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TAKING TEXT AND STRUCTURE REALLY SERIOUSLY:  
CONSTITUTIONAL  
INTERPRETATION AND THE CRISIS OF PRESIDENTIAL  
ELIGIBILITY

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\*237 Throwing down the gauntlet at the entire community of constitutional scholars, the editors of Constitutional Commentary at the University of Minnesota Law School have recently announced what "could be the most earth-shaking discovery in constitutional law since Marbury"<sup>1</sup> — George Washington, the Father of Our Country, was constitutionally ineligible to become president of the United States.<sup>2</sup> As the editors point out, the argument is "quite straightforward,"<sup>3</sup> especially for those who have drunk deeply from the well of Justice Scalia's "plain-meaning" approach to legal interpretation.<sup>4</sup> But we think

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<sup>1</sup> Contest: Was George Washington Constitutional?, 12 CONST. COMMENTARY 137, 137 (1995) [hereinafter Contest].

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994) ("The simplest version of textualism is enforcement of the 'plain meaning' of the statutory provision: that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?").

their argument is equally compelling for legal scholars who profess any allegiance to the values of traditional legal craft. As Professor Laurence Tribe has recently and eloquently reminded us, the traditional lawyer's tools of parsing text, intention, and structure are essential to avoid the temptation—increasingly prevalent among legal academics these days—of resorting to "free-form" methods of interpreting the Constitution.<sup>5</sup> It is in this spirit of fidelity to text and craft that we take up the important, though hitherto neglected, question of presidential eligibility under the United States Constitution.

**\*238 I. The Minnesota Argument: Virginia Is for Losers**

The Minnesotans' surprising discovery flows from a literal reading of the Eligibility Clause of Article II, section 1: The constitutional text explicitly restricts eligibility to those persons who were "natural born Citizen[s], or a Citizen of the United States, at the time of the Adoption of this Constitution."<sup>6</sup> Article VII in turn provides that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution."<sup>7</sup> The terms for adoption required by Article VII were satisfied when New Hampshire became the ninth state to ratify on June 21, 1788.<sup>8</sup> Although Virginia, New York, North Carolina, and Rhode Island would later vote to join the new nation,<sup>9</sup> the Constitution achieved full legal birth with New Hampshire's ratification; hence, only citizens of the nine ratifying states could be denominated "citizens of the United States" as of the time of the Constitution's adoption. Because George Washington was a citizen of Virginia, he "was not a citizen of the United States at the time the Constitution went into effect under Article VII, and hence was ineligible to be President under Article II. Q.E.D."<sup>10</sup>

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<sup>5</sup> Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1227 (1995).

<sup>6</sup> U.S. Const. art. II, ' 1, cl. 5 (emphasis added).

<sup>7</sup> U.S. Const. art. VII.

<sup>8</sup> HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 212 (1911).

<sup>9</sup> Virginia ratified on June 25, 1788, *id.* at 216, New York on July 26, 1788, *id.* at 216, North Carolina on November 21, 1789, *id.* at 218, and Rhode Island on May 29, 1790, *id.* at 219.

<sup>10</sup> Contest, *supra* note 1, at 137.

Although legal scholars with insufficient devotion to the values of craft and textual fidelity might be tempted to take this argument lightly, one can hardly deny that the argument appears to be a perfectly straightforward reading of the constitutional text. And the issue of presidential eligibility, though rarely if ever litigated, cannot be dismissed as a peculiar or isolated constitutional problem. Much of the Constitution is devoted to establishing the minimal requirements for national office; the Supreme Court's recent decision regarding congressional term limits<sup>11</sup> reflects the significance of discerning those requirements, come what may in terms of political consequences. As the Minnesota editors note, their interest in constitutional eligibility requirements was piqued by a recent article of their fellow Minnesotan, Professor Michael Paulsen, who recently examined constitutional limitations on cross-branch service. Paulsen's article, *Is Lloyd Bentsen Unconstitutional?*,<sup>12</sup> addressed the possibility that the former Secretary of the Treasury was constitutionally disqualified from office because he had served as a senator when the Senate voted to increase the secretary's salary.<sup>13</sup> Notwithstanding its somewhat odd and possibly *ad hominem* title, Paulsen's article was completely serious in inquiring whether literal readings of the constitutional text may be casually disregarded because of political inconvenience, or if they must instead be fully complied with as a measure of our enduring commitment to our nation's fundamental legal document.

Indeed, another eligibility requirement—that the president must be thirty-five years of age<sup>14</sup> — has routinely been held up as the canonical example of the importance of taking the constitutional text seriously as binding law. The thirty-five-year requirement, it is often said, is the quintessential "easy case" that shows that the Constitution cannot (and should not) be bent to one's personal politics and practical predilections.<sup>15</sup> For many constitutional commentators, this easy case illustrates the truth that, despite the recent popularity of deconstruction

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<sup>11</sup> U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

<sup>12</sup> Michael S. Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994).

<sup>13</sup> *Id.* at 907; see U.S. Const. art. I, § 6 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, ... the Emoluments whereof shall have been increased during such time ..."); cf. Paul Brest, *Processes of Constitutional Decisionmaking* 15-46 (1975) (examining a similar problem regarding President Nixon's appointment of William Saxbe as attorney general).

<sup>14</sup> U.S. Const. art. II, § 1, cl. 5.

<sup>15</sup> See Tribe, *supra* note 5, at 1224-25 (arguing against the view that "the law of the Constitution is, in the end, merely a language for pressing one's preferences").

and other trendy interpretive theories, the Constitution means what it says and says what it means.<sup>16</sup> If the plain meaning of this portion of Article II, section 1 cannot be evaded, why should we think that the portion of text immediately preceding it is any less binding upon us? And so, if the Minnesotans' argument is in fact the best reading of the text, we should be as duty bound to respect it—no matter the consequences—as we are to respect the thirty-five-year requirement.

We begin our analysis by noting that the reach of the Minnesotans' argument is scarcely limited to George Washington's presidency. If their argument is taken seriously, then the only legitimate presidents among the first nine chief executives were John Adams and his son, John Quincy Adams.<sup>17</sup> In 1788, Virginia was the home of not only Washington,<sup>18</sup> but \*240 also Jefferson,<sup>19</sup> Madison,<sup>20</sup> Monroe,<sup>21</sup> and William Henry Harrison.<sup>22</sup> By 1788, Andrew Jackson

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<sup>16</sup> For an argument of this type in the context of the debate concerning the exclusivity of Article V as a method of legitimately amending the United States Constitution, see David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4, 3-4 (1990) (arguing that Article V "is clear, exclusive, and ... means what it says"). The most notable proponents of the contrary view are Bruce Ackerman and Akhil Amar. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 52-56 (1991) (arguing that Article V is not exclusive and advocating amendment by public referendum); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1055-56 (1988) ("[W]ere [Article V] in fact the only mode of constitutional amendment, it would violate the inalienable right of a majority of the People to alter or abolish their government ...").

