Constitutional Theory and Ideological Factors: Three Nineteenth-Century Justices

Philip C. Kissam

FOREWORD

Professor Philip C. Kissam was a member of the University of Kansas School of Law faculty for more than thirty years. His untimely death in December 2004 left a void at the Law School that will be hard to fill.† In a sense, however, he lives on in his last two articles, which he finished in the months before his death.‡‡ One of those articles is presented here, and it is timely and thought provoking. In this Article Professor Kissam explores the background of three nineteenth-century Justices of the U.S. Supreme Court and develops links between their varied backgrounds and their quite different theories of constitutional interpretation. This work is a systematic account demonstrating that background matters in the development of one’s judicial philosophy.

Professor Kissam had intended to apply this approach to some twentieth-century Justices as well, and he was working on that project at the time of his death. This project would be well worth pursuing further, and it is hoped that this work of Professor Kissam’s will inspire others. Further development of the hypothesis and the evidence concerning it will help us to better understand the powerful men and women who sit on the U.S. Supreme Court and the other federal courts.

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* Late Professor of Law, University of Kansas. I have benefited a great deal from the research assistance of Carolyn Clark and Ed Browne.

† See the tribute to Professor Kissam by his former colleague, Sidney A. Shapiro, at 53 U. Kan. L. Rev. 949 (2005).


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If you will examine, you will find that it is the viewpoint of the individual that they have carried with them, without charging any . . . intention to do wrong, to either side. After all, the close cases, the difficult cases in an appellate court, are often determined by human nature, by the viewpoint of the individual. That is a part of the man and remains as a part of the judge.

—Senator George Norris

I. INTRODUCTION

This Article explores relationships between the constitutional theory and ideology of individual Supreme Court Justices. I have selected for this examination the lives, judicial and otherwise, of three prominent Justices who served on the Supreme Court during the nineteenth century: Joseph Story, Roger Taney, and Stephen J. Field. Each of these Justices adopted or pursued a relatively distinct constitutional theory that illustrates one of the basic approaches to constitutional interpretation and decision making. Each of these Justices also enjoyed a rich and complex life outside his judicial career. Justice Story’s “common law constitutionalism,” Justice Taney’s brand of “strict originalism,” and Justice Field’s “theory of principles” make these Justices good candidates for studying the possible connections between a judge’s political ideology, the formative experiences that help form such an ideology, and the particular constitutional theory of an individual Justice.

Part II of this Article sketches the basic approaches to constitutional interpretation and decision making. Part III articulates a theory for examining relationships between a judge’s ideology, her formative life experiences, and her constitutional theory. Parts IV through VI employ this theory to examine the constitutional theories, lives, and ideologies of Story, Taney, and Field, respectively. In Part VII some conclusions are drawn suggesting that there are typically good connections between a judge’s ideology and her constitutional theory. Specifically, in the cases of Story, Taney, and Field, the judge’s religious experience, prelegal and legal education, professional experiences, and “political ambitions” appear to have shaped and be consistent with the judge’s distinctive constitutional theory. In Part VIII the prospects for a similar examination of twentieth-century Justices are outlined.

1. 66 CONG. REC. 3053 (1925) (statement of Sen. Norris) [hereinafter Norris] (opposing the nomination of Harlan Fiske Stone as an Associate Justice of the U.S. Supreme Court).
II. CONSTITUTIONAL THEORIES

There are three basic approaches to constitutional interpretation. One is “common law constitutionalism” in which a judge attempts to ascribe meaning to provisions of the constitutional text by employing the methods, and in some cases the substance, of common law. This approach gives substantial independent weight to the rules and analogies of judicial precedents but may also rely upon a careful investigation of the historical or “precedential” background to the adoption of particular constitutional provisions. This approach emphasizes deciding cases narrowly, limiting rulings to relatively specific situations, and relying on the authority of “incompletely theorized agreements” about general constitutional language as applied to facts and, more frequently, incompletely theorized agreements about the rules and holdings of prior cases as applied to facts. The relevance of substantive common law to constitutional interpretation was more important in our earlier constitutional history, when common law precedents were often the only available kind of legal authority to help interpret new constitutional provisions. But even today, common law rules—for example the right of a person to refuse medical treatment—can figure into the development of constitutional doctrine. Common law constitutionalism also tends to emphasize differences between “legal authorities” and other sources of reasoning such as politics, policy, or morality. It also draws upon the notion of legal expertise and the application of conventional legal methods for interpreting statutes and reasoning from precedents. There are two basic justifications for common law constitutionalism. First, common law constitutionalism is the methodology that most constitutional law cases have used. Second, the principle of stare decisis, a central principle of common law constitutionalism, best serves the rule-of-law values of predictability, stability, and constraint upon a judge’s personal values.

5. See Robert Post, Theories of Constitutional Interpretation, 30 REPRESENTATIONS 13, 15–16, 18–21 (1990) (stating that “doctrinal interpretation” in constitutional law is grounded in “the
A second fundamental approach to constitutional interpretation is "originalism." In this approach, the ascription of meaning to language in the constitutional text focuses on determining an "original meaning" for a textual provision as a matter of either the popular understanding of constitutional terms at the time of their adoption, the structure of the constitutional text, related provisions in the text, or evidence of the framers' intent. This approach in its "strict" or "hard" versions does not give much, if any, independent weight to precedents because it considers constitutional precedents to be legitimate only if they are supported by the original meaning of the text or are otherwise well established as a matter of tradition; a legitimate precedent may not be inconsistent with original meaning. Strict originalist theories also purport to draw a sharp line between law and politics or morality, sharper even than the claims of common law constitutionalism, where policy arguments are sometimes recognized as shaping the rules. Strict originalist theories are justified on either or both of two grounds. First, the originalist may argue that constitutional interpretation obtains its authority from the "consent" of the public that has been given through the writing and ratification of the constitutional text. Second, the originalist may argue that the original meaning of textual provisions is the only "neutral," "objective," or "democratic" source of law that is available to constrain judges from imposing their own values upon democracy, which is expressed only by the majoritarian decisions that adopted the constitutional text and that are made by elected legislators and executive officers.

The third basic approach to constitutional interpretation may be called "theories of principle." Although all lawyers and all approaches to constitutional interpretation use the term "principle" to refer to a legal

authority of law" or, in other words, in rule-of-law values); see also Strauss, supra note 2, at 891–92 (discussing the argument for traditionalism).


8. E.g., Bork, supra note 6, at 20–25; Scalia, Originalism, supra note 6, at 862; Antonin J. Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1183–84 (1989). Of course, the substantial difficulties in determining the historical intent of collective bodies, when conflict in ideas was just as likely as it is today, mean that the constraint upon judicial values from original meaning may be quite illusory. SUNSTEIN, DESIGNING DEMOCRACY, supra note 3, at 88–89. Moreover, common law constitutionalism, which requires the interpretation of many precedents as well as the text and intentions behind the constitutional text, may restrain judges just as much or even more than originalist theory can. See generally Strauss, supra note 2.

standard that is more general than a case rule or holding, I use “theories of principle” to capture Ronald Dworkin's conception of a principle as a general standard that has the moral dimension of granting individual rights and that is distinct from a standard of collective welfare or policy argument. The sources of these principles will vary between different versions or theories of this approach. Some may rely on “natural rights” or moral rights per se as sources of principle, but other theories may limit the concept of a moral or legal principle to those embedded in legal authorities such as constitutional texts, Framers' intent, and precedents. Theories of principle are justified by two related claims: first, that arguing from principles is the essence of a lawyer's work in hard cases, and second, that the best way to make law the best law it can be is by recognizing our country's fundamental values or “ethos” as the legitimate basis for law.

There is a fourth approach to constitutional decision making that is not, strictly speaking, interpretive of constitutional provisions: "constitutional pragmatism." This approach ascribes meaning to the constitutional text as a matter of the good social consequences of constitutional rules, although most versions of constitutional pragmatism recognize that analyzing social consequences is often aided by consideration or interpretation of legal authorities to obtain wisdom from the past about the issues currently in play. Such interpretations make many versions of constitutional pragmatism look like or approximate common law constitutionalism, which may allow for pragmatic judgments when the rules run out or justice demands a better result than common law authorities provide. Because theories of principle may also consider the consequences of competing principles in weighing them against each other, constitutional pragmatism at times may also look like a theory of principles. Constitutional pragmatists, however, do not feel bound to or obligated by interpretations of legal authorities.

12. See Dworkin, Law's Empire, supra note 10, at 410; Post, supra note 5, at 17–18, 23–26.
15. See Dworkin, The Model of Rules, supra note 9, at 27.
16. Broadly speaking legal pragmatism may be said to include common law constitutionalism.
The basic justification for constitutional pragmatism, in both its conservative and liberal forms, is that constitutional law should be responsive to contemporary social values and needs.\textsuperscript{17}

Several general observations pertain to understanding the basic approaches to constitutional law. First, there are significant overlaps between the approaches. For example, both common law constitutionalism and theories of principle may use originalist arguments if the arguments support interpretations of particular constitutional texts. But these originalist arguments are unlikely to be regarded as dispositive or sufficient in themselves to resolve issues. Rather, they fit with or approximate Cass Sunstein's idea of "soft originalism," which begins with an originalist argument but adds additional reasons or authority to justify a decision,\textsuperscript{18} and Michael Dorf's concepts of "ancestral" and "heroic" originalism, where the originalist argument is either well established in the American constitutional tradition or a good idea of government articulated by our especially wise founders.\textsuperscript{19} Conversely, strict originalists are certainly willing to employ moral/legal principles of the Dworkinian kind as long as the principles are perceived to be embedded in some kind of evidence of original meaning.\textsuperscript{20}

Second, whenever individual judges or Justices consistently pursue a basic approach to constitutional law, an individual's approach or theory is likely to combine method and substance. This phenomenon has already been observed in common law constitutionalism, but originalists and theorists of principle can also hold to conservative or liberal substantive values depending upon the sources they use to determine original meaning or moral/legal principles. Conservative originalists are likely to call for and rely upon relatively specific evidence of original meaning or Framers' intent to keep constitutional law fixed to its original moorings, while liberal originalists are more likely to call for and rely

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and theories of principle as well as constitutional pragmatism because the openness or flexibility of each of these approaches can be contrasted with the more rigid "formalism" of strict originalism. See Thomas C. Grey, Judicial Review and Legal Pragmatism, 38 Wake Forest L. Rev. 473, 477–80 (2003). But the finer distinctions in constitutional law and interpretation that are drawn by this Article make a narrower conception of pragmatism useful to the analysis.

\textsuperscript{17} See generally Posner, Pragmatic Adjudication, supra note 13 (discussing legal and philosophical pragmatism as an approach to constitutional interpretation); Farber, supra note 13 (arguing courts should use legal pragmatism to interpret the constitution).

\textsuperscript{18} See SUNSTEIN, DESIGNING DEMOCRACY, supra note 3, at 87–89 (providing a brief discussion of originalism).


\textsuperscript{20} See supra text accompanying notes 6–7 (explaining that originalists will justify an interpretation if it is supported by original text).
upon the general purposes of the constitutional text to allow for some flexibility and judgment in the application of original meanings to contemporary issues. Conservative theorists of principle may often rely on ideas of "natural rights" to obtain a relatively stable constitutional regime, while liberal theorists may be more inclined to employ moral/legal principles embedded in constitutional authorities to achieve flexibility and responsiveness to contemporary social circumstances.

Third, even when a Justice appears to adopt a particular approach, there is nothing to stop the individual Justice from shifting to another approach in a particular case if the circumstances of the case invite that approach. All theories of constitutional law require some form of elaboration of doctrine by using precedents, and thus they invite common law constitutionalism at times. All approaches profess fidelity to the words in the constitutional text, and thus they may invite Justices to switch to strict originalist arguments at times. Arguably too, because all basic approaches make some use of moral/legal principles, even if under significant constraint in common law constitutionalism and strict originalism, all Justices may have a tendency to incline toward a theory of principles in particular cases, particularly if the principles can be "discovered" in either relevant precedents or in evidence of the Constitution's original meaning.21

Fourth, an individual Justice's constitutional theory would seem to be an inevitable part of that individual's broader political ideology about how American government should work.22 For one thing, theories of constitutional law inevitably involve choices about the meaning of American democracy, if not also choices about theories of justice.23 For another, political ideologies would seem to help individual Justices integrate or make coherent the meaning of their political ideas, their judicial roles, and the particular decisions they reach.24 At the same time, a broader political ideology will help provide "legitimacy" for a judge's decisions, at least in her own mind. Of course, any ideology also leaves things out, distorts one's vision of reality, and helps to disguise

21. Cf. Post, supra note 5 (stating that all theories of constitutional interpretation depend ultimately upon being "responsive" to particular aspects of the American ethos).

22. Cf. Norris, supra note 1 (arguing that a Justice's "viewpoint" will affect her decisions).


24. Cf. JOHN RAWLS, A THEORY OF JUSTICE 48–53 (1971) (describing a process of "reflective equilibrium" by which an individual brings his beliefs in general moral principles and particular moral convictions into alignment).
the unattractive features of one's actions or beliefs. But in the complex political world of constitutional law, distortion, integration, and legitimacy appear to be helpful both phenomenologically and psychologically to the work of individual Justices.

