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Managing Constitutional Uncertainties and the Constant Conflict between the Federal and State Governments in the United States of America

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Thesis submitted for the degree of
Doctor of Philosophy

Durham Law School
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Abstract

Despite successfully setting out a novel form of government, the Constitution of the United States of America drafted in 1787 has not remained without uncertainties. This thesis contributes to the area of study of US constitutional law by examining whether and how these uncertainties have remained unresolved, and how the United States has been managing these uncertainties since its founding.

It will also establish that these uncertainties have created a constant conflict between the federal and state governments, which also had to be managed by the United States differently throughout the various eras.

In order to demonstrate the above, the thesis will examine the development of three fundamental areas of the Constitution: the Commerce Clause, the protection of fundamental rights and the Guarantee Clause. The findings of the thesis will identify four links between the development of these areas of constitutional law: 1) the management of constitutional uncertainties, 2) the management of the constant conflict between the federal and state governments, 3) the living constitutional values approach, and 4) the purpose of the creation of a uniform national system.

The thesis will conclude that the diverging approaches adopted by the federal government since the Founding era in these areas have created a further uncertainty about how the federal government will manage these uncertainties and the constant conflict at any given time.

Statement of Copyright

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Dedicated to my grandfathers

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Chapter 1: Constitutional Uncertainties and Methods of Interpretation to Resolve the Constant Conflict between the Federal and State Governments in the United States of America

The transformations that the political climate around the world has undergone in recent years have not only been manifest in the area of politics, but that of constitutional law as well. In the European Union, parallel with political debates, the discussions in constitutional law ultimately focus on the powers the European Union was entrusted with in the Treaties of the European Union (or its competences). Whether the power has therefore been withdrawn from the states to act in these areas (or in other words, whether their sovereignty has been limited by these competences) has been an evident constitutional law debate. This debate became even more noticeable alongside the political discussions during the campaign leading up to the referendum of the United Kingdom whether to leave the European Union,[1] which ultimately concluded in its decision to withdraw from the Union.

During the numerous discussions in the European Union surrounding politics in the media or daily conversations, one can often find a lack of discussion about the constitutional law aspects of the arguments. A different perspective, however, emerged with the current 'rule of law crisis' of the European Union.[2]

Since the rule of law is listed as one of the fundamental values of the Union in Article 2 Treaty on European Union,[3] one would expect that the robust protection of this value. The only mechanism available for the enforcement of the breach of this value is laid down in Article 7 Treaty on European Union, which restricts the powers of the

[1] Macer Hall, 'Boris Johnson Urges Brits to Vote Brexit to' (*Express.co.uk*, 20 June 2016) <https://www.express.co.uk/pictures/pics/6566/EU-referendum-Brexit-Remain-Leave-campaign-pictures> accessed 9 June 2018; 'Briefing: Taking Back Control from Brussels' (*Vote Leave*) <http://www.voteleavetakecontrol.org/briefing_control.html> accessed 9 June 2018.

[2] European Parliament, 'European Parliament Resolution of 25 October 2016 with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2015/2254(INL))' <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0409&language=EN&ring=A8-2016-0283#BKMD-20>.

[3] 'Consolidated Version of the Treaty on European Union' Art 2.

European Union when such a value is threatened by a Member State or when a Member State is found to be in breach of this value.[4]

Whilst various institutions of the European Union, such as the Commission[5] or the European Parliament,[6] have contended for years that the rule of law is in grave jeopardy in some of its Member States, such as Poland and Hungary,[7] the number of actions taken by these institutions was constrained in this area. These actions included approving Resolutions at the European Parliament,[8] the Commission adopting a Communication on a 'New Framework',[9] commencing enforcement proceedings against Hungary for breaches of specific legislative measures in contravention of EU law[10] and ultimately triggering the 'nuclear option',[11] the Article 7 enforcement mechanism against Poland in December 2017.[12]

In parallel with the shortcomings of the system to resolve the rule of law crisis itself, the current years have also highlighted various fundamental flaws of the European Union. One such characteristic is its political unwillingness to respond to serious threats to its common values, which it claims to be fundamental to its founding,[13] unless they are so serious that they cannot be ignored. Moreover, it also underlined the inadequacy of the legal provisions of the Union to address such a crisis, such as the Union lacking competence to act in a manner different from that set out in the Treaties.[14]

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[4] ibid Art 7.
[5] See for instance European Commission, Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law COM(2014) 158 final 2.
[6] See for instance European Parliament (n 2).
[7] European Commission, 'Press Release: Commission Adopts Rule of Law Opinion on the Situation in Poland' <http://europa.eu/rapid/press-release_IP-16-2015_en.htm>.
[8] See for instance European Parliament (n 2).
[9] See for instance European Commission (n 5).
[10] See for instance *Case C-286/12 Commission v Hungary* [2012] ECLI:EU:C:2012:687.
[11] Jan-Werner Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' 2012–2013 Paper Series Transatlantic Academy Paper Series 17.
[12] European Commission, 'Press Release - Rule of Law: European Commission Acts to Defend Judicial Independence in Poland' (20 December 2017) <http://europa.eu/rapid/press-release_IP-17-5367_en.htm> accessed 5 January 2018.
[13] 'Consolidated Version of the Treaty on European Union' (n 3) Art 2.
[14] 'Consolidated Version of the Treaty on the Functioning of the European Union' Arts 3 - 6.

