *Id.* at 10.

¹⁶ See, e.g., BORK, *supra* note 1, at 166 (discussing the interpretive difficulties imposed by a constitutional provision whose meaning “cannot be ascertained”); Barnett, *supra* note 1, at 645 (“Due to either ambiguity or generality, the original meaning of the [constitutional] text may not always determine a unique rule of law”); Fish, *supra* note 1, at 640 (acknowledging the “obstacles to the specification of meaning” of constitutional text); Graglia, *supra* note 1, at 1044 (contending that a legislative choice will “very rarely” be “clearly disallowed by the Constitution”); Paulsen, *supra* note 1, at 2057 (acknowledging that the Constitution’s language may be “indeterminate . . . as to the specific question at hand”).

substantial disagreement among these theorists. Stanley Fish, for example, offers no prescription, being satisfied to underscore the distinction between “interpretation”—determining the intention of the text’s author—and doing “something else”:¹⁷

- A text means what its author intends.
- There is no meaning apart from intention.

....

— If you are not trying to determine intention, you are not interpreting; but sometimes interpreting is not what you want to be doing (although before you do something else, you should be sure you have good reasons).

....

— None of the above amounts to a method. Knowing that you are after intention does not help you find it; you still have to look for evidence and make arguments.¹⁸

Numerous other exclusive originalists, however—including the former Judge Robert Bork, Lino Graglia, and Michael Stokes Paulsen—have converged on the prescription that constitutional ambiguities mandate judicial deference to “current democratic majorities” and, therefore, judicial abstinence. Thus, my colleague, Lino Graglia, contends that “[j]udicial invalidation of the elected representatives’ policy choices should be permitted only when (as would very rarely be the case) the choice is clearly disallowed by the Constitution.”¹⁹ Michael Stokes Paulsen takes a similar position, and on similar majoritarian grounds:

The enterprise of constitutional adjudication consists of applying the original linguistic meaning of the document to lawsuits in which a question of constitutional meaning is properly presented. . . . If the meaning of the words of the Constitution supplies a sufficiently determinate legal rule or standard applicable to the case at hand, that rule or standard must prevail over a contrary rule supplied by some other competing source of law (typically a state or federal statute, or an executive branch or agency action). . . . But if the meaning of the Constitution’s language fails to provide such a rule or standard—if it is actually indeterminate (or under-determinate) as to the specific question at hand—then a court has no basis for displacing the rule supplied by some other relevant source of law applicable to the case (typically, a rule supplied by political decisions made by an imperfect representative democracy).²⁰

Robert Bork’s articulation of this position is surely the most crisp:

The judge who cannot make out the meaning of a [constitutional] provision is in exactly the same circumstance as a judge who has no Constitution to work

¹⁷ Fish, *supra* note 1, at 640.

¹⁸ *Id.* at 649–50.

¹⁹ Graglia, *supra* note 1, at 1044.

²⁰ Paulsen, *supra* note 1, at 2057 (citations omitted).

with. There being nothing to work with, the judge should refrain from working.²¹

Although presented in slightly different words, the conclusion of each of these three scholars is the same. Each is grounded in a reading of the Constitution that privileges the Legislature and current democratic majorities over the Judiciary and the supermajorities who ratified the original Constitution and each subsequent amendment. In addition, this position frequently conflates constitutional ambiguity with constitutional silence. Consider Robert Bork's contention that

[a] provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it. . . .

. . . If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics, the conclusion is not that the judge may write his own Constitution. The conclusion is that judges must stand aside and let current democratic majorities rule, because there is no law superior to theirs.²²

Much of the weight of Bork's argument rests on his claim that constitutional ambiguity is ultimately no different than constitutional silence. According to Bork, a constitutional provision whose meaning is unclear cannot serve as a constitutional constraint because it effectively does not exist as a part of the Constitution.²³ Thus, a court has no authority to invalidate the enactment of a current legislative majority on the ground that the legislation violates a nonexistent (because ambiguous) provision of the Constitution. Such legislation, according to Bork, cannot violate the Constitution and therefore, as a law seemingly "made in Pursuance" of the Constitution, is part of "the supreme Law of the Land."²⁴

There are two fundamental problems with this argument, however. First, an ambiguous constitutional provision is not logically the same as constitutional silence. That a constitutional provision has multiple possible meanings is not the same as the provision not existing. If a judge considers a constitutional provision to have two possible meanings, it is far from obvious why, instead of choosing between those meanings using some principle or best efforts, the judge instead ought to subscribe to a third meaning, that the provision in question does not really exist. Why is this approach

²¹ BORK, *supra* note 1, at 166.

²² *Id.* at 166–67.

²³ *Id.* at 166.

²⁴ *Id.* at 166–67; *see also* U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

more consistent with the original meaning (or understanding or intent) of the Constitution?

Perhaps what Bork means to say—though I don't think he does—is that when confronted with two or more possible meanings for a constitutional provision, the judge should choose the meaning that will result in the challenged legislation being upheld. But nowhere does the Constitution state that uncertainties in constitutional meaning should be resolved by the courts in favor of sustaining the challenged legislation.²⁵ Furthermore, any such interpretive methodology would render the current legislative majority superior in the Constitution's tripartite structure of government, a result that is fundamentally at odds with the Constitution's separation of arguably equal powers.

Lino Graglia reads the Constitution to include a presumption against judicial invalidation of challenged legislation that is arguably even stronger than Bork's, and is thus subject to many of the same criticisms set out above. Graglia would permit such invalidation “only when (as would very rarely be the case) the [legislative] choice is clearly disallowed by the Constitution.”²⁶ Graglia's justification for this reading of the Constitution does not rely on Bork's conflation of constitutional ambiguity and constitutional silence, but more straightforwardly on a concern to “effectively limit judicial policymaking and protect representative self government”²⁷ from judges “who are not subject to electoral control.”²⁸ The Constitution itself, however, does not reflect either Graglia's proclaimed degree of discomfort with the judicial power or the great solace he takes from majoritarian lawmaking.

Michael Paulsen initially avoids Bork's and Graglia's mistakes of presuming unequal power among the three branches of government. Paulsen begins from the explicit premise that “[r]ecognition of the other branches' co-equal interpretive power should affect *the manner* in which each branch exercises its interpretive authority.”²⁹ He continues:

An important aspect of interpretive restraint by any branch is respect for, and due consideration of, the views of other actors in our constitutional system, be they Congress, the executive, the courts or institutions of state government. This is nothing much more than down-to-earth humility—the recognition that any one interpreter (or branch) can err. The interpreter should acknowledge that it can, in any event, surely profit from careful consideration of the views of another and might revise its own initial position in light of such consideration. . . . An individual (or branch) should have an especially high degree of

²⁵ And on what basis (if at all) would Bork have a judge choose among possible meanings for an ambiguous provision in situations in which each possible meaning would require the sustaining of the challenged legislation?

²⁶ Graglia, *supra* note 1, at 1044.

²⁷ *Id.*

²⁸ *Id.* at 1021.

²⁹ Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 332 (1994).

certainty in the correctness of his (its) conclusions before upsetting the cooperative project by advancing a view at odds with that of a *co-equal interpreter*.³⁰

Paulsen's explicit acknowledgment of the equality among the three branches and his focus on the potential for error by each actor—not just by the courts—within our constitutional system are good (and largely uncontroversial)³¹ starting points. He goes on, however, to embrace the fact that “[a] statute of Congress is ordinarily given a substantial ‘presumption’ of constitutionality, on the theory that a co-equal branch has (at least implicitly) affirmed its constitutionality,”³² and to offer

a more general rule of judicial restraint: A court should not substitute its interpretation of a text for that of the political branches (acting within their proper spheres) when more than one interpretation is possible, there is no principled rule supplied by text, history, structure, and precedent that privileges one reading over the other, and the political branches have acted pursuant to one such reading.³³

Paulsen's analysis is more nuanced than Bork's or Graglia's and generally has much to recommend it. In acknowledging that the task for the courts (and the Legislature) is choosing among possible interpretations of an ambiguous provision, Paulsen avoids Bork's error of equating an ambiguous constitutional provision with no provision. But in the end, despite explicitly affirming the equality of the three branches of government, Paulsen too lapses into a position premised on legislative superiority.

Paulsen's conception of government as a “cooperative project” involving deference among the branches does not, in theory, preclude the Legislature from deferring to the Judiciary when considering enacting laws that may run afoul of an ambiguous constitutional provision. But there can be no preexisting judicial doctrine or constitutional interpretation to which the Legislature might defer unless a court has already ruled under the ambiguous provision on the constitutionality of a law previously enacted by the Legislature. And if that prior legislation was consistent with one possible interpretation of the ambiguous constitutional provision, Paulsen would have the court sustain the challenged legislation and defer to the Legislature's implicit interpretation of the constitutional provision. Thus, under Paulsen's prescription, the deference between these two branches will inevitably be unidirectional, with the courts always deferring to the Legislature's interpretation of ambiguous constitutional provisions.³⁴ His variant of legis-

³⁰ *Id.* at 332–33 (emphasis added).

³¹ It seems likely that Bork and Graglia would take issue with these claims.

³² Paulsen, *supra* note 29, at 333.

³³ *Id.*

³⁴ This assumes, of course, that the legislature's interpretation of the ambiguous constitutional provision meets Paulsen's requirements set forth above. *See* text accompanying note 33. It should also be noted that Paulsen, like Bork and Graglia, offers no guidance for how a judge is to choose among possi-

lative supremacy is therefore ultimately subject to the same criticisms as Bork's and Graglia's. Somewhat ironically, however, Paulsen's analysis helps one to see especially clearly that the Legislature's interpretation of an ambiguous constitutional provision is ultimately no more legitimate—no less a potential *de facto* amendment of the Constitution—than the interpretation offered by a court, other things being equal.

So if the analyses and prescriptions offered by Bork, Graglia, and Paulsen are all fatally flawed, what should a court do when confronting a constitutional provision that has more than one possible meaning with no logical reason for the court (or other interpreter) to privilege one meaning over the other(s)? Consider that a primary concern triggered by an ambiguous constitutional provision is that the Supreme Court's choice of one of several possible meanings *might* effect a *de facto* amendment of the Constitution outside the formal procedures of Article V.³⁵ Consider further that the opportunity to formally amend the Constitution is the lone option provided in the Constitution for correcting any errors in the Supreme Court's decisions interpreting the Constitution.³⁶ Thus, the ultimate arbiter of the Constitution's meaning is a supermajority of the states—whether acting through their legislatures or through special conventions—required under Article V to ratify a constitutional amendment.

I would therefore propose a canon of interpretation for the Supreme Court that makes it as easy as possible for the supermajority required by Article V to correct any errors in the Court's declared understanding of the Constitution. The proposed canon is that, when choosing among plausible interpretations of a constitutional provision, the Court whenever possible should choose the interpretation favored by (or most likely to benefit) the party that is *less* likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court's interpretation.

Assessing the logical possibility of a particular party or group obtaining a constitutional amendment will sometimes be easy for the Court: if a numerical supermajority would arguably benefit from a particular interpretation of the ambiguous provision, they typically would have a much easier time obtaining their preferred interpretation via a constitutional amendment

ble meanings for an ambiguous constitutional provision in situations in which each possible meaning would require sustaining the challenged legislation.

³⁵ Article V of the Constitution states, in relevant part, that:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

U.S. CONST. art. V.

³⁶ Errors in the lower federal courts' decisions may be corrected through the appellate judicial process. *See id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

than would the numerical minority that is disadvantaged by that interpretation. In this situation, the proposed canon would have the Court choose the interpretation of the ambiguous provision that favors the numerical *minority*. Hypothetical examples include alternative interpretations of the Eighth Amendment's Cruel and Unusual Punishments Clause that favor or disfavor individuals sentenced to prison for a crime,³⁷ and alternative interpretations of the Fourteenth Amendment's Equal Protection Clause regarding the right of convicted felons to vote.³⁸ The universe of individuals sentenced to prison for a crime and the universe of convicted felons are both obviously tiny relative to the vast supermajority of individuals who are not—and do not expect to become—members of either group. Thus, in each of these hypothetical cases, the proposed canon would have the Supreme Court choose the interpretation of the relevant ambiguous constitutional provision that favors the sentenced individuals and the convicted felons, respectively.

Other times, however, the parties to the dispute may be comparably numerous or equally likely (or unlikely) to be able to obtain their preferred interpretation through the formal amendment process. Hypothetical examples include alternative interpretations of the Second Amendment's right "to keep and bear Arms,"³⁹ and alternative interpretations of the First Amendment's "freedom of speech" as applied to flag burning.⁴⁰ No matter how each of these rights is interpreted, each is a right borne by nearly all adults in our society. That is, virtually any adult has the right "to keep and bear arms," however interpreted, subject to certain regulations and a tiny number of exceptions.⁴¹ Similarly, the Constitution's guarantee of freedom

³⁷ Compare, for example, the majority's opinion in *Solem v. Helm*, 463 U.S. 277 (1983) (interpreting the Eighth Amendment's prohibition on "cruel and unusual punishments" to prohibit prison sentences under state law that are disproportionate to the crime), with Chief Justice Burger's dissent (joined by Justices White, Rehnquist, and O'Connor), *id.* at 304–15 (Berger, C.J., dissenting) (interpreting the Eighth Amendment to reach only the "mode" of punishment and not the length of a sentence of imprisonment).

³⁸ Compare, for example, the majority's opinion in *Richardson v. Ramirez*, 418 U.S. 24 (1974) (interpreting the Fourteenth Amendment to permit a state statute disenfranchising felons), with Justice Marshall's dissent (joined by Justice Brennan), *id.* at 73–86 (Marshall, J., dissenting) (interpreting the Fourteenth Amendment to prohibit such a statute).

³⁹ Compare, for example, the majority's opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment to provide an individual right to possess a firearm unconnected with service in a militia and to preclude the District's ban on handgun possession in the home), with Justice Stevens's dissent (joined by Justices Souter, Ginsburg, and Breyer), *id.* at 2822–47 (Stevens, J., dissenting) (interpreting the Second Amendment not to curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons and, therefore, to permit the District's ban).

⁴⁰ Compare, for example, the majority's opinion in *Texas v. Johnson*, 491 U.S. 397 (1989) (interpreting the First Amendment to protect flag burning as expressive conduct), with Chief Justice Rehnquist's dissent (joined by Justices White and O'Connor), *id.* at 422, 432 (Rehnquist, C.J., dissenting) (interpreting the First Amendment not to protect flag burning, deemed to be "one rather inarticulate symbolic form of protest that [is] profoundly offensive to many").