Finally, we may not be able to determine whether the constitutional theory of individual judges determines constitutional decisions or merely helps them construct post hoc justifications or rationalizations for their decisions. But if we can establish persuasive links between a judge's ideology and her constitutional theory, we can at least view the theory as a kind of "bridge" that establishes a certain coherence between the judge's political ideas and experiences and her constitutional decisions. At a minimum, then, the links between political ideas, experience and constitutional theory can point to the deeper political causes of a judge's decisions.

III. IDEOLOGY AND CONSTITUTIONAL THEORY

An ideology may be thought of either narrowly as a set of conscious ideas and beliefs or, more broadly, as an ensemble of conscious beliefs, semiconscious beliefs, images and other symbolic forms, and particular cognitive skills or habits such as the practices of narrative, cognitive dissonance, and the use of "heuristics" or decision-making techniques that have no justification other than that they help one make decisions without any other reason. In view of the apparent complexity and open-ended qualities of an individual's political ideology and any judge's constitutional theory, the broader definition or conception of ideology is more likely to be the useful one in analyzing connections between a person's ideology and her constitutional theory. This analysis will also rely on what J.M. Balkin has called an "ambivalent conception"

26. Cf. EDMUND S. MORGAN, THE GENUINE ARTICLE 208–09 (2003) (arguing that the legitimacy of a political regime is always established by means of a "political fiction," such as the divine right of kings or popular sovereignty, and that the fiction is not literally true but can be a workable hypothesis so long as it does not blatantly deny reality); Garry Wills, Lessons of a Master, NY REV. OF BOOKS, June 24, 2004, at 12, 14 (discussing Morgan's political fiction argument).
of ideology—one that attempts to demonstrate how ideology can both empower individuals as a matter of the integration of meanings and legitimating behavior and at the same time produce untold effects of limitation, domination, or injustice as an aspect of an ideology’s distortions. 29

What life experiences of an individual judge might produce a distinctive political ideology that includes a relatively distinct constitutional theory? Judging constitutional issues may be an important experience in developing a judge’s particular constitutional theory. But many areas of a judge’s “nonjudicial” experiences may also contribute to the development of a judge’s broader ideology and her constitutional theory. These areas include the familial background and nurturing of the judge, her religious upbringing and beliefs, and her education as a young adult, including her undergraduate and legal training. One’s professional experience as a practicing lawyer, one’s political experiences, and one’s social life with peers and friends may constitute other important formative events in the development of a judge’s particular ideology and constitutional theory.

Consider, as working hypotheses, some possible relationships that might develop between a judge’s nonjudicial experiences and the constitutional theory she maintains as a judge. In her familial and religious background, has a judge been exposed to some kind of puritanical regime that emphasizes individual efforts and responsibility almost exclusively, or has she been raised with a religious appreciation of collective efforts to help others in need? Has she developed, religiously or otherwise, an “orthodox worldview” that commits her to believe in “an external, definable, and transcendent authority”? 30 Or has she developed a “progressivist worldview” that “resymbolize[s] historic faiths according to the prevailing assumptions of contemporary life”? 31 Individualism versus collectivism in a young person’s religious training and other experiences might well determine a judge’s relative focus upon individual rights versus government powers in a judge’s constitutional theory. 32 An orthodox thinker may be inclined toward an originalist

29. See Balkin, supra note 28, at 122–27 (distinguishing between “neutral,” “critical,” and “ambivalent” conceptions of ideology).
31. See id. (explaining that progressivist world views influence liberals).
32. See, e.g., Part VI, infra (describing Justice Stephen Field’s individualism, including a
theory of constitutional interpretation, or a natural rights theory of principle, as a way of relying upon the "external, definable, and transcendent authority" of the constitutional text or natural law. A progressivist thinker, on the other hand, may prefer a more pragmatic, evolutionary theory such as common law constitutionalism or a theory of principle that locates its moral/legal principles in the changing world of social circumstances and law.\textsuperscript{33}

Consider also how a judge's college education might influence her later choice of constitutional theory. Did she study philosophy, and, if so, what kind? Was it Aristotelian in nature, focusing on the study of practical thought and judgment? Or was it Platonic in nature, emphasizing fundamental principles or ideals as the driving engine of moral thought? Or did she study subjects such as economics or political science? The choices and accidents of a college curriculum may well influence a judge's constitutional theory.\textsuperscript{34}

Consider too how a judge's extrajudicial professional and political experiences could influence the choice of a constitutional theory. A litigator who uses creative arguments to persuade her audience may be attracted to a theory that emphasizes openness and change in constitutional law, while an office counselor, who spends more time searching for clear authorities to advise clients, may be attracted to a formalistic theory such as originalism. A judge's extrajudicial political experiences—as a politician seeking votes and power, as a national or state legislator, or as a member of the executive branch—might well influence how a judge thinks of the relationships between law and politics (are they separate or integrated?),\textsuperscript{35} between national and state powers,\textsuperscript{36} or between the different branches of national government

Calvinist upbringing and participation in the Gold Rush of 1849, and his constitutional theory of individual rights and limited government powers).

\textsuperscript{33} See Philip C. Kissam, Explaining Constitutional Law Publicly or, Everyman's Constitution, 71 UMKC L. Rev. 77, 118–23 (2002) (considering a variety of possible influences upon a judge's choice of constitutional theory, including the distinction between orthodox and progressivist worldviews).

\textsuperscript{34} See, e.g., Joel Francis Paschal, Mr. Justice Sutherland: A Man Against the State 5–20 (1951) (describing the influence of Karl G. Maeser, president of Brigham Young University and follower of Herbert Spencer, and Thomas Cooley, Dean of Michigan Law School, on George Sutherland's political and judicial philosophy of strong individual rights and limited government powers).

\textsuperscript{35} Compare, e.g., Part IV, infra (describing Story's desire to keep law and politics separate) with Part V, infra (describing Chief Taney's apparent efforts to integrate law and politics).

\textsuperscript{36} For example, Justices Hugo Black and William Douglas, who played important roles in upholding the constitutionality of the national administrative state after the New Deal, were both members of the national government in the 1930s, while Justice Sandra Day O'Connor, a frequent
under the separation of powers doctrine. More generally, did a judge’s political experiences provide her with a taste or distaste for legislative compromises about specific practical issues? Or did her experience in the executive branch of government give her a taste for the exercise of relatively unencumbered power, thus inviting both respect for such power as a judge and the desire to exercise similar power as a judge?

Finally, the social life or socialization of a judge, the friends he spends time with and talks to informally about politics (if not about particular judicial cases), and the kinds of audiences a judge addresses outside the formal role of a judge or politician are likely to influence a judge’s political ideology and constitutional theory. Joseph Story, for example, circulated all his life within the New England elite, which was largely a conservative Federalist group. Though Story grew up as a Jeffersonian Republican, this socialization may explain much of Story’s property-oriented conservatism, especially in his more mature years. Stephen Field socialized with Leland Stanford, the railroad tycoon who recommended to Abraham Lincoln that Field be appointed to the Supreme Court, and Field’s judicial philosophy was protective of large businesses, including railroads, especially as Field matured into his role as a Supreme Court Justice. Although hard to pin down with exactitude, such social influences may be important to the construction of a judge’s political ideology and constitutional theory.

ponent of the “new federalism” in contemporary constitutional law, was a leader in the Arizona Legislature.

37. For example, Chief Justice Roger Taney served as both Attorney General and Secretary of the Treasury in Andrew Jackson’s Administration before his appointment to the Court and seems to have been particularly conscious of separation of powers issues. See Part V, infra. More recently, Justices William Rehnquist and Antonin Scalia, who worked in the executive branch under Republican administrations, and Justice Byron White, who served in the Justice Department under Presidents Kennedy and Johnson, have each taken a particular interest in separation of powers issues. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988) (stating that the Ethics in Government Act of 1978 did not violate the separation of powers principle); INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting) (disagreeing with the majority opinion holding that a one-house congressional veto provision in 244(c)(2) of Immigration and Naturalization Act was unconstitutional).

38. For example, George Sutherland served two terms as a U.S. senator, from 1904 to 1916, but before his appointment to the Supreme Court in 1922 he had become a close confidant to President Warren Harding, advising him on many issues connected with his election in 1920 and the beginnings of his Administration. PASCHAL, supra note 34, at 105. As a Supreme Court Justice, Sutherland subsequently demonstrated both great respect for an unencumbered executive in foreign affairs and a great desire for limiting the ability of governments to regulate private economic entities. Id. at 124–52.


40. See id. (discussing Story’s strict protection of property rights).

IV. JOSEPH STORY

Joseph Story, an Associate Justice of the Supreme Court from 1811 to 1845, was a practitioner of common law constitutionalism in both method and substance. As part of this theory he believed in keeping law separate from politics. Common law constitutionalism, moreover, enabled Story to incorporate within his interpretations of constitutional law two important substantive values: respect for a strong national government vis-à-vis the states in America’s federal system, and a rigorous protection of property and contract rights and economic individualism under several constitutional doctrines. Story’s constitutional theory might be explained simply as a matter of a judge working with conventional legal methods: the rules for interpreting written texts and the doctrine of stare decisis. His theory, however, seems of a piece with virtually all of his nonjudicial experiences, which suggests at least an implicit role for political ideology in shaping Story’s constitutional theory.

Story’s constitutional approach can be illustrated by considering six of his more famous opinions. The first two were written early in his Supreme Court career and concerned the implied powers of the President and Congress. The next two, from the middle of his career, involved his concurring and dissenting opinions in two famous Contracts Clause cases. The final two opinions were delivered in 1842, near the end of Story’s career, and they concerned the disparate subjects of a federal common law and the power of state governments to participate in the extradition of slaves who had escaped from slavery in southern states. Each of these opinions demonstrates Story’s common law method and at least one or more of the prominent substantive values in his theory.

Brown v. United States asked whether the President had implied authority to confiscate the property of an enemy’s subject after Congress had declared war against the subject’s country but without specific legislative authorization (this case arose during the War of 1812). The Supreme Court decided that the President had no implied authority to confiscate the subject’s private property, and thus needed legislative

42. JAMES McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 162–70 (1971).
43. See NEWMYER, supra note 39, at 71–72 (“Law and politics for him were different ways of doing things: One was based on principle and science and the other on compromise and short-term self-interest.”).
44. U.S. CONST. art. I, § 10, cl. 1.
45. 12 U.S. (3 Cranch) 109 (1814).
authorization.\textsuperscript{46} Story, however, had found for the President in his circuit court opinion in the case, and his dissent in \textit{Brown} relied almost entirely upon the circuit court opinion, which he fully incorporated into his Supreme Court dissent.\textsuperscript{47} After a statement of the facts, the opinion reviewed the international law and common law of England on sovereign confiscation of the property of enemy subjects, and Story concluded that a sovereign's right to confiscate without legislative authorization existed in both international and common law.\textsuperscript{48} Thus, Story, using a "common law method" for interpreting written texts, analyzed the legal context of the issue of confiscation in wartime that at least had surrounded if not informed the drafting and adoption of the Constitution, which does not mention the confiscation of property in wartime. After this common law analysis, Story asserted that the express authority of Congress was not necessary and that the President had implied power under the Constitution "to employ all the usual and customary means acknowledged in war, to carry it [the conduct of war] into effect."\textsuperscript{49} Only after this analysis and assertion did Story turn to the text of the Constitution for support, noting that Article II authorized the President to faithfully execute the laws and that Congress's declaration of war was a law to be executed.\textsuperscript{50} After this common law analysis and justification of the President's power, Story responded to Brown's argument of limited presidential powers by asserting that the constitutional text's statement of specific powers—such as Congress's authority to grant letters of marque and reprisal against enemy subjects—did not limit war conduct powers.\textsuperscript{51} Finally, Story employed another distinctive common law method to support his position. He argued for the President's implied power by analogy from a noncontroversial hypothetical. His hypothetical asked if, after a declaration of war "a British ship of war... should now come within our ports," without a statute declaring such ship to be confiscable,\textsuperscript{52} "[c]an it be possible, that the executive has not the power to authorize such seizure?"\textsuperscript{53} Should not the same result apply to a British subject's ship?