Chapter 1: Constitutional Uncertainties and Methods of Interpretation to Resolve the Constant Conflict between the Federal and State Governments in the United States of America

The initial premise of this thesis was to investigate and offer a possible solution to the 'rule of law crisis' of the European Union,[15] by comparing whether and how established federal systems around the world, such as the United States of America or the Federal Republic of Germany, have been established to react to such crises. During the early stages of the study of the United States of America, however, the assumptions of the author that such a federal state would - without a doubt - be able to respond to a crisis to one of its core federal fundamental values were quite swiftly rebutted. The thesis, therefore, sets out to examine whether a 'rule of law crisis' similar to that of the European Union could arise in the United States of America and how it would be managed on a federal level. This study thus required to commence the investigations with the fundamental aspects of US constitutional law.

I. Fundamental Aspects of Constitutional Law of the United States of America

One of the most vital causes of debate about the constitutional nature and structure of the European Union is spurred by the lack of a definition of what the European Union is. This becomes apparent through the lack of agreement and objective understanding by scholars, politicians and citizens on what the European Union is and what it stands for. For instance, whilst scholars argue that the European Union may be regarded an international organisation,[16] others claim that it is of '*sui generis'* nature[17] or that it is a 'federal union of states.'[18] It is, however, less challenging to determine what the European Union cannot be defined as: it is most certainly not a state. If it was to ever aspire to become one, a model that could be suggested for the Union to adopt is that of a federal state, such as that of the United States of America.[19] Such a federal

[15] European Parliament (n 2).
[16] Derrick Wyatt, 'New Legal Order or Old' [1982] European Law Review 147.
[17] HL Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Martinus Nijhoff 1955) 126.
[18] Robert Schutze, *European Union Law* (Cambridge University Press 2015) 75.
[19] See for instance Winston Churchill, 'Mr Winston Churchill Speaking in Zurich 9th September 1946' <http://www.churchill-society-london.org.uk/astonish.html> accessed 1 September 2017.

system, however, did not come into existence without difficulties either. Similar to the European Union, the objectives in the initial stages of the development of the United States were to create a distinct union between the ex-colonies, as opposed to creating a single state encompassing all of them.

I.1. The Era of the Articles of Confederation

Following the American Revolution, the Articles of Confederation created a Confederacy called the United States of America in Article I.[20] The purpose of this 'firm league of friendship' between the states, according to Article III, was declared as:

> their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.[21]

This Confederacy was also characterised by the states retaining 'their sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States.'[22] The difference between the Confederacy and the novel federal system is, thus, highlighted in the above Articles as well. The Confederacy was merely a 'league of friendship' between the states, whilst the newly created federal government in 1787 was, in fact, a state.

Thus, without the 'constituent governments' the common government representing all 'constituent governments' could not exist.[23] The place where the interest of this 'loose federal union'[24] would be represented by 'delegates from the constituent governments'

[20] Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia (1781), Article I.
[21] Articles of Confederation, Article III.
[22] Articles of Confederation, Article II.
[23] Ronald Watts, 'Models of Federal Power Sharing' (2001) 167 International Social Science Journal 25.
[24] Seymour Martin Lipset, *The First New Nation* (Basic Books 1963) 30.

was the Congress.[25] Under Article V, the delegates from the states would meet once a year in Congress.[26] In Article IX, Congress was also seemingly granted with a wide range of powers, such as:

> entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.[27]

As opposed to a common court acting as the supreme judicial authority, it was also Congress that was granted with the powers to act as 'the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever.'[28]

Another fundamental aspect of this confederate system was that Congress did not have any authority to 'act on the people themselves,' since all actions of Congress were concerned with the states.[29] This reluctance to grant the common central authority with more extensive powers may be explained by the previous experience of the drafters of these Articles with Great Britain.[30]

However, it soon became apparent that this Confederacy was not the most adequate choice of government for the representation of the interests of the states as a whole. The states comprising the Confederacy clearly placed their own interests in the foreground of all their activities: they 'operated their own navies,' 'issued [their] own currency' and had their own laws about taxation.[31] Furthermore, the states diverged in their policies greatly and possessed key different features. For instance, the states

[25] Watts (n 23) 25.
[26] Articles of Confederation, Article V.
[27] Articles of Confederation, Article IX.
[28] Articles of Confederation, Article IX.
[29] David L Shapiro, *Federalism: A Dialogue* (Northwestern University Press 1995) 15.
[30] ibid.
[31] Larry N Gerston, *American Federalism: A Concise Introduction* (M E Sharpe 2007) 25.

in the South were characterised as 'plantation economies,' where slavery flourished, while the North focused on 'fishing, shipbuilding, and commerce.'[32]

The problems with this system of government did not only manifest in the actions of the states themselves, but also in the confederate system of government. In Congress, under Article V, each state was given one, equal, vote, and, following Article IX, all actions were to be determined by unanimity.[33] This made it possible for even one state to block any actions of Congress and reaching a unanimous decision highly challenging. Moreover, while Congress was conferred powers to 'requisite' funds from each state to assist in its work, the states did not oblige to these requests and by 1786 it did not have sufficient funding to operate.[34]

Following the call for an unsuccessful convention in Annapolis to reform this system in a situation of 'economic decline', a further Convention was called for in 1787 in Philadelphia, which would transpire into the Constitutional Convention.[35]

I.2. The Era of the Inception and Ratification of the Constitution

I.2.1. The Inception of the Constitution

During the secret meetings of the representatives present during the Philadelphia Constitutional Convention - recorded in notes subsequently released of these discussions[36] - it became apparent to the Framers of the Constitution that setting up a novel system might achieve the aims they set out more effectively than the 'league of friendship'[37] already set up under the Articles of Confederation.[38] However, as