⁴¹ Felons are one such exception. See *Lewis v. United States*, 445 U.S. 55 (1980) (finding constitutional a federal firearms statute that prohibits a felon from possessing a firearm).

of speech, including any attendant right to burn a flag, extends to virtually any adult, subject to certain broadly applicable time, place, and manner limitations.⁴² In these situations, public opinion regarding the preferred interpretation of the ambiguous constitutional provision may be nearly equally divided, or it may be difficult to identify the relative numbers of individuals advantaged and disadvantaged by a particular interpretation or who prefer a particular interpretation.⁴³

In these situations, in which *any* plausible interpretation of an ambiguous constitutional provision may result in a universe of individuals who disfavor the interpretation and who are not likely, as a matter of logical possibility, to be able to obtain a “correcting” constitutional amendment, the canon offers the Court no guidance. A corollary to the canon, however, would have the Court in these situations refrain from declaring nonjusticiable any constitutional provision that could plausibly be interpreted to protect a party that, as a matter of logical possibility, could not obtain a constitutional amendment to overturn the Court’s adverse interpretation.

Underlying both the canon and its corollary is an acknowledgement that correcting judicial errors by formally amending the Constitution is an opportunity open, as a matter of logical possibility, only to numerical (super) majorities or those whose interests at issue are not likely to be opposed by more than one-quarter of the states.⁴⁴ Thus, if the Court declares nonjusticiable an ambiguous constitutional provision that could plausibly be interpreted to protect or otherwise advantage a numerical minority, those adversely affected are unlikely to be able to overturn the Court’s action through the Article V amendment process. If instead the Court were to interpret the ambiguous provision in the way favored by the numerical minority, the adversely affected majority would, as a logical matter, be *relatively more likely* to be able to obtain its favored interpretation through the Article V amendment process, if it chose to pursue the matter. In sum, to the extent that the Court’s interpretation of an ambiguous constitutional provision is “in error,” the error may be permanently entrenched if the Court rules in favor of the numerical majority or declares the constitutional provision to be nonjusticiable, but may be relatively more correctible through the Article V

⁴² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)):

Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

⁴³ For example, the fact that I do not own a gun provides no useful information about whether I prefer to have the right—the option—to own one, or what limitations (if any) on that broader right I prefer.

⁴⁴ See *supra* note 35 (describing the supermajoritarian constitutional amendment process required by Article V, including the requirement that amendments be ratified by three-quarters of the states).

amendment process if the Court instead rules in favor of the relevant numerical minority.

The proposed corollary reflects two additional, related concerns. First, a constitutional provision with an ambiguous original meaning sometimes may have only plausible interpretations that disadvantage groups whose interests at issue are likely ultimately to be opposed by more than one-quarter of the states. Thus, whatever interpretation the Court chooses, a subsequent, remedial constitutional amendment is not a logical possibility for those disadvantaged by the interpretation. The corollary would have the Court in these situations eliminate one interpretive option and not declare the ambiguous constitutional provision nonjusticiable. Although the Court's interpretation of the ambiguous provision may result in the invalidation of little more, if any, legislation than would occur under a judicial declaration of nonjusticiability, the continued availability of judicial review has important benefits. Most obviously, the opportunity for judicial review permits and encourages the conversation about the relevant constitutional provision to continue.⁴⁵ Those who would have the Court invalidate the challenged legislation or alter its previous interpretation of the relevant constitutional provision will have greater access to the Court and, at the margin, will be more inclined to litigate their claims.⁴⁶ Even if the Court's chosen interpretation results in a strong presumption of constitutionality and the chance of persuading the Court to invalidate the challenged legislation is therefore slim, it nonetheless provides a chance—a chance that is not af-

⁴⁵ In recent years, theories of “constitutional dialogue” have become increasingly popular, with various scholars contending that judicial review should be understood as part of a larger, ongoing dialogue between the Judiciary and other constitutional actors about constitutional meaning. *See, e.g.*, NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 23 (2004); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 201–06 (1988); MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001); Christine Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective*, 21 *TEMP. INT'L & COMP. L.J.* 1 (2007); Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577, 645 (1993); Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparison: An Essay in Honor of Mark Tushnet*, 26 *QUINNIPIAC L. REV.* 599 (2008); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4 (2003).

⁴⁶ Although stare decisis will largely preclude the disadvantaged group from relitigating the “same case” before the Court, the Court has occasionally heard the “same case” en route to explicitly reversing itself. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 95, 100 n.25 (1986) (holding that a criminal “defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in *his case*,” and stating that “[t]o the extent that anything in *Swain v. Alabama* . . . is contrary to the principles we articulate today, that decision is overruled.”). Typically, one would expect the future cases brought by the disadvantaged group primarily to involve related issues or distinct subgroups of the group affected by the previous decision. In the Eighth Amendment context, for example, this would mean cases concerning whether the Amendment prohibits the imposition of the death penalty on the mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304 (2002), or on convicted criminals younger than eighteen, *see Roper v. Simmons*, 543 U.S. 551 (2005).

forded the disadvantaged group by a judicial declaration of nonjusticiability and a closed courthouse door.

Second, one would expect Congress to conduct its own business with more constitutional caution and thoughtfulness when its enactments in a particular area are subject to judicial review than when the Court has declared the relevant congressional power to be plenary. Even more significant, however, is the difference in the likely effect on the Court itself. The step from a previous declaration of nonjusticiability to the determination that even a very low level of scrutiny is warranted seems a much larger one for the Court, psychologically and otherwise, than either finding that a challenged enactment does not pass even a very low level of scrutiny or adding “bite” to an existing doctrine.

The proposed canon does not offer the Court an easy or precise way to determine which group affected by its interpretation of an ambiguous constitutional provision is more likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court’s interpretation.⁴⁷ In this regard, the canon is no different from most other doctrines or standards of review, which (necessarily) afford the Court substantial discretion in their application. Moreover, the primary goal of the canon is simply to have the Court, when confronted by an ambiguous constitutional provision, take into account the fact that under our Constitution a supermajority of the states is the ultimate judge of the “correct” interpretation of such a provision,⁴⁸ and that the parties to a dispute will often differ significantly in their potential ability to use the Article V process to correct any perceived errors in the Court’s interpretation.

Some may be concerned that the amendment process has proven to be too difficult to serve as a meaningful route for correcting the Court’s “errors,” and that the focus of the proposed canon is therefore misguided. Lino Graglia, for example, has acknowledged the potential of the amendment process to serve as a check on the Court, but he takes little solace from this possibility, which he contends has “for various and complex reasons become more theoretical than real.”⁴⁹ In fact, since 1789, more than ten thousand amendments to the Constitution have been proposed in Congress,⁵⁰ but

⁴⁷ As was explained in the text accompanying notes 37–38, however, sometimes the Court should find this determination easy to make.

⁴⁸ See *supra* notes 35–36 and accompanying text (discussing the use of the Article V amendment process to “correct” an interpretation made by the Supreme Court).

⁴⁹ Graglia, *supra* note 1, at 1021.

⁵⁰ C-Span’s Capitol Questions, <http://www.c-span.org/questions/weekly54.asp> (last visited Mar. 8, 2009). The number of amendments formally proposed in each Congress from 1989 through 1998, for example, were:

Congress	Number of Proposed Amendments
.....	
105th (1997–98)	103
104th (1995–96)	158

only thirty-three have been sent to the states for ratification, and only twenty-seven of those have been ratified.⁵¹ It should also be noted, however, that at least four of the seventeen amendments ratified after 1791 were adopted precisely in order to reverse, or otherwise “correct,” a decision of the Court.⁵²

If one believes that the Article V amendment process poses too high a barrier to constitutional change, and therefore too weak a check on the Court, the response should not be to ignore the important role of the amendment process in the Constitution’s allocation of lawmaking power. Rather, one should consider ways to improve the amendment process so that it provides a stronger check on the Court. In this regard, Robert Bork, for example, has suggested that our Constitution might benefit from the adoption of a provision similar to Section 33 of the Canadian Charter of Rights and Freedoms.⁵³

Commonly called the “notwithstanding clause,” Section 33 authorizes the Canadian Parliament to “expressly declare in an Act of Parliament . . . that the Act or a provision thereof shall operate notwithstanding” certain specified provisions of the Charter.⁵⁴ Any such declaration “shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration,”⁵⁵ although the Parliament may repeatedly reenact the declaration, without limitation.⁵⁶ The purpose of Section

103rd (1993–94)	156
102nd (1991–92)	165
101st (1989–90)	214

Id. Any member of Congress may formally propose an amendment to the Constitution by introducing a joint resolution. *Id.*

⁵¹ For the text of the six amendments approved by Congress but not ratified by the states, see RICHARD B. BERNSTEIN, AMENDING AMERICA 301–03 (1993).

⁵² The Eleventh Amendment reversed *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Thirteenth and Fourteenth Amendments reversed *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment reversed *Pollock v. Farmer’s Loan and Trust Co.*, 157 U.S. 429 (1895); and the Twenty-Sixth Amendment “corrected” *Oregon v. Mitchell*, 400 U.S. 112 (1970).

⁵³ ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 91–92 (2003). Although Bork celebrates the “democratic control over courts” that Section 33 has the potential to provide, he cautions that the provision “has proved ineffective” in Canada and that in any case, “the chances of such a proposal being accepted [in the United States] lie somewhere between zero and nil.” *Id.* at 92. He further posits that “[i]n all probability, the mere existence of a checking power, even though ineffective in practice, would be used, as it has been in Canada, to justify judicial adventurism.” *Id.*

⁵⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33(1) (U.K.). The relevant provisions of the Charter to which Section 33 applies are Section 2, regarding “fundamental freedoms” of “conscience and religion,” “thought, belief, opinion and expression,” peaceable assembly, and association, *id.* § 2, and Sections 7 through 15, concerning “legal rights” to “life, liberty, and security of the person,” protection against unreasonable search and seizure, and fairness in criminal proceedings, *id.* §§ 7–15. Section 33 does not apply to the Charter’s “Democratic Rights,” *id.* §§ 3–5; “Mobility Rights,” *id.* § 6; language rights, *id.* §§ 16–23; the enforcement provision, *id.* § 24; or the gender equality clause, *id.* § 28.

⁵⁵ *Id.* § 33(3).

⁵⁶ *Id.* § 33(4).

33 is to enable Parliament to override certain individual rights provisions of the Charter for a limited period of time, thereby suspending or nullifying any judicial review under the relevant provision(s).⁵⁷ An American variant of this provision might, for example, authorize Congress to pass legislation to “override” or “correct” a decision of the Court upon a vote of two-thirds (or three-fourths) of each house.⁵⁸

Given the small likelihood that our Constitution will soon be amended to include some variant of a notwithstanding clause, and given the relatively high barrier posed by the Article V amendment process, some might ask the following: Why shouldn’t the Supreme Court always defer to the Legislature when a law is challenged under an ambiguous constitutional provision, on the ground that the view of a democratic majority, as expressed through the legislative process, is a better proxy for the view of a supermajority of Congress and of the states (as potentially expressed through the Article V amendment process) than is the view of five unelected Justices? Although facially attractive, this contention overlooks the critical fact—reflected in various parts of the Constitution—that a supermajority is very different from a majority.⁵⁹ The fact that “only” a simple majority has expressed a particular policy preference in a simple-majority lawmaking regime is *at least* as likely to mean that a supermajority does *not* share that preference as

⁵⁷ See 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 39-2, -5 (5th ed. 2007). Hogg notes that the “purpose of the sunset clause is to force reconsideration by the Parliament or Legislature of each exercise of the power at five-year intervals (intervals in which elections will have been held).” *Id.* at 39-5; see also Wikipedia, Section 33 of the Canadian Charter of Rights and Freedoms, http://en.wikipedia.org/wiki/Section_Thirty-three_of_the_Canadian_Charter_of_Rights_and_Freedoms (last visited Mar. 11, 2009) (“[I]f the people wish for the law to be repealed they have the *right* to elect representatives that will carry out the wish of the electorate.”).

⁵⁸ One might prefer a three-quarters requirement to a two-thirds requirement in order to more closely track the requirement in Article V that the legislatures of (or conventions in) three-quarters of the states must ratify a proposed amendment. See *supra* note 35. I see no particular virtue in having this supermajoritarian override be time limited, especially because any override legislation could itself presumably be overridden if the requisite supermajorities in a subsequent legislature so voted. One commentator notes that the time limit on uses of the Canadian notwithstanding clause “underscores the idea that this override power interrupts normal constitutional relations, and it confirms the idea that it is to be used only as long as circumstances warrant the removal of normal constitutional processes and norms.” John D. Whyte, *Sometimes Constitutions Are Made in the Streets: The Future of the Charter’s Notwithstanding Clause*, 16 CONST. F. 79, 82 (2007). But one could imagine a supermajority override provision being viewed as a part of “normal” constitutional processes, albeit one not likely to be frequently employed.

⁵⁹ In several critical places, the Constitution explicitly specifies that a supermajority is necessary for a particular action. See, e.g., U.S. CONST. art. I, § 5, cl. 2 (specifying that each house of Congress may expel a member with the concurrence of two-thirds of the members); *id.* art. I, § 7, cl. 2 (specifying that approval of two-thirds of each house of Congress can override a presidential veto); *id.* art. I, § 7, cl. 3 (same); *id.* art. II, § 3 (specifying a quorum of one representative from two-thirds of the states for a vote by the Electoral College in the event that no one candidate for President receives a majority of the votes cast by the Electors); *id.* art. V (specifying various two-thirds and three-fourths supermajorities for amending the Constitution).

that it does.⁶⁰ In addition, the very purpose of many provisions of the original Constitution, as well as of the Bill of Rights, is to protect minorities from the majority—to protect the individual from the (majoritarian) government.⁶¹ That protection is lost if the Supreme Court were to defer to the current legislative majority whenever a law is challenged under an ambiguous constitutional provision.

Independently of the above, the proposed canon and its corollary offer numerous benefits that should make them worthy of consideration by adherents of a wide range of theories of constitutional interpretation. Proponents of a “living Constitution” should find the proposals attractive because of their focus on facilitating the ability of current supermajorities to clarify the meaning of ambiguous constitutional provisions. In addition, both the canon and its corollary are concerned with keeping the constitutional conversation going more generally, by facilitating discussion and “correction” of the Court’s “errors” in interpretation through the formal amendment process as well as in the Court itself through the proscription of judicial declarations of nonjusticiability. Finally, as shall be demonstrated in the remainder of this Article, the canon and its corollary also have the potential to reduce the amount of aggregate-welfare-reducing legislation enacted, relative to the current state of affairs.

Exclusive originalists, residing at the opposite end of the interpretive continuum, may not share the above concerns, but nevertheless might acknowledge that the Legislature’s interpretation of an ambiguous constitutional provision is ultimately no less a potential *de facto* amendment of the Constitution than the interpretation of the Court. Thus, exclusive originalists should find the facilitating of the operation of the Article V amendment process to be an attractive component of any prescription for the Court’s interpretation of ambiguous constitutional provisions.