\textsuperscript{46} \textit{Id.} at 129.
\textsuperscript{47} \textit{Id.} at 129–53 (Story, J., dissenting).
\textsuperscript{48} \textit{Id.} at 135–44.
\textsuperscript{49} \textit{Id.} at 144–45 (quoting The Emulous, 8 F. Cas. 697, 703 (C.C.D. Mass. 1813) (No. 4,479), \textit{rev'd sub nom.} Brown v. United States, 12 U.S. (8 Cranch) 109 (1814)).
\textsuperscript{50} \textit{Id.} at 149.
\textsuperscript{51} \textit{Id.} at 149–50.
\textsuperscript{52} \textit{Id.} at 150.
\textsuperscript{53} \textit{Id.}
Story's common law methods and his theory of implied national powers reemerged two years later in his opinion for the Court in *Martin v. Hunter's Lessee*. The basic issue in the case was whether Congress had constitutional authority to extend the Supreme Court's appellate jurisdiction to review state supreme court interpretations of federal law. Virginia's Court of Appeals (the highest court in Virginia) had held that Congress did not have this authority because of "state sovereignty" and the "compact theory" of the Constitution in which independent state governments were thought to have created a national government of specific, enumerated, and limited powers. In this federalism case, Story did not have available international or common law on the division of powers within a federal state, and his arguments to some extent overlap those of originalism. But his arguments are more flexible than those of strict originalism, which was certainly the kind of theory relied upon by the Virginia Court of Appeals. In response to Virginia's compact theory, Story justified the opposing theory—that the Constitution was created by "the people of the United States" rather than the states acting as sovereigns—by making three relatively persuasive common law arguments as well as textual arguments from the preamble of the Constitution and Article III's statement of the judicial power as applying to "all" cases arising under federal law. Story argued that established practice under the Constitution and also under the Articles of Confederation had recognized appellate review of state court decisions by federal courts. He also argued that federal appellate review was justified by two central purposes underlying Article III's creation of the federal judicial power: to take certain cases away from possibly prejudiced state courts and, most importantly, to ensure the uniform interpretation of federal laws and treaties. To be sure, all three of these arguments might be used by an originalist despairing of more specific evidence of the Framers' intent, but in *Martin*, Story was willing to range relatively broadly beyond the text and specific Framers' statements into the historical context to justify the implied national power to review state court decisions. In doing this, he provided the basic grounding for Chief

54. 14 U.S. (1 Wheat.) 304 (1816).
55. Id. at 323–24.
57. *Martin*, 14 U.S. at 324–28 (internal quotation marks omitted).
58. Id. at 345, 351–52.
59. Id. at 347.
60. Id. at 348.
Justice Marshall’s opinion three years later in *McCulloch v. Maryland* that recognized more general implied legislative powers for Congress.

Story’s two famous Contracts Clause opinions are his concurring opinion in *Trustees of Dartmouth College v. Woodward* and his dissenting opinion eighteen years later in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*. Earlier, in *Fletcher v. Peck*, the Supreme Court had held that the Contracts Clause prohibited “impairing the obligation” of a state’s own contracts as well as private contracts and, furthermore, that a state legislature’s attempt to rescind a prior land grant constituted such an impairment. *Dartmouth College* and *Charles River Bridge* raised significant issues about the application of the Contracts Clause to other kinds of state grants or contracts. Dartmouth College had been established in 1769 by a royal corporate charter that appointed twelve trustees as the corporation and authorized them to govern the college and appoint their successors “forever hereafter.” In 1816, New Hampshire adopted statutes that authorized the Governor to appoint nine additional trustees and that subjected decisions of the trustees to a new board controlled by the Governor. The Supreme Court, in an opinion by John Marshall, held that these statutes impaired obligations of the original charter and thus violated the Contracts Clause. Marshall’s opinion refuted the state’s claim that Dartmouth had been established for a “public purpose” and was therefore a “public corporation” that could be regulated as it was a subdivision of state government. Marshall’s opinion, however, provided only limited citations to support the position that Dartmouth had been established for “private purposes,” and he did not establish a persuasive argument why the charter involved consideration and should be treated as a contract rather than a government license that could be modified by subsequent legislation. Story’s concurring opinion, in contrast, delved into the English common law to provide extensive citations to support both the

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64. 10 U.S. (6 Cranch) 87 (1810).
65. Id. at 138.
67. Id. at 554.
68. Id. at 665–66.
69. Id. at 627–41.
private/public distinction for corporate charters\textsuperscript{71} and the idea that Dartmouth College provided "consideration" in return for its charter, thus qualifying the charter as a contract entered into for "private purposes."\textsuperscript{72} Story's common law approach, when compared with Marshall's more free-ranging arguments, nicely illustrates common law constitutionalism as well as Story's desire to keep law separate from politics.

In Charles River Bridge, the Supreme Court confronted the tension between its protection of publicly granted private property interests under the Contracts Clause and the growing interest of state governments in promoting economic growth in the 1820s and 1830s. Massachusetts had granted a corporate charter to the Charles River Bridge Company in 1785 and authorized the company to construct a bridge and collect tolls for a period of seventy years.\textsuperscript{73} The state authorized another company to build a second bridge near the first one in 1828, a bridge that would become toll-free after a maximum of six years.\textsuperscript{74} The Charles River Bridge Company claimed impairment of the obligations of their charter and thus a violation of the Contracts Clause.\textsuperscript{75} The Supreme Court, in an opinion by Roger Taney, held that common law precedents established a rule that public grants should be construed strictly against private grantees, that the Charles River Bridge franchise did not mention an exclusive right to the bridge or tolls, and that there was therefore no violation of the Contracts Clause.\textsuperscript{76} Taney also relied upon the unchallenged practices in this era of state legislatures authorizing roads and railroads to be constructed near previously chartered toll-charging turnpikes\textsuperscript{77} and the public interest served by allowing state legislatures to promote a free market in economic development.\textsuperscript{78}

In contrast to Taney's respect for and deference toward state sovereignty, Story argued in dissent, vehemently and persuasively according to David Currie,\textsuperscript{79} that the common law did not support a rule of strict construction of public grants against the grantee but that to the

\textsuperscript{71} Dartmouth College, 17 U.S. at 667–82 (Story, J., concurring).
\textsuperscript{72} Id. at 683–96. But cf. Currie, supra note 70, at 144 (questioning the persuasiveness of Story's argument that consideration existed).
\textsuperscript{73} Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Peters) 420, 420 (1837).
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 539–49.
\textsuperscript{77} Id. at 551–52.
\textsuperscript{78} Id. at 552–53.
\textsuperscript{79} Currie, supra note 70, at 209–10.
contrary recognized a grantee’s implied rights that were connected to the exercise of the grantee’s express rights. “It is a principle of common sense, as well as of law, that when a thing is granted, whatever is necessary to its enjoyment is granted also.” In Story’s view, the construction of public grants in the King’s favor at common law was limited to cases of “mere donation” to private parties, and that public grants based on consideration—in this case the provision promising the public transportation services—were to be construed in the grantee’s favor because it would be unfair for government to receive consideration and then take back value. Story also argued against Taney’s public policy claim that states needed freedom to promote a free market in economic development by noting that development might be promoted just as much by protecting private contracts with the state as by recognizing a state’s discretion to modify the contracts. So again we see Story’s common law constitutionalism relentlessly at work and, at the same time, trying to separate itself from politics by doubting Taney’s policy claim about the need for state discretion to promote free markets and refusing to take a position on the complex political issue of how best to promote economic growth.

In *Swift v. Tyson* Story famously relied upon an interpretation of the common law and its general principles to establish a federal common law of commercial contracts. Section 34 of the Judiciary Act of 1789 provided that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States.” To the modern reader this statute might both seem quite clear and appear to require federal courts to apply relevant state common law rules in diversity cases. But to Story—steeped in and committed to the standards and values of the common law—the statutory reference to “laws of the several states” within a common law context was to be read narrowly and not to require federal courts to apply common law decisions of state courts. This provision for Story only required federal courts to apply state statutes in diversity cases because “in the ordinary use of language . . . it will hardly

81. *Id.* at 592.
82. *Id.* at 597.
83. *See id.* at 608 (“No man will hazard his capital . . . for a single moment.”).
85. *See id.* at 5 (explaining the intent of the Framers of the Judiciary Act of 1789).
be contended, that the decisions of courts constitute laws." Thus, federal courts, as a matter of something like comity, were left with a choice to apply either the general principles of a uniform common law or more specific state common law rules. For Story, the wise choice followed Lord Mansfield’s pronouncement about the need for a uniform common law of negotiable instruments. He distinguished between “state laws strictly local” that dealt primarily with real estate, which should be followed in diversity cases, and the “general commercial law” that federal courts should apply on a uniform basis throughout the United States.

In Prigg v. Pennsylvania Story, an opponent of slavery (though a “gradualist” and not an abolitionist), wrote the Court’s opinion invalidating a Pennsylvania law that was designed to ensure a fair process in the return of fugitive slaves to southern states. His opinion illustrates several prominent aspects of his constitutional approach: a powerful concern for property rights, a taste for strong national power to be administered by uniform laws, and the practice of interpreting the constitutional text in light of its historical circumstances including any relevant common law rights. Story thus provided a three-part rationale for the decision: that Pennsylvania’s law interfered with the slaveowner’s property rights—recognized by Article IV’s fugitive slave clause—by imposing procedural conditions on the return of slaves; that Article IV’s extradition and fugitive slave clauses, which had been “necessary” for the creation of the United States under the constitution, granted exclusive legislative authority to the federal government to provide for the return of slaves by means of uniform laws that could be defeated if conflicting state laws were allowed; and that the Pennsylvania law, by imposing additional conditions, conflicted with and was therefore preempted by the federal Fugitive Slave Act of 1793. Though each of these arguments may be questioned, each reveals some of the methods

88. Id. at 18–19.
89. Id. at 19.
90. Id. at 18–19.
91. 41 U.S. (16 Pet.) 539 (1842).
93. 41 U.S. at 673.
94. See Prigg, 41 U.S. at 612–13 (“The clause... could not have been surrendered by [the States], without endangering their whole property in slaves.”).
95. Id. at 611.
96. Id. at 622–25.
97. See id. at 617–18 (arguing that the legislation of Congress supersedes state legislation).
98. Currie, supra note 70, at 242–45.
and substance of Story’s common law constitutionalism—attention to the historical circumstances of particular written texts and attention to common law property rights.

Joseph Story’s life in many respects is consistent with his commitment to common law constitutionalism and a jurisprudence of national powers. First, his father, Elisha Story, was a Marblehead, Massachusetts, physician who by 1773 had become a full-fledged supporter of American independence, helping throw tea into the Boston Harbor, fighting at Concord and Lexington, and serving under George Washington in some of the early Revolutionary War campaigns around New York City. 99 Joseph Story was born in 1779, the first child of Dr. Story’s second marriage. He was raised to appreciate the importance of the unified effort among the colonies and states to win their independence from Britain; the importance of a strong national government to establish, maintain, and protect the United States; and the revolutionary context within which the U.S. Constitution was adopted. 100 As we have seen, Story would persistently interpret provisions of the constitutional text within their historical and revolutionary contexts to establish grounds for strengthening the national government’s powers against foreign enemies and limiting the potentially obstreperous or other balkanizing behavior of states.

Second, Story was raised in a religious household that practiced a humanitarian, tolerant, and individualistic form of Protestant Christianity, and he remained a devout Christian throughout his life. 101 Story’s religion, then, is consistent with his general commitment to the common law—which, in the accounts of Blackstone and many others, incorporated and promoted Christianity 102—and with his belief in the protection of individual property rights by constitutional law as well as common law. In fact, the connections between Christianity and law were so important to Story that he promoted the ideas of the Christian foundation of common law and government’s interest in spreading Christian religion generally in his public speeches and writings, including his debate with Thomas Jefferson about whether Christianity formed a foundational part of common law. 103 Thus, like his familial background, Story’s religion supported his constitutional theory.

99. NEWMYER, supra note 39, at 4–11.
100. Id.
101. Id. at 13.
102. McCLELLAN, supra note 42, at 120–21.
103. Id. at 118–28.
Third, from 1795 to 1798 Story was an enthusiastic and excellent undergraduate student at Harvard College, where he converted from Calvinism to the more humanitarian Unitarianism; was exposed to both the somewhat radical "natural rights" theories of John Locke and Thomas Paine and the more traditional, conservative "natural law" theories of Edmund Burke and others; willingly read and mastered many canonical literary texts; and even wrote some bad poetry.\textsuperscript{104} In Story's enthusiasm for and care in reading and writing literary texts, we can see the beginnings of his taste for reading and writing complex texts that any common law theorist must have if the precedents of common law and constitutional law are to be mastered. To be sure, Story appears to have been attracted to romanticism in his undergraduate days,\textsuperscript{105} which may seem inconsistent with the conservative bent of his later career. But romanticism emphasized individuality and the greatness of individual endeavors (perhaps, for example, mastering the common law), and it may have helped Story attend to the conservative natural law and common law criticisms of romanticism that he would follow later in his political and judicial career.\textsuperscript{106}

Fourth, after Harvard, from 1798 to 1801, Story served as an apprentice lawyer to two prominent New England lawyers who impressed upon him the need to prepare himself for the law by reading Blackstone, other commentaries on the common law, and plenty of leading English and American cases.\textsuperscript{107} Then in his legal practice, from 1801 to 1811, Story not only used the common law constantly to deal with his clients' problems but also distinguished himself by writing a practitioner's manual on the common law, \textit{Selection of Pleadings in Civil Actions}.\textsuperscript{108} Story joined the Supreme Court, at the precocious age of thirty-two, as something of an expert in the common law. Moreover, some of his more prominent and best-paying clients were major New England merchants, and they provided Story with "insight into the working relationship between lawyers and entrepreneurs, between law and capitalism."\textsuperscript{109} This insight seems to have informed Story's opinions in such cases as \textit{Charles River Bridge} and \textit{Swift v. Tyson} in which he

\begin{itemize}
\item[104.]\textit{See NEWMYER, supra} note 39, at 20–36 (discussing Story's time at Harvard and the effect it had on him).
\item[105.]\textit{MCCELLELLAN, supra} note 42, at 8–11.
\item[106.]\textit{See id.} at 61–117 (describing Story's usage and interpretation of natural law).
\item[107.]\textit{NEWMYER, supra} note 39, at 38–45.
\item[108.]\textit{See id.} at 45–52 (detailing Story's early rise in the Essex County bar to one of its leading lawyers).
\item[109.]\textit{Id.} at 51.
\end{itemize}
argued for the importance of common law property and contract rights in promoting economic growth and a unified national market.