[32] David Brian Robertson, *Federalism and the Making of America* (Routledge 2012) 20.
[33] Articles of Confederation, Articles V and IX.
[34] Robertson (n 32) 21; Geoffrey R Stone and others, *Constitutional Law* (7th edn, Wolters Kluwer Law & Business 2013) 8.
[35] Robertson (n 32) 21; Stone and others (n 34) 8.
[36] United States Constitutional Convention and James Madison, *Notes of Debates in the Federal Convention of 1787 with an Introduction by Adrienne Koch* (W W Norton 1987).
[37] Articles of Confederation, Article III.
[38] Bruce Ackerman, *We the People: Foundations*, vol 1 (Belknap Press of Harvard University Press 1991) 168.

Ackerman highlights, this included defying the provisions of the Articles of Confederation by firstly, attending the Convention, and, secondly, by adopting the new Constitution that required instead of the unanimous consent, the ratification of only nine states out of the thirteen.[39]

The novel federal system proposed in the Constitution included two forms of government within the United States of America: the state and the novel federal governments. Thus, a fundamental question that the Framers needed to address in the Constitution was the balance of powers between these two forms of government within the same system. As illustrated in the chapters that follow, two main approaches about this question can be identified during the Convention debates.

Delegates, such as Madison or Hamilton, who supported the idea of a more powerful central government with wider powers than those of the Congress under the Articles of Confederation, were keen to grant wide powers to the novel federal government.[40] This meant, however, that powers that were previously possessed by the states would be transferred to the new central government. This position, obviously, generated a point of constant conflict that this novel federalist system created.

This constant conflict between the federal and state governments is further enlarged by the uncertain provisions laid down in the Constitution. Whilst key provisions did enumerate the powers of the federal government, this list of powers of the Congress under Article I section 8 raised further issues, since the Constitution did not clearly define what those powers entailed.[41]. We will look at the effects of these problems in constitutional history in Chapters 4 and 5.

The second ideology that was supported by delegates at the Convention, such as Sherman or Ellsworth, was insistent on states retaining the majority of their powers and the novel federal government to be only granted with limited powers.[42] It may be argued that supporters of this ideology had claimed victory over those advocating for

[39] Constitution of the United States of America 1787, Article V.
[40] Robertson (n 32) 22–23.
[41] Constitution of the United States of America 1787, Article I section 8.
[42] Robertson (n 32) 23–24.

a strong national government when the powers of the newly formed national government were enumerated in the Constitution, such as those of Congress mentioned in Article I section 8 above.[43] However, their victory cannot be characterised as complete. Since these provisions were not clearly defined, they created a further uncertainty as to what the limits of the powers of the federal government are.

Therefore, the ground for the constant conflict of federalism was set: the locus of federal and state powers would remain a constant uncertainty, and a point of conflict between the states and the federal government. Moreover, this would also give rise to continuous debates over the method of interpretation of the Constitution: should it be interpreted based on the text alone or is there an 'invisible Constitution'[44] that relies on further sources to interpret the Constitution?

I.2.2. The Ratification of the Constitution

Following the Philadelphia Convention, the Constitution was sent to the states for ratification. It is highlighted that the process of ratification of the Constitution itself already differed largely from the previous process of legislation under the Articles of Confederation. Whilst the latter required unanimity, the Constitution only required a two-third majority of the votes for ratification from states under Article VII.[45] However, not all states were keen to ratify the Constitution with immediate effect. Thus, ratification debates ensued in many of the states.

While these ratification debates took place, The Federalist Papers[46] were originally published as newspaper articles addressed to the citizens of New York under the name Publius.[47] As James Madison highlighted, the pseudonym Publius referred to

[43] Constitution of the United States of America 1787, Article I section 8.
[44] Laurence H Tribe, *The Invisible Constitution* (Oxford University Press 2008).
[45] Constitution of the United States of America 1787, Article VII.
[46] Alexander Hamilton and James Madison, *The Federalist Papers* (Yale University Press 2009).
[47] Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005) 69; James Madison, 'Madison's Account of The "Federalist"', *Federalist: A Commentary the Constitution of the United States* (1898) xlix.

Valerius Publicola,[48] one of the leaders of the Roman Revolution. In these papers, three members of the group called Federalists - comprised of Alexander Hamilton, James Madison and John Jay -, argued for the ratification of the Constitution and a stronger federal government. Unsurprisingly, two key members of this group were Madison and Hamilton, who argued, as they did during the Constitutional Convention, that the federal government should occupy a strong position in this new system of government, through wider powers allocated to it than under the Articles of Confederation.

In their work, the creation of the constant constitutional conflict between the federal and the state governments may also be identified. Firstly, both Hamilton and Madison found it important to emphasise that the states would not be abolished in the novel system of the United States of America created by the Constitution. For instance, Hamilton argued that:

> The proposed Constitution, so far from the abolition of the State governments, makes them constituent parts of the national sovereignty.[49]

He further claimed that the states occupied such position as they were not only given 'direct representation in the Senate,' but were also left with 'certain exclusive and very important portions of sovereign power.'[50]

The Anti-Federalists, those arguing for a federal government with limited authority, occupied the key positions on the other side during the ratification debates.[51] For instance, as will be examined further in Chapter 3, in Pennsylvania and Virginia, where both states had adopted their own Bill of Rights, during the ratifying Conventions, the lack of a federal Bill of Rights – that would have mirrored these state protections at federal level - was raised as one of their main objections to the ratification of the Constitution.[52]

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[48] Madison (n 47) xlix.
[49] Hamilton and Madison (n 46) No IX 46.
[50] ibid.
[51] William W Wiecek, *The Guarantee Clause of the US Constitution* (Cornell University Press 1972) 68; Stone and others (n 34) 10.
[52] See Chapter 3, section III.2.3. for a further discussion about this.