<sup>17</sup> But see *infra* note 40 (giving the reason, unmentioned by the Minnesotans, that the first Adams's presidency was indeed in patent violation of the constitutional text).

<sup>18</sup> WASHINGTON IRVING, *LIFE OF GEORGE WASHINGTON: VOLUMES IV AND V*, at 278 (Allen Guttman & James A. Sappenfield eds., Twayne Publishers 1982) (1857).

<sup>19</sup> In 1788, Jefferson resided in Paris, where he served as United States ambassador to France, but Virginia remained his legal domicile. 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826*, at 324, 603 (James M. Smith ed., 1995) (noting Jefferson's departure for Paris in 1784 and return in 1789).

<sup>20</sup> See *JAMES MADISON: A BIOGRAPHY IN HIS OWN WORDS* 156 (Merrill D. Peterson ed., 1974) ("[H]e left ... for home in March, 1788, to seek election to the Virginia convention.").

had moved from his North Carolina birthplace to Tennessee<sup>23</sup>—then not even a state at all<sup>24</sup>—and Martin Van Buren was a child in New York.<sup>25</sup> Finally, though Zachary Taylor was born in 1784 in Orange County, Virginia, "[h]is youth was passed among the pioneers of Kentucky, whither his parents emigrated soon after his birth."<sup>26</sup> Kentucky, of course, did not enter the Union until 1792.<sup>27</sup> Given these consequences, one might hesitate to accept what we call the "Minnesotan argument" unless there is no better reading of the text.

Happily, there may well be an alternative. Many constitutional thinkers, including Abraham Lincoln, argue that the identity of the "United States" pre-exists the ratification of the Constitution.<sup>28</sup> The text of the Constitution surely encourages this view. The famous beginning of the Preamble—"We the People of the United States ... do hereby ordain and establish this Constitution"—suggests that the "United States" preceded the particular political structure established by

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<sup>21</sup> See MAXIM E. ARMBRUSTER, *THE PRESIDENTS OF THE UNITED STATES AND THEIR ADMINISTRATIONS FROM WASHINGTON TO REAGAN* 94 (7th rev. ed. 1982) ("In 1786 [Monroe] again was in his state's Assembly, serving four years.").

<sup>22</sup> See WILLIAM A. DEGREGORIO, *THE COMPLETE BOOK OF U.S. PRESIDENTS* 139-40 (1984) (stating that Harrison was a student in Virginia until 1791).

<sup>23</sup> ARMBRUSTER, *supra* note 21, at 114, 117.

<sup>24</sup> TENN. CONST. pmb. (noting that Tennessee became a state in 1796).

<sup>25</sup> ARMBRUSTER, *supra* note 21, at 125.

<sup>26</sup> Abraham Lincoln, Eulogy on Zachary Taylor at Chicago, Illinois (July 25, 1850), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858*, at 247, 247 (Don E. Fehrenbacher ed., 1989).

<sup>27</sup> 1 JOHN A. GARRATY & ROBERT A. MCCAUGHEY, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES* 167 (6th ed. 1987). Even if we viewed Kentucky as part of Virginia at the time New Hampshire ratified, that would obviously not have helped Taylor.

<sup>28</sup> In his 1863 Gettysburg Address, Lincoln claimed the new nation was brought forth "[f]our score and seven years ago," or in 1776. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865*, at 536, 536 (Don E. Fehrenbacher ed., 1989). As we explain below, however, it would have been more correct to have said "four score and eight years ago." See *infra* text accompanying notes 37-40.

the new Constitution. Moreover, states within the United States quite regularly replace their constitutions,<sup>29</sup> but that is no warrant for arguing that, for example, ontologically new Georgians (who have lived under ten state constitutions \*241 in the past two hundred years)<sup>30</sup> are created along with their new constitutions. They are presumably old Georgians living under new constitutions. France is on its Fifth Republic<sup>31</sup> (and still counting), but no one suggests that the French were any less French during the period of the prior Republics—or during the reign of Louis XVI for that matter. In like fashion, one can envision a broader category of "citizens of the United States" who simply chose to replace what they believed to be a defective Articles of Confederation with a brand new constitutional schema.

Added support for this view is found in Article VI, which states that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."<sup>32</sup> It is hard to argue that such debts could have been created unless there was a "United States" prior to the United States "under this [particular] Constitution" to create them.

Accordingly, citizens of any of the states that were members of the Confederation (including Virginia) presumably were citizens of the United States for purposes of Article II.<sup>33</sup> Indeed, reading Article II in the way suggested by the Minnesotans invites a puzzling anomaly not compelled by the text: All of the states within the Confederation could have ratified the Constitution on the same

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<sup>29</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 248-49 (Sanford Levinson ed., 1995).

<sup>30</sup> *Id.* at 248.

<sup>31</sup> MAURICE AGULHON, *THE FRENCH REPUBLIC: 1879-1992*, at 391 (Antonia Nevill trans., 1993).

<sup>32</sup> U.S. Const. art. VI, cl. 1.

<sup>33</sup> Even though we reject the Minnesotan position, we acknowledge that Washington's status during the four days between New Hampshire's ratification on June 21, 1788 and Virginia's on June 25 is problematic. Assuming that the United States had indeed changed drastically as the result of New Hampshire's act, it seems odd to refer to Washington as a citizen of the new United States during that brief period when the United States consisted of only those states that had ratified and Virginia was not yet one of these. Perhaps this means that Washington was a citizen of the United States up to the very moment of New Hampshire's ratification, but not immediately afterward. If so, we may have located (with apologies to Professor Ackerman) a truly "constitutional moment"!

day, yet only those persons in the first nine states to ratify could qualify as "citizens" and so satisfy the presidential eligibility requirements of Article II.<sup>34</sup>

Finally, one should insist that the textual provisions of Article II be read together rather than in isolation.<sup>35</sup> In addition to its citizenship \*242 requirements, Article II, section 1 establishes a residency requirement limiting presidential eligibility to those citizens who have "been fourteen Years a Resident within the United States."<sup>36</sup> If one believes that the United States begins with the Constitution, then no one was eligible to become president until 1802!

Given the language of the residency requirement, one must assume that the Framers believed that the United States had emerged at least fourteen years before the new political structure established by the Constitution. George Washington was inaugurated on April 30, 1789,<sup>37</sup> which gives us a limit date of April 30, 1775. In hindsight, this makes a good deal of sense. The battles at Concord and Lexington, usually thought of as the beginning of the American Revolution, took place on April 19, 1775,<sup>38</sup> which may therefore be taken as the birthday established by the Constitution for the new nation. As George Frisbie Hoar declared, "At the moment of John Buttrick's word of command [to resist the British soldiers at Concord bridge,] American national life began... . The order was given to British subjects. The order was obeyed by American citizens."<sup>39</sup>

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<sup>34</sup> Or, to put it another way, imagine the representatives of the states lining up to sign the document in random order. It hardly makes sense that citizens of basically simultaneously ratifying states would be treated as anything other than citizens of the United States at the time of the adoption of the Constitution, whatever the technical implication of Article VII. Indeed, given that Virginia ratified only four days after New Hampshire, this hypothetical does not depart very far from the actual events.