Fifth, while in practice, Story engaged in politics although political life does not seem to have been a particularly joyful or rewarding experience for him. He served short terms in both the state and federal legislatures, often engaged in writing laws for the judiciary, and he played important roles in the electoral contests of others. But Story was impatient with the give-and-take compromises of political life, as well as the demands of party loyalty, and he was apparently dissatisfied, too, with the lack of systemic rationality, or "science," in legislative politics.\textsuperscript{110} It is not surprising, then, that Story would commit himself to common law constitutionalism that, more than the other basic approaches to constitutional interpretation, tends to divide "law" from "politics."

Sixth, throughout his professional career—in private practice from 1801 to 1811; in his judicial practice, especially while riding circuit in New England; as a distinguished professor of law at Harvard from 1829 to 1845; and in his forays into state politics both before and after his appointment to the Court—Story worked and socialized with many members of New England's mercantile elite and their lawyers.\textsuperscript{111} This experience surely helped motivate him to adopt a jurisprudence that would protect property and contract rights and promote a healthy national economy through the exercise of national government powers.

Finally, Story's beliefs about the moral harms of slavery, together with his beliefs about the need for gradualism to bring an end to slavery, can be reconciled with his constitutional theory even if, in cases like \textit{Prigg v. Pennsylvania}, there is tension between his ideology and his theory. Story's jurisprudence incorporated both a conservative protection of property rights, which in early nineteenth-century America supported or at least recognized slavery as an important social and legal institution, and the promotion of strong national powers to allow the national government to solve economic and social problems. For the national government to "solve" the slavery problem, however, there could only be a gradual development in this direction in view of the strength of slavery as an institution and the support slavery obtained from constitutional provisions. Story wrote opinions on circuit and for the Supreme Court that cut back slavery rights at the margins, especially with regard to the slave trade.\textsuperscript{112} But in \textit{Prigg v. Pennsylvania}, Story's

\textsuperscript{110} See \textit{id.} at 52–63 (describing Story's self-made measurement on political actions as scientific).

\textsuperscript{111} E.g., \textit{id.} at 117–25, 237–332.

\textsuperscript{112} See United States v. Amistad, 40 U.S. (15 Pet.) 518, 593 (1841) (holding that Africans
contextual, common law reading of the relevant constitutional provisions, which advanced the protection of property and slavery as an institution via the fugitive slave clause, together with his commitment to a strong national government, supported his position that exclusive federal power over fugitive slaves should invalidate state laws that might either promote or interfere with the return of fugitive slaves to their owners.\footnote{See 41 U.S. (1 Pet.) 417 (1842). Story apparently believed that this decision was a compromise that could promote a gradual end to slavery through the exercise of exclusive national powers. \textit{Newmyer, supra} note 39, at 370–78.}

Story’s formative life experiences and his ideological beliefs, then, are quite consistent with and help explain his basic theory of common law constitutionalism.

V. ROGER TANEY

President Andrew Jackson appointed Roger Taney as Chief Justice of the Supreme Court in 1836, and he served as Chief Justice until his death in 1864.\footnote{Charles W. Smith, Jr., \textit{Roger B. Taney: Jacksonian Jurist} 14 (1936).} Born in 1777, two years before Story, Taney and Story were contemporaries, although Taney’s later service on the Court overlapped Story’s for only nine years.\footnote{\textit{Id.} at 4.} Taney also pursued a different constitutional theory from Story. In his major opinions, Taney hewed to an originalist form of constitutional interpretation that emphasized strong states’ rights vis-à-vis the national government’s powers. Taney’s formative life experiences were quite different from Story’s, and they suggest cogent reasons for Taney’s adoption of originalist methods and his expansive concept of state powers, which included the protection of slavery as essentially a matter of state rather than national law.

Taney’s originalism appears to have served three basic values or purposes. First, by limiting the evidence of constitutional meaning to textual provisions and related evidence of the Framers’ intent, Taney increased his discretion to choose among competing constitutional positions in certain cases. His discretion increased because of the opportunity to develop interpretations from conflicting evidence of imprisonment aboard a Spanish-owned ship who mutinied could not be returned to the ship owners because the Africans “are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom”); United States v. La Jeune Eugenie, 26 F. Cas. 832 (1822) (No. 15,551) (holding that under an 1807 act outlawing the slave trade, the seizure of a French slave ship on suspicion that it was an American ship in disguise was legal and did not violate international law); \textit{Newmyer, supra} note 39, at 345–58, 365–70 (detailing Story’s attempts to reduce the rights of those involved in the slave trade).
constitutional meaning that is provided by the relatively abstract
language in the constitutional text, and because of conflicting (and
often sparsely reported) views of the Framers. Thus, Taney could
comfortably promote state powers under the Constitution as a matter of original
meaning by adopting a compact theory of the Constitution, whereby state
governments were thought to have created the national government as
their agent of limited powers. This theory opposed the popular
sovereignty theory promoted by the Marshall Court, which emphasized
the need to make “the people’s” national government an effective one.
Substantial constitutional protection for slavery as a matter of state law
and the absence of congressional authority to create a national bank both
ensued from Taney’s originalism and his compact theory of the
Constitution.

Second, the discretion in originalism methodology allowed Taney,
expressly or implicitly, to skirt around and at times ignore precedents
that raised difficulties for his positions by treating such precedents as
inconsistent with original meaning. Thus, for example, Taney appeared
to skirt around or dismiss the holding and arguments in McCulloch v.
Maryland\(^\text{116}\) in writing President Jackson’s 1832 Bank Veto Message

that, contrary to McCulloch, argued in good part that the creation of a
national bank was outside the powers of the national government.\(^\text{117}\)

Third, originalism offered additional important political advantages
as well. Originalism, which purports to align constitutional meaning
with the historical meaning of the Framers, undoubtedly has a powerful
resonance in public and political discourse because of its favorable
historical and nationalistic connotations. Perhaps it resonates favorably
among many lawyers, too, because it replicates conventional legal
methods for interpreting statutes. Taney certainly was aware of the need
for such political and public resonance, if not also resonance among
lawyers, when writing opinions on important and publicly divisive issues
such as the Bank Veto Message of 1832\(^\text{118}\) and the Court’s 1857 decision
in Dred Scott v. Sandford,\(^\text{119}\) which concerned the constitutional position
of slaves who had been taken into free states and territories and was
thought, at least by some, to represent a judicial decision that might help
avert a civil war.

\(^{116}\) 17 U.S. (4 Wheat.) 415 (1819).

\(^{117}\) See 2 JAMES D. RICHARDSON, A Compilation of the Messages and Papers of the
Presidents 576–91 (1903) (justifying veto of an act to continue the national bank); infra text
accompanying notes 120–27.

\(^{118}\) Id.

\(^{119}\) 60 U.S. (19 How.) 393 (1857).
Taney's constitutional theory of originalism and state sovereign powers figured significantly in many of his important opinions, starting with one he constructed as President Jackson’s Attorney General before he was appointed to the Court. The Bank Veto Message of 1832 was formally authored by President Jackson, of course, but the significant constitutional passages in it followed and elaborated arguments Taney had submitted to Jackson earlier. In fact, the passages on constitutional law in the message may well have been written by Taney, who participated in making revisions to the Veto Message.\textsuperscript{120}

The message first advanced policy arguments against the nationally chartered private bank, arguing that the large, monopolistic institution was an unwarranted subsidy to its shareholders, a threat to economic competition, and a threat to the political liberties of Americans should the bank become controlled by subjects of a foreign country at war with the United States.\textsuperscript{121} But more than half of the message was devoted to the argument that chartering a national bank was unconstitutional notwithstanding the Supreme Court’s decision thirteen years earlier that creating a national bank was constitutional,\textsuperscript{122} and the Veto Message’s arguments are clearly if implicitly based on originalist methodology and the compact theory of the Constitution. The first of the arguments, which questions the authority of \textit{McCulloch v. Maryland} as precedent, was simply that “[m]ere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”\textsuperscript{123} Because Congress had been divided on the issue, approving a national bank in 1791 and again in 1816, but disapproving a bank in 1811 and 1815, and because there were many expressions in state legislative, judicial, and executive opinions against the bank, the Veto Message claimed there was no well-settled precedent in favor of the bank’s constitutionality.\textsuperscript{124}

The Veto Message then limited the import of \textit{McCulloch} in a second way—by claiming that under the separation of powers principle an opinion of the Supreme Court “ought not to control the coordinate

\textsuperscript{120} See \textsc{Carl Brent Swisher, Roger B. Taney} 189–97 (1936) (describing the creation of the Bank Veto Message).

\textsuperscript{121} See \textsc{Richardson, supra} note 117, at 576–79.

\textsuperscript{122} See \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 415, 432 (1819) (holding that the creation of a national bank was within Congress’s constitutional powers).

\textsuperscript{123} \textsc{Richardson, supra} note 117, at 581–82.

\textsuperscript{124} \textit{Id.} at 582.
authorities” of the national government. Because each public officer takes an oath to uphold the constitution,

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.

Finally, in its longest section, the Veto Message offered a careful interpretation of *McCulloch* that seemed intent on reading it narrowly in light of strong state constitutional powers, or the compact theory of the Constitution. Here the message purports to apply the rule of *McCulloch* by arguing, with some persuasiveness, that the maintenance of a privately owned, nationally chartered bank was neither “necessary” nor “proper” in carrying out the specific enumerated powers of the national government. But this narrow reading of *McCulloch*, which takes “necessary” to mean “essential,” ignores Chief Justice Marshall’s opinion in *McCulloch* that applied a deferential “rational means test” to determine the constitutionality of Congress’s exercise of its implied powers. The Veto Message’s narrow reading and application of *McCulloch* can best be understood (or only understood) as an interpretation of that decision within the framework of an originalist compact theory interpretation of the Constitution, one that limits the powers granted to the national government by the original thirteen states.

Shortly after his appointment to the Court, Roger Taney wrote the Court’s opinion in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, which held there was no violation of the Contracts Clause or impairment of the obligation of contracts when a state limited the benefits of a previously granted corporate charter in the absence of express protection of the benefits in the charter. Taney’s opinion, like Story’s dissent, was grounded in an interpretation of common law precedents concerning public grants of charters and franchises to private parties. Taney held that the common law provided that ambiguities in

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125. *Id.*
126. *Id.*
127. *See id.* at 581–88 (noting the reserved power of the states to control property rights that was improperly invaded by creation of a national bank).
the grants of franchises "where the public interest is concerned"130 were to be interpreted against the private holders of the franchises and in favor of the public.131 But he ignored Story's argument of a distinction at common law between "contracts" for franchises based on an exchange of valuable consideration, for which the recognition of implied benefits was reasonable, and "mere donation[s]" of franchises, which were construed in favor of the public.132 Taney also argued that the judicial implication of exclusive privileges in corporate charters would lead to a thicket of line drawing by the courts in reviewing legislative decisions.133 Both Taney's confidence in his interpretation of the common law and his concern about judicial second-guessing of legislative judgments can best be understood as interpretations of the common law and federal judicial power within the framework of an originalist compact theory of the Constitution that reserves maximum government powers for the sovereign states.

Taney also took positions and wrote opinions that favored state powers in a series of cases in which the Court considered Commerce Clause challenges to state regulations. The Marshall Court, including Story, seemed to favor but never adopted as a rule the theory that the power to regulate interstate commerce granted by the Commerce Clause134 was exclusive to the national government and preempted state regulations even in the absence of federal statutes.135 The Taney Court turned away from this exclusive power theory, favoring concurrent state and federal powers in the absence of conflicting laws, and ultimately settling on the compromise rule of Cooley v. Board of Wardens,136 which recognized dual areas for exclusive federal power and concurrent state and federal powers depending upon the nature of the subject to be regulated.137 On the way to Cooley, however, a splintered Court decided several complicated issues on which Taney consistently favored state regulations that would maximize the authority of state governments to protect social welfare as they deemed fit. In New York v. Miln,138 Taney

130. Id. at 544.
131. See id. at 543–48 (discussing rights of franchise in relation to rights of the public).
132. Id. at 587–97 (Story, J., dissenting).
133. Id. at 552–53 (majority opinion).
134. U.S. CONST. art. 1, § 8.
135. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197–200 (1824) (distinguishing the power of taxation from the commerce power and ultimately ducking the issue of the Dormant Commerce Clause's relationship to state's exercising control over interstate commerce).
137. Id. at 321.
did not write an opinion but joined the majority against a Story dissent. The Court in *Miln* upheld New York's requirement that ship captains provide local authorities with a list of all passengers they brought into the state.¹³⁹ Ten years later, in the *License Cases*,¹⁴⁰ a unanimous Court, but without an opinion of the Court, upheld state laws requiring licenses for the importation of liquor. Taney's opinion argued against the Marshall Court's exclusive power theory on grounds that the constitutional text did not explicitly provide for an exclusive power and because the Court had already held that the national powers to regulate bankruptcy and the militia were not exclusive.¹⁴¹ Then, in the *Passenger Cases*,¹⁴² the Court, by a five-to-four vote, invalidated state laws that charged ship captains a fee for every passenger they brought into the state, with the fees to be used for the support of indigent aliens and the treatment of sick passengers.¹⁴³ Taney argued in dissent against the exclusive power theory that some Justices in the majority had relied upon and also argued that the retained police powers of the state to promote the social welfare were sufficient to uphold the laws whether or not the commerce power was exclusive.¹⁴⁴ Once again, in this series of cases there is evidence of Taney's originalism and his apparent adoption of the compact theory of the Constitution. He interpreted the constitutional text narrowly, against the implication of national powers vis-à-vis the states, and he argued for substantial reserved or retained police powers of the state in the face of competing theories in precedents of the Court.