It will be further analysed in Chapter 3 how this challenge was overcome by the Federalists, ultimately resulting in the adoption of the Constitution. Interestingly, the Bill of Rights was not added to the main text of the Constitution following its ratification, but was adopted in the form of ten amendments, attached to the end of the document. Whilst the Tenth Amendment to the Constitution, as part of this Bill of Rights, did attempt to address the constant conflict between the states and the federal government over the limits of the powers of each, the wording of it provided further room for interpretation:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[53]

Whilst the first part of this Amendment, at first sight, might seem to set clear limits to the powers of the federal government, the living nature of the Constitution must also be considered when reading this provision. If the powers delegated to the federal government are not clearly defined, the powers that, thus, remain with the state governments will, consequently, not be clearly defined either. It will, therefore, be examined further whether fundamental provisions of the Constitution of the United States of America establish limits to these powers and how these have developed since the Founding era.

The chapters that follow will also examine these debates in more detail when these contributed to the evolution of how this constant constitutional conflict has been managed in the areas examined.

During the ratification debates, it was those arguing for the adoption of the Constitution that could claim victory when New Hampshire ratified the Constitution as the ninth state.[54] The methods by which the United States of America came into existence, however, pose constitutional questions up until today.

[53] Constitution of the United States of America 1787, Amendment X.
[54] Amar, *America's Constitution: A Biography* (n 47) 6.

It may, on the one hand, be claimed that the delegates to the Constitutional Convention did not have the authority to speak for the people of the United States of America, especially provided that the Convention itself could be argued to have been convened contrary to the Articles of Confederation. On the other hand, the ratification of the Constitution by the states may ascertain that the Constitution, in fact, speaks for 'We the People,' as set out in its Preamble.[55] Moreover, intriguingly, it was only Massachusetts and New Hampshire whose constitutions were previously ratified by the states,[56] thus making it possible to claim that the federal Constitution was a manifestation of the will of the people even more so than many of the state constitutions at the time.

This work will demonstrate that despite the Constitution acting as the cornerstone of the federal system of government of the United States of America, since its inception no definitive answer has been proclaimed for the conflicts highlighted above that resulted from the creation of this system so far. This position, thus, creates a further conflict in the United States of America: the Constitution and its interpretation may at one point in time enable, and at another inhibit advances in society.

This works aims to demonstrate the above through examining three key and ambiguous constitutional provisions: the Guarantee Clause, the due process clause of the Fourteenth Amendment and the Commerce Clause. Throughout the study of the historical developments and current state of these provisions, an emphasis will be placed on the transformative 'constitutional moments' in the history of the United States, adopting the definition from Ackerman:[57] the Founding, the Reconstruction and the New Deal Era.

II. Interpreting the Constitution

[55] Constitution of the United States of America 1787, Preamble.
[56] Amar, *America's Constitution: A Biography* (n 47) 6.
[57] Ackerman, *We the People: Foundations* (n 38).

Throughout the examination of the three fundamental areas of the Constitution, special attention is going to be placed on the interpretation of the Constitution itself.

II. 1. Three separate branches of government

One of the fundamental differences of the federal system created in the Constitution compared to the one created by the Articles of Confederation was the creation of the three separate branches of federal government. Under this structure, Congress is to act as the legislative branch,[58] the President takes on the role of the executive[59] and the Supreme Court acts as the judicial arm.[60] Each branch of the government is required to act within the bounds of the Constitution while fulfilling their roles. It is, therefore, argued that performing the roles assigned to them by the Constitution, involves the interpretation of the Constitution by each branch. Thus, if the basis of a legislative Act of Congress is understood differently by Congress and the President or the Supreme Court, a conflict is consequently created that originates not only from the provision in the Constitution, but its interpretation as well.

Consequently, it is argued that the separation of powers principle, which is bound to ensure the checks and balances within the federal system,[61] also relies on the interpretation of the Constitution. The checks and balances system would only function to its upmost effectiveness when all three branches of government adopted the same method of interpretation of the Constitution. If the separate branches adopted different interpretative methods, a conflict would always be present within the arms adopting different methods of interpretation. A clear illustration of the above can be observed in Chapter 5 that sets out to study the development of the commerce clause: if Congress enacts legislation based on the interpretation of the Constitution that allows them wide-ranging powers under the commerce clause, this Act would be ruled constitutional by a Supreme Court that adopts the same methods of interpretation. However, if the

[58] Articles of Confederation 1777, Article I section 1.
[59] Articles of Confederation 1777, Article II section 1.
[60] Articles of Confederation 1777, Article III section 1.
[61] MNS Sellers, 'Republicanism: Philosophical Aspects' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier Science Ltd 2001) 13208; Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997) 180–183.

majority of the Supreme Court Justices adopts a method of interpretation that advocates for the narrow reading of the same provision, the same Act would be ruled unconstitutional.

In such an instance, the question arises: the actions of which branch of government are to be held supreme over the other. A case decided at the Supreme Court in 1803 provided the United States of America with an answer.