<sup>35</sup> See Tribe, *supra* note 5, at 1233 ("It seems axiomatic that, to be worthy of the label, any 'interpretation' of a constitutional term or provision must at least seriously address the entire text out of which a particular fragment has been selected for interpretation, and must at least take seriously the architecture of the institutions that the text defines." (emphasis in original)).

<sup>36</sup> U.S. Const. art. II, ' 1, cl. 5.

<sup>37</sup> ARMBRUSTER, *supra* note 21, at 54.

<sup>38</sup> GARRATY & MCCAUGHEY, *supra* note 27, at 119.

<sup>39</sup> EDWARD T. LINENTHAL, *SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS* 23 (1991).

Once we read the citizenship requirement together with the residency requirement, the Minnesotans' argument evaporates.<sup>40</sup>

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<sup>40</sup> Of course, if the Constitution had been ratified immediately after proposal by the Philadelphia Convention and Washington thus had been elected and inaugurated earlier, then the presumed birthdate of the United States would be prior even to Lexington and Concord. Perhaps one could treat the First Continental Congress, which convened in Philadelphia on September 5, 1774, as the nation's birthdate. Indeed, in his First Inaugural Address, Lincoln stated that "[t]he Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776." Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, supra note 28, at 215, 217-18 (emphasis added). Or is it conceivable that Article II is simply badly drafted on this point? In any event, it should be clear that the legitimacy of John Adams's presidency is fatally undermined by the fact that he spent the years 1778-1788 in Paris, Amsterdam, and—following formal recognition by the British of American independence in 1783—in London, engaged in diplomacy on behalf of the new country. JOHN FERLING, JOHN ADAMS: A LIFE 190-295 (1992) (describing Adams's life as a diplomat from 1778-1788). Thus, as of Adams's March 4, 1797 inauguration, he obviously had not "been fourteen Years a Resident within the United States" (emphasis added), even if one adopts a birthdate for the United States of 1774. There is no problem if the birthdate was 1772 (or early 1773), but that only underscores the importance of precisely identifying the point at which the United States emerged from the womb of historical possibility into the realm of the fully actual.

To save Adams's eligibility would require a most uncraftsmanlike interpretation of the phrase "a Resident within" or the term "United States." One presumes that the Framers required residency—with its clear connotation of physical presence—because of their belief that a full sharing of the quotidian experiences of life on American soil was a prerequisite for ultimate leadership. Whatever else Adams was doing in Europe—and a rich American tradition suggests that the fleshpots of that continent did not provide a suitable milieu for the creation of the truly virtuous citizenry that underlies a republican political order—he was not experiencing what Cardozo might have described as American "life in all its fullness." See *Welch v. Helvering*, 290 U.S. 111, 115 (1933). Hence, any effort to characterize Adams as a "Resident within the United States," while in fact living in Europe, would do violence to our ordinary understanding of the text chosen in Article I.

Alternatively, one might seek to save Adams's eligibility by arguing that he was a resident within the "United States" from the moment of his birth in Massachusetts, even though the "United States" had not yet been born. On this theory, we need not decide the precise moment at which the "United States" came into being, because the reference to the "United States" is to particular land—the land that was later wrested from colonial rule—rather than to a particular political entity. But this reading is obviously a stretch, indeed "free form." If the Framers intended to denote merely the territory instead of the political entity, they could



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easily have used the phrase "the territory now comprising, or comprising in the future, the United States." Their failure to do so suggests that reference is being made to a concept (hence, our earnest effort to establish the true birthdate of the "United States"). To accept the United States-as-physical-territory position, one must believe that the "United States" in fact preceded anyone's recognition that the political entity existed, so that it would make sense to refer, without further qualification, to the Anasazi as having lived in the United States. This point raises deep philosophical questions well beyond the scope of this Article. For further discussion, see SAUL A. KRIPKE, NAMING AND NECESSITY (1980).

We might emphasize that the durational citizenship and "residence within" requirements present the possibility of continuing conundra for serious constitutionalists. Note, for example, that Article I, section 2 requires that members of the House of Representatives be "seven Years a Citizen of the United States" and section 3 requires that senators have been "nine Years a Citizen of the United States" in order to be eligible. Imagine now that Canada in fact dissolves and that, say, British Columbia (with, presumably, a suitable new name) becomes the fifty-first state within the United States. When, precisely, would a citizen of this new state be eligible to run for Congress or to become President?

Is it conceivable that the Constitution estops the new state from electing any native to Congress until seven or nine years have elapsed, even though someone from one of the existing fifty states, or Puerto Rico, Guam, or the Virgin Islands, could move to the new state and immediately run for office? That might strike one as an extraordinarily stupid outcome, but the text does seem to require this, unless, that is, one engages in relatively free-form interpretation. Of course, the text also calls into doubt the legitimacy of representatives and senators elected by Texas and California upon their entry into the Union, since they had been American territory less than seven years at the time of admission.

And what about the former Canadian who wishes to run for the presidency? Would it be impossible for any such person ever to run, on the grounds that no one not a citizen of the United States before statehood could count as a "natural born citizen" or a citizen at the time of adoption of the Constitution? Or would we treat those persons who had been born in British Columbia as constructive "natural born citizens" of the United States as well? And what about the requirement of fourteen years of residence within the United States? Would everyone in the new state be prohibited from running for the presidency until fourteen years after entry? Of course if we do date "residence within" from the time of admission of the new state, then Adams's presidency appears to be in trouble, at least if we believe in neutral criteria. If, however, one argues that Adams was eligible to be President in 1797 because Massachusetts was always "really" a part of the United States, even though it didn't achieve its telos until forty-some years after Adams's birth in 1735, then it would seem difficult to resist the conclusion that the ex-British Columbians would also be eligible on the grounds that British Columbia, too, was now revealed to have always been "essentially" part of the United States even though it took an unusually long time for this essence to reveal itself in history.

**\*243** II. A Really Serious Reading of Article II, Or Why Zachary Taylor Was Our Last Constitutional President

Fidelity to text and legal craft have shown us why Washington's presidency was constitutionally legitimate. Yet, the Minnesotans' exhortation to take text seriously leads us to more serious and important discoveries. Read in the light of traditional craft values, the constitutional text, we **\*244** think, demonstrates convincingly that there has been no legitimate president of the United States since Zachary Taylor. As we shall now explain, the constitutional text clearly limits presidential eligibility to those who were citizens of the United States at the time of the Constitution's adoption in 1788.<sup>41</sup> No one else could (and can) serve in that office, at least without further amendment of the document. This discovery, we well recognize, considerably raises the constitutional stakes. We are no longer discussing the status of the long-terminated Washington presidency, but now we are grappling with the legitimacy of William Jefferson Clinton's current occupancy of the Oval Office.<sup>42</sup> Nevertheless, we feel duty bound, as legal academics, to follow the truth wherever it may lead us. Fidelity to text and commitment to craft, we think, require no less.