Taney also took positions favoring state powers that directly concerned the right of states to regulate slavery. In *Groves v. Slaughter*,¹⁴⁵ the Court was asked whether a prohibition against importing slaves in Mississippi's constitution violated the Commerce Clause or invalidated the sale of imported slaves to state residents. The Court avoided the Commerce Clause question but nonetheless held the sales valid on the theory that the constitutional provision was not self-executing and had not been implemented by state legislation. Taney joined this opinion, but also offered a concurring opinion that stated, without giving reasons, that the importation of slaves was a state matter not subject to congressional control under the Commerce Clause.¹⁴⁶ One

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¹³⁹. *Id.* at 152.
¹⁴⁰. 46 U.S. (5 How.) 504 (1847).
¹⁴¹. *Id.* at 578–86.
¹⁴². 48 U.S. (7 How.) 283 (1849).
¹⁴³. *Id.*
¹⁴⁴. *Id.* at 464–71, 483–90 (Taney, J., dissenting).
¹⁴⁶. *Id.* at 508–09 (Taney, J., concurring).
year later, in *Prigg v. Pennsylvania*, Taney concurred in striking down Pennsylvania's law regarding the return of fugitive slaves because the law made the return of slaves more difficult for owners. But he disagreed with Story's opinion for the Court, which recognized the exclusive power of Congress to regulate fugitive slave issues, arguing that states ought to be able to protect the property rights of slave owners the same way they protected other property rights. Taney's originalism and his compact theory of the Constitution can be seen in both his apparent preference for state legislation over state constitutional amendments in *Groves v. Slaughter*, and his inclination to support both state powers and property rights that facilitated the institution of slavery.

Finally, Taney's originalist interpretive method is starkly evident in his opinion for the Court in *Dred Scott v. Sandford*. Dred Scott, a slave in Missouri, had resided with his master in Illinois, a free state, and then in the territory of Minnesota where slavery was banned by the Missouri Compromise of 1820, before he returned to Missouri. Sold to a resident of New York after his return, Scott brought a diversity of citizenship suit in the federal courts seeking freedom on the basis of his residence in Illinois and Minnesota. The Court ruled that Scott, as the descendant of a slave, was not and could not be a citizen and thus the federal courts lacked jurisdiction to hear his case. Taney's opinion stated his originalist methodology early on: "The duty of the court is, to interpret the instrument they [the Founders] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted." He then launched into a lengthy historical discussion of state laws, including both slave legislation and the antimiscegenation statutes of northern states; federal laws; judicial decisions; and the historical context of the framing of the Constitution's provisions on citizens and the naturalization of citizens. He concluded that these sources established that the Framers could not have meant to include slaves or their descendants within the concept of "citizens" when the Constitution was adopted, and that they could not have meant to grant the power to the

147. 41 U.S. (16 Pet.) 539 (1842).
148. *Id.* at 626–33 (Taney, J., concurring).
149. *Id.* at 635.
151. 60 U.S. (19 How.) 393 (1856).
152. *Id.* at 397.
153. *Id.* at 398.
154. *Id.* at 407.
155. *Id.* at 405.
federal government or the states to recognize the citizenship of former slaves at any later time. Then, notwithstanding the denial of jurisdiction, Taney went on to argue that Dred Scott had not been made free by his residences in Minnesota and Illinois. Applying originalist methodology and compact theory to the Minnesota question, Taney argued again, at length, that the Framers had intended to severely limit the powers of Congress over territories, in effect granting Congress only the power to regulate territories as a “trustee” for “the people of the states” until the peoples of a territory became a state and chose whether to have slavery as a legal institution. Taney quickly settled the Illinois question by citing to Strader v. Graham in which the Court six years earlier had held that a slave taken from a slave state into a free state did not become free, thus protecting property rights in slaves.

Consider now the potential fit between Roger Taney’s major life experiences and his constitutional theory of originalism and the Constitution as a compact between the states. Taney was raised on a tobacco plantation in southern Maryland by a Roman Catholic family that had been part of the slave-owning landed gentry or aristocracy of Maryland for several generations. English trade restrictions had hurt the sale of tobacco in Maryland before the Revolutionary War and most tobacco planters supported independence. But unlike Joseph Story’s father, who served in Washington’s “national army,” Roger Taney’s father and uncle served as officers in the state militia, which provided an “unspectacular defense” against British privateers and local pirates. Moreover, continuing economic stress in the tobacco industry after the war, associated with the failure of England and the United States to agree on a commercial treaty and the economic power wielded by Baltimore merchants who extended credit and bought tobacco, caused the Taneyes to change their expectations and abandon the idea of establishing all sons on estates of their own. Roger Taney, a second son, was thus nurtured...

156. Id. at 405–27.
157. Id. at 430–54.
158. Id. at 448. Taney followed Stephen Douglas’s popular sovereignty theory that the people in U.S. territories should be free to choose slavery or not at the time of statehood.
159. 51 U.S. (10 How.) 82 (1851).
160. The Court actually declined to answer the question citing a lack of jurisdiction. Taney, however, went on to explain that the status of a citizen was to be determined by the state of domicile for that citizen. Id. at 93.
161. SWISHER, supra note 120, at 1–15.
162. See supra note 99 and accompanying text.
163. SWISHER, supra note 120, at 10.
164. See id. at 11–12 (noting Michael Taney’s emphasis on following the custom of passing one’s estate to his oldest son).
in an elite but localized (or state-oriented) culture and perhaps raised with something of a suspicion about adverse effects that could be caused by large governments and private economic organizations. The antinational, pro-state ideology of Roger Taney could well have its roots in these early experiences.

Taney’s Catholicism does not seem to have been a major feature of his public life, nor does he appear to have experienced personally any significant discrimination that many Catholics did face in late eighteenth- and early nineteenth-century America, even—or especially—in Maryland.\textsuperscript{165} Maryland was established as an English colony by a Catholic proprietor, received most of the early Catholic immigrants to colonial America, and at times promoted an ideal of tolerance between Catholics and Protestants—in good part to encourage immigration by members of both sects.\textsuperscript{166} But the immigration of many Protestants diminished this ideal of tolerance, and Taney’s family had become Catholics “in spite of legislation which deprived them of political rights, limited their privileges of worship, and prohibited the establishment and maintenance of Catholic schools.”\textsuperscript{167} In fact, the discrimination against Catholic education in Maryland before the Revolutionary War had caused Taney’s father, Michael, like other members of the Maryland aristocracy, to be sent to Catholic schools in France and Belgium in the 1760s.\textsuperscript{168} Roger Taney, then, was certainly aware of the animus against Catholics that had been in play in Maryland and the United States more generally both before and after the Revolutionary War. Nonetheless, he was also aware of the relative prosperity of Catholics in Maryland, their success at maintaining a strong sense of community, and, significantly, the successful entrance of many Catholics into the politics and government of Maryland during the Revolutionary War and in the following decades.\textsuperscript{169} The Revolutionary War caused a shift in


\textsuperscript{166} See JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE 73–74 (1985) (noting that Calvert recognized that religious tolerance would be a key component in successful colonization).

\textsuperscript{167} SWISHER, supra note 120, at 8.

\textsuperscript{168} SMITH, supra note 114, at 4–5 (noting that discriminatory legislation also deprived Roger Taney’s mother of any formal schooling); SWISHER, supra note 120, at 8.
Protestant America toward a grudging acceptance if not complete tolerance of Roman Catholics, and Maryland adopted a state constitution that was one of the few that did not contain discriminatory provisions against Catholics. In this sense at least, Roger Taney’s religion may have provided additional ideological support for his attachment to state governments and his state-oriented theory of the Constitution.

Taney’s college education and subsequent training in the law provide more direct evidence of a fit between his ideology and subsequent constitutional theory. From 1792 to 1795, at ages fifteen to eighteen, he attended Dickinson College in Carlisle, Pennsylvania, where he came under the substantial influence of Charles Nisbet, the charismatic president of the college who taught ethics, logic, metaphysics, and criticism, including subjects of political economy. Nisbet was a Scottish Calvinist minister influenced by but lapsed from the Scottish enlightenment, who seems to have been an excellent if authoritative and opinionated teacher. He taught elitist or Federalist principles of governance, and he modeled an authoritative style. Taney subsequently became a long-standing and active member of the Maryland Federalist party before the party collapsed in the 1820s. Taney also adopted a constitutional theory that was based on the “fundamental authority” of the Constitution’s original meaning and one that he articulated in a most confident style, thus emulating both the ideas and style of Nisbet.

From 1796 to 1799, Taney served as a legal apprentice in Annapolis, Maryland, in the office of Judge Jeremiah Townley Chase. Judge Chase had been one of a few members who had voted against adoption of the U. S. Constitution at the Maryland ratifying convention in 1788 on the ground that the Constitution’s grant of national powers threatened state sovereign powers. Taney thus began his legal education and career in a very different way from Joseph Story and most legal apprentices, somewhat removed from the more practical aspects of law as an apprentice to a judge rather than lawyer, and presumably influenced by Chase’s political ideology and constitutional theory, which emphasized state sovereign powers.

169. DOLAN, supra note 166, at 69–124; esp. 74 ("[I]n seventeenth-century Maryland, to be Catholic meant that a person was most likely prosperous.").
170. See AUGUSTINA, supra note 165, at 310–93; esp. 375–78 (describing the “complete political equality” accorded to Catholics under the Maryland constitution).
171. SMITH, supra note 114, at 5–7; SWISHER, supra note 120, at 15–23.
172. See infra text accompanying note 175.
173. SWISHER, supra note 120, at 24–28.
174. SMITH, supra note 114, at 7.
Over the next thirty-two years, Roger Taney practiced law and politics in Maryland with much success. He became recognized as one of the best lawyers in the state, and he became a leader in Maryland’s Federalist party, serving a brief term as a member of the House of Delegates from 1799 to 1801 and a longer term as a State Senator from 1816 to 1821, although he lost other elections for legislative office.  

When the Federalist party expired in the 1820s, Taney became a supporter of Andrew Jackson and participated substantially in his campaigns for President in 1824 and 1828. His successes in both legal practice and politics in Maryland were capped and symbolized by his appointment in 1827 as Maryland’s Attorney General, a position he held until his appointment by Andrew Jackson as U.S. Attorney General in 1831.

During this period Taney had numerous experiences that would have strengthened his belief in the importance and efficacy of state governments and taught him to be suspicious of the national government and its promotion of particular powerful interests. As a lawyer, banker, and legislator he supported the development of and state support for rural banks that would provide adequate credit for farmers. He also became a vigorous proponent of state promotion of public improvements in roads, canals, and railroads. As a state senator between 1816 and 1821 he would have observed and tried to respond to the specific aspects of the Panic of 1819 in Maryland and the ethical scandals at the Baltimore branch of the national bank, which was blamed for much of the crisis. And as both legislator and litigator he participated in the debate of several issues involving state regulation of slavery that revealed not only Taney’s interest in the welfare of blacks but also his commitment to slavery as a necessary legal institution and his unhappiness with the Missouri Compromise of 1820 by which the federal government had regulated against slavery in most of the Louisiana Purchase. Then, after moving to Baltimore in 1823, Taney became the attorney and a director of the Union Bank of Maryland, a state chartered bank, which

176. Id. at 12–13.
177. SMITH, supra note 114, at 8–13; SWISHER, supra note 120, at 28–118.
178. SWISHER, supra note 120, at 82–88.
179. Id. at 115.
181. SWISHER, supra note 120, at 92–100.
surely exposed him to the competitive threats to state banks created by the much larger, nationally chartered Bank of the United States.\textsuperscript{182} More specifically, at this time he argued to the U. S. Supreme Court on behalf of a Baltimore merchant who claimed that the Bank of the United States had voided his security contract by concealing fraudulent conduct by the Bank’s Maryland cashier.\textsuperscript{183} Taney’s practice in Maryland before he assumed national positions thus shaped his thinking about the relative balance between state, national, and private powers.