II. 2. The Supreme Court: the ultimate arbiter?

Since the powers for the federal government to act arise from the provisions laid down in the Constitution, all measures adopted by the federal government must have a constitutional basis. Whilst Article III section 1 of the Constitution grants the Supreme Court with the judicial powers in the United States of America,[62] the Framers of the Constitution laid down the powers of the Supreme Court in quite ambiguous terms. This resulted in a fundamental dispute arising soon after the adoption of the Constitution, requiring the Supreme Court to determine whether it had a power of judicial review under the Constitution.

In the early case of *Marbury v Madison*[63] Marbury petitioned the Supreme Court to issue a writ of mandamus to compel Madison, the Secretary of State, to deliver the commission of Marbury as 'a justice of the peace for the County of Washington, in the District of Columbia' in line with an 'act of congress passed in February, 1801,' and signed by the previous President.[64] Such a petition by Marbury proved necessary as the then President Jefferson refused to deliver his commission.[65]

After establishing that Marbury did have the right to have the commission delivered to him, Chief Justice Marshall, in his opinion, emphasised that:

[62] Constitution of the United States of America 1787, Article III section 1.
[63] *William Marbury v James Madison, Secretary of State of the United States* (1803) 5 (1 Cranch) US 137.
[64] ibid 137.
[65] Stone and others (n 34) 25.

> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.[66]

He subsequently devised the political question doctrine, claiming that when 'the heads of departments are the political or confidential agents of the Executive,' their acts may only be review politically.[67] However, he asserted, that when they perform 'a specific duty [that] is assigned by law, and individual rights depend upon the performance of that duty,' and these rights get violated, the individual should be able to rely on 'the laws of his country for a remedy.'[68] After establishing that the rights of Marbury had been violated, Chief Justice Marshall concluded that he should be provided with a legal remedy.[69]

The vital importance of this judgment lies in the subsequent part where Chief Justice Marshall discussed what remedies Marbury could be provided with. While doing so, he laid down the foundations of judicial review in the United States of America. He firstly declared that the Judiciary Act of 1789 granting the Supreme Court with the powers of issuing writs of mandamus was contrary to the Constitution and, thus, could not be relied upon by Marbury.[70] In deciding whether the Act was constitutional, he relied on Article III of the Constitution that granted the Supreme Court with two types of jurisdiction: original and appellate.[71] He consequently held that any Act of Congress expanding the powers of the Supreme Court over those granted to it by the Constitution was contrary to the Constitution.[72]

After declaring that 'an act of the Legislature repugnant to the Constitution is void,'[73] he highlighted that it is the judiciary that should decide 'on the operation of each,' when

[66] *William Marbury v James Madison, Secretary of State of the United States* (n 63) 164.
[67] ibid 166.
[68] ibid 166.
[69] ibid 167 - 168.
[70] ibid 177.
[71] Constitution of the United States of America 1787, Article III section 2.
[72] *William Marbury v James Madison, Secretary of State of the United States* (n 63) 177.
[73] ibid 177.

a conflict between two laws arises.[74] Thus, he asserted, in situations where a law and the Constitution came into conflict, it was up to the Supreme Court to decide which laws applied, in line with 'the very essence of judicial duty.'[75] Thus, it is argued, he resolved two constitutional uncertainties by arguing that the Supreme Court did, indeed, have powers of judicial review. The first conflict that was resolved by this was the one created by the silence of Article III of the Constitution, and the second was the conflict created based on the different methods of interpretation by different branches of the federal government.

The Supreme Court, thus, also became the ultimate arbiter of the changes in the interpretation of the Constitution. Following the decision in *Marbury v Madison*,[76] the Supreme Court has accepted this role and has adopted two different interpretations of the Constitution in its decisions.[77]

II.2.1. Originalist Interpretation

One of the methods of interpretation adopted by the Supreme Court is the originalist one. This technique can be summarised as the view that the interpretation of the Constitution should follow the original meaning of the Constitution, as viewed at the time of its adoption.[78]

Interpreting the Constitution in light of the intentions of the Framers of the Constitution was undeniably less challenging while the Framers were still alive:[79] those interpreting the document could rely on the Framers themselves to provide them with guidance when in doubt. If one is to rely on the intent of the Framers in interpreting the Constitution nowadays, however, they are faced with a highly arduous task. As Justice Scalia highlighted, this currently requires the investigation of 'an enormous mass of material' that would, in fact, befit a historian rather than a lawyer.[80] In addition,

[74] ibid 178.
[75] ibid 179.
[76] ibid.
[77] Erwin Chemerinsky, *Constitutional Law* (4th edn, Wolters-Kluwer 2013) 11–12.
[78] Stone and others (n 34) 722.
[79] Ackerman, *We the People: Foundations* (n 38) 88.
[80] Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849, 856–857.

interpreting materials from the Founding era to determine the original meaning or intent of the Framers can also yield different results, depending on the materials selected for guidance and the method of interpretation chosen. Thus, for instance, while 'textualists' would rely on the 'linguistic and social contexts' of the era, 'original structuralist' would rely on placing 'the institutions in their original contexts' to determine the interpretation of a particular provision of the Constitution.[81]

If one was to follow the strict textual interpretation of the Constitution in 1787, they would also be faced with another challenge: how to transform the provisions of the Constitution to ones that are suitable for our current era. The Framers of the Constitution could not have anticipated the changes in society that occurred following the ratification of the Constitution. In order to ensure that the Constitution may be used as a cornerstone for our current society, those advocating for the originalist interpretation had to identify a method by which this interpretation could cater for the situations arising throughout each period of time. Thus, for instance, the Framers would not have had an opinion on whether the electric chair constituted 'cruel and unusual punishment' under the Eighth Amendment, since an electric chair would not have been used at the time.[82]

In such a situation, two originalist methods of interpretation may provide especially useful: first, that of attempting to identify the original intent of the Framers, and, second, that of relying on the democratic process set out in the Constitution.