Recall Article II's text once more: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President ..."<sup>43</sup> A textual neophyte might think that the phrase "at the time of the Adoption of this Constitution" refers only to the immediately preceding language in Article II—"a Citizen of the United States"—so as to grandfather (or grandmother) johnny-come-latelies like Alexander Hamilton who entered the colonies after birth and only then became a citizen of one of the ratifying states. On this theory, citizens not "natural born" but naturalized at the time of ratification were allowed to attain the presidency, but those naturalized thereafter were forever barred from running for this august office. So understood, this clause of the Constitution has rightly and eloquently

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<sup>41</sup> Thus, Taylor, born in 1784, is the last constitutional president. See ARMBRUSTER, *supra* note 21, at 149 ("Taylor was born in Orange County, Virginia, November 24, 1784."). Not only are all later presidents ineligible, but so are Taylor's immediate predecessors, John Tyler and James K. Polk, both born after ratification. See *id.* at 137 ("[Tyler] was born March 29, 1790, at the family homestead Greenway in Charles City County, Virginia."); *id.* at 143 ("[Polk] was born in historic Mecklenburg County, North Carolina, on November 2, 1795 ...").

<sup>42</sup> Of course, it goes without saying that, as dedicated constitutionalists, we are raising only legal, and not political, questions about Clinton's legitimacy.

<sup>43</sup> U.S. Const. art. II, ' 1, cl. 5.

been denounced as the Constitution's stupidest provision by such eminent theorists as Randall Kennedy<sup>44</sup> and Robert Post.<sup>45</sup>

Nevertheless, this inequitable, albeit conventional, interpretation of the constitutional text is wholly inconsistent with the text and grammar of Article II. After all, the phrase "at the time of the Adoption of this Constitution" is separated by an all-important comma from the phrase that precedes it, thus suggesting, indeed requiring, that it modifies both "natural \*245 born Citizen" and "a Citizen of the United States."<sup>46</sup> A rigorous textual interpretation of the clause thus avoids

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<sup>44</sup> Randall Kennedy, A Natural Aristocracy?, 12 CONST. COMMENTARY 175 (1995).

<sup>45</sup> Robert Post, What Is the Constitution's Worst Provision?, 12 CONST. COMMENTARY 191 (1995).

<sup>46</sup> The issue raised by the comma's placement is described by experts as "the problem of ambiguous modification." See Terri LeClercq, Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers, 2 LEGAL WRITING: J. LEGAL WRITING INST. (forthcoming 1995). David Mellinkoff has traced such problems back to the 16th century, which suggests that the problem was well known to the Framers. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 164-65 (1963). Regarding this and other interpretive quandaries, Jabez Sutherland's 1891 treatise on statutory construction presumably summarized the best conventional understanding of legal usage; at the very least, anyone who disagrees with Sutherland bears a very high burden of proof. According to Sutherland,

Referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. This proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.

Id. (quoting JABEZ SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION ' 267 (1891) (emphasis added)).

One might argue that the Constitution's use of commas often strikes a modern reader as especially promiscuous. See, e.g., U.S. Const. art. II, ' 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."); id. cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during

the vicious discrimination against non-natural-born citizens usually ascribed to it by routine interpretation. When the text is given its plain meaning, it suggests instead a far more profound discrimination against those who were not sufficiently part of the national community at the nation's birth.

Indeed, it seems clear enough that our reading of the text is absolutely required under a plain-meaning approach that pays due attention to the Constitution's words and its punctuation.<sup>47</sup> To be sure, this interpretation requires some elaboration, but this is not fatal to plain-meaning arguments. After all, as Justice Scalia, the doyen of textualists, has pointed out, a patch of text may be "susceptible of only one meaning, although ... that meaning is not immediately accessible" until one engages in a complex process of analysis.<sup>48</sup>

\*246 Some benighted souls may dare to label our reading as "frivolous" because it seems to result in what they regard as a monumentally stupid—and therefore unacceptable—outcome. One might begin by noting that it is not at all clear that stupid outcomes are necessarily precluded by the standard norms of constitutional interpretation.<sup>49</sup> It was, after all, James Madison himself who told his colleagues in the very first session of the House of Representatives that "[h]ad the power of making treaties ... been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of

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the Period for which he shall have been elected ... "). But surely not all commas can be overlooked, and one must presumably have a theory that allows one to differentiate between meaningful and superfluous commas. It seems most charitable to begin with the presumption that commas were intended to be meaningful, so that the burden of proof should be on the person who wishes to ignore certain commas as superfluous. And, needless to say, a preference for one or another political result cannot, for dedicated constitutionalists, count as a sufficient reason for respecting or ignoring the controversial comma.

<sup>47</sup> Devotion to craft requires "a commitment of the legal community to conduct our government in accord with the best interpretation of ... text and structure." Tribe, *supra* note 5, at 1279 (emphasis in original). Such a commitment surely involves observing "absolutely unambiguous commands of the Constitution." *Id.*

<sup>48</sup> *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting). We owe this reference to George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 342 (1995). Professor Taylor describes Scalia as "arguing that even though the inquiry was taxing, because the statute [under consideration in *Pauley*] was in the end definitive, the agency interpretation was not entitled to deference." *Id.* at 342 n.91.

<sup>49</sup> See generally Symposium, *Constitutional Stupidities*, 12 CONST. COMMENTARY 139 (1995).

the Constitution."<sup>50</sup> One might lament that Bill Clinton is not truly eligible for the presidency (not having been a citizen of the United States in 1788); one might even suggest rectifying this obvious imperfection by quick passage of an amendment. But neither regret nor the need for reform would or should change the status of what the Constitution means. As Justice Thomas has recently reminded us, the Constitution means what it said when it left the hands of the Framers, and no amount of hand wringing or wishful thinking can change the unalterable meanings of the Founding Document.<sup>51</sup>

But, equally important, we think that the cavalier assumption that our reading is "stupid" or even "frivolous" begs the question. Instead, reflection on the plain meaning of the text, especially when coupled with reflection on some of the most prominent strands of the American political tradition, has led us to conclude that the Framers, in adopting the language they did, were sending an extraordinarily deep and profound message to later generations. As with Poe's purloined letter, we have failed to grasp this message only because we have refused to look at what was in front of us all the time.

Reserving the presidency to persons who were citizens at the time of the Founding is hardly shortsighted. To the contrary, it reflects the deeply held Jeffersonian impulse in American constitutionalism, with its emphasis on the need for periodic reconsideration and even revolution regarding our institutional structures. The Framers well understood, even if we do not, that the Constitution of 1787-1788 was a compact for the citizens of that generation and not for all time.<sup>52</sup> This decision reflects an attractive \*247 modesty in the Founding Generation about the likelihood of their having achieved perfection in designing a

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<sup>50</sup> James Madison, Speech to the House of Representatives (1791), in PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 13 (3d ed. 1992).