Also of potential appeal to exclusive originalists is the responsiveness of the canon and its corollary to the legitimacy concerns raised by Randy Barnett, who has observed:

Because lawmakers acting pursuant to their constitutional powers govern those who did not consent [to the original Constitution], to be legitimate, the lawmaking processes must provide assurances that both the enumerated and unenumerated rights of those who are governed will not be violated. To en-

⁶⁰ Due to strategic voting in representative bodies, the fact that “only” a simple majority has voted in favor of a particular bill *under a simple majority lawmaking regime* provides no useful information about whether or not a specified supermajority would support the bill if such a supermajority were required for passage. See *infra* note 117 and sources cited therein.

⁶¹ Most critically, Article I, Sections 8 through 10, delimit the powers that the Congress may exercise. Although the Constitution does not specify that either house of Congress shall make its decisions via majority rule, and indeed specifies that “[e]ach House may determine the Rules of its Proceedings,” U.S. CONST. art. I, § 5, cl. 2, Congress is a substantially majoritarian institution. See U.S. Senate, Rules and Procedure, http://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm (last visited Apr. 25, 2009) (providing links to rules and procedures of the House and Senate).

hance legitimacy, then, *ambiguous terms should be given the meaning that is most respectful of the rights of all who are affected* and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect.⁶²

Central to the proposed canon and its corollary is a concern that the Article V rights of those potentially disadvantaged by the Court’s interpretation of an ambiguous constitutional provision receive the greatest possible respect within the larger lawmaking process. Under Barnett’s analysis, this should increase the overall legitimacy of that process.⁶³

In the remainder of this Article, I discuss the Spending Clause as an example, with especially important practical implications, of how the proposed canon and its corollary would operate, and the benefits to be gained from these particular second-order rules of interpretation.

II. THE ORIGINAL UNDERSTANDINGS OF THE SPENDING CLAUSE

Article I, Section 8 of the U.S. Constitution states that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”⁶⁴

When the text of this provision is viewed in isolation, there are at least two plausible understandings of its General Welfare Clause. One interpretation is that Congress has the power to spend in any way that it deems will further the general welfare. Another interpretation is that Congress may spend only to further a notion of the “general Welfare” that is not also within its sole power to define, and which is instead delineated by the legislative powers enumerated in Article I. Thus, the former interpretation grants Congress a plenary spending power, while the latter would impose some meaningful, external constraints on that power.

⁶² Barnett, *supra* note 1, at 646 (emphasis added). Consistent with exclusive originalism, Barnett notes that

this method of construction—as distinct from interpretation—is only appropriate when terms are genuinely ambiguous or when the original level of generality can be satisfied by more than one rule of law. It should not be used to change the original meaning of the Constitution without adhering to the formalities governing amendments that are needed to preserve its integrity as a written constitution.

Id. (footnotes omitted).

⁶³ Consistent with exclusive originalism, Barnett summarizes his position as follows:

In sum, when the original public meaning of a term or provision in a written constitution fails to provide a unique rule of law to apply to a particular case, it still provides a “frame” that, while excluding many possibilities, requires choice among the set of unexcluded alternatives. When such choices must be made, rules of construction that (1) are *consistent* with original meaning and (2) ensure the legitimacy of the lawmaking process ought to be adopted.

Id. at 647 (footnotes omitted).

⁶⁴ U.S. CONST. art. I, § 8, cl. 1.

Alexander Hamilton is commonly associated with the former view, while James Madison is frequently given credit for the latter.⁶⁵ Both men were at the Philadelphia Convention, and each subsequently contended that his understanding of the spending power was the understanding of the Convention.⁶⁶ Other, less well-known delegates to the Convention similarly disagreed about the meaning of the provision. Robert Yates of New York, for example, contended that the General Welfare Clause conferred a plenary spending power.⁶⁷ Oliver Ellsworth, meanwhile, explained to the Connecticut ratifying convention that the spending power was limited by Congress's other enumerated powers.⁶⁸

In the years immediately following the Philadelphia Convention, both Congress and the President took actions and made statements that further evidenced a lack of agreement on the original meaning of the Spending Clause. This is not surprising, given the lack of agreement among the convention delegates and the fact that numerous members of the early Congresses and two early Presidents had participated in the federal Convention or their state's ratifying convention.⁶⁹

⁶⁵ See, e.g., John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 66–67 (2001) (contrasting Hamilton's "expansive" interpretation of congressional spending power with Madison's view that "the power to tax and spend did not confer upon Congress the right to do whatever it thought to be in the best interest of the nation, but only to further the ends elsewhere specifically enumerated in the Constitution"); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 218 (1995) (observing that Madison thought Congress could not spend for purposes beyond its enumerated powers at all, while Hamilton argued it could); Jeffrey T. Renz, *What Spending Clause? (or The President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 87 (1999) (describing the Hamiltonian interpretation as "grant[ing] Congress the power to spend for any purpose that it deems in furtherance of the general welfare" and the Madisonian interpretation as "limit[ing] congressional power to spend and to enact laws pursuant to the powers enumerated in Section 8").

⁶⁶ See Renz, *supra* note 65, at 95–96 (quoting Madison's statement that his position "conform[ed] to the Constitution as understood by the Convention that produced and recommended it, and particularly by the State conventions that adopted it" (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (Max Farrand ed., 1966))); *id.* at 124–25 (quoting Hamilton's 1791 *Report on Manufactures to the House of Representatives* in which he contends that it is "of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper" (citing 4 THE WORKS OF ALEXANDER HAMILTON 70, 151–52 (Henry Cabot Lodge ed., 1885))).

⁶⁷ *Id.* at 96 (citing 1 THE DEBATE ON THE CONSTITUTION 3–6, 167, 501 (1993); 2 THE FOUNDERS' CONSTITUTION 419 (Philip B. Kurland & Ralph Lerner eds., 1987)).

⁶⁸ *Id.* (citing 2 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 190–97 (Philadelphia, J.B. Lippincott & Co., 2d ed. 1881)).

⁶⁹ Of the fifty-five delegates who attended the Philadelphia Convention, George Washington and James Madison went on to become our first and fourth Presidents, respectively, and sixteen others went on to serve in the First U.S. Congress. Compare 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557–59 (Max Farrand ed., 1937) (listing the delegates to the Convention), with BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 45–46 (2005), available at <http://www.gpoaccess.gov/serialset/cdocuments/hd108-222/1st.pdf> (showing that the Senate of the First Congress included Philadelphia Convention delegates Johnson (Conn.), Bassett (Del.), Read

Consistent with the Madisonian interpretation of the spending power, the First Congress refused to make a loan to a glass manufacturer, with several members arguing that such an appropriation would be unconstitutional.⁷⁰ The Fourth Congress in 1796 declined to appropriate federal funds to assist the citizens of Savannah, Georgia following a fire that devastated the entire city, with opponents of the bill contending that the General Welfare Clause did not empower Congress to make such an appropriation.⁷¹

In 1806, President Jefferson proposed an amendment to the Constitution in his State of the Union Address, in order to enable Congress to spend an anticipated surplus of federal funds on “the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers.”⁷² The Constitutional Convention had expressly rejected a similar amendment that would have authorized Congress to fund internal improvements,⁷³ apparently sharing Jefferson’s view that an amendment was necessary “because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied.”⁷⁴

Although President Jefferson’s proposed amendment was never adopted,⁷⁵ numerous Congresses from 1800 to 1860 enacted legislation providing for internal improvements.⁷⁶ Seemingly agreeing with Jefferson and Madison, almost every President during that period vetoed such legislation as unconstitutional.⁷⁷ In 1817, in the final days of his second term as President, Madison himself vetoed legislation that would have funded the con-

(Del.), Few (Ga.), Strong (Mass.), Langdon (N.H.), Morris (Pa.), and Butler (S.C.), and the House included delegates Sherman (Conn.), Baldwin (Ga.), Carroll (Md.), Gerry (Mass.), Gilman (N.H.), Clymer (Pa.), Fitzsimons (Pa.), and Madison (Va.)). See also Renz, *supra* note 65, at 97 (describing the originalist argument that “[b]ecause many members of Congress and two Presidents were members of the federal Convention, and others were members of their respective state ratifying conventions . . . , the informed actions of the branch to which they belonged reflect the true understanding” of the Constitution).

⁷⁰ Eastman, *supra* note 65, at 79 (citing 2 ANNALS OF CONG. 1686 (1790)); Renz, *supra* note 65, at 98 (citing 2 ANNALS OF CONG. 1631 (1790)).

⁷¹ 6 ANNALS OF CONG. 1712–27 (1796); see Eastman, *supra* note 65, at 79; Renz, *supra* note 65, at 97–98.

⁷² Eastman, *supra* note 65, at 82 (quoting THOMAS JEFFERSON, WRITINGS 529 (Merrill D. Peterson ed., 1984)).

⁷³ Eastman, *supra* note 65, at 79 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 69, at 615–16).

⁷⁴ JEFFERSON, *supra* note 72, at 1509–12; see also Eastman, *supra* note 65, at 82; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 27 (1994) (citing 16 ANNALS OF CONG. 11, 15 (1806)).

⁷⁵ See Eastman, *supra* note 65, at 82.

⁷⁶ See *id.* at 82–87 (discussing examples); Engdahl, *supra* note 74, at 27–33.

⁷⁷ See Eastman, *supra* note 65, at 68, 82–87 (“[W]ith the exception of only half a dozen years, the nearly unanimous position of every President from Jefferson in 1800 to Buchanan in 1859 was that Congress did not have constitutional authority to make appropriations for internal improvements.”). John Quincy Adams was an exception. *Id.* at 83; see also Engdahl, *supra* note 74, at 28–33.

struction of roads and canals within particular states on the ground that the Spending Clause did not authorize such internal improvements.⁷⁸

James Monroe succeeded Madison and proclaimed in his first annual address as President that Congress had no power to spend for internal improvements because such was “not contained in any of the specified powers granted to Congress,” nor was it “incidental to, or a necessary means . . . for carrying into effect any of the powers which are specifically granted.”⁷⁹ In 1822, Monroe vetoed a bill for maintenance of the Cumberland road, which he considered an unconstitutional internal improvement.⁸⁰ But Monroe’s stated concern was not that the expenditure was not authorized by, or necessary to the exercise of, one of the enumerated congressional powers. Instead, his focus was the General Welfare Clause itself, which he asserted limited Congress’s spending power “to purposes of common defence, and of general, not local, national, not State, benefit.”⁸¹ In 1930, Congress passed the Maysville Road Bill, which was similar to the Cumberland Road Bill of 1822 and which suffered a similar fate.⁸² In vetoing it, President Jackson expressed concern that the road ran entirely within a single state, and therefore would be of merely local benefit rather than an appropriation in the “general” welfare, as required by the Constitution.⁸³

In 1847, Congress presented President Polk with appropriation legislation that allocated \$500,000 for “the improvement of numerous harbors and rivers lying within the limits and jurisdictions of several of the states . . .”⁸⁴ Polk’s view was that the individual states were free to impose tonnage duties to pay for such internal improvements, and that federal power should be exercised solely to check state abuses in the levying of the duties.⁸⁵ Polk thought this arrangement vastly preferable because the duties

are, in every instance, to be levied upon the commerce of those ports which are to profit by the proposed improvement; . . . the expenditure being in the hands of those who are to pay the money and be immediately benefited, will be more carefully managed and more productive of good than if the funds were drawn

⁷⁸ See Renz, *supra* note 65, at 98 (citing 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 589 (1913)); see also Eastman, *supra* note 65, at 82 (citing 30 ANNALS OF CONG. 212 (1817)).

⁷⁹ 31 ANNALS OF CONG. 18 (1817); see also Eastman, *supra* note 65, at 82–83; Renz, *supra* note 65, at 99 (citing RICHARDSON, *supra* note 78, at 713–52).

⁸⁰ See Eastman, *supra* note 65, at 83 (citing 39 ANNALS OF CONG. 1838 (1822)).

⁸¹ 39 ANNALS OF CONG. 1838, 1849 (1822); see also Eastman, *supra* note 65, at 83. But see Engdahl, *supra* note 74, at 29–30 (contending that the basis of Monroe’s veto was not a lack of congressional power to appropriate funds for internal improvements, but rather a lack of congressional power to construct and maintain such improvements).

⁸² See Engdahl, *supra* note 74, at 31.

⁸³ *Id.* (citing 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 483, 487 (James D. Richardson, ed., Wash., D.C., 1897)).

⁸⁴ 43 H.R. JOURNAL 83 (1847); see also Eastman, *supra* note 65, at 84–85.

⁸⁵ 43 H.R. JOURNAL 82–88 (1847); see also Eastman, *supra* note 65, at 84–85.

from the national treasury and disbursed by the officers of the General Government; that such a system will carry with it no enlargement of federal power and patronage, and leave the States to be the sole judges of their own wants and interests, with only a conservative negative in Congress upon any abuse of the power which the States may attempt.⁸⁶

Recalling the very different view taken during the Administration of John Quincy Adams, Polk elaborated on his concerns about a plenary spending power and the inevitable unfettered rent-seeking by members of Congress:

[W]hen the system [of federal funding for internal improvements] prevailed in the General Government [during the John Quincy Adams Administration], and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or State, whatever might be the object. We should be blind to the experience of the past, if we did not see abundant evidences that, if this system of expenditure is to be indulged in, combinations of individual and local interests will be found strong enough to control legislation, absorb the revenues of the country, and plunge the government into a hopeless indebtedness. . . . Such a system could not be administered with any approach to equality among the several States and sections of the Union. . . . [S]ome would be enriched at the expense of their neighbors.⁸⁷

For more than another decade, Presidents continued to veto appropriation legislation for internal improvements and echoed Polk's concerns.⁸⁸ But during that same period, Congress evidently considered its spending power to be substantially broader, perhaps plenary.

III. THE SUPREME COURT'S UNDERSTANDINGS OF THE SPENDING CLAUSE

In 1936, the Supreme Court finally entered the discussion about the scope of Congress's spending power when it decided *United States v. Butler*.⁸⁹ Given the history summarized in Part II above, what possible conclusions about *the* original meaning of the Spending Clause could an originalist Justice reach? And what should an originalist Justice do in the face of an historical record reflecting original and persistent disagreement about the meaning of the Clause?

In its brief in *Butler*, the United States conceded that "the scope to be given to the phrase 'general welfare'" in the Spending Clause of Article I was controversial and that conflicting theories existed as to the "proper in-

⁸⁶ 43 H.R. JOURNAL 88 (1847); *see also* Eastman, *supra* note 65, at 85.

⁸⁷ 43 H.R. JOURNAL 85–87 (1847); *see also* Eastman, *supra* note 65, at 85–86.