Finally, from 1831 to 1834 Taney served in President Andrew Jackson’s Administration, first as Attorney General and then as Secretary of the Treasury, although the Senate rejected his nomination as Secretary of the Treasury after he had served nine months.\textsuperscript{184} As Attorney General, he wrote opinions on issues of great political importance to the Jackson Administration and the country. One of these issues concerned the constitutionality of state laws that required free blacks employed on foreign ships to be kept in prison while their vessels were in ports, and in his opinions Taney advanced the originalist argument that blacks lacked citizen rights, an argument he would later rely on in \textit{Dred Scott}.\textsuperscript{185} His other significant opinions concerned the lack of national government power to charter a national bank,\textsuperscript{186} and these opinions, as we have seen, played an important role in the construction of the Bank Veto Message of 1832.\textsuperscript{187} But after extension of its charter had been vetoed, the national bank still had four years left under its original charter of 1816, and the bank and the Jackson Administration engaged in an extended struggle to obtain political acceptance of their respective positions throughout the election of 1832 and second Jackson Administration.\textsuperscript{188} Both as Attorney General and as Secretary of the Treasury, Taney played a significant role on behalf of the Jackson Administration, first as Attorney General through opinion writing and litigation against the bank, and then as Secretary of the Treasury in arranging to shift national government

\begin{longtable}{l}
182. See Smith, \textit{supra} note 114, at 11 (describing Taney’s hostility toward the Bank of the United States).
185. See id. at 146–59 (describing Taney’s decisions related to free blacks and the political environment of the time).
186. See id. at 160–93 (describing the struggle between the Jackson Administration and the Bank of the United States).
188. See Swisher, \textit{supra} note 120, at 160–93 (describing the bank war of the Jackson Administration).
\end{longtable}
deposits from the Bank of the United States to several state-chartered banks to bolster the soundness of state bank notes against the national bank’s attempts to embarrass state banks by making unexpected calls on their ability to pay their notes. 189 While the Jackson Administration ultimately won the struggle, the Senate’s rejection of Taney’s nomination after serving nine months as Secretary of the Treasury was clearly retaliation for his effective work against the national bank. 190

In summary, Taney’s pre-judicial life experiences reveal several reasons why he developed strong emotional attachments to his native state, 191 corresponding political and legal beliefs in state sovereignty as an essential concept of constitutional law, and substantial doubt and suspicion about recognizing strong national powers under the Constitution. As Joseph Story’s formative experiences appear to fit well with Story’s common law constitutionalism, Roger Taney’s formative ideological experiences appear to fit equally well with his constitutional theory of originalism that supported ideas of limited national powers, strong state powers, and interpreting the Constitution as a compact between state governments.

VI. STEPHEN J. FIELD

Stephen J. Field served as an Associate Justice of the Supreme Court from 1863, when Abraham Lincoln appointed him, until his resignation in 1897. 192 During his tenure throughout the last third of the nineteenth century, Field and the Court faced issues that were quite different from those in the time of Story and Taney. The Fourteenth Amendment was adopted in 1868 and spawned a range of new issues and possible constitutional limitations upon the states. At the same time, the Industrial Revolution produced new kinds of vast economic power in America, new government regulations were designed to serve or regulate this power, and new complex questions of race and immigration law

189. Id.
190. See id. at 207–88 (describing the political environment at the time).
191. In 1849, looking back on his appointment as the U.S. Attorney General, Taney expressed such an attachment when he stated that the only public office he had deeply coveted was that of Attorney General of Maryland.

It had been most commonly filled by highly gifted and eminent men; and my family on both the father and mother’s side have been for so many generations Maryland people, that I have always felt strong Maryland attachments; and... my highest ambition was to receive the highest bar honor in my native state; and to be thought worthy of succeeding the distinguished lawyers who had held the office before me.

Id. at 141–42.
192. Swisher, supra note 120, at 93–97.
arose. Within this context, Field wrote influential opinions that made him famous, in some camps notorious, as a judicial bomb-thrower who was to merge natural-rights thinking with the Fourteenth Amendment and other constitutional doctrines. In this merger, Field fashioned a constitutional jurisprudence of principles that he and many others thought would implement a constitutional law that served contemporary social needs, especially in the field of economic enterprise.\textsuperscript{193} This jurisprudence was conservative in at least two senses: it rested on long-recognized beliefs within the American political ethos in the values of individualism and private economic enterprise, and it favored the interests of business and property over novel attempts by states to regulate in the interests of social welfare. But Field’s jurisprudence was also liberal in the classical sense of favoring individual liberties over collective actions by the state, and liberating as well, even if not intended as such by Field, in that his theory of constitutional principles indicated a pathway or general approach toward making constitutional law adequately evolutionary in a rapidly changing world.\textsuperscript{194}

Field’s particular constitutional theory contained several basic principles. One was the deep Lockean principle that the primary purpose of government is to promote the natural rights of individuals, particularly their rights to property and to choose a trade or occupation.\textsuperscript{195} Second, fundamental constitutional rights to property and to a trade or occupation should be recognized as a matter of both the natural rights of man and the liberty and property rights protected by the Fourteenth Amendment, and a clear line between protected individual rights and the proper limited scope of government regulatory powers should be maintained.\textsuperscript{196} Third, individuals should enjoy strong equality rights under the Fourteenth Amendment in the sense that states should treat everyone with formal equality, particularly with regard to property and occupational rights, if not “social rights.”\textsuperscript{197} Fourth, the federalism principle embodied in

\textsuperscript{193} See generally Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. AM. HIST. 970 (1975) (discussing Field’s contribution to property law, offering a new view of Field’s convictions regarding economic privilege, and concluding that Field’s jurisprudence was fashioned to provide solutions to the underlying problems of the 1870s).

\textsuperscript{194} See Charles W. McCurdy, Stephen J. Field and the American Judicial Tradition, in THE FIELDS AND THE LAW: ESSAYS 5, 18 (1986) (claiming that twentieth-century jurists and legal scholars, including Chief Justice Earl Warren, “embraced Field’s defense of the Court’s democratic character and put it to work in defense of quite different values”).

\textsuperscript{195} See infra note 205 and accompanying text (describing the Lockean principle).

\textsuperscript{196} See infra notes 225–27 and accompanying text (explaining Field’s Fourteenth Amendment views).

\textsuperscript{197} Id.
provisions of the written Constitution not only authorized limited, enumerated powers of the national government but also sharply divided federal and state powers from each other, thus contradicting the notion of concurrent powers recognized by the Taney Court and creating the separate limited government zones of dual federalism.\textsuperscript{198} Finally, with the exception of the first Lockean principle, which was abstract enough to be absolute, Field considered these to be strong principles but did not treat them as absolute in nature, preferring instead to balance them against each other in the case of conflict.\textsuperscript{199} Although Field's particular theory was undoubtedly a conservative one on balance, his theory of principles established a model for other theories of principle that throughout the twentieth century motivated the Supreme Court to move in other, less conservative directions.\textsuperscript{200}

Field's constitutional theory can be illustrated by three sets of opinions. First, in \textit{Cummings v. Missouri}\textsuperscript{201} and \textit{Ex parte Garland}\textsuperscript{202} Field wrote the opinions for a five-Justice majority that invalidated state and federal laws that required persons seeking to practice particular professions after the Civil War to take an oath that they had not given aid to the Confederacy. The basic issue that divided the Court's majority from the four dissenters was whether these "test oaths" should be characterized as "punishments," in which case they violated the Ex Post Facto and Bill of Attainder clauses, which are only applicable to criminal punishments, or whether they should be characterized as "prophylactic" regulations designed to ensure future proper conduct by professionals in such fields as government offices, lawyering, and the ministry.\textsuperscript{203} Both Field and Justice Samuel Miller writing for the dissenters apparently agreed that legislative motive was determinative of the issue,\textsuperscript{204} but the evidence of such motive appears to have been sparse, and the two Justices relied on competing inferences that were surely influenced by

\textsuperscript{198} KENS, \textit{supra} note 175, at 211.

\textsuperscript{199} \textit{See infra} notes 232–36 and accompanying text (explaining Field's balancing test).

\textsuperscript{200} \textit{See, e.g.}, Griswold v. Connecticut, 381 U.S. 479, 486 (1965). In \textit{Griswold} the Court said, We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

\textit{Id.}

\textsuperscript{201} 71 U.S. (4 Wall.) 277 (1867).

\textsuperscript{202} 71 U.S. (4 Wall.) 333 (1867).

\textsuperscript{203} \textit{Id.} at 336.

\textsuperscript{204} CURRIE, \textit{supra} note 70, at 295.
their deeper principles. Field was explicit about the Lockean principle of natural rights, including the natural right to pursue a trade and the natural right to equal treatment in the pursuit of a trade or occupation, both of which supported his inference and characterization of the test oaths as punishment:

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. [Thus,] any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.203

Field analyzed how disqualification from occupations was a traditional punishment for crime at common law,206 and how, in his view, disqualifications from lawyering and the ministry bore no relationship to the person’s fitness for future professional practice.207 Thus, Field did not rely just upon abstract natural rights theory but seemed interested in employing natural rights theory to help interpret ambiguous legal authorities or, in other words, in merging natural rights theory with positive law. Moreover, in considering the government’s and dissent’s arguments about test oaths as prophylactic measures to serve the public good, Field demonstrated an apparent willingness to balance natural rights principles against the competing principle of the police power of government by “weighing” the competing principles—at least to the extent of his rather confident dismissal of the argument about the potential prophylactic nature of test oaths for ministers and lawyers.208

Second, Field’s famous and influential dissent in the Slaughter-House Cases209 provides a more comprehensive demonstration of his constitutional theory. This case involved a challenge under the Thirteenth and Fourteenth Amendments to a monopoly in the slaughtering business for New Orleans that had been granted by the Louisiana Legislature. One company had been given an exclusive right to build and operate a facility for landing and slaughtering animals

205. Cummings, 71 U.S. at 321–22. Note that Field was writing a year before adoption of the Fourteenth Amendment.
206. Id. at 320–22.
207. Id. at 319–20.
208. Consider the possibility that a legislature might require test oaths after the Civil War to ensure that private religions also promote a “civil religion” of reverence for the state and its law, and to ensure that lawyers are committed to the state’s law.
209. 83 U.S. (16 Wall.) 36, 83 (1873).
outside the city, although the company had to allow other butchers the right to slaughter at this facility if they paid a reasonable fee. Samuel Miller wrote for the Court’s majority of five, denying all constitutional claims against the statute by the monopoly company’s competing butchers: the monopoly constituted neither “slavery” nor “involuntary servitude” under the Thirteenth Amendment, nor did it abridge the competing butchers’ “privileges or immunities,” deny them “equal protection of the laws,” or deprive them of “liberty, or property, with due process of law” under the Fourteenth Amendment. Miller’s opinion, in essence, limited the two amendments to specific issues of law and race notwithstanding their broad language, and his rationale for doing this depended in part upon his originalist reading of the central purposes behind the two amendments as designed to deal with official racial discrimination without upsetting the pre-Civil War balance of powers between the federal and state governments.

Field’s dissenting rationale began with the broad claim, which appears to call for a merger between natural law and positive law, that “[n]o one will deny the abstract justice which lies in the position of the [competing butchers]; and I shall endeavor to show that the position has some support in the fundamental law of the country.” He considered next the principle of the state’s police power by applying it to the statute in question, and he found this principle, in effect, to be lacking in weight because only two of the statute’s provisions “can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered.” The statutory monopoly’s other possible public benefits, such as limiting inspection costs by economy of scale or limiting the geographical spread of noxious odors, were in Field’s view “shallow” and deserving of “only . . . passing notice” because of the apparently noxious grant of exclusive economic privileges that abridged the occupational rights of the competing butchers.

Field then gave relatively lengthy consideration to the butchers’ Thirteenth Amendment argument. He did not find this argument either necessary or dispositive of the case, but he indicated in this passage that

210. Id. at 78–83.
211. Id. at 68–81.
212. Id. at 86–87 (Field, J., dissenting).
213. Id. at 87.
214. Id. at 87–88.
215. Id. at 89–93.
the abstract language of "involuntary servitude" and the general purpose of the provision, "to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life," could be applied to the butchers' situation.\footnote{216} The Thirteenth Amendment thus seemingly constituted an "intersecting principle" for Field that was deserving of some weight or consideration and was thus supportive of the position that he ultimately grounded in the Fourteenth Amendment.