<sup>51</sup> *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring) (citing *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

<sup>52</sup> This latter understanding might be labeled the "Marshallian canard." See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (describing the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (emphasis in original)). Why Marshall's 1819 views should prevail over the understandings of 1787-1788 is not at all clear. For similar arguments, see *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1880 (1995) (Thomas, J., dissenting) ("[Justice Story's] Commentaries on the Constitution were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding.").

radically new political system.<sup>53</sup> More importantly, the limited term of eligibility is an overt acknowledgment of what is perhaps the greatest problem facing a revolutionary political regime like that constructed between 1776 and 1788: How does one maintain the warm zeal of the Founding Generation, which staked its own "lives, ... fortunes, and ... sacred Honor"<sup>54</sup> on creating a new system of government? How does one pass this revolutionary spirit on to a new generation, born to a different set of experiences, reared in stability and relative comfort, who may see little glory in simply maintaining the work of their fathers?<sup>55</sup>

Thus, the Framers may well have believed that it would be dangerous for the Republic to have a president whose republican spirit had not been born through baptism by total immersion in the holy spirit of 1775-1787. Could one really trust a leader whose own freedom was not fought for and earned through an audacious appeal to heaven, but who was instead handed his freedom routinely and unceremoniously as an expected birthright? Who among us will confidently answer "yes" to this question? For this reason, the fifth clause of Article II, section 1 placed a duty upon the later generations to grapple with their own fitness to rule, to confront the potential inadequacy of leaders who had not directly participated in the epic events of the Founding. It thus called upon Us the People to recognize the emergence of a true constitution-making moment. When the last embers of the Founding Generation died out, the nation was then rightly deprived \*248 of anyone legally eligible to rule as our president, because no one morally entitled to be president remained. A new generation must then take up the cause

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<sup>53</sup> See Sanford Levinson, Introduction to *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, supra note 29, at 5 (noting that Article V is an indirect acknowledgment of the Constitution's imperfections). After all, the first United States Constitution, the Articles of Confederation, lasted a scant seven years between its ratification in 1781 and its replacement in 1788 by the newly ratified second Constitution.

<sup>54</sup> THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

<sup>55</sup> This calls to mind Abraham Lincoln's justifiably famous Address to the Young Men's Lyceum of Springfield, Illinois:

It is to deny, what the history of the world tells us is true, to suppose that men of ambition and talents will not continue to spring up amongst us. And, when they do, they will as naturally seek the gratification of their ruling passion, as others have so done before them. The question then, is, can that gratification be found in supporting and maintaining an edifice that has been erected by others? Most certainly it cannot... . Towering genius disdains a beaten path.

Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions (Jan. 27, 1838), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858*, supra note 26, at 28, 34 (emphasis in original).

of the revolution—as did the generation of 1776. The members of this new generation must give their own free and willing consent to the basic institutional structures whose purpose is to secure the inalienable rights of "life, liberty, and the pursuit of happiness." These values may remain our beacon through all time, but there is certainly no reason to believe that the particular institutional means chosen in 1787 to achieve them will be similarly immortal. Instead, as Jefferson insisted, we must relentlessly scrutinize our institutions to make sure that they are still conducive to the purposes for which they were originally created. "Nothing," he rightly insisted, "is unchangeable but the inherent and unalienable rights of man."<sup>56</sup> Whatever threatens these rights should be un sentimentally eliminated. "[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, ... and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."<sup>57</sup> To paraphrase Jefferson, the tree of liberty often needs to be pruned of those branches whose rot threatens the survival of the tree itself.<sup>58</sup>

The need for perpetual deliberation and, when necessary, drastic change is not merely Jefferson's conceit or Lincoln's anxiety of influence. As Lincoln well noted, "The principles of Jefferson are the definitions and axioms of free society."<sup>59</sup> The duty of each generation to remake both itself and the nation is deeply woven into the American character, in our own thought as well as that of the Founding Generation. Indeed, repeated deliberation about the adequacy of our institutions—what the Virginia Constitution calls the "frequent recurrence to fundamental principles"<sup>60</sup> —is explicitly anticipated in Article V itself, which provides for the convocation of new constitutional conventions.

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<sup>56</sup> Letter from Thomas Jefferson to John Cartwright (June 5, 1824), in *THE PORTABLE THOMAS JEFFERSON* 581 (Merrill Peterson ed., 1975). An essential article for anyone who doubts the importance of our Jeffersonian legacy is Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 *WIS. L. REV.* 1305, 1354.

<sup>57</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON*, supra note 56, at 1327.

<sup>58</sup> See Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON* 356 (J. Boyd ed., 1955) ("The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it[s] natural manure.").

<sup>59</sup> Letter from Abraham Lincoln to H.L. Pierce and others (Apr. 6, 1859), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865*, supra note 28, at 18, 19.

<sup>60</sup> Va. Const. art. 1, ' 15.

This duty imposed on the successor generation—and, one might hope, their successors in an endless chain of deliberative assemblies—would surely have gladdened the heart of Thomas Jefferson. As he often \*249 remarked to his sometimes skeptical friend Madison, each generation must decide for itself how to govern rather than be a mere vassal ruled by the dead hand of the past.<sup>61</sup> Jefferson was adamant in his desire to "prevent[] the degeneracy of government, and nourish[] a general attention to the public affairs."<sup>62</sup> No better way to encourage such "attention" can be imagined than eliminating, at some point in the future, the pool of potential presidents. And no better venue for discussion of the needs of that new moment can be imagined than a constitutional convention brought about by constitutional necessity.

Such a convention would be the proper occasion not only for deciding who should be eligible to be president in the brave new world that follows the loss of one's political parents, but also, just as importantly, for rethinking whether we were well served by having a president at all. The institution of the presidency is a peculiar, indeed, almost uniquely parental one; it is perhaps no accident that Washington was called "the Father of our Country." Perhaps by 1850 or so, the country would be mature enough to do without this idiosyncratic institution, and be ready to embark on a more adult parliamentary path of self-government.

In any event, it was the brilliance of the Framers that led them to require such a Jeffersonian moment of republican dialogue by guaranteeing the impossibility of any constitutionally eligible president and thereby forcing future generations to engage in their own act of reflective constitution making. Far from an exercise in constitutional stupidity, our reading of the Eligibility Clause—which, we hasten to repeat, is no mere reading but is the plain and simple meaning of the constitutional text itself—demonstrates the unexcelled wisdom of the Founding Generation. To refuse to adopt it is not only to ignore the literal meaning of the text—an offense bad enough by itself—but also, and more seriously, to deny the continued relevance of some of the most important and attractive aspects of our American political heritage.

Not surprisingly, the history of the revisions of the constitutional text confirms our understanding of the Framers' intentions. The Convention had the opportunity, at several points, to adopt language that unambiguously distinguished

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<sup>61</sup> See THOMAS JEFFERSON, Draught of a Fundamental Constitution for the Commonwealth of Virginia, in NOTES ON THE STATE OF VIRGINIA 209, 221-22 (William Peden ed., W.W. Norton & Co. 1982) (1787) (proposing a method for convening an assembly for altering the Virginia Constitution). But see THE FEDERALIST NO. 49, at 314-17 (James Madison) (Clinton Rossiter ed., 1961) (arguing that overly frequent appeals to the citizenry would ultimately deprive the government of the necessary respect of the public).