First, relying on the original intent of the Framers instead of the narrowest interpretation of the text allows those adopting the originalist interpretation to be adaptable to situations not previously anticipated by the Framers. Such an original intent can be identified as what 'the general (or generally educated and politically attentive) public' regarded the provisions to stand for at the time the Constitution was adopted.[83] One must, therefore, pay close attention to interpreting the statements

[81] Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204, 218.
[82] SL Whitesell, 'The Church of Originalism' (2014) 16 Journal of Constitutional Law 1531, 1555–1556.
[83] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart Publishing 2009) 258.

made by the Framers as the general opinion of the public at the time, since as Powell highlighted, even Madison claimed that these should be 'regarded strictly as private opinions.'[84] Subsequently, if a provision of the Constitution is subject to interpretation, the originalist method would require the examination of a wide array of materials available to establish what the general public opinion was at the time as the original intent.

Thus, the other possible method of using the originalist interpretation to establish whether a transformation of the understanding of the provision had taken place is to use another argument of Scalia. He claimed that the Framers established a system whereby through elections, the people may have the opportunity to change those in power, thus, signalling a shift in the current values of society if those voted in advocated for those different values.[85] However, he still claimed that elections would 'prevent certain changes in original values,' thus ensuring that whilst the current values would be reflected in the legislation enacted by the new government, these would stay true to the original values laid down in the Constitution.[86]

Whilst this method of interpretation may provide useful when investigating the original intent of the Framers, the second possible method of interpretation with its more flexible approach to the Constitution may prove to be more effective in allowing the Constitution to be adapted to each period of time. The reasons for this will be investigated briefly below and will also be demonstrated through the study of the three key fundamental areas in the Constitution in the subsequent chapters of this thesis. While examining the above, each chapter will commence with attempting to identify what the original understanding of each provision could have been at the time of the drafting and adoption of the Constitution and will consequently examine whether this understanding has transformed over the years.

[84] Jefferson H Powell, 'The Original Understanding of Original Intent' (1985) 98 Harvard Law Review 885, 938.Powell 938
[85] Scalia (n 80) 862.
[86] ibid.

II.2.2. Non-originalist methods of interpretation

If one is to look for a more effective method of adapting the provisions of the Constitution to the values and circumstances of our current society, this thesis argues that the non-originalist interpretation methods of the Constitution may prove more suitable.

This method, as opposed to the textual provisions, places an emphasis on the values which should conform to the Constitution, while arguing that the Constitution is not a static document, but is 'an evolving historical practice.'[87] Subsequently, non-originalists claim that when making decisions about a case when a dispute about a provision of the Constitution arises, it should also be considered that the conditions and the values in 1787 were different from today. The Constitution was drafted by white males, some of whom were slaveowners and who certainly did not know what a mobile phone or the internet was, since these did not exist at the time. However, the Constitution written in that year must conform to our current society and the connection between these two eras may be made by uncovering the fundamental values that the Constitution and each of its provisions encompassed.

Whereas Scalia under the originalist method of interpretation argued that any changes in values would only be able to take effect if a change in government took place through elections, the non-originalist method of interpretation allows the Supreme Court to recognise these changes in values before such changes in government take place. Thus, it becomes a fundamental point of contention in such a system whether the Supreme Court (those unelected by the People) may be able to better represent the values of the People than those who have been elected by them, i.e. the Congress or the President.[88]

This method also brings to light the conflict that if the other branches of government accepted the originalist method of interpretation, the same provision of the Constitution may be interpreted differently by the Supreme Court using the non-originalist method.

[87] Ackerman, *We the People: Foundations* (n 38) 34.
[88] See for instance Scalia (n 80) 854., who argues that Congress is more representative of 'societal values' than the Supreme Court.

Following the decision in *Marbury v Madison*,[89] it would consequently be the method of interpretation adopted by the Supreme Court that would prevail. This would consequently evolve to the same point of contention as above, if Congress or President (those elected by the People) adopt the originalist method of interpretation, why would the decision of the unelected Justices at the Supreme Court prevail.

Those adopting the non-originalist method of interpretation may rely on the intentionalist technique to provide reasons for the authority of the Supreme Court in the above points. As Brest set out in what Monaghan referred to as his 'constitutional decision making criteria,'[90] the intent of the Framers may be derived from three sources:

1) 'any instances of the rule's application which passed through [their] mind during the process of adopting it;'
2) 'the language of the rule [they] drafted;' and
3) 'the undesirable consequences [they] hoped to avoid by enacting the rule.'[91]

Therefore, the text of the provision in question would thus only provide a starting point for establishing the intent, and the other sources would occupy the same level of importance as the Constitution itself.[92]

Another approach utilised by the non-originalists is that of the 'living Constitution.'[93] Ackerman described this approach by arguing that the Constitution is 'an evolving historical practice' during which 'each generation contributed to our constitutional legacy.'[94] Ackerman, thus, argues that instead of drawing comparisons with various philosophers, when adopting this method of interpretation, the focus should be placed on examining the decisions that were made by 'We the People' in America.[95]

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[89] *William Marbury v James Madison, Secretary of State of the United States* (n 63) 177.
[90] Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 New York University Law Review 353, 385.
[91] Brest (n 81) 210.
[92] ibid 209.
[93] Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 Northwestern University Law Review 549.
[94] Ackerman, *We the People: Foundations* (n 38) 34; Bruce Ackerman, *We the People: The Civil Rights Revolution*, vol 3 (The Belknap Press of Harvard University Press 2014) 34.
[95] Ackerman, *We the People: The Civil Rights Revolution* (n 94) 34–35.