⁸⁸ *See* Eastman, *supra* note 65, at 86–87 (discussing vetoes by Presidents Pierce and Buchanan); Engdahl, *supra* note 74, at 32–33 (discussing a veto by President Pierce).

⁸⁹ 297 U.S. 1 (1936).

terpretation” to be given the Clause.⁹⁰ The government acknowledged the Madisonian theory “that the general welfare clause is a limitation on the taxing power; that the clause itself has reference to and is limited by the subsequently enumerated powers; that is, that Congress can tax only to carry out one or more of these latter powers.”⁹¹ But “the correct theory,” the government asserted, was the Hamiltonian theory that Congress “may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers.”⁹²

It is significant that the government repeated throughout its brief that although the spending power was not limited by Congress’s other enumerated powers, the General Welfare Clause *did* limit Congress to providing “for the general, as distinguished from local, for the national, as distinguished from state, welfare.”⁹³ Thus, the government’s brief envisioned Congress spending for general or national—but not local or state—purposes that might lie outside its other Article I powers.

Delineated in this way, the spending power is not plenary and might differ scarcely, if at all, from a Madisonian interpretation if one were of the view that Congress’s other Article I powers represent the entire universe of logically possible general/national actions Congress might take.⁹⁴ Under this interpretation, there would be a role for the courts in invalidating appropriations determined to be local or state and not general or national in their purposes or objects. Indeed, the courts could undertake this task while still leaving entirely to Congress’s discretion the subject matter and dollar

⁹⁰ Brief for the United States at 136, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401). In addition to the Madisonian and Hamiltonian theories, the brief identified a third theory—“that the [General Welfare C]lause should be construed as granting Congress power to promote the general welfare independently of the taxing power”—which it declared “has generally been rejected.” *Id.* at 136–37.

⁹¹ *Id.* at 137.

⁹² *Id.*

⁹³ *Id.* at 138; *see also id.* at 143–44 (“The circumstances under which the [General Welfare C]lause was adopted by the Constitutional Convention further indicate that it was meant to describe at the same time the fullness of the taxing power granted to Congress and the limitation upon that power, namely, that it might not be used for purely local objects.”); *id.* at 145 (“It is only reasonable to suppose, therefore, that since the *burden* of taxation was to be borne by all the States, it was decided that the power of distributing the *benefits* of taxation should be limited to purposes serving the general good of all the States, and should not permit promotion of localized welfare of one or more of the larger States.”); *id.* at 148–49 (“The only qualification of the generality of the [‘general Welfare’] phrase in question, which seems to be admissible, is this: That the object, to which an appropriation of money is to be made, be general, and not local; its operation extending, in fact, or by possibility, throughout the Union, and not being confined to a particular spot.” (quoting Hamilton)); *id.* at 149 (“My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not state benefit.” (quoting Monroe)); *id.* at 172 (“It is not suggested that the public money may be expended by Congress for any other than national purposes, or for any other uses than those of the Nation.”).

⁹⁴ That is, perhaps, as a logical matter, there are no general or national purposes outside those already provided for in Article I.

amount of the particular general or national purposes for which federal funds should be appropriated.

In its *Butler* brief, however, the government went on to argue that the Spending Clause is nonjusticiable and Congress's spending power therefore de facto plenary:

It is our position not only that the welfare clause should be construed in the Hamiltonian sense to include anything conducive to the national welfare; it is our position also that the question of what is for the general welfare must have been left primarily to the judgment of Congress, and as to that question, the judicial branch will not substitute its judgment for the judgment of the legislature.

It is not suggested that the public money may be expended by Congress for any other than national purposes, or for any other uses than those of the Nation. But we do maintain that the question of what is a national purpose, of what is a national use, is, in the first instance, purely a question of governmental policy—of political economy—in the largest sense of that term; and that Congress is necessarily the proper arbiter of that question.

. . . .

It seems clear that the founders intended that the procedure provided by the Constitution for the consideration by Congress of fiscal measures and the accountability to the electorate were the only checks on congressional appropriations.⁹⁵

The opposing party in *Butler*, William M. Butler et al. as the Receivers of Hoosac Mills Corporation, not surprisingly disputed the government's interpretation of the Spending Clause as plenary and nonjusticiable,⁹⁶ and referred the Court on this issue to the scholarly 225-page brief submitted to the *Butler* Court by Malcolm Donald on behalf of one of its amicus curiae, the National Association of Cotton Manufacturers.⁹⁷

In its decision, the Court in *Butler* acknowledged that “[s]ince the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation” of the General Welfare Clause.⁹⁸ The Court nonetheless went on to affirm as “correct” the view that it attributed to Hamilton and Story: “[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”⁹⁹ The Court made clear, however, again citing both Hamilton and Story, that the spending power was not plenary: “[T]he powers of taxation and appropriation extend only to matters of na-

⁹⁵ Brief for the United States, *supra* note 90, at 172–73.

⁹⁶ Brief for Receivers of Hoosac Mills Corporation, Respondents at 11, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401).

⁹⁷ Brief Filed by Malcolm Donald as Amicus Curiae on Behalf of the National Association of Cotton Manufacturers, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401).

⁹⁸ 297 U.S. 1, 65 (1936).

⁹⁹ *Id.* at 66.

tional, as distinguished from local, welfare.”¹⁰⁰ In the end, all this was arguably mere dicta, because the Court ultimately invalidated the challenged legislation on Tenth Amendment grounds, and thus was “not now required to ascertain the scope of the phrase ‘general welfare of the United States’ or to determine whether an appropriation in aid of agriculture falls within it.”¹⁰¹

One year later, however, in *Helvering v. Davis*, the Court declared the question of the scope of the spending power “settled” by its decision in *Butler*: “The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents.”¹⁰² The Court explained that although “[t]he line must still be drawn between one welfare and another, between particular and general,” that

[t]he discretion [in drawing this line] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. . . . [“W]e naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.”¹⁰³

The *Helvering* Court underscored the limited nature of both its then-current and likely future role in this area by noting that “the concept of the general welfare” is not “static”: “Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.”¹⁰⁴

The Court’s 1937 decision in *Helvering* did not explicitly declare the Spending Clause to be nonjusticiable. Its holding that the discretion afforded by the “general Welfare” language of the Spending Clause “belongs to Congress, unless the choice is *clearly wrong, a display of arbitrary power, not an exercise of judgment*” arguably constituted a standard of review, albeit one with seemingly little bite.¹⁰⁵ This lack of doctrinal bite was further exacerbated, of course, by the Court’s explicit denial of standing to federal taxpayers some fifteen years earlier.¹⁰⁶

By 1976 in *Buckley v. Valeo*, the Court had dropped any pretense of justiciability and made clear that it considered the “general Welfare” language to provide no constraint at all on Congress’s spending power:

¹⁰⁰ *Id.* at 67.

¹⁰¹ *Id.* at 68.

¹⁰² 301 U.S. 619, 640 (1937).

¹⁰³ *Id.* at 640–41 (quoting *Butler*, 297 U.S. at 67).

¹⁰⁴ *Id.* at 641.

¹⁰⁵ *Id.* at 640 (emphasis added). Not surprisingly, the Court offered no example of a congressional appropriation or other action that might not meet this test.

¹⁰⁶ See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

Appellants' "general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause It is for Congress to decide which expenditures will promote the general welfare: "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." . . . Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution Whether the chosen means appear "bad," "unwise," or "unworkable" to us is irrelevant; Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8.¹⁰⁷

In sum, although the Court embarked upon its doctrinal work in 1936 with an explicit acknowledgment of the Spending Clause's historical ambiguity,¹⁰⁸ there has been no ambiguity in the Court's interpretation of the Clause. The Court's explicit declaration in 1976 that the General Welfare Clause is not justiciable¹⁰⁹ was consistent with its previous decisions, albeit stated a bit more crisply. And the Court has never subsequently wavered from that view.¹¹⁰

IV. THE (UNACKNOWLEDGED) EFFECTS OF THE COURT'S APPROACH

Originalists such as Bork and Graglia, who contend as a jurisprudential matter that constitutional ambiguities mandate judicial abstinence,¹¹¹ surely approve of the Court's position that the concededly ambiguous Spending Clause is not justiciable. Other scholars and court watchers may be comfortable with the Court's approach because they believe (1) that no one is harmed by it, (2) that anyone who might be disadvantaged by it is free to seek a constitutional amendment pursuant to Article V, or (3) that it simply is not possible for the court to draw useful or coherent lines delimiting Congress's spending power.

In the remainder of this Article, I examine those latter three claims and conclude that none withstands close scrutiny. I begin by showing in this Part that, as a theoretical matter, an unfettered congressional spending power should be expected to result in systematic harm to residents of large-

¹⁰⁷ *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam).

¹⁰⁸ *See United States v. Butler*, 297 U.S. 1, 65 (1936) (noting that "[s]ince the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation" of the General Welfare Clause).

¹⁰⁹ *See supra* note 107 and accompanying text.

¹¹⁰ Most recently, in *South Dakota v. Dole*, the Court observed that the level of judicial deference required under the Spending Clause was so great that it "questioned whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. 203, 207 n.2 (1987).

¹¹¹ *See supra* notes 19 (Graglia), 21–24 (Bork) and accompanying text.

population states. Next, I present empirical data that support this theoretical claim of systematic fiscal redistribution from large-population states to small-population states, for which there is no compelling justification. This Part concludes by explaining why those who are predictably and systematically harmed by the Court's abstinence will not be able to obtain a constitutional amendment to "correct" the Court's interpretation of the Spending Clause as nonjusticiable.

Building on the analysis in this Part, I proceed in Part V to rebut the claim that a coherent judicial doctrine delimiting Congress's spending power is not possible. Part V applies the proposed canon and its corollary to arrive at a possible spending power doctrine that would be consistent with one plausible, original meaning of the Spending Clause while also mitigating the unjustified redistribution described in Part IV.

*A. An Unfettered Spending Power and Systematic Redistribution*¹¹²

The existing structure of representation in Congress, combined with the existing rules of majoritarian decisionmaking,¹¹³ clearly affords small-population states disproportionately great representation relative to their shares of the nation's population.¹¹⁴ Less obvious is that this allocation of representation significantly affects the distribution of gains from any legislation Congress enacts, including legislation pursuant to the Spending Clause, thereby ensuring small-population states a disproportionately large slice, and large-population states a disproportionately small slice, of the federal pie. Furthermore, this systematic wealth redistribution infringes on the autonomy of the states that are burdened by the redistribution: In the absence of such redistribution, the burdened states would effectively have more money and, thus, greater freedom of choice.

Insofar as members of Congress are concerned with reelection, and therefore also with the welfare of their constituents, they will seek to enact legislation with greater expected benefits than expected costs to their con-

¹¹² The discussion in this section is substantially derived from previous articles in which I have discussed the role of the United States Senate in ensuring unjustifiable, systematic redistribution among the states. See, e.g., Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923 (1997); Lynn A. Baker & Samuel H. Dinkin, *Getting from Here to There: The Rebirth of Constitutional Constraints on the Special Interest State*, 40 WM. & MARY L. REV. 515 (1999); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997) [hereinafter Baker & Dinkin, *The Senate*]; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *Federalist Revival*].

¹¹³ Of course, Congress is at present only an imperfectly majoritarian body given the Senate's cloture rule, which requires sixty votes to end debate regardless of the number of senators present. See Baker & Dinkin, *The Senate*, *supra* note 112, at 29 n.28, 61; see also U.S. Senate, *supra* note 61 (link to Senate rules). See generally SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

¹¹⁴ See, e.g., Baker & Dinkin, *The Senate*, *supra* note 112, at 24, 71 tbl.5.

stituents. Moreover, because legislators themselves are scarce resources and their choice of agenda necessarily entails opportunity costs,¹¹⁵ their first priority is likely to be legislation with expected benefits to their constituents that *most greatly* exceeds the expected costs to their constituents. Thus, we would expect each legislator to be especially eager to enact “special legislation” with benefits that accrue uniquely to her own constituents but with costs that are spread among the constituents of all legislators. Certainly, each legislator should be relatively more interested in enacting such special legislation than in seeking legislation with costs and benefits that are both generally distributed or are both concentrated on her own constituents.¹¹⁶

Unfortunately, special legislation is more likely to be expropriative—to have aggregate costs that exceed its aggregate benefits—than is legislation with costs and benefits that are both generally distributed or both concentrated on the same constituency. Each of these latter two types of legislation is likely to be enacted only if its aggregate benefits exceed its aggregate costs, because no representative is likely to seek the passage of legislation whose costs to her own constituents exceed its benefits to them. Special legislation, however, may be enacted even if its aggregate costs exceed its aggregate benefits. Because vote trading is possible, Legislator *A* will often agree to support legislation that yields \$10 million in benefits for Legislator *B*’s constituents even if it imposes aggregate costs of \$11 million on the rest of the nation (including, but not concentrated on, Legislator *A*’s constituents). Legislator *A* will support this legislation in exchange for Legislator *B*’s vote on legislation that similarly benefits Legislator *A*’s constituents at the expense of the rest of the nation—including Legislator *B*’s constituents.

Notwithstanding the aggregate welfare loss, this type of vote trading would be attractive to representatives for at least two reasons. First, the terms of each representative’s trades, taken alone, might well provide *her own constituents* aggregate benefits that exceed the aggregate costs to them. That is, in order to obtain support sufficient to enact legislation that pro-

¹¹⁵ Professors Paul Samuelson and William Nordhaus explain “opportunity costs” as follows:

The immediate dollar cost of going to a movie instead of studying is the price of a ticket, but the opportunity cost also includes the possibility of getting a lower grade on the exam. The opportunity costs of a decision include all its consequences, whether they reflect monetary transactions or not.

Decisions have opportunity costs because choosing one thing in a world of scarcity means giving up something else. The opportunity cost is the value of the good or service forgone.

PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 128 (16th ed. 1998) (emphasis omitted).

¹¹⁶ Although any legislator’s first preference logically might be to enact special legislation that uniquely benefits her own constituents and whose costs are borne *exclusively* by other legislators’ constituents, such legislation likely will face greater opposition than similar legislation whose costs are distributed more generally and diffusely. See Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 400–22 (1992); cf. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 44 (1983) (“A representative or senator seldom can argue convincingly that he alone is responsible for the legislative production of a *public good* . . .” (emphasis added)).

vides her constituents \$10 million in special benefits, a representative may need to support legislation that provides other representatives' constituents special benefits at an aggregate cost to her own constituents of only \$8 million. This is possible because the approval of only a simple majority of legislators is necessary for enactment. Thus, the constituents of representatives who were not a party to these particular bargains, and who may have even opposed the legislation, will nonetheless bear a portion of its total cost, a portion that the beneficiaries of the special legislation need not internalize.¹¹⁷ Second, even if the terms of a particular set of trades do not provide a representative's constituents aggregate benefits that exceed its aggregate costs *to them*, the representative will be able to claim complete credit for the special legislation that benefits her constituents; but she will share only diffuse blame for helping enact special legislation that benefits others at the partial expense of her own constituents. Because this blame is diffuse, it will be less salient to her constituents and may also be less well publicized than the passage of the beneficial special legislation. Thus, the benefits *to each representative* of this sort of vote trading are likely to exceed the costs.