<sup>62</sup> Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, supra note 58, at 92, 93.



between citizens naturalized at the time of ratification and citizens naturalized thereafter; the Convention likewise had the opportunity \*250 to accept proposed language that would have unambiguously established the presidential eligibility of persons born after ratification. For example, in Hamilton's proposed draft of June 18, the Eligibility Clause (Article IX, section 1) stated that "[n]o person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States."<sup>63</sup> Pierce Butler's notes of August 31 describe a similar alternative: "No Person shall be eligible to the Office of the President ... who shall not be a natural born Citizen of the United States, excepting those who now are or at the time of the Adoption of this Constitution shall be a Citizen of the said States any one of whom may be President."<sup>64</sup>

Yet when the Committee of Detail offered its final September draft, it chose a decidedly more ambiguous text. An earlier draft of September 4 stated that "[n]o Person except a natural born Citizen, or a Citizen of the 2U.S. at the time of the adoption of this Constitution shall be eligible to the office of President."<sup>65</sup> The single comma after "Citizen" could be read to suggest Hamilton's and Butler's view. Significantly, the comma was then immediately removed, so the Committee of Detail's final report read: "No Person except a natural born Citizen or a Citizen of the U— S— at the time of the adoption of this Constitution shall be eligible to the office of President."<sup>66</sup> The omission of the comma clearly shows that the clause "at the time of ... adoption" was meant to apply to both natural-born citizens and naturalized citizens.

This final draft was sent to the Committee of Style, headed by Gouverneur Morris, with the instruction that no grammatical or stylistic changes should affect the substance of the text. In its first attempt, the Committee of Style restored the comma after "natural born Citizen,"<sup>67</sup> but, faced with the possibility that it had thereby changed the Convention's meaning, it added a second comma: "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president."<sup>68</sup> The second comma effectively restored the meaning of the Committee of Detail's final draft, which had no commas.

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<sup>63</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS].

<sup>64</sup> 2 *id.* at 253 (James H. Hutson ed., Supp. 1987).

<sup>65</sup> 2 FARRAND'S RECORDS, *supra* note 63, at 494.

<sup>66</sup> 2 *id.* at 498.

<sup>67</sup> 2 *id.* at 574.

<sup>68</sup> 2 *id.* at 598.

The continual insertion and reinsertion of commas shows that the Framers were quite conscious of the different meanings of this complicated and important sentence. They repeatedly rejected punctuation that would \*251 have adopted Hamilton's and Butler's view—the very view that, ironically enough, conforms to the conventional (but clearly incorrect) reading of the Eligibility Clause.

Madison's notes do not reflect the debates over these commas, but this is hardly surprising. Madison had little use for Jefferson's vision of popular reconsideration of constitutional adequacy and potential radical change should the Constitution be found deficient.<sup>69</sup> Given Madison's distaste for such a position, it is not surprising that his notes of the Constitutional Convention contain little discussion of the matter. We note, without necessarily endorsing, Professor Crosskey's view that "Madison's notes ... cannot be accepted as a complete and wholly truthful account of the matters they purport to record."<sup>70</sup> Nevertheless, the notes that we do have contain definite telltale signs that the Framers contemplated a sunset provision on presidential eligibility. Not only do we have evidence of a continual war over the commas in early September, but we also find this cryptic but revealing remark from Hamilton in early June: "Note—At the period which terminates the duration of the Executive there will always be an awful crisis— in the National situation."<sup>71</sup>

Despite the clear dictates of the text and the now-apparent commitments of the Framers,<sup>72</sup> no reinvention of government took place when the

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<sup>69</sup> See THE FEDERALIST NO. 49, *supra* note 61, at 314 (describing the "insuperable objections" to the frequent constitutional conventions proposed by Jefferson); see also Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH. L. REV. 2443, 2451 (1990) (presenting Madison's view that recognizing imperfection in the Constitution and providing for change via Article V could pose a danger to constitutional order by undermining popular veneration of the new charter of government).

<sup>70</sup> WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 12 (1953) (emphasis added).

<sup>71</sup> 1 FARRAND'S RECORDS, *supra* note 63, at 145.

<sup>72</sup> We join those committed to craft values in affirming the axiom "that it is enacted law—whether in the form of a statute or a constitution—that governs, never the unenacted intentions of any lawgiver," though we also agree that knowledge about the "assumptions, hopes, or fears" of the Founders can certainly shed light on a provision's meaning. Tribe, *supra* note 5, at 1242 n.66.

Founding Generation died off. We the People continued, even though without constitutional warrant, to elect "presidents," constitutionally ineligible though they were. To account sufficiently for this result would require a separate article about the many developments in American political culture (such as the formation of the political party system) that frustrated the deepest aspirations of the Framers. Nevertheless, perhaps it is enough for present purposes that the Jeffersonian commitment was fulfilled when, in the aftermath of the War Against Southern Secession, the "original" Constitution was laid to rest and replaced by a much-deliberated and "reconstructed" substitute. This reconstruction of the constitutional order probably coincided with the interment of the very last constitutionally \*252 eligible potential candidates for the presidency. So perhaps, as Lincoln suggested, we did indeed have a "new birth of freedom"<sup>73</sup> confirming the continuing availability of a constitutionally legitimate president, whether one of the Founding Generation or one born in later times. Indeed, this might be one of the hidden meanings of the failure to impeach Andrew Johnson, a key event in Bruce Ackerman's analysis of the "constitutional moment" of the post-Appomattox period.<sup>74</sup> Had Johnson been impeached, we clearly would have been on the road to a parliamentary system. The Senate's decision to retain him was not only a conscious decision to retain the presidency; arguably, it also effectively legitimized presidents like Johnson, whose post-1788 birthday made him clearly ineligible for the office. If this is indeed what was wrought in the carnage of the Civil War and our nation's subsequent Reconstruction, then perhaps Bill Clinton is a constitutional president after all. But if this thesis is correct, it is only so, as with so much else about our modern constitutional order, because of the new understandings forged in the blood of America's second constitutional moment.<sup>75</sup>

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<sup>73</sup> Lincoln, *supra* note 28, at 536.

<sup>74</sup> Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 505-07 (1989).

<sup>75</sup> Some of these understandings—such as the guarantee against state infringement of the privileges or immunities of national citizenship—took canonical textual form and are thus uncontroversial. Others, however, such as the revision of presidential eligibility, are nontextual amendments, but are presumably no less authoritative. Of course, scholars especially committed to craft values might, with good reason, reject this sort of informal repudiation of a firm constitutional requirement. Structural provisions like those regarding presidential eligibility cannot be treated as "merely suggestive—as though they offer teasing hints about the design of any number of possible governmental frameworks." See Tribe, *supra* note 5, at 1246. One might wish that the events of the Civil War and its aftermath could somehow validate otherwise ineligible presidents. Yet "[a]nyone seriously committed to constitutional law as a text-centered enterprise ... must emphatically reject such a view." *Id.* at 1292.