Two other techniques adopted by Tribe and Brest as non-originalist methods of interpretation of the Constitution may be grouped together as those focusing on the values derived from the Constitution. The two differ on how these values are to be determined. The focus of the technique adopted by Tribe is the current values. He argued that it is 'the contemporary content of freedom, fairness and fraternity' that would be required to be investigated by 'both Court and country' in cooperation under this non-originalist method.[96] The emphasis in the approach advocated for by Brest is, however, placed on those 'values that are fundamental to our society.'[97]

This thesis sets out to demonstrate that a non-originalist method of interpretation, which may be referred to as the living constitutional values approach - blending the techniques adopted by Ackerman, Tribe and Brest - would provide the most effective method of interpretation of the Constitution if a threat of or an actual 'rule of law crisis,' such as the one currently taking place in the European Union would ever materialise in the United States of America. The living constitutional values approach, thus, requires the adoption of three key statements:

1) The Constitution is not a static document that is incapable of evolving and adapting to changes in society. It is, however, a constantly transforming document based on the decisions made by each generation.
2) The Framers intended to lay down certain fundamental values during the drafting and adoption of the Constitution that may be discovered by using various methods, such as the constitutional decision making criteria of Brest.
3) The constitutional values of each generation may vary and the Constitution is able to accommodate these changes in values as long as it can be demonstrated that these conform to the fundamental constitutional values discovered as such during the drafting and adoption of the Constitution.

Utilising three key areas of constitutional law, this thesis sets out to demonstrate the reasons why adopting the living constitutional values approach may provide the most

[96] Scalia (n 80) 853.
[97] ibid.

effective method of interpretation when the fundamental values that could be unveiled as part of this approach are in grave jeopardy by a state.

Since the Supreme Court has adopted the role of ultimate arbiter, a focus is going to be placed on the decisions of the Supreme Court over the various eras in the ensuing chapters. This further sets out to reflect the living constitutional approach – how the interpretation of the Constitution has changed with the generations and how this has resulted in the Constitution being able to be adapted to different circumstances. The chapters will also demonstrate how the values comprised in each of the provisions of the Constitution examined have transformed throughout the ages. One key provision, where the transformations have been constant and apparent is the understanding of the values included in the commerce clause.

This work aims to demonstrate how these approaches have also influenced the interpretation of the Constitution at various key eras in the United States and whether these have resulted in a successful method of dealing with its constitutional uncertainties and the constant conflict between the federal and state governments.

II.2. The rise and fall of dual federalism

Chapters 3, 4 and 5 of this work will identify and further analyse the first response of the federal government, and especially the Supreme Court, to the management of the constitutional uncertainties created by the Commerce Clause[98] and the Bill of Rights.[99]

The first response of the Supreme Court to the constant conflict is identified in the case of *Gibbons v Ogden*,[100] which will be examined in detail in Chapter 4. In this case Chief Justice Marshall interpreted the Constitution and the system that it created as what Corwin coined a 'dual federalist' system.[101]

[98] Constitution of the United States of America 1787, Article I, section 8, third clause.
[99] Constitution of the United States of America 1787, Amendments I - X.
[100] *Gibbons v Ogden* (1824) 22 US 1.
[101] Edward S Corwin, 'Congress's Power to Prohibit Commerce a Crucial Constitutional Issue' (1933) 18 Corrnell Law Quarterly 477, 481.

According to this interpretation, the two systems of government could co-exist because they regulated two separate spheres. Thus, as long as each level of government regulated only in its respective area, the status quo would be maintained and the constant conflict between these two governments would be managed effectively.

Chapter 3 will examine that in the area of the protection of fundamental rights, a similar approach of the Supreme Court may be identified where the protection of fundamental rights was initially regarded to be an area that only states may regulate.

However, the following chapters will demonstrate that this method of interpretation could not be maintained, and even the Justices of the Supreme Court immediately following Chief Justice Marshall disagreed with this interpretation of the Constitution.

II.3. Civil War

Another key moment in the management of constitutional uncertainties and the constant conflict between the federal and state governments was the rise of and the Civil War itself.

Chapters 2 and 3 will concentrate and analyse the response of the federal government to the uncertainties created around the status of slavery. As will be demonstrated in these chapters, the issue of slavery did not only raise questions regarding the status of the slaves and ex-slaves as individuals, but also generated a dual conflict. This dual conflict consisted of the usual vertical conflict between the federal and state governments and the horizontal conflict between the Northern and Southern states. Whilst most Northern states advocated the abolition of slavery, most Southern states insisted on the maintenance of this system. In order to do so, they claimed that any powers to regulate the issue of slavery remained with the states, and did not belong to the federal government.[102]

[102] See Section V.1 of Chapter 2 of this work for a further discussion about this.