¹¹⁷ In making such bargains, therefore, a representative might logically be expected to seek the support of the minimum number of representatives necessary to secure passage of her legislation. See WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32–101 (1962) (arguing that in American politics, parties seek to increase votes only until they achieve the minimum number necessary to form a winning coalition). By doing so, a representative simultaneously minimizes the amount of strategic bargaining in which she must engage—the representative's opportunity costs—and maximizes the competition among legislators to join her coalition, thereby driving down the price of obtaining any legislator's support. This in turn minimizes the total amount the representative must "pay" to ensure passage of her legislation.

In practice, however, proponents of legislation will strive to secure a supermajority of votes, largely because of the uncertainty under which prevote lobbying and logrolling takes place; the outcome of the final vote cannot be known in advance. In this context, political scientist R. Douglas Arnold has observed:

All else equal, [legislative] leaders prefer large coalitions because they provide the best insurance for the future. Each proposal must survive a long series of majoritarian tests—in committees and subcommittees; in House and Senate; and in authorization, appropriations, and budget bills. Large majorities help to insure that a bill clears these hurdles with ease.

R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 117–18 (1990) (emphasis added); see also R. DOUGLAS ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* 43, 52 (1979) (explaining that legislators seek supermajorities "because a whole series of majorities are required, one at each stage of the congressional process . . . [and] they want to minimize risks of miscalculation or last-minute changes"); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 111–15 & n.67 (1974) (noting that frequency distribution data indicate that House and Senate roll call votes "are bimodal, with a mode in the marginal range (50–59.9 percent) and a mode in the unanimity or near-unanimity range (90–100 percent)," and that similar patterns have been observed in state legislatures).

This is the tragedy of the legislative commons.¹¹⁸ Although each representative's individually rational decisions will necessarily contribute to a decline in social welfare, a representative can only hurt her own constituents—and therefore her own chances for reelection—if she does not seek special legislation.¹¹⁹ For in a majoritarian system in which vote trading is possible, a representative's constituents nonetheless will bear part of the costs of other successful bargains resulting in special legislation for other representatives' constituents, including bargains to which the representative was not a party and to which she may even have been opposed. Thus, only by joining the race to forge successful bargains that simultaneously benefit her constituents and exploit those who are not members of the winning coalition—a true “race to the bottom”—can an individual legislator maximize her constituents' welfare, and therefore her own.¹²⁰

Of course, legislation must also receive the approval of the President before it becomes law, and such expropriative, special legislation seems a likely target for an executive veto. Because his constituency is the entire nation, a President might be expected to be guided by the preferences of a majority of the entire electorate.¹²¹ And, notwithstanding its passage by a

¹¹⁸ Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); see also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 139–40 (1962); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 645–46 (1994).

¹¹⁹ BUCHANAN & TULLOCK, *supra* note 118, at 139–40; Gillette, *supra* note 118, at 636–38, 645–46.

¹²⁰ The race to the bottom and the tragedy of the commons, whether legislative or otherwise, are both variants on the prisoner's dilemma. See Gillette, *supra* note 118, at 638 n.36 (explaining the tragedy of the commons in terms of the prisoner's dilemma); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1217–19 (1992) (explaining the race to the bottom in terms of the prisoner's dilemma).

¹²¹ BUCHANAN & TULLOCK, *supra* note 118, at 248 (“The President should, insofar as he uses his veto power as a simple legislative tool, follow the preferences of the majority of the voters.”); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 155 (1992) (“One-quarter of the voters may elect one-half of the legislature, but the president must still be responsive to a coalition of one-half.”).

This expectation must be modified slightly, however, in light of the fact that the President is not elected directly by the people, but rather by the Electoral College, which gives different weights to the votes of residents of different states. See U.S. CONST. art. II, § 1, cl. 2–3. By affording each state “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress,” *id.* art. II, § 1, cl. 2, the Constitution gives the small states a disproportionately greater power to choose the President relative to their share of the nation's population. Thus, although the 2000 Census shows that California, for example, has sixty-nine times the population of Wyoming—33,930,789 versus 495,304—it had only eighteen times as many presidential Electors—fifty-five (fifty-three representatives and two senators) versus three (one representative and two senators). See U.S. CENSUS BUREAU, UNITED STATES CENSUS 2000: CONGRESSIONAL APPORTIONMENT 2 tbl.1 (July 2001) [hereinafter 2000 CONGRESSIONAL APPORTIONMENT].

This in turn means that the President, who needs 270 electoral votes in order to be (re)elected, may formally represent only the 45.4 percent of the nation's population that resides in the forty smallest

majoritarian body, special legislation is unlikely to have the sincere support of a majority of voters.¹²² Nonetheless, special legislation is unlikely to be vetoed for the same sorts of reasons that legislators seek its enactment. Should he veto such legislation, the President will arouse the intense, well-publicized, and not-soon-forgotten ire of the concentrated minority that would have benefited from the legislation, while simultaneously providing a diffuse and scarcely salient benefit to a substantial majority.¹²³ Certainly, the benefits *to a President* of vetoing such legislation—particularly during his first term—will seldom exceed the costs.¹²⁴

states. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 23 tbl.20 (120th ed. 2000).

¹²² That is, in a world without vote trading, this legislation would not garner the support of a majority. Cf. Gillette, *supra* note 118, at 637 (“[A]n exchange of votes can expropriate wealth by excluding some groups from the logrolling process and by creating coalitions that are able to obtain net personal benefits while imposing on nonmembers of the coalition net social costs. Where negative-sum trades are possible, for each decisionmaker the strategy of participating in such deals dominates alternatives.” (footnotes omitted)).

¹²³ See Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 411–12 (1988) (suggesting this as the reason why one “may doubt that item veto authority would effect a major change in political practice”). These same incentives nearly led President Clinton in 1995 to veto the recommendations of an independent commission on military base closings—a body originally established to avoid the problem of special legislation—because their recommendation would result in a loss of nearly 20,000 jobs in California, a state crucial to his reelection. See Tim Weiner, *Decrying Base-Closing Plan as an “Outrage,” the President Gives a Grudging Go-Ahead*, N.Y. TIMES, July 14, 1995, at A16. Indeed, Clinton ultimately approved the commission’s recommendations only after it assured him that the Pentagon would be permitted to turn over most of the jobs at risk to private contractors. Eric Schmitt, *After Assurances on California Jobs, Clinton Is Expected to Approve Base-Closing List*, N.Y. TIMES, July 10, 1995, at B9.

See also David D. Kirkpatrick, *President’s Tough Talk on Budget Earmarks Is Met with Questions on Timing*, N.Y. TIMES, Jan. 29, 2008, at A18 (noting that in seven years President Bush “signed spending bills containing about 55,000 earmarks worth more than \$100 billion” and “was notably silent on the subject [of earmarks] until after his fellow Republicans lost control of Congress in the 2006 midterm elections,” when he began publicly to oppose them); Robert Pear, *Bush, Vocal Foe of Earmarks, Embraces Them in His Budget*, N.Y. TIMES, Feb. 10, 2008, at A1 (“President Bush often denounces the propensity of Congress to earmark money for pet projects. But in his new budget, Mr. Bush has requested money for thousands of similar projects.”).

¹²⁴ Buchanan and Tullock do not appear to see this. See BUCHANAN & TULLOCK, *supra* note 118, at 248 (contending that “the President should, insofar as he uses his veto power as a simple legislative tool, follow the preferences of the majority of the voters” and “[t]herefore, he would accept only bargains which meet the approval of the majority of the populace”). Yet this lack of presidential incentive is why Professor Robinson predicts that “the item veto would be only marginally useful in curtailing private goods [or special] legislation.” Robinson, *supra* note 123, at 419–20. In addition, the President may himself have “special political debts to particular groups or geographic regions, and can be expected to favor special benefits for them” or at least not to veto such benefits. *Id.* at 412 n.32. President Reagan, for example, did not extend “his general campaign against wasteful spending to subsidized grazing rights and electric power in the West, his strongest political base.” *Id.* (quoting Normal Ornstein, *Veto the Line Item Veto*, FORTUNE, Jan. 7, 1985, at 109–11). For discussion of President Bush’s similarly self-interested position on earmarks, see, for example, Kirkpatrick, *supra* note 123; Pear, *supra* note 123.

Given this analysis, one would expect much of the legislation that Congress enacts pursuant to its spending power to be special legislation that reduces aggregate social welfare. These enactments would not result in redistribution among the states, however, if representation in Congress were allocated solely on the basis of population, and each state's coalition-building power (i.e., its power to enact legislation) in Congress were therefore substantially proportional to its share of the nation's population. Under a scheme of purely proportional representation, one would expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be approximately proportional to its population, and the per capita benefits to each state therefore to be nearly the same.

Of course, the representation of the states in the Senate is not proportional to their respective populations. Because each state receives two senators, the Senate affords small-population states (small states) disproportionately great representation, and large-population states (large states) disproportionately little representation relative to their shares of the nation's population. This in turn means that the small states have disproportionately great coalition-building power in the Senate relative to their shares of the population.

One measure of a state's theoretical "coalition-building power" is the likelihood that it will be the swing vote on any proposed legislation.¹²⁵ In the Senate, each state has the same 2-in-100 theoretical chance to be the swing vote on a given piece of proposed legislation.¹²⁶ In the language of modern game theory, the Shapley-Shubik power index of every state is equal in the Senate.¹²⁷ But this means that smaller states have a dispropor-

¹²⁵ The notion of the swing voter or "pivot" for the winning coalition is central to both the Shapley-Shubik power index and the Banzhaf power index. See MARTIN SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS* 200–04 (1982). I assume throughout that each state's representatives vote as a block. Relaxing this assumption simplifies the calculations I discuss in this Part, but does not change the results.

¹²⁶ Each senator has the same 1-in-100 theoretical chance to be the swing vote on any proposed legislation. And each of the fifty states is represented by two senators, each with one vote. See U.S. CONST. art. I, § 3, cl. 1.

¹²⁷ The Shapley-Shubik index considers all possible orders in which a vote can take place. For any ordering of n players (voters) there will be a unique player who is in a position to provide the winning coalition with just enough strength to win. That player is the pivot for the coalition. If all $n!$ orderings are assumed equiprobable, then the Shapley-Shubik index is a measure of the probability that any player is pivotal. If one assumes instead that every winning coalition is equiprobable, the Banzhaf Index can be used to measure the probability that any one player (voter) is pivotal. See SHUBIK, *supra* note 125, at 200–04. The analysis is not affected, however, by one's choice of assumptions or the index used.

There are 100 players (senators) in the Senate. Thus, there are 100! possible orderings in which a vote can take place. Because each player has the same number of votes (one) on a given piece of proposed legislation, each player has the same likelihood of being the swing vote. And because each state is represented by the same number of players (two senators), each *state* has the same likelihood of being the swing vote. Calculated precisely, each state has a 2-in-100 chance to be the swing vote on any given piece of proposed legislation, and each state's Shapley-Shubik index is therefore .02.

tionately greater likelihood, relative to their shares of the nation's population, of being the swing vote on any proposed legislation. In the House, in contrast, where each state's representation is substantially proportional to its population,¹²⁸ the theoretical likelihood that a small state is the swing vote on any proposed legislation is roughly equal to its share of the population and therefore small.¹²⁹ This means that smaller states are less likely

Although in this instance each state's—and each player's—Shapley-Shubik index is the same as its voting strength, that will not always be the case. Indeed, a major contribution of the Shapley-Shubik index is to demonstrate the erroneousness of the common intuition that the a priori power distribution inherent in a given apportionment of voting strength is always a trivial function of the nominal voting strengths. In particular, the Shapley-Shubik index shows that large weighted majority games, such as the Electoral College, give a disproportionate power advantage to the big players, and that some voters may be incapable of affecting the outcome of any proposed legislation even though they have a vote. The former finding is presented in Irwin Mann & L.S. Shapley, *The A Priori Voting Strength of the Electoral College*, in *GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR* 151–64 (Martin Shubik ed., 1964) (demonstrating that states with sixteen or more votes in the Electoral College have a Shapley-Shubik index slightly greater than their number of votes, while states with fourteen or fewer votes have a Shapley-Shubik index slightly smaller than their number of votes). The latter finding is demonstrated by the following example:

Consider a game with four players (or coalitions)—*A*, *B*, *C*, *d*—with votes of 2, 2, 2, and 1, respectively. A simple majority of four votes is needed to carry a motion. In each of the 24 (4!) possible orderings of the four players, the pivot is underlined.

ABCd	B <u>AC</u> d	BC <u>A</u> d	BC <u>d</u> A
ABdC	B <u>A</u> dC	Bd <u>AC</u>	Bd <u>C</u> A
AdBC	C <u>AB</u> d	CB <u>A</u> d	CB <u>d</u> A
AdCB	C <u>A</u> dB	Cd <u>AB</u>	Cd <u>B</u> A
ACBd	d <u>ABC</u>	dC <u>AB</u>	d <u>B</u> CA
ACdB	d <u>A</u> CB	dB <u>AC</u>	d <u>C</u> BA

The Shapley-Shubik indices for *A*, *B*, *C*, and *d* are, respectively: 8/24 (.33), 8/24 (.33), 8/24 (.33), and 0/24 (0). See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 730 n.83 (1991). Thus, although the player denoted *d* has one-seventh of the total voting strength in this hypothetical body, that player can be shown to have no power. That is, *d* can be shown mathematically to be incapable of affecting the outcome of any motion, no matter how it votes. *Id.*; see also SHUBIK, *supra* note 125, at 203–04. Similarly, in a game with three players with votes of 2, 2, and 1, respectively, each of the players has a Shapley-Shubik index of 0.33 if a simple majority of three votes is required for passage. Thus, even though one player has a voting strength only one-half as large as the others', that player's power to affect the outcome of any vote is identical to that of each of the others.

¹²⁸ Because the Constitution provides that “each State shall have at Least one Representative” no matter how small its population, the smallest states may be slightly overrepresented in the House even though representation in that body is “apportioned among the several States . . . according to their respective Numbers.” U.S. CONST. art. I, § 2, cl. 3. Thus, although the 2000 Census shows that California, for example, has sixty-nine times the population of Wyoming (33,930,789 versus 495,304), it had only fifty-three times as many Representatives in the House (fifty-three versus one). See 2000 CONGRESSIONAL APPORTIONMENT, *supra* note 121, at 2 tbl.1.