After considering the relative weights of the competing police power principle and the intersecting Thirteenth Amendment principle, or its purpose, Field turned to the Fourteenth Amendment's Privileges and Immunities Clause to find the constitutional violation in Louisiana's statutory monopoly.\footnote{217} To define the privileges and immunities of U.S. citizens as including a right to trade absent reasonable police power regulations, Field proceeded seamlessly, or comprehensively, to consider natural rights ideas,\footnote{218} the language of the constitutional text,\footnote{219} evidence of the Framers' intent,\footnote{220} precedents decided under Article IV's Privileges and Immunities Clause respecting equal treatment by states of citizens from other states,\footnote{221} and finally, the common law of monopolies.\footnote{222} Field started with the observation that the Privileges and Immunities Clause "does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation."\footnote{223} Field rejected Miller's idea that the privileges and immunities of U.S. citizens were limited to those protected by the national government before the Civil War, for that would make the clause "a vain and idle enactmen, which accomplished nothing."\footnote{224} Field argued instead that "if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."\footnote{225} He then proceeded to demonstrate that Congress, which proposed the Fourteenth Amendment

\footnotesize{216. Id. at 90.}
\footnotesize{217. Id. at 93–111.}
\footnotesize{218. Id. at 96.}
\footnotesize{219. Id. at 95.}
\footnotesize{220. Id. at 97–98.}
\footnotesize{221. Id. at 97–100.}
\footnotesize{222. Id. at 100–04.}
\footnotesize{223. Id. at 96.}
\footnotesize{224. Id.}
\footnotesize{225. Id.}
to shore up its constitutional authority for the Civil Rights Act of 1866, had "at least" stated some of these rights in the Act and also contemplated the much broader concept of natural rights included within Justice Bushrod Washington's definition of Article IV's privileges and immunities in his 1823 opinion in Corfield v. Coryell.\textsuperscript{226} Finally, Field turned at some length to consider other constitutional and common law precedents to indicate the traditional respect for the right to engage in ordinary trades and occupations that had been provided by both American and English courts.\textsuperscript{227}

Establishing this sort of coherence between relevant moral/legal principles and the many kinds of legal authorities that can be relevant to a hard case in constitutional law constitutes the essence of a theory of constitutional principles. To be sure, not all theories of principle need to rely upon natural rights as Field did. But ascertaining and giving relative weights to the moral principles that underlie the relevant competing and intersecting legal authorities in a particular case to determine the best interpretation of constitutional law for the case is the essence of this approach to constitutional decision making.\textsuperscript{228}

Field's later opinions applied his theory of principles and reveal additional aspects of the theory. In Munn v. Illinois,\textsuperscript{229} a majority of seven Justices upheld Illinois's regulation of prices charged by grain warehouses in Chicago on the basis of a two-part argument: that courts should defer to reasonable judgments by legislatures about facts and the public good; and that the grain warehouses, which collectively exerted market power over grain storage, were not merely private businesses but rather businesses "affected with a public interest" so that the public had the right to regulate the business for the common good.\textsuperscript{230} Field, in dissent, argued that the Court had misread the common law precedents, which in his view allowed price regulations only of public utilities and other monopolistic businesses that received privileges from government—such as the eminent domain power, or exclusive rights to import—and thus the Court had failed to maintain the bright line between public affairs and private affairs that would prevent the

\textsuperscript{227} The Slaughter-House Cases, 83 U.S. at 98-111.
\textsuperscript{228} See supra text accompanying notes 9-12 (describing "theories of principle" approach to constitutional interpretation).
\textsuperscript{229} 94 U.S. 113 (1877).
\textsuperscript{230} Id. at 126.
subversion or "invasion" of private property rights or "the principles upon which our republican government is founded." 231

A series of opinions on immigration-related issues that Field wrote on circuit and for the Court illustrate his ability to weigh competing principles in an attempt to bring coherence to the principles of the (admittedly limited) police powers of government; the natural and constitutional rights to property, trade, and occupations; and an individual's right to formal equality in her treatment by government. In these opinions, Field also relied upon the dual federalism idea of a bright line between the powers of states to exercise police powers and the national government's power over immigration. Thus, in In re Ab Fong, 232 Field, for the U. S. Circuit Court, invalidated a California law that required ship owners to post bonds to guarantee that "lewd and debauched" persons lacking in funds would not become a charge of the state. Field argued that the control of immigration was an exclusive national power; that a state could only exclude foreigners as a matter of "self-defense," which this was not; and that the appropriate way for states to deal with prostitution or public charges was by the fair and effective administration of general laws that would apply to all persons, not just immigrants. 233 In later cases for the Circuit Court, Field invalidated San Francisco ordinances that required male prisoners to have their hair cut short, which was obviously aimed at disgracing Chinese prisoners who wore their hair braided in long queues, 234 and that conditioned laundry permits on the recommendation of not less than twelve citizens and taxpayers resident in the same block, thus making it virtually impossible for Chinese owners of laundries to obtain permits. 235 On the other hand, writing for the Supreme Court three years later in two related cases, Field upheld as within the state's police power San Francisco ordinances that prohibited public laundries within a certain area of the city from operating on Sundays and between the hours of 10 PM and 6 AM notwithstanding the relatively persuasive argument that the intent of these laws had been to deprive Chinese-owned laundries of business opportunities and thereby discourage Chinese immigration, just like the laws discussed above. 236 But the latter ordinance did not infringe

231. Id. at 136, 140 (Field, J., dissenting).
232. 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102).
233. Id. at 216.
234. Ho An Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546).
235. In re Quang Woo, 13 F. 229 (C.C.D. Cal. 1882). This decision predates and anticipates the Supreme Court's similar decision in Yick Wo v. Hopkins, 118 U.S. 356 (1886).
as deeply upon a person's rights to property and trade as the earlier ordinances had; they were formally equal among all persons; and a stronger localized police power rationale could be established for these ordinances. Thus Field's opinions in the immigration law area appear to illustrate a relatively careful balancing of competing principles that informed his constitutional theory.

Consider now the possible relationships between Stephen Field's formative life experiences and his constitutional theory. Field was raised in Stockbridge, Massachusetts, as one of nine children of a strict, puritanical, Congregational minister, who believed in the Bible and Christian doctrine as absolute truths or principles about the way to live.237 Field's father seems to have been a major influence on his children's education before they left home.238 Field then attended Williams College from 1833 to 1837, and in his senior year he studied extensively with the philosopher Mark Hopkins, who was noted for teaching that a kind of mathematical certainty and comprehensiveness could be brought to the moral and human sciences just as it could be brought to the study of the natural world.239 Field was not particularly religious during his adult life, at least not until the very end,240 but as a judge he applied with great confidence the moral/legal principles he deemed relevant to the social good, which seems consistent with his early education.

Significantly, in the summers of 1834 to 1837 Field assisted the great contemporary theorist of Jacksonian democracy, Theodore Sedgwick II, a Stockbridge neighbor, in Sedgwick's writing of the three volumes of *Public and Private Economy*. In these volumes, Sedgwick argued for a sharp distinction between the public and private spheres, a large unencumbered private sphere, and formal equality in any government's treatment of individuals in order to prevent government from extending privileges neither to the few nor the many.241 Field's constitutional jurisprudence, as Charles McCurdy has argued, seems in effect to have been a translation of Sedgwick's political philosophy into constitutional theory.242

237. SWISHER, supra note 41, at 5–12.
238. Id.
239. Id. at 16–20.
240. Id. at 12, 447–48.
242. Id. at 7.
Field’s ambitions and confidence as a judge also may have been formed by other familial, personal, and political experiences. Three of his brothers also became nationally famous: David Dudley Field, the great legal codifier and New York City lawyer to robber barons;243 Cyrus Field, the businessman responsible for laying the first transatlantic telegraph cable;244 and Henry Field, who followed his father into the ministry and established a national reputation through his writings and sermons.245 Moreover, upon graduating from college, Stephen Field became an apprentice to his older brother and subsequently worked as his partner for seven years, until 1848.246 Stephen, possibly chafing under the domination of his older brother, and restless in any event, then traveled in Europe between 1848 and 1849 with his father, brother Henry, and sister Mary before leaving for California and the Gold Rush of 1849.247 In this environment, it is hard not to believe that both modeling by and competitiveness with his brothers influenced Field’s desire to make his mark as a professional lawyer and judge, and his theory of principles certainly fostered this kind of desire for fame.

Field’s extended trip through Europe exposed him to the year of revolutions in European capitals. He and his family were in Paris when the government of Louis Philippe was overthrown by revolution, in Rome just after troops of the new French government had taken possession of the city from the Pope, and in Vienna when troops hostile to the Emperor were approaching the city.248 These wealthy American tourists249 were surely made aware of what democratic instincts and actions could do to property rights, and Stephen J. Field all his life appeared to be concerned for the protection of property rights from “democratic revolutions.”250

243. SWISHER, supra note 120, at 172, 283.
244. Id. at 284.
245. Id. at 8–9.
246. Id.
247. SWISHER, supra note 41, at 23–24.
248. Id. at 23.
249. Id. According to Swisher,
   Stephen had little money, but David Dudley was said at this time to be worth about one
   hundred thousand dollars, acquired partly as the result of a remunerative practice and
   partly through marriage to a rich widow. . . . The sons of the minister had speedily
   become prosperous, and the family scale of living included extensive travel and other
   luxuries . . . .
250. See Howard Jay Graham, Justice Field and the Fourteenth Amendment, 52 Yale L.J. 851,
   864–70 (1943) (Graham argues in particular that Field’s later reaction to the Paris Commune of
   1871, following France’s defeat in the Franco-Prussian War, triggered Field’s move toward laissez-
   faire principles in his opinions in cases such as the Slaughter-House Cases and Munn v. Illinois).
In addition to the influence of Theodore Sedgwick and the European revolutions, another major cause of Stephen Field’s attachment to the moral/legal principles of property rights certainly came from his decision to move to California in 1849 and from his experiences there as a lawyer, politician, and judge in developing a new regime of law, especially property law, in the midst and aftermath of the Gold Rush of 1849. For fourteen years Field was an adventurer, individualist, private lawyer, and public official (as a legislator and both trial and appellate judge) in California, as he established law practices, first in Marysville and then in San Francisco, and ran successfully for local offices, for the state legislature, and finally for an appointment on the Supreme Court of California. His practice involved primarily property law, and for a time he was also a successful speculator in property rights. As a judge he was frequently involved in settling property rights as well as other law and order issues, and as a supreme court justice in the new state of California some of his most complex and publicly contentious issues involved resolving the tensions and conflicts between the older Mexican law of property, the common law, and gold miners’ customary practices. Field’s California experience surely helps explain his passion for both property rights and an individual’s right to pursue any ordinary occupation.

Finally, Field’s political experiences during his tenure on the U.S. Supreme Court deserve examination. As noted, before his appointment in 1863, Field had become friendly with members of the California business elite, including the railroad magnate Leland Stanford who recommended his appointment to President Lincoln, and he maintained strong “informal links with the business elite” of the nation throughout his later career. As with Story, Field’s attachment to strong property principles was surely enhanced by the social life he led outside the courtroom. Of at least equal significance for the development of his constitutional theory, Field was nominated for the presidency at the Democratic Party conventions of 1868 and 1880; he ran a serious

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251. See KENS, supra note 175, at 1–92 (tracing the events of Field’s life from his arrival in California to his nomination to the Supreme Court); SWISHER, supra note 41, at 25–104 (noting Field’s unmatched ability to craft practical legal doctrines for the developing frontier).
252. SWISHER, supra note 41, at 52–104.
253. Id. at 29–30, 37.
254. KENS, supra note 175, at 70–92; SWISHER, supra note 41, at 91–104.
255. SWISHER, supra note 41, at 243–44.
256. KENS, supra note 175, at 226.
257. See supra text accompanying note 110 (discussing Story’s forays into state politics).
campaign to obtain the nomination in 1880, and he was talked about seriously as a candidate again in 1884. Although not victorious in these instances, the adulation and praise showered on Field by these events could have stimulated his ambition and desire to make his mark on American government, which as a Supreme Court Justice he was able to do by means of his constitutional principles theory.

In summary, Justice Stephen Field’s theory of fundamental constitutional principles, which produced a relatively coherent set of bright-line rules that recognized strong property rights and a sharp distinction between the private sphere of action and limited public spheres of national and state government, are much of a piece with his formative life experiences and the apparent ideology it generated. He was an individualist and believer in strong moral principles, and had marked political ambitions to govern the United States in ways that he believed were dictated by “natural,” fundamental principles.

VII. PATTERNS AND CONTRASTS

The doctrine of guilt by association is abhorrent enough in the criminal and deportation fields without being extended into the relation between lawyer and client. Any lawyer who is eminent enough to be named to the Supreme Court of the United States has too able and complex a mind to admit of such an easy explanation. Probably the best place to look, if you want to guess his future attitude toward important cases, is not in his file of clients or in his safe-deposit box but at the books in his private library at home.

—Zechariah Chafee, Jr.

Can any generalizations be made across our three Justices about relationships between their ideological backgrounds, their formative life experiences, and their constitutional theories? To attempt such generalizations, let us consider the possible relevance of five kinds of

258. See KENS, supra note 175, at 169–84, 227–34 (stating that Field’s prestige from sitting on the nation’s highest court made him worthy as a presidential candidate); SWISHER, supra note 41, at 283–99 (same).

259. See KENS, supra note 175, at 236–42 (stating that Field still had the presidency on his mind in 1884); SWISHER, supra note 41, at 300–20 (stating that letters from affluent political leaders mentioned Field’s name for the Democratic nomination in 1884).

260. See ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 359 (1941) (commenting on the nomination of Charles Evans Hughes as Chief Justice of the U.S. Supreme Court in 1930).
formative experiences to the choice of different constitutional theories by the three judges.