The Southern States' defeat in the Civil War also resulted in fundamental constitutional questions that will be analysed further in Chapter 2. For instance, a key question became whether these states remained part of the United States of America during the Civil War and if not, whether they would have to satisfy the condition of being a 'republican form of government' under the Guarantee Clause of the Constitution in order to be (re)admitted to the Union.[103]

The era of the Reconstruction, during which time the federal government aimed to re-integrate the Southern states into the United States of America, resulted in further constitutional changes. This period is thus characterised by the federal government establishing a stronger position and aiming to address the constant conflict further. In the Thirteenth Amendment, adopted as one of the Reconstruction Amendments, slavery was abolished, thus bringing the issue of slavery under the authority of the federal government, as opposed to the states. Moreover, as Chapter 3 will further demonstrate, the Fourteenth Amendment also addressed the two characteristics of the debate around slavery. It firstly aimed to resolve the constitutional uncertainty created around the status of the ex-slaves, and, secondly, it aimed to resolve the constant conflict between the federal government and the states in the area of the Bill of Rights. The methods of doing so will be analysed further in that chapter.

II.4. The New Deal

Chapter 5 will also illustrate how the constitutional uncertainties around the Commerce Clause and the constant conflict between the federal and state governments played a role during the New Deal.

This programme, devised by President Roosevelt as a response to the Great Depression, advocated for a stronger federal government. To do so, President Roosevelt could take advantage of the constitutional uncertainties created by the Constitution in the Commerce Clause and the blurred lines between the limits of the

[103] Constitution of the United States of America 1787, Article IV section 4.

powers of the federal and state governments in this area. Whilst the Supreme Court was initially opposed to the expansion of the powers of the federal government under the Commerce Clause, 'a switch in time' occurred, that, in fact, accepted the approach espoused by Congress, expanding the powers of the federal government under the Commerce Clause.[104]

Throughout the examination of the development of these areas of constitutional law in the United States, this work will also aim to demonstrate whether during these key times the living constitutional values approach may be argued to have been adopted by the Justices of the Supreme Court, thus, allowing the constitutional provisions to adapt to the circumstances of each era.

III. Structure of the thesis: the guarantee of a republican government , fundamental rights and interstate commerce

Chapter 2 of this work will focus on the constitutional uncertainty created in the federal Constitution in another fundamental provision: the Guarantee Clause. Article 4 section 4 of the Constitution of the United States of America states:

> 'The United States shall guarantee to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.'[105]

The chapter will highlight the constitutional uncertainties created in this clause regarding what a republican form of government entails. It will also demonstrate that the constant conflict manifests itself in a varied manner in this area. The conflict in this area, where the federal government was clearly granted authority, has not revolved around the powers of the federal and the state governments in this area. Instead, it has been the separate branches of the federal government that have entered into a state of constant disagreement over which branch has the responsibility of enforcing the Guarantee Clause.

[104] Chemerinsky, *Constitutional Law* (n 77) 169.
[105] Constitution of the United States of America 1787, Article IV section 4.

Chapter 3 will investigate the constitutional uncertainties that originally arose from the state constitutions as opposed to the federal Constitution. It will demonstrate how the varying protections afforded to individuals in the United States of America in the various states have created an uncertainty that was to be solved with the adoption of the Bill of Rights. However, it will also illustrate that with a lack of clear interpretation on whether the Bill of Rights would apply against the states, the constant conflict between the federal and state governments was also present in the development of this fundamental area as well. It will also argue that this conflict was also manifest in the constitutional methods of interpretation adopted by the Supreme Court at different times throughout the ages.

Chapters 4 and 5 of this work will further examine the Commerce Clause of the Constitution. Article I, section 8 in clause 3 of the Constitution states:

> 'The Congress shall have power […] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'[106]

Chapter 4 will emphasise the constant uncertainty as to whether this clause prohibits states from regulating interstate commerce. The study of this, dormant, aspect of the Commerce Clause will place an emphasis of how constitutional uncertainties in this area have been created since the drafting of this provision. It will further illustrate how these uncertainties have contributed to the constant conflict between the federal and state governments in this area.

Chapters 4 and 5 will also demonstrate that the constitutional uncertainties and the constant conflict in this area have contributed to the creation and protection of a uniform national market through the different methods of interpretation of the Constitution adopted by the federal government.

Chapter 5 will study the Commerce Clause from the obvious aspect apparent at first sight in the clause. This, affirmative aspect will examine how Congress has used its powers to regulate interstate commerce since the ratification of the Constitution. The chapter will also draw parallels to the uncertainties that have been present for the

[106] Constitution of the United States of America 1787, Article I section 8 clause 3.

dormant aspect of this clause and assess whether these have also had an impact on the development of the affirmative understanding of this clause. It will also analyse how the management of the constant conflict between the federal and state government has also impacted upon the development of not only the interpretation of this clause, but that of the national market as well.

The concluding remarks of the thesis will firstly summarise the findings of the examinations in the above chapters, and analyse how managing the constitutional uncertainties in these key areas have created similar and diverging approaches to the interpretation of the Constitution throughout the different eras. It will also assess whether these approaches have assisted the various advancement of society throughout the ages and the creation of a uniform, federal, approach.

Chapter 2: Protecting the United States of America from a tyranny by creating federal and state republican governments

The constitutional value set out in the Guarantee Clause

I. Introduction

Article IV section 4 of the Constitution of the United States sets out that the 'United States' guarantees 'a republican form of government' to each State by the federal government and pledges for the protection of the states against 'invasion' and 'domestic violence'.[107] As apparent from