¹²⁹ For two reasons, a small state's Shapley-Shubik index will only approximate, rather than be identical to, its share of the nation's population. First, as explained in notes 121 and 128, *supra*, the smallest states' voting strength in the House slightly exceeds their actual share of the nation's population. Second, as explained in note 127, *supra*, large weighted majority voting games such as the House give a disproportionate power advantage to the big players. For a complete listing of the various states'

than larger states to cast the deciding vote in the House. In sum, the Shapley-Shubik power index of a small state is significantly larger in the Senate than in the House.¹³⁰

Of course, neither the House nor the Senate alone may enact legislation—the approval of at least a simple majority present in each body is required.¹³¹ Thus, one must determine each state’s theoretical coalition-building power in the Congress as a whole. Table 1 presents original calculations of each state’s Shapley-Shubik power index for Congress using the 2000 Census data.¹³²

current Shapley-Shubik power indices for the House, Senate, and Congress, and their number of House Representatives, *see infra* Table 1.

¹³⁰ *See infra* Table 1. Similarly, the *voting strength* of a small state is greater in the Senate than in the House. *See supra* note 127.

¹³¹ *See* U.S. CONST. art. I, § 7, cl. 2. Sometimes, of course, more than a simple majority of one or both chambers is required, as in the case of Senate filibusters, *see supra* note 113; in order to override a President’s veto, *see* U.S. CONST. art. I, § 7, cl. 2; or where supermajorities are otherwise required by the Constitution, *see, e.g., id.* art. I, § 3, cl. 6 (impeachments); *id.* art. V (constitutional amendments).

¹³² The Shapley-Shubik Indices for the House in Table 1 were calculated by Lynn Baker using the program *ssmmle* (Shapley-Shubik Indices by Modified Multilinear Approximation) designed by Professors Dennis Leech and Robert Leech and available at <http://www.warwick.ac.uk/~ecaae/ssmmle.html>. The Shapley-Shubik Indices for Congress in Table 1 were calculated by Sam Dinkin using an original method (details provided upon request to the author).

In a previous article, Sam Dinkin and I presented the first computer calculations of which we are aware of each state’s Shapley-Shubik index in Congress. Those calculations were based on 1990 Census data. *See* Baker & Dinkin, *The Senate*, *supra* note 112, at 26–27.

Table 1: Shapley-Shubik Power Indices for States Based on 2000 Census

State	Reps	S-SI House	S-SI Senate	S-SI Congress
Cal.	53	.134	.02	.071
Tex.	32	.076	.02	.045
N.Y.	29	.068	.02	.042
Fla.	25	.058	.02	.037
Ill., Pa.	19	.044	.02	.031
Ohio	18	.041	.02	.030
Mich.	15	.034	.02	.026
Ga., N.C., N.J.	13	.029	.02	.024
Va.	11	.025	.02	.022
Mass.	10	.022	.02	.021
Ind., Mo., Tenn., Wash.	9	.020	.02	.020
Ariz., Md., Minn., Wis.	8	.018	.02	.019
Ala., Colo., La.	7	.016	.02	.018
Ky., S.C.	6	.013	.02	.017
Conn., Iowa, Okla., Or.	5	.011	.02	.016
Kan., Ark., Miss.	4	.009	.02	.015
W. Va., Utah, Neb., N.M., Nev.	3	.007	.02	.014
Me., N.H., Haw., Idaho, R.I.	2	.004	.02	.013
Mont., S.D., Del., N.D., Vt., Alaska, Wyo.	1	.002	.02	.012

Comparing any large and small state, these calculations reveal that the smaller state's disproportionately great power in the Senate, relative to its share of the nation's population, is only very slightly mitigated by the proportional representation that the House provides. Consider, for example, the following relationships between California and Rhode Island:¹³³

¹³³ According to the 2000 Census, upon which the apportionment of representation in Table 1 is based, the population of California was 33,930,798 and the population of Rhode Island was 1,049,662. See 2000 CONGRESSIONAL APPORTIONMENT, *supra* note 121, at 2 tbl.1.

Rhode Island was chosen because it receives two Representatives in the House. See *id.* States such as Wyoming that receive only one Representative may be overrepresented in the House because of the Constitution's dictate that "each State shall have at Least one Representative" no matter how small its share of the nation's population. U.S. CONST. art. I, § 2, cl. 3.

- Population: 32.3 to 1
- Power in House: 33.5 to 1
- Power in Senate: 1 to 1
- Power in Congress: 5.5 to 1

Counterintuitively, the ratio of California's and Rhode Island's power in Congress (5.5 to 1) turns out not to be the midpoint between the ratio of their power in the House and the Senate (19.5 to 1), but much more nearly approximates the ratio of their power in the Senate (1 to 1) than the ratio of their power in the House (33.5 to 1).

Of course, theoretical measures of coalition-building power such as the Shapley-Shubik power index capture only part of the complex reality. The committee system, seniority, savvy, and charisma—to name just a few variables—all affect a particular legislator's, and therefore a particular state's, *actual* coalition-building power in the Senate. Happily, however, we need not attempt to quantify these myriad, often intangible, variables for purposes of this discussion. For the equal apportionment of representation in the Senate also determines the likelihood that an especially powerful senator—*by any measure of influence*—represents a particular state.

West Virginia, for example, has a 2-in-100 chance of having one of its representatives chair all of the important Senate committees and otherwise wield the influence that Senator Byrd historically has.¹³⁴ To be sure, this is

¹³⁴ For example, Senator Byrd's committee memberships have included Appropriations, Armed Services, Budget, and Rules and Administration. See CONGRESSIONAL YELLOW BOOK 56 (Eric L. Birholz ed., fall 2000); see also Senator Byrd's Committee Assignments, <http://www.senate.gov/~byrd/committee.htm> (last visited Mar. 11, 2009). Many observers have attributed Byrd's extraordinary success in steering federal dollars to his home state to his chairmanship of the Senate Appropriations Committee. See, e.g., Brian Kelly, *Pigging Out at the White House; Never Mind Last Week's Spending Bonanza; George Bush Has Long Been a Closet Pork Barreler*, WASH. POST, Sept. 6, 1992, at C1; Richard Munson, *Deforming Congress: Why Those Capitol Hill Budget Reforms Could Cost You Plenty*, WASH. POST, Sept. 5, 1993, at C3; see also BRIAN KELLY, ADVENTURES IN PORKLAND (1992) (highlighting Senator Byrd's ability to obtain a relatively large share of federal benefits for his small home state and crowning him "the Pope of Pork"); Drummond Ayres, Jr., *Senator Who Brings Home the Bacon*, N.Y. TIMES, Sept. 6, 1991, at A16 (detailing Senator Byrd's steering of over \$750 million worth of federal projects and over 3,000 jobs into West Virginia over a three-year period); Kevin Merida, *Watchdog Group Cites Congress for Barrelful of Porcine Projects*, WASH. POST, Feb. 17, 1994, at A21 (observing that a watchdog group awarded Senator Byrd a "Lifetime Achievement" award for obtaining more tax dollars than any other member of Congress for his home state).

Most recently, Representative John Murtha of Pennsylvania has been named the "king of pork" by various groups. See, e.g., Robert Pear, *Lawmakers Put Out New Call for Earmarks*, N.Y. TIMES, Feb. 14, 2008, at A20 (noting that Taxpayers for Common Sense reported that Rep. Murtha "obtained \$176 million in earmarks—more than any other House member except Roger Wicker, Republican of Mississippi, who is now a senator," but adding that Senators Byrd of West Virginia, Stevens of Alaska, and Cochran of Mississippi each obtained several times that amount for their home states); Robert Pear, *Republicans to Call for More Disclosure on Earmarks*, N.Y. TIMES, Apr. 3, 2008, at A23 (noting that "Republicans have described Representative John P. Murtha, a Democrat, as the 'king of pork'" but adding that "Citizens Against Government Waste said two House Republicans [Wicker of Mississippi and Young of Florida] won more money for home-state projects" in 2007); Andrew Taylor, *Congress For-*

the same 2-in-100 chance that California or Texas has, but it is much larger than the 3-in-435 chance that West Virginia would have if representation in the Senate were apportioned as it is in the House.¹³⁵ That is, relative to its share of the nation's population, West Virginia has a disproportionately great chance of having an especially powerful representative in the Senate, while it has only a substantially proportional chance of having an especially powerful representative in the House.

Given the absence of any judicially enforced constitutional constraints on the modern Congress's exercise of its spending power, the allocation of coalition-building power in the Senate will importantly affect the distribution of special legislation—"pork"—that Congress enacts under the Spending Clause.¹³⁶ In the Senate, each state has the same likelihood over time of providing the swing vote on a given piece of proposed legislation,¹³⁷ and each state's senators therefore have the same power to secure special spending legislation for their constituents. Thus, if the Senate alone could enact legislation, and if all senators were rationally self-interested,¹³⁸ one would expect the total dollar amount of special legislation that each state receives over time to be equal. This means, however, that the per capita benefits of the special legislation received would be substantially greater in small-population states than in large ones. When California and Wyoming each secure the equivalent of one billion dollars in special legislation from the federal government, for example, this amounts to \$29 for each of California's 33.9 million residents, but \$2,019—nearly seventy times as much—for each of Wyoming's 495,000 residents.¹³⁹ In the House, in contrast, representation is allocated on the basis of population, and each state's coalition-building power within that body is substantially proportional to its share of the nation's population.¹⁴⁰ Thus, if the House alone could enact legislation, we would expect the total dollar amount of each state's benefits

gets *Ban on Pet Projects*, USA TODAY, Mar. 31, 2008, http://www.usatoday.com/news/washington/2008-03-31-4172642754_x.htm (noting that Rep. Murtha "got the 'porker of the year' award from Citizens Against Government Waste, a Washington-based watchdog group").

¹³⁵ See 2000 CONGRESSIONAL APPORTIONMENT, *supra* note 121, at 2 tbl.1.

¹³⁶ In 2008, earmarks in federal spending bills numbered more than 10,000 items and totaled nearly \$20 billion. Kirkpatrick, *supra* note 123. Because this is "less than 1 percent of the federal budget," *id.*, some have observed that the greatest problem with earmarks is not the "fiscal fallout," but the fact that "they can lead to 'conflicts of interest, the irrational and unconstructive allocation of resources, or [be used] by Congressional leaders as carrots and sticks to buy votes for larger measures that clearly lack majority support on the merits.'" Marilyn W. Thompson & Ron Nixon, *Even Cut 50%, Earmarks Clog a Military Bill*, N.Y. TIMES, Nov. 4, 2007, at A1.

¹³⁷ See *supra* notes 125–27 and accompanying text.

¹³⁸ This is a central assumption of the interest group theory component of public choice theory. See, e.g., BUCHANAN & TULLOCK, *supra* note 118, at 11–39; DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991).

¹³⁹ The 2000 Census determined the population of California to be 33,930,798 and the population of Wyoming to be 495,304. See 2000 CONGRESSIONAL APPORTIONMENT, *supra* note 121, at 2 tbl.1.

¹⁴⁰ See *supra* notes 127–29 and accompanying text.

from all the special legislation enacted over time to be approximately proportional to its population,¹⁴¹ resulting in nearly the same per capita benefits to each state.

But of course, neither the House nor the Senate acting alone can pass legislation. The approval of at least a simple majority present in each body is required.¹⁴² One would therefore expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be neither directly proportional to its share of the nation's population (House), nor equal (Senate), but somewhere in between. More specifically, one might expect the per capita share of special legislation that each state will receive over time to approximate its per capita Shapley-Shubik power index in Congress. Thus, the existing allocation of coalition-building power in the Senate is likely to affect the distribution of the "gains" from the special leg-

¹⁴¹ See *supra* note 129 and accompanying text. It is a common misconception that if the House acting alone could enact legislation, a permanent majority coalition of large states would form, depriving the smaller states of the benefits of Union membership while imposing on them all of its costs. This outcome, however, would require the congressional logrolling "game" to have a permanent "core," which it lacks.

Robert Sugden explains that the only "core solution" to the logrolling game is a "Condorcet choice." A Condorcet choice exists when there is no single alternative that cannot be blocked by any coalition of voters even though it is not the first choice of a majority:

An outcome is said to be in the core of a game if it cannot be *blocked* by any coalition of players. Given the assumption that all preferences take the form of strict orderings, a coalition of players blocks one outcome, *x*, if there is some other alternative, *y*, such that (i) every member of the coalition prefers *y* to *x*, and (ii) by the rules of the game, concerted action by the members of the coalition can ensure that *y* is the outcome of the game, irrespective of what non-members do [A]n alternative, *x*, is in the core of the majority rule game if and only if, for every other feasible alternative, *y*, a majority of voters prefer *x* to *y*. This of course is Condorcet's criterion. The core of the game is identical with the Condorcet choice.

ROBERT SUGDEN, *THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS* 148 (1981).

In the following example, alternative 1 is the Condorcet winner, even though only A prefers it to all other alternatives, because both A and B prefer 1 to 3, and both A and C prefer 1 to 2:

A	B	C
1	2	3
2	1	1
3	3	2

See *id.* at 140, 147; see also DENNIS C. MUELLER, *PUBLIC CHOICE II*, 114–15 (1989); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 n.55, 994–96 (1989).

Whenever a Condorcet choice does not exist, the legislative outcome will be a function of such procedural variables as the order in which various alternatives are formally considered. This is the "voting paradox," frequently referred to as the Arrow "impossibility theorem." See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); see also DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); SUGDEN, *supra*, at 140; Levmore, *supra*, at 984–90; Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

¹⁴² See U.S. CONST. art. I, § 7, cl. 2. Sometimes, of course, more than a simple majority of one or both chambers is required. See *supra* note 131.

isolation that is enacted, by ensuring small states a disproportionately large slice, and large states a disproportionately small slice, of the federal pie. The prediction, in short, is that the Senate's current structure of representation ensures a systematic redistribution of wealth from the larger states to the smaller states.¹⁴³

The analysis above gives powerful reason to question the now-classic "political process" argument that is frequently invoked when concerns are expressed about the scant protections afforded the states under modern readings of the Tenth Amendment and other federalism provisions of the Constitution.¹⁴⁴ The argument, which could similarly be invoked in the context of the spending power, contends that there is no need for the federal courts to invalidate federal legislation that may encroach on the autonomy of the states because of the role that the states themselves play in the enactment of federal legislation. That is, the structure of the federal political process arguably affords the states ample protection against federal encroachments on their autonomy, including fiscal redistribution among the states, so there is simply no need for judicially imposed, external limits on Congress's spending power.