A. Religious Background

We have but limited and only rather general information about the religious experiences and beliefs of Joseph Story, Roger Taney, and Stephen Field. But what we know at least suggests, at a general if speculative level, that different religious backgrounds of the Justices may have had some role in their adoption of distinctively different constitutional theories. Joseph Story’s common law constitutionalism and his humanitarian form of Christianity seem to fit together in two respects: in the widespread belief in his time (at least among lawyers) that the common law was a manifestation of God’s will, and in Story’s belief that the common law approach to constitutional law was the best way to serve the public good. Roger Taney’s Catholicism, on the other hand, possibly enhanced his attachment to the state of Maryland in the early nineteenth century and thus his attachment to a theory of originalism that could support a concept of strong states’ rights within our constitutional structure. Possibly too, his pious Catholic mother instilled in him a religiously grounded respect for relying upon fundamental authority like the constitutional text. In contrast, the Puritan upbringing of Field in the family of a Calvinist minister may have formed part of his prelegal education that attached him to the basic idea of using fundamental or absolute moral/legal principles to guide the law. In addition, his relatively secular adult life after he moved away from his Calvinist father’s influence may have encouraged him to seek these fundamental principles in a broader range of less certain authorities than those relied upon by originalists and common law constitutionalists.

261. See supra text accompanying notes 101–03 (discussing Story’s religious background).
262. See, e.g., supra text accompanying notes 79–90 (discussing Story’s common law approach to both the Charles River Bridge case and Swift v. Tyson); 112–13 (discussing Story’s common law approach to the law of slavery).
263. See supra text accompanying notes 165–70 (discussing Taney’s religious background).
264. Id.
265. See SWISHER, supra note 120, at 11 (“[T]he creed of the Puritans was an iron creed, it formed iron character.”).
266. See supra text accompanying notes 238–40 (discussing Field’s upbringing).
B. Prelegal Education

Story, Taney, and Field each seem to have been intellectually influenced in substantial ways by aspects of their prelegal educations, and these influences can be related in a general way to their different approaches to constitutional interpretation. Joseph Story as an undergraduate at Harvard seems to have been enamored with the reading and writing of complex texts, both literary and political, which would appear to be effective training for (and perhaps a kind of indoctrination in) the common law approach to constitutional law.267 Roger Taney fell under the influence of Charles Nisbet, the president of Dickinson College, who based his moral arguments confidently on authoritative texts such as the Bible or the constitutional text.268 Stephen J. Field was influenced at Williams College by the moral philosopher Mark Hopkins, who relied on basic moral principles to analyze and make prescriptions for our ethical and social lives. During his college summers, Field was influenced by his work with Theodore Sedgwick, an exponent of the basic political principles of Jacksonian democracy.269

C. Legal Training and Practice

Critical aspects of our three Justices’ legal training and experiences in practice correlate well with their particular constitutional theories. Joseph Story in his apprenticeship was impressed with the importance of reading the common law; then in practice, both before appointment to the Supreme Court and later as a Harvard law professor, Story wrote several treatises on the common law.270 Roger Taney in his apprenticeship was apparently influenced by a states’ rights judge,271 and his law, political, and related practices in Maryland for many years thereafter involved him in working with the state government on behalf of clients or arguing for the state government in various lawsuits.272 These experiences would

267. See supra text accompanying notes 104–06 (discussing Story’s enthusiasm for reading complex texts).
268. See supra text accompanying notes 171–72 (discussing Charles Nisbet’s ideology and teaching style and its apparent influence upon Taney).
269. See supra text accompanying notes 239–42 (discussing Field’s college-era influences and their apparent effects on Field’s judging and constitutional theory).
270. See NEWMYER, supra note 39, at 38–45, 51, 271–72, 281–304 (discussing Story’s embracing of and extensive involvement with the common law throughout his apprenticeship, legal practice, and scholarship); supra text accompanying notes 107–09 (same).
271. See supra text accompanying notes 173–74 (discussing Taney’s apprenticeship with Judge Jeremiah Townley Chase).
seem to support Taney's attraction to an originalist methodology that justifies state powers. Finally, Stephen Field's establishment of both legal and judicial practices in California at the very beginning of its statehood, with the law on the books both sparse and uncertain, seems well disposed to encouraging a constitutional theory of fundamental principles that blurred or merged natural law and common law authorities and thought.273

D. Political Experiences

Each of our three Justices had substantial political experiences before and, at least in Field's case, after joining the Supreme Court. These experiences seem on the whole to have been quite different from each other, and they too can be correlated with the choice of different constitutional theories. Joseph Story seems not to have been particularly enchanted with most of his legislative experiences, and he tended to involve himself as a legislator in Massachusetts in such "judicial issues" as protecting an independent judiciary and considering the wisdom of legal codification reforms.274 A common law approach, which emphasizes a sharp distinction between law and politics and the special expertise of lawyers needed for understanding, would seem to follow from these kinds of political experiences. In contrast, Roger Taney seems to have enjoyed a rather fulsome political career, as a state legislator, party organizer, and Attorney General for Maryland and then the United States.275 An originalist approach to constitutional law, with its political resonance in terms of historical celebration and its judicial discretion to make "sound" political choices, would seem to be a good fit with Roger Taney's political experiences. Finally, Stephen Field seems to have experienced and enjoyed a somewhat more adventurous and less conventional political career than either Story or Taney, as evidenced by Field's first political offices in the unformed state of California in the 1850s and later in his outside runs for the presidency.276 Field's political career, therefore, seems to mirror and perhaps inform his willingness to

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272. See supra text accompanying notes 177–83 (discussing Taney's extensive legal and political experiences with the Maryland state government).

273. See supra text accompanying notes 251–54 (discussing Field's legal experiences in California).

274. See NEWMYER, supra note 39, at 54–58, 63 (discussing Story's activities and final disillusionment with party politics); supra text accompanying note 110 (same).

275. See SWISHER, supra note 120, at 32–33, 82–83, 143 (discussing Taney's political experiences); supra text accompanying notes 177–90 (same).

276. See supra text accompanying notes 251–59 (discussing Field's unique political career).
base his jurisprudence on the powerful, fundamental principles of his constitutional theory—principles that could support significant changes in law to meet changing circumstances.

E. Socialization

Notwithstanding the doubts about the influence of clients on a judge’s later performance expressed by Zechariah Chafee in the epigram to this Part,277 the different kinds of social experiences of our three Justices also may be related to their constitutional theories. Joseph Story’s family and friends in Massachusetts included significant members of New England’s commercial elite who were interested in promoting economic development with a national market and uniform law promoted by the national government.278 Story’s commitment to the substance of common law and his promotion of a strong national government served these interests. Roger Taney’s substantial professional work was not only with commercial clients in Maryland but also with many different kinds of state and national politicians.279 In this context both his originalist methodology and appreciation for states’ rights under the Constitution can be viewed as helpful to his social as well as political life. Stephen Field appears to have socialized prominently with many capitalist leaders after the Civil War who were intent upon creating new rules for laissez-faire capitalism in the context of the Industrial Revolution,280 and this kind of socialization matches well with Field’s business-oriented constitutional theory of principles.

In summary, perhaps one can say that the main link between the ideological factors and constitutional theories of these three Justices are best captured by three phenomena: the nature of the Justice’s worldview and thought (orthodox or progressivist) as shaped by his upbringing, his religion, and his formal education; the nature of the Justice’s particular political experience and ambitions (legal only, giving legal advice to politicians, or electoral politics for himself); and the nature of the primary audience that a Justice assumes in writing his constitutional opinions.281 Story, the common law constitutionalist, seems to have been

277. Chafee, supra note 260.
278. See supra text accompanying note 111 (describing Story’s friends).
279. See supra text accompanying notes 161–90 (describing Taney’s experiences in different capacities, his relationships with politicians such as Andrew Jackson, and his views on timely political issues).
280. See supra text accompanying notes 255–56 (describing Field’s friendship with Leland Stanford and other prominent California businessmen).
a relatively orthodox thinker whose chief political desire was to articulate well-crafted judicial opinions that would have wide appeal to the legal profession. Taney, the strict originalist, seems to have been an orthodox thinker, too, but one whose main political desire was to establish “sound government” and whose primary or “ideal” audience was, therefore, the country’s mainstream politicians, if not also the public. As explained above, Taney’s broad political goal and his writing for these two primary audiences were well served by originalist constitutional theory.\textsuperscript{282} In contrast, Field appears to have been more of a secular progressivist thinker, desiring to change government (including the law) by advancing basic principles to make American government the best it could be in the new circumstances of the Industrial Revolution. He, too, certainly wanted to appeal to politicians and the public, but perhaps Field’s ideal audience consisted more of change-oriented or radical political types than did Taney’s audience of mainstream politicians.

VIII. LOOKING FORWARD

The historical contexts within which Story, Taney, and Field worked deserve elaboration as shaping influences upon the particular constitutional theories of these Justices. Story and Taney served on the Supreme Court in an era immediately following the founding of the constitutional text and the articulation of a few basic constitutional principles, such as the principles of judicial review and implied federal powers, in the early years of the Marshall Court. They dealt with new kinds of constitutional issues raised by the commercial revolution in antebellum America and the developing national crisis over slavery with only limited constitutional authorities: a sparse constitutional text and relatively few leading precedents. Furthermore, they were working as judges at a time when the common law was by far the dominant feature of legal practices and at a time when “the historical givenness of the Constitution [needed reconciliation] with the idea of self-government.”\textsuperscript{283}

\begin{footnotesize}
\begin{enumerate}
\item[See supra] text accompanying notes 117–19 (explaining that Taney used originalism in part to appeal to the historic and nationalistic instincts of politicians and the public).
\item[Paul W. Kahn, \textit{Legitimacy and History: Self-Government in American Constitutional Theory} 32 (1992). Professor Kahn includes both Joseph Story and Roger Taney among the leading proponents of a “maintenance model” of constitutional law that replaced Chief Justice Marshall’s “making model.” \textit{Id.} at 32–64.
\end{enumerate}
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In this context, it does not seem surprising that Joseph Story would employ the common law as both method and substance in interpreting the constitutional text, or that Roger Taney would pursue an originalist methodology that essentially treated the constitutional text as a contract between the peoples of the United States and their government. These were the legal ideologies commonly available to judges in the first part of the nineteenth century.

Stephen Field, on the other hand, came of age and worked as a judge during the later, more materialistic stages of the commercial revolution in antebellum America, as this revolution became transformed by and merged into the post-Civil War Industrial Revolution. This was a time when vast changes in the economic landscape appeared to demand comparable changes in the relationships between government and business, when moral reforms seemed necessary to many members of the conservative American elite and the ideology of Social Darwinism was affecting many intellectuals and many members of the ruling elite.\footnote{See, e.g., KENS, supra note 175, at 2–5 (describing the relevance of laissez-faire economics, the focus on the rights of individuals and Field's advocacy of entrepreneurial liberty).} Constructing a constitutional theory of moral/legal principles, a theory which draws upon, but is not limited by, the more conventional legal methods of common law constitutionalism and originalism, was a reasonable response to this new context that allowed Field to integrate his pro-business values and his sense of the need for new endurable constitutional rules to meet the new economic and social circumstances after the Civil War with the methods of traditional legal reasoning.

The constitutional theories of twentieth-century Supreme Court Justices have been shaped by still different legal and political contexts. By the early decades of the twentieth century, Justices such as Charles Evans Hughes, George Sutherland, and Benjamin Cardozo were faced by a legal and political landscape that was much different from that faced by Story, Taney, and Field. The Progressive Era produced new kinds of regulatory legislation and the modern administrative state of complex administrative agencies, and by this time there were plenty of constitutional precedents on which to base legal arguments. By the middle of the twentieth century, Justices such as Hugo Black, Felix Frankfurter, and William Douglas were making their constitutional decisions in the context of the Great Depression, the New Deal, World War II, and the Cold War, events that surely raised some skepticism in each of these Justices about the unalloyed virtues of capitalism and that just as surely produced some respect for, and even awe of, the
accomplishments of government and large businesses in helping the country escape the Great Depression and in successfully prosecuting World War II. At the end of the twentieth century, Justices such as William Brennan, Sandra Day O'Connor, and Antonin Scalia faced yet other kinds of complicated political and legal contexts, which included a newfound skepticism about large institutions, especially government, and the civil rights revolutions of minorities, women, and homosexuals. Moreover, these and most other twentieth-century Justices attended law schools and thus conceivably have been influenced in their choice of constitutional theories by the nature of their formal legal studies in ways that differ substantially from the apprenticeships of Story, Taney, and Field.

These changing contexts throughout the twentieth century have surely influenced the particular constitutional theories adopted by twentieth-century Justices. Yet there appear to remain the three basic approaches to constitutional interpretation pioneered respectively by Story, Taney, and Field: common law constitutionalism, originalism, and theories of principle.285 We may then expect, or hypothesize, that there will be some significant relationships between the ideological factors and constitutional theories of Justices that hold over time. In other words, the common law constitutionalism and formative life experiences of Joseph Story may bear some similarity to those of Charles Evans Hughes and Sandra Day O'Connor; the strict originalism and life experiences of Roger Taney may display some similar features to those of Hugo Black and Antonin Scalia; and the theories of principle and the backgrounds of Stephen J. Field, Benjamin Cardozo, and William Brennan may reveal family resemblances. This is the hypothesis that should govern subsequent studies of the relationships between the constitutional theories and ideological factors in the lives of twentieth-century Supreme Court Justices.

285. See Post, supra note 5, at 18–26 (stating that Doctrinal Interpretation focuses on stare decisis, Historical Interpretation focuses on the original intent of the Framers, and Responsive Interpretation focuses on underlying constitutional principles).