Do these new understandings retroactively legitimate the post-Taylor (and Tyler and Polk) presidencies? This is not an easy question. But answer it we (as a culture) must, for on it may ride the names of countless public schools, libraries, streets, New Jersey Turnpike rest stops, and even cities, not to mention the visages atop Mount Rushmore. Would we really want to continue honoring men who are in fact usurpers, who were not legitimately entitled to the offices they inhabited, who have disobeyed the very Constitution they swore to uphold? Law reviews around the country, we think, could do far worse than devote their next issue (nay, their next volume) to the manifold implications of this important discovery.<sup>76</sup>

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At this point, some readers may conclude that we are not being serious in making these arguments but are actually engaging in an elaborate parody. The authors, they will say, are slyly mocking self-confident textualists like Justice Scalia and born-again defenders of craft values like Professor Tribe, whose previous writings have often seemed every bit as imaginative as the writings of the scholars he now condemns. Yet such assessments should not be made lightly. Most scholars would hardly feel complimented if a colleague told them, "Your last article was a fine parody of legal scholarship." Without strong evidence to the contrary, then, standard principles of interpretive charity require the reader to assume that legal arguments offered in conventional legal form should be taken seriously.<sup>77</sup>

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<sup>76</sup> We can think of a number of questions that might be the subject of scholarly inquiry in such a volume. For example, one must consider whether the vetoes enacted by these faux presidents are constitutionally valid, since none of these men had the right to inhabit the office and exercise the prerogatives of the presidency. The constitutionality of most of the legislation they did sign is less troublesome, of course, because a bill can become law without a president's signature. See U.S. Const. art. I, ' 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law ... "). Nevertheless, some bills not signed by a legitimate president near the end of a session of Congress would automatically be subject to a pocket veto. *Id.* So it is possible that at least some of the bills signed by these impostor presidents could not constitutionally have become laws of the United States.

<sup>77</sup> A general rule of conversational interaction is that individuals, especially those generally recognized by the community as serious scholars, intend to be taken seriously when they speak. This might be deemed part of the "Cooperative Principle" of engaging in scholarly conversation. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26-40 (1989).

But what if the piece is a parody? How could one tell this for certain? Perhaps an article is a parody if the arguments it makes are frivolous. Of course, this requires us to differentiate frivolous interpretations of the Constitution from merely imaginative and creative ones.<sup>78</sup> And history has a way of confounding our attempts at making this distinction. For example, the argument that home-grown wheat substantially affects interstate commerce and is therefore a proper subject of Congressional regulation would have been thought frivolous in 1890, but is accepted black-letter law today.<sup>79</sup> Indeed, the contrary view would likely place one outside the mainstream of legal craftspersons.<sup>80</sup> So too would a claim that states are prohibited from making any and all laws impairing the obligations of private contracts,<sup>81</sup> that the requirements of the Equal Protection Clause apply to the states but not to the federal government,<sup>82</sup> or that the

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<sup>78</sup> See generally Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 *OSGOODE HALL L.J.* 353 (1986).

<sup>79</sup> See *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942).

<sup>80</sup> The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not affect the statement in the text, for Chief Justice Rehnquist appeared to go out of his way to reaffirm the classic New Deal cases. *Id.* at 1627-28. Justice Thomas's concurrence is another matter, but it failed to gain the assent even of a single additional Justice. *Id.* at 1649 (Thomas, J., dissenting) (characterizing the "substantial effects" test as a wrong turn in Commerce Clause jurisprudence and suggesting future reconsideration of the test). Should Thomas's views eventually prevail, however, this would simply make our point in a different way.

<sup>81</sup> See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934) ("[T]he prohibition [on laws impairing the obligation of contracts] is not an absolute one and is not to be read with literal exactness ..."). Interestingly, our colleague Lino Graglia, whose commitment to a minimalist Constitution is almost unlimited, has written that "[a]n example of a plainly unconstitutional statute would be difficult to find in a standard constitutional law casebook, except for the debtor relief law involved in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The law clearly violated the contract clause; in that case, however, the statute was upheld." Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 *HARV. L. REV.* 1331, 1344 n.26 (1985) (reviewing SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984) and JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984)).

<sup>82</sup> See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2116 (1995) (observing that "[t]here is nothing new about the notion" that the Equal Protection Clause applies to both the states and the federal government); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (arguing that it would be "unthink—able" for the

Eleventh Amendment bans suits in law and equity only by the citizens of one state against another state, but not suits for damages by the citizens of one state against their own state.<sup>83</sup> The history of legal craft, like the history of being disciplined by text, intent, and structure, and indeed, like the history of "thinking like a lawyer," is a history of lawyers self-assuredly stating positions thought frivolous by a previous generation equally convinced of its own vision of what the craft of law requires. Yet, all the same, is it not assuredly true that at any given point in time, there is some determinacy about what is on and off the wall—at least until things change?

Even if we accept the fact that legal craft will distinguish the frivolous from the nonfrivolous, still further problems await the reader interested in determining whether this Article is a parody. After all, its authors might simply be incompetent as lawyers, unable to distinguish the frivolous from the warrantably assertible. And what if some well-trained lawyer takes this Article's arguments seriously—thinking them no crazier than those appearing regularly, for example, in the Supreme Court's Commerce Clause or privacy jurisprudence—and cites them in some relevant brief? Does that mean that the Article is in fact not a parody, even if its authors intended it to be one? Professor Tribe, for example, confessed that he became disillusioned with literary criticism when an essay he wrote as a joke was mistaken for a serious piece of scholarship.<sup>84</sup> But is this problem solved by changing professions from literature to law, or does the problem simply \*255 follow us (and Professor Tribe) into constitutional interpretation as well? Is it not the unfortunate fact that many self-styled parodies are often taken seriously by an unsuspecting audience, much to the delight (or the chagrin) of their authors?<sup>85</sup>

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Constitution to place a lesser duty on the federal government than on the states to provide equal protection). We cannot resist noting that Justice Thomas, the fearless devotee of originalism, see *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1909 (1995) (Thomas, J., dissenting); *Lopez*, 115 S. Ct. at 1643-46 (Thomas, J., concurring), joined in *Adarand* with nary a sentence explaining why the national government is legitimately subject to the strictures of the Equal Protection Clause.

<sup>83</sup> See *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890) (holding that the Eleventh Amendment prevents a citizen of a state from suing that state in federal court unless the state consents).

<sup>84</sup> See Tribe, *supra* note 5, at 1224, 1223-24 (explaining that after his "satiric" essay comparing the lives of Willy Loman in *Death of a Salesman* and Gregor Samsa in *Metamorphosis* won a serious prize, he decided to switch to a field where it was presumably easier to tell the difference between parody and serious argument).