Consider the reasoning of Professor Herbert Wechsler who, along with Professor Jesse Choper, is the scholar with whom this argument is commonly associated.¹⁴⁵ Wechsler has observed that the Senate, in which all states are equally represented, "cannot fail to function as the guardian of

¹⁴³ This prediction rests in part on the assumption that large and small states' *contributions* to the federal treasury are not systematically *dis*proportional to their respective shares of the nation's population.

¹⁴⁴ *See, e.g.,* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1995) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); *United States v. Morrison*, 529 U.S. 598, 650 (2000) (Souter, J., dissenting) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." (quoting *Garcia*, 469 U.S. at 552) (internal quotation marks omitted)); *Printz v. United States*, 521 U.S. 898, 956 (1997) (Stevens, J., dissenting) ("The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." (quoting *Garcia*, 469 U.S. at 550–51) (internal quotation marks omitted)); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 877 (1976) (Brennan, J., dissenting) ("[T]he extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress.").

¹⁴⁵ Sometimes called the Wechsler-Choper thesis today, this argument was presented first in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and later in JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (criticizing Wechsler's particular arguments but contending that there "are 'political safeguards' of federalism, safeguards that have a longer pedigree and a stronger claim to constitutional legitimacy than the current Supreme Court's clumsy bid to impose its will on Congress"). *But see* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (critiquing Kramer).

state interests as such.”¹⁴⁶ He has therefore concluded that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.”¹⁴⁷

The central problem with Wechsler’s analysis is that he misidentifies the problem. Although the state-based apportionment of representation within the federal government¹⁴⁸ may ensure that “state interests as such” are protected against federal oppression, federal oppression is not the problem.¹⁴⁹ The problem, rather, lies in the ability of *some states* to harness the federal lawmaking power to encroach on the resources and autonomy of *other states* to their own advantage. That is, the problem is ultimately *horizontal*, rather than *vertical*, encroachments on state resources and state autonomy.¹⁵⁰ Not only can the state-based allocation of congressional representation not protect an individual state against this use of the federal lawmaking power, it facilitates it.

¹⁴⁶ Wechsler, *supra* note 145, at 548, 557. Wechsler’s discussion was cited approvingly by the Court in *Garcia*, 469 U.S. at 550, 551 n.11 (“It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”), and by the dissent in *Usery*, 426 U.S. at 877 (Brennan, J., dissenting) (“[T]he extent of federal intervention into the States’ affairs in the exercise of delegated powers shall be determined by the States’ exercise of political power through their representatives in Congress.”).

¹⁴⁷ Wechsler, *supra* note 145, at 559 (footnote omitted); *see also id.* at 558 (“Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse . . .”).

¹⁴⁸ The state-based allocation of representation in the Senate is obvious: each state receives two senators and therefore has formal equality in representation. *See* U.S. CONST. art. I, § 3, cl. 1. Although representation in the House is proportional to population, it too is state-based insofar as each state is ensured one representative no matter how small its population, representatives are allocated by state, and House districts do not cross state lines. *See id.* art. I, § 2, cl. 3; *see also* Wechsler, *supra* note 145, at 547–50, 552–55.

¹⁴⁹ It is not clear what Wechsler means by “state interests as such” or the presumably opposed “federal interests as such.” Juxtaposing these two sets of interests is nonetheless common in the context of conditional federal spending, including by commentators who, in contrast to Wechsler, are concerned that “state interests as such” are less likely to be advanced by Congress than “federal interests as such.” *See, e.g.,* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 860–68 (1979); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 123–25.

Although Wechsler focuses on the state-based allocation of representation in Congress, he nonetheless suggests that oppression by the “national authority,” rather than the oppression of some states by other states, is the problem that the structure of representation avoids. *See* Wechsler, *supra* note 145, at 558 (stating that the national political process “is intrinsically well adapted to retarding or restraining new intrusions *by the center* on the domain of the states” (emphasis added)).

¹⁵⁰ I have discussed this distinction between horizontal and vertical threats to state autonomy at greater length in previous articles. *See, e.g.,* Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1940 (1995); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 107–28 (2001); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 475–77 (2003); Baker, *supra* note 145, at 955–56.

Wechsler's observation about the Senate's role in protecting state autonomy is especially ironic in the context of fiscal redistribution among the states. The analysis in this Part IV.A above showed that under a scheme of purely proportional representation, such as the House provides, one would not expect Congress's spending legislation to reveal systematic fiscal redistribution from the larger states to the smaller states. This redistribution, with its attendant impingement on the autonomy of the large states that systematically bear its costs, occurs solely because of the disproportionately great—because “equal”—representation that the Senate affords small-population states.

As a theoretical matter, it is therefore clear that the state-based allocation of congressional representation *cannot* protect the large states against aggregate-welfare-reducing and autonomy-infringing fiscal redistribution.

B. *The Empirical Evidence*

The available data support the above theoretical claims. Researchers at Harvard's Kennedy School of Government have calculated the “balance of payments” that each state had with the federal government in fiscal years 1993 through 1999.¹⁵¹ Each state's contribution to the federal treasury—individual and corporate income taxes, social insurance taxes, excise taxes, estate and gift taxes, and customs duties¹⁵²—is measured against the federal outlays it received—Medicare, Social Security, public assistance including Unemployment Insurance, defense spending including veterans' benefits, and nondefense discretionary spending including federal programs in agriculture, education, national parks, and transportation.¹⁵³

The results are consistent with the prediction. A regression analysis of the data for all fifty states reveals that the per capita Shapley-Shubik index is a statistically significant ($p < 0.01$) explanator of the per capita balance of payments between the states and the federal government for fiscal years 1993 through 1999.¹⁵⁴ As Tables 2 and 3 reveal, the balance of payments with the federal government was negative in seven or more of the ten largest states during each year from 1993 through 1999, but positive in seven or

¹⁵¹ See HERMAN B. LEONARD & JAY H. WALDER, *THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1999 RETROSPECTIVE ISSUE—1983–1999*, at 117–20 (24th ed. 2000), available at <http://www.hks.harvard.edu/taubmancenter/publications/fisc/index.htm>.

¹⁵² See *id.* at 109, 111; see also *id.* at 56–57; MONICA E. FRIAR ET AL., *THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1995*, at 30–31, 93–96 (20th ed. 1996) [hereinafter FY 1995 STUDY]; HERMAN B. LEONARD ET AL., *THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1998*, at 95 (23d ed. 1999) [hereinafter FY 1998 STUDY].

¹⁵³ See LEONARD & WALDER, *supra* note 151, at 26, 109, 111; see also *id.* at 43–56; FY 1995 STUDY, *supra* note 152, at 32–35; *id.* at 93–96 (describing methodology); FY 1998 STUDY, *supra* note 152, at 26–32; *id.* at 93, 95 (describing methodology).

¹⁵⁴ See *infra* Appendix I. For the details of how this regression analysis was performed in a previous, more limited study, see Baker, *Federalist Revival*, *supra* note 112, at 210 (study of fiscal year 1998); Baker & Dinkin, *The Senate*, *supra* note 112, app. 3, at 103 (study of fiscal year 1995).

more of the ten smallest states in each of those years. The result is an average per capita income transfer of -\$560 in 1993 through 1999 from residents of the ten largest states, compared to an average per capita income transfer of +\$543 to residents of the ten smallest states during that same period.

Such systematic redistribution is not problematic if there is a principled justification for it. Unfortunately, there does not appear to be one. The most obvious justification—poverty—does not fully explain this systematic difference. A statistical analysis confirms that even after controlling for each state’s poverty rate as determined by the Census Bureau, the per capita Shapley-Shubik index is still a statistically significant explanator of the individual states’ balance of payments with the federal government for fiscal years 1993 through 1999.¹⁵⁵

That a state has a small population does not make it, or its residents, obviously more virtuous, needy, beneficial to the larger society, or otherwise deserving of a disproportionately large share of the federal treasury relative to large-population states and their residents. Neither moral nor economic theory appears to offer any justification for the type of redistribution ensured by the existing allocation of representation in the Senate. Thus, whatever one’s conception of the “general Welfare” constraint of Article I, Section 8 might be,¹⁵⁶ it is unlikely to encompass such redistribution.

¹⁵⁵ See *infra* Appendix 1 and 2.

¹⁵⁶ U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States”); see *supra* Part II.

*Table 2: Balance of Payments with the Federal Government:
Per Capita Income Transfer—Fiscal Years 1993–1999¹⁵⁷
Ten Largest States¹⁵⁸*

<i>State</i>	<i>1993</i>	<i>1994</i>	<i>1995</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>
Cal.	-\$308	-\$184	-\$255	-\$387	-\$463	-\$600	-\$685
N.Y.	-\$924	-\$1103	-\$943	-\$767	-\$702	-\$854	-\$890
Tex.	-\$169	-\$169	-\$54	-\$90	-\$142	-\$252	-\$189
Fla.	+\$520	+\$132	+\$258	+\$316	+\$354	+\$128	+\$47
Pa.	-\$63	-\$70	+\$166	+\$104	+\$167	+\$218	+\$256
Ill.	-\$1611	-\$1600	-\$1687	-\$1689	-\$1717	-\$1535	-\$1669
Ohio	-\$482	-\$513	-\$438	-\$408	-\$412	-\$369	-\$344
Mich.	-\$1126	-\$1051	-\$1411	-\$1418	-\$1387	-\$1231	-\$1042
N.J.	-\$2202	-\$2021	-\$2079	-\$2027	-\$2006	-\$2054	-\$2342
N.C.	-\$153	-\$99	-\$41	+\$54	+\$53	+\$66	+\$146

*Table 3: Balance of Payments with the Federal Government:
Per Capita Income Transfer—Fiscal Years 1993–1999¹⁵⁹
Ten Smallest States¹⁶⁰*

<i>State</i>	<i>1993</i>	<i>1994</i>	<i>1995</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>
Wyo.	+\$29	+\$264	+\$294	+\$249	+\$617	+\$243	+\$386
Alaska	+\$1665	+\$1660	+\$1063	+\$1399	+\$1969	+\$2155	+\$2777
Vt.	-\$284	-\$270	+\$18	+\$150	+\$39	+\$167	+\$343
N.D.	+\$2213	+\$2611	+\$1870	+\$1664	+\$2644	+\$2568	+\$3043
Del.	-\$1981	-\$1740	-\$1415	-\$1016	-\$1025	-\$1050	-\$1025
S.D.	+\$1538	+\$1458	+\$1053	+\$1248	+\$1659	+\$1838	+\$2327
Mont.	+\$1792	+\$1686	+\$1774	+\$1819	+\$2189	+\$2454	+\$3109
R.I.	+\$323	+\$304	+\$495	+\$431	+\$649	+\$754	+\$528
Idaho	+\$851	+\$543	+\$552	+\$653	+\$569	+\$817	+\$829
N.H.	-\$1756	-\$1335	-\$1430	-\$1441	-\$1498	-\$1565	-\$1787

¹⁵⁷ LEONARD & WALDER, *supra* note 151, at 117–20. Data are all in 1999 dollars, adjusted by a state cost-of-living index. *See also id.* at 111–12 (App. B—Methodology).

¹⁵⁸ This is based on the 1990 Census. *See* U.S. Census Bureau, Apportionment and Apportionment Population Based on the 1990 Census, <http://www.census.gov/population/www/censusdata/apportionment/files/table-a.pdf> (last visited Mar. 11, 2009). New census data do not affect the apportionment of the House of Representatives until the first elections held thereafter (e.g., in November 1992 for the 1990 Census), for representatives to take office in January of the following year (e.g., in January 1993 for the 103rd Congress). *See* U.S. Census Bureau, Congressional Apportionment, <http://www.census.gov/population/www/censusdata/apportionment/index.html> (last visited Mar. 11, 2009).

¹⁵⁹ *See supra* note 157.

¹⁶⁰ *See supra* note 158.

C. *The (Im)Possibility of a Constitutional Amendment*

The analysis in sections A and B above demonstrated, both theoretically and empirically, that the existing structure of representation in Congress, combined with rules of majoritarian decisionmaking, result in unjustifiable, systematic fiscal redistribution from large-population states to smaller ones. One obvious remedy available to the large-population states would be to seek a constitutional amendment, pursuant to Article V,¹⁶¹ that would impose clear limits on Congress's spending power.

The analysis above, however, also suggests that this amendment possibility is more theoretical than real: The existing rules governing the enactment of federal spending legislation have a clearly identifiable group of systematic beneficiaries—the small-population states that are afforded disproportionately great representation in the Senate, and therefore also in Congress, relative to their shares of the nation's population. Based on the 2000 Census, thirty-three states currently are overrepresented in the Senate, thirteen are underrepresented, and four are proportionately represented.¹⁶² Each of the thirty-three overrepresented states might be expected to oppose the adoption of a constitutional amendment that would adversely affect its continued ability to obtain a disproportionately large share of the federal pie.

Under Article V, the consent of two-thirds of the Senate—or a convention called by two-thirds of the state legislatures—is necessary, but not sufficient, to propose an amendment, and ratification by three-fourths of the states is required for adoption.¹⁶³ Thus, if the senators from, or legislatures in, as few as seventeen of these thirty-three overrepresented states opposed the proposal of an amendment, or as few as thirteen states opposed ratification, the continuation of the existing regime would be ensured.

Therefore, in order for an amendment limiting Congress's spending power to have any chance at adoption, its proponents would need to persuade a substantial number of the states that clearly benefit from the existing regime that they would do *even better* under the proposed regime. This would require the amendment's proponents to demonstrate that at least twenty of the thirty-three states that disproportionately benefit from the existing regime would *each* experience an increase in aggregate welfare if the amendment were adopted, notwithstanding the anticipated loss of federal redistribution in favor of each of those states.

¹⁶¹ See *supra* note 35.

¹⁶² The states that currently have fewer than eight representatives in the House are overrepresented, the states with ten or more representatives are underrepresented, and those with nine representatives are proportionately represented, as readily seen by comparing each state's Shapley-Shubik index in the House with its index in the Senate. See *supra* Table 1; see also 2000 CONGRESSIONAL APPORTIONMENT, *supra* note 121, at 2; cf. Baker & Dinkin, *The Senate*, *supra* note 112, at 71 tbl.5.

¹⁶³ See U.S. CONST. art V.

Moreover, to the extent that particular interest groups might have disproportionately great power within certain states—such as farmers in Iowa and Nebraska or the dairy industry in Wisconsin—the amendment’s proponents similarly would need to persuade these interest groups that they would each experience an increase in aggregate welfare notwithstanding the anticipated loss of federal redistribution in their favor if the amendment were adopted. I am doubtful that proponents of such an amendment could provide the relevant states and interest groups persuasive evidence on this score. Thus, it seems extremely unlikely that the states that are not currently overrepresented in the Senate could obtain a constitutional amendment that would limit or reduce the ability of the overrepresented states to receive a disproportionately large share of federal appropriations.

V. THE PROPOSED CANON AND THE POSSIBILITY OF A SPENDING POWER DOCTRINE

The discussion in Part II showed the Spending Clause to be a constitutional provision with an importantly ambiguous original meaning. In 1936, the *Butler* Court explicitly acknowledged that ambiguity and then chose one plausible, if also ambiguous, interpretation of the Clause.¹⁶⁴ Later decisions have resolved those ambiguities, making clear that the Clause is not justiciable.¹⁶⁵ That understanding of the Clause as nonjusticiable has been reinforced by the Court’s decisions, beginning in 1923, denying federal taxpayers standing to challenge congressional appropriations.¹⁶⁶

In choosing among the plausible interpretations of the Spending Clause, neither the *Butler* Court nor any later Court invoked a second-order rule for interpreting provisions of the constitutional text that have ambiguous original meanings.¹⁶⁷ The Court never assessed the likely effect on aggregate social welfare of finding the Spending Clause nonjusticiable, although Parts IV.A and IV.B above show both that such an analysis (theoretical or empirical) is possible and that the results are troubling. Nor did

¹⁶⁴ *United States v. Butler*, 297 U.S. 1, 65–67 (1936) (noting that “[s]ince the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase [‘general Welfare, ’]” and concluding that the phrase grants Congress a “wide range of discretion”).

¹⁶⁵ *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam) (noting that the General Welfare Clause is not a limitation on congressional power and that it “is for Congress to decide which expenditures will promote the general welfare”); *South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987) (stating that the “level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all” and citing *Buckley* in support); *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (stating that the discretion in drawing the line “between particular and general” is “not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment”).

¹⁶⁶ *See Frothingham v. Mellon*, 262 U.S. 447, 486–87 (1923); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342–46 (2006); *Asarco Inc. v. Kadish*, 490 U.S. 605, 614 (1989); *Flast v. Cohen*, 392 U.S. 83, 91–94, 102–06 (1968).

¹⁶⁷ *See supra* Part III.

the Court in any of these cases seem to consider the implications of its reading of the Spending Clause for the ability of those adversely affected by the decision—whether in the short- or longer-term—to use the Article V amendment process to “correct” any “errors” in the Court’s interpretation.

The canon of interpretation that I propose would have the Court, when confronting more than one plausible interpretation of an ambiguous constitutional provision, choose the interpretation favored by, or most likely to benefit, the party that is less likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to “correct” the Court’s interpretation, if it were to seek one. The analysis in Parts IV.A and IV.B above showed that the existing structure of representation in Congress, combined with rules of majoritarian decisionmaking, results in systematic wealth redistribution from the large-population states to the smaller states in the absence of any judicial constraint. This means that if the Court holds the Spending Clause to be nonjusticiable, or otherwise only minimally constrains Congress’s spending power, that decision benefits the states that are overrepresented in the Senate relative to their shares of the nation’s population. If instead the Court were to limit Congress’s ability to enact special legislation or “pork” under the Spending Clause, its decision would benefit (relative to the status quo) the states that are underrepresented or proportionately represented in the Senate relative to their shares of the nation’s population.

The proposed canon would have the Court assess which group of states—the thirty-three small-population states that are currently overrepresented in the Senate or the other seventeen states—is theoretically more likely to be able to obtain a constitutional amendment if it considers itself disadvantaged by the Court’s chosen interpretation of the Spending Clause. Section IV.C explained why the seventeen states that are *not* currently overrepresented in the Senate would be extremely unlikely to obtain a constitutional amendment that would limit or reduce the ability of the overrepresented states to receive a disproportionately large share of federal appropriations.

Now consider the alternative. If the Court were to interpret the Spending Clause to constrain federal expenditures in some way that would disadvantage the small-population states relative to the current state of affairs, what is the likelihood that those states could secure a constitutional amendment to overturn that decision? There are thirty-three such states with overrepresentation in the Senate, and the consent of thirty-four states is needed to propose an amendment, with thirty-eight needed to ratify one. Thus, in order to obtain such an amendment, the overrepresented states would need to persuade five additional states that they would each experience an increase in aggregate welfare, notwithstanding the likely adverse financial effects of such an amendment for the state. Although this seems

unlikely to occur in the near term, shifts in population or other developments may eventually make it plausible.¹⁶⁸

In sum, at present, the thirty-three overrepresented states are only five states short of the thirty-eight needed for ratification of a favorable amendment, while the thirteen underrepresented and four proportionately represented states, taken together, would need the consent of twenty-one additional states in order to obtain an amendment. The states that are overrepresented in the Senate therefore seem vastly more likely than the remaining states to one day obtain a favorable constitutional amendment regarding the scope of the spending power.

This analysis leads to two possibilities under the proposed canon. One possibility is for the Court to choose, as between the two interpretations of the Spending Clause that are consistent with the (ambiguous) original meaning, the one that would be disfavored by the states that are overrepresented in the Senate. Those states would be free to seek a constitutional amendment to “correct” the Court’s interpretation, if they chose. If the Court were concerned, however, that even these small-population states are not likely as a matter of logical possibility to be able to obtain an amendment, then the proposed corollary to the canon would have the Court *not* declare the Spending Clause nonjusticiable and to provide some standard of review under the Clause that is consistent with the original meaning.¹⁶⁹

Were the Court to adopt the proposed canon and undertake the crafting of a Spending Clause doctrine, it would find ready guidance in the Madisonian interpretation of the provision articulated by Monroe: that Congress’s spending power is limited “to purposes of common defence, and of general, not local, national, not state, benefit.”¹⁷⁰ Although the Court has proclaimed repeatedly since 1936 that “[i]t is for Congress to decide which expenditures will promote the general welfare,”¹⁷¹ it is surely within the Court’s competence to distinguish between general and local purposes, between national and state benefits. After all, the courts of virtually every state in multiple contexts have long successfully distinguished between leg-

¹⁶⁸ For example, population shifts between the 1990 and 2000 censuses resulted in an increase from thirty-two to thirty-three states that are overrepresented in the Senate. Wisconsin moved from the proportionately represented to the overrepresented category, while Indiana went from underrepresented to proportionately represented. Compare Table 1 *supra*, with Baker & Dinkin, *The Senate*, *supra* note 112, at 71 tbl.5.

¹⁶⁹ By a “standard of review,” I mean a standard that some appropriations legislation might logically fail. Thus, a judicial declaration of a plenary spending power that leaves solely to Congress the determination of what is consistent with the “general Welfare” would not constitute such a standard of review. Indeed, such a statement would be a declaration of *de facto* nonjusticiability.

¹⁷⁰ 39 ANNALS OF CONG. 1838, 1849 (1822); see also *United States v. Butler*, 297 U.S. 1, 67 (1936) (noting that Hamilton contended “that the purpose must be ‘general, and not local,’” and that Story similarly believed that the appropriation power “extend[s] only to matters of national, as distinguished from local, welfare”).

¹⁷¹ *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam); see also *Butler*, 297 U.S. at 67 (holding that Spending Clause permits Congress a “wide range of discretion”); cases cited *supra* note 165.

islation that is local versus general in its purpose, and between matters of local versus state-wide concern.¹⁷² In sum, the Court *could* interpret the Spending Clause as justiciable and read the phrase “general Welfare” in the text of that Clause as a constraint on Congress’s spending power.¹⁷³

If the Court were to adopt the proposed canon and were to interpret the “general Welfare” provision of the ambiguous Spending Clause to be a justiciable constraint on Congress’s power, those who believe that Congress alone can or should determine what appropriations promote the “general Welfare” would have two primary ways to proceed. First, they would be able to argue to the Court with regard to any particular challenged appropriation (a) that the appropriation was consistent with the “general Welfare,” or (b) that there should be a strong presumption that any congressional appropriation is, by virtue of its enactment through a majoritarian democratic legislative process, consistent with the “general Welfare.” Second, if the Court nonetheless ultimately held that a challenged appropriation was inconsistent with the “general Welfare” and therefore prohibited by the Constitution, those who deemed this ruling to be in error could seek a constitutional amendment to correct the error.¹⁷⁴

In stark contrast, under the status quo in which the Court has not adopted any second-order rule for interpreting provisions of the constitutional text that have ambiguous original meanings, and has simply declared the Spending Clause nonjusticiable, those who would seek to “correct” the Court’s interpretation of the Clause have no way to do so: they have neither

¹⁷² See, e.g., LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 224–43 (3d ed. 2004) (discussing and presenting cases involving state constitutional prohibitions on “special” and “local” legislation); *id.* at 274–317 (discussing and presenting cases involving constitutional home rule, which require the courts to distinguish between matters of “local or municipal” concern and matters of state-wide concern). See generally Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *DENV. U. L. REV.* (forthcoming 2009).

¹⁷³ It might also prove necessary for the Court to alter its existing doctrine governing federal taxpayer standing in order to accommodate challenges to any such arguably unconstitutional enactments pursuant to the spending power. See cases cited *supra* note 166.

State courts have long granted standing to state and local taxpayers concerned to challenge various expenditures. See, e.g., BAKER & GILLETTE, *supra* note 172, at 425–42. Indeed, a unanimous U.S. Supreme Court observed in 1879 with regard to the standing of a *county* taxpayer to challenge local fiscal legislation, “there would seem to be no substantial reason why a [claim] by or on behalf of individual tax-payers should not be entertained to prevent [an illegal disposition of public money]. The courts may be safely trusted to prevent the abuse of their process in such cases.” *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879).

The U.S. Supreme Court has repeatedly treated state taxpayers the same as federal taxpayers, however, and has therefore “refused to confer standing upon a state taxpayer absent a showing of ‘direct injury,’ pecuniary or otherwise.” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (citing *Doremus v. Bd. of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952)); see also, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). A more extensive discussion of taxpayer standing is beyond the scope of this Article.

¹⁷⁴ However unlikely success on this front might appear to be at the present time, the potential for success is far greater than for the large-population states, as was discussed in Part IV.C above.

meaningful access to the Court nor any realistic ability to adopt a constitutional amendment.

CONCLUSION

Proponents of originalism frequently acknowledge that some constitutional provisions are ambiguous, but have reached no consensus on how the Court should proceed in cases involving such provisions. In this Article, I have offered the Court an applicable canon of interpretation, which centers on the often overlooked facts that the ultimate arbiter of the Constitution's meaning is a supermajority of the states acting pursuant to Article V's amendment procedures, and that Article V is the route provided in the Constitution for correcting any errors in the U.S. Supreme Court's decisions.

I have discussed the indisputably ambiguous Spending Clause as an example of how the canon and its corollary would operate. My primary aim in that examination has been to demonstrate—to originalists and proponents of a “living Constitution” alike—the many benefits of the proposed canon. But I also hope that those who remain reluctant to embrace the canon will nonetheless profit by being provoked to question whether the abstinence advocated by many originalists is in fact the appropriate judicial response to ambiguous constitutional provisions.

APPENDIX 1

*Aggregate Regression Analysis for Years 1993–1999: Is the Per Capita Shapely-Shubik Index a Statistically Significant Explanator of the Per Capita Balance of Payments (“bop”) Between the States and the Federal Government?*¹⁷⁵

Aggregate Regression for 1993–1999

<i>Variables</i>	<i>bop</i>
poverty_rate	165.4***
	(17.24)
pc_ssindex	9.55e+10***
	(1.88e+10)
Constant	-2171***
	(246.6)
Observations	350
R-squared	0.253

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

¹⁷⁵ The balance of payments data used for the analysis are from LEONARD & WALDER, *supra* note 151, at 117–20. The poverty rate figures used are from JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-214, POVERTY IN THE UNITED STATES: 2000, at 11 tbl.D (2001) (data for years 1998 and 1999); JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-207, POVERTY IN THE UNITED STATES: 1998, at xi tbl.B (1999) (data for years 1996 and 1997); ELEANOR BAUGHER & LEATHA LAMISON-WHITE, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-194, POVERTY IN THE UNITED STATES: 1995, at ix tbl.B (1996) (data for years 1993 through 1995). The Shapley-Shubik index numbers for each state for 1993 through 1999 are available at Baker & Dinkin, *The Senate*, *supra* note 112, at 27. The population data used to calculate the per capita Shapley-Shubik numbers are from U.S. Census Bureau, Time Series of Intercensal State Population Estimates: April 1, 1990 to April 1, 2000 (Apr. 11, 2002), http://www.census.gov/popest/archives/2000s/vintage_2001/CO-EST2001-12/CO-EST2001-12-00.html.

APPENDIX 2

*Regression Analysis for Individual Years 1993–1999: Is the Per Capita Shapely-Shubik Index a Statistically Significant Explanator of the Per Capita Balance of Payments (“bop”) Between the States and the Federal Government?*¹⁷⁶

Regression Results for 1993

<i>Variables</i>	<i>bop</i>
poverty_rate	140.2***
	(39.77)
pc_ssindex	1.00e+11**
	(4.83e+10)
Constant	-2148***
	(669.1)
Observations	50
R-squared	0.243

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

Regression Results for 1994

<i>Variables</i>	<i>bop</i>
poverty_rate	148.0***
	(43.61)
pc_ssindex	1.11e+11**
	(4.95e+10)
Constant	-2154***
	(689.3)
Observations	50
R-squared	0.234

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

¹⁷⁶ See *supra* note 175.

Regression Results for 1995

<i>Variables</i>	<i>bop</i>
poverty_rate	173.7***
	(37.99)
pc_ssindex	7.18e+10
	(4.58e+10)
Constant	-2295***
	(569.7)
Observations	50
R-squared	0.332

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

Regression Results for 1996

<i>Variables</i>	<i>bop</i>
poverty_rate	206.3***
	(41.63)
pc_ssindex	7.41e+10*
	(4.29e+10)
Constant	-2650***
	(588.1)
Observations	50
R-squared	0.372

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

Regression Results for 1997

<i>Variables</i>	<i>bop</i>
poverty_rate	227.0***
	(54.58)
pc_ssindex	7.63e+10
	(4.99e+10)
Constant	-2794***
	(707.7)
Observations	50
R-squared	0.318

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

Regression Results for 1998

<i>Variables</i>	<i>bop</i>
poverty_rate	198.7***
	(60.03)
pc_ssindex	9.91e+10*
	(5.51e+10)
Constant	-2371***
	(753.4)
Observations	50
R-squared	0.250

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

Regression Results for 1999

<i>Variables</i>	<i>bop</i>
poverty_rate	240.4***
	(64.89)
pc_ssindex	1.30e+11**
	(5.72e+10)
Constant	-2780***
	(789.3)
Observations	50
R-squared	0.291

Standard errors in parentheses

*** p<0.01; ** p<0.05; * p<0.1