<sup>85</sup> For example, the Report from Iron Mountain on the Possibility and Desirability of Peace, published during the 1960s, was a very sophisticated

Second, even if an argument is not frivolous, could it not still be a parody if the author intended it to be such? Consider Professor Paulsen's recent "discovery" of an unpublished opinion in *Brown v. Board of Education* upholding the doctrine of *Plessy v. Ferguson* on stare decisis grounds.<sup>86</sup> Upholding *Plessy* in 1954 was surely not a frivolous position, even if it was a wicked one. Despite this, Professor Paulsen clearly wants to poke fun at the plurality opinion in *Planned Parenthood v. Casey*,<sup>87</sup> which maintained that *Roe v. Wade*<sup>88</sup> should not be

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parody of bureaucratic response to the possibility of a peacetime economy, but was considered by some contemporary right-wingers in the 1990s to be altogether serious. LEONARD C. LEWIN, *REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE* (1967); see Andy Meisler, *Slipping the Bonds of Earth and Sky*, *N.Y. TIMES*, Aug. 3, 1995, at C1, C6 (discussing the belief of some readers that the book is "an account of a plan for a totalitarian, left-liberal new world order, [that] was compiled by a secret cabal of Government officials"). Consider also the following anecdote told by Dan A. Farber regarding his article *An Economic Analysis of Abortion*, 3 *CONST. COMMENTARY* 1 (1986):

The thesis is that a woman who wanted an abortion should have to bid against the fetus, on whose behalf a guardian would pledge future income. It was reprinted by the *New Republic*. I must have gotten fifty or sixty letters from people who took it seriously. Most thought it was just terrible—a third-year law student at Yale wrote a five page, single-spaced letter explaining how it exemplified everything that had been wrong with his legal education. (I wrote back that Yale had apparently destroyed his sense of the absurd.) More alarmingly, about a dozen of the letters were favorable, including one from a pediatrician and one from an economist at the Chicago Fed, both of whom thought this was a real conceptual break-through in dealing with the abortion issue.

Electronic mail message from Dan Farber, Professor of Law, University of Minnesota, to Sanford Levinson (Aug. 8, 1995). Farber notes, "I tried to be gentle with the people who took the piece seriously and approved of its thesis. The TNR editors had played it very straight, which probably accounted for some of the problem." *Id.* We are grateful to Professor Farber for his permission to publish his anecdote.

<sup>86</sup> Michael S. Paulsen & Daniel N. Rosen, *Brown, Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 *N.Y.U. L. REV.* 1287 (1994).

<sup>87</sup> 112 S. Ct. 2791 (1992).

<sup>88</sup> 410 U.S. 113 (1973).

overturned even though the plurality refused to concede that it was correctly decided.<sup>89</sup>

Finally, and most troubling, is it possible that an argument could be a parody even if this was not the author's original intention? Consider in this context two articles written in 1977 in the wake of then-Justice Rehnquist's opinion in *National League of Cities v. Usery*,<sup>90</sup> which \*256 invalidated a federal minimum-wage law as applied to state employees because it invaded the reserved power of the "states qua states."<sup>91</sup> One of these articles was written by Frank Michelman;<sup>92</sup> the other, by Laurence Tribe, the recent defender of text, structure, and intention and eloquent opponent of free-form constitutional interpretation.<sup>93</sup> Tribe and Michelman argued that the true doctrinal import of *National League of Cities*, when deeply analyzed, was that states were required to provide minimum levels of welfare for their citizens. We dare say that Newt Gingrich, among others, might well be surprised by such a reading of the Constitution (or even of the case), but then he is not a lawyer and is therefore unlikely to be sufficiently attuned to the values of legal craft.

Professors Tribe and Michelman are widely viewed as precisely the kind of imaginative and creative scholars that the academy needs and cherishes; indeed, they are rightly considered as among the finest constitutional scholars of their generation. Is that dispositive in deciding whether their 1977 articles are parodies? Could one still describe them as parodies of a certain genre of legal scholarship even if Tribe and Michelman did not realize it at the time (or perhaps even now), and even if the editors of the *Harvard Law Review* and *Yale Law Journal*—by almost all accounts the two leading law journals in the United States—believed the articles to exemplify legal argumentation at its finest?<sup>94</sup>

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<sup>89</sup> See *Casey*, 112 S. Ct. at 2808 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

<sup>90</sup> 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>91</sup> *Id.* at 847.

<sup>92</sup> Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty"* in *National League of Cities v. Usery*, 86 *YALE L.J.* 1165 (1977).

<sup>93</sup> Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 *HARV. L. REV.* 1065 (1977).

<sup>94</sup> Cf. J.M. Balkin, *The Domestication of Law and Literature*, 14 *L. & SOC. INQUIRY* 787, 814 n.42 (1989) (book review) (arguing that Judge Richard Posner is the greatest unconscious satirist of capitalism of the late twentieth



Even if these two articles are not parodies of constitutional scholarship, does this mean that an article signed by someone else making the same arguments—especially today—could not be a parody?

Finally, one might be convinced that this Article is a parody because it contains the discussion about parodies that you are now reading. Surely this is a tip-off of our real intentions. Yet in assessing the importance of this fact, should it make any difference whether the text following the four asterisks was written by all three authors, or was added later on by only one of them, or even by some other wholly unrelated person (perhaps the editors of the journal you are now reading)? Could the addition of the words "This is just a parody" ipso facto convert any number of serious and seriously intended law review articles into parodies?<sup>95</sup>

\*257 Consider, for example, what would happen if the words "This is just a parody—not to be taken seriously" appeared at the end of the following writings:

1. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
2. Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).
3. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).
4. *Roe v. Wade*, 410 U.S. 113 (1973).
5. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Whether or not the addition of the words "This is a parody" converts any of the above into a parody, would the arguments in these works be any less correct—or questionable—if we added these words (or, conversely, if each concluded with the words "and everything you have read is meant with the utmost seriousness")? And this brings us back again to our central problem: Can a legal

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century, though that is almost certainly not his intention nor is it the likely view of his publishers).

<sup>95</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 57 (1988) (finding that the addition of the words "ad parody—not to be taken seriously" rendered an advertisement not defamatory, because no reasonable person would believe it to be a true statement of and concerning the plaintiff). In fact, some works offered as serious arguments would undoubtedly be strengthened if offered as parodies. Recall Soren Kierkegaard's famous remark about one of the most influential philosophers of the nineteenth century, G.W.F. Hegel: "If [Hegel] had written his whole *Logic* and in the Preface had disclosed the fact that it was merely a thought-experiment ..., he would have been the greatest thinker that has ever lived. Now he is comic." WALTER LOWRIE, *A SHORT LIFE OF KIERKEGAARD* 116 (3d prtg. 1946).

argument which was not intended to be a parody, written in lawtalk that makes dutiful reference to text, structure, original intention, and precedent, which is taken seriously by other legal academics and which may even have the force of law, nevertheless still constitute a parody? Must we in the legal academy teach every opinion of a Justice of the United States Supreme Court seriously? Or can we properly say that some (but which?) are parodies of legal argument? As Shakespeare reminded us, even "[a] dog's obeyed in office."<sup>96</sup> This only underscores, though, that some parodies are the occasion for tears rather than laughter.

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<sup>96</sup> WILLIAM SHAKESPEARE, KING LEAR act 4, sc. 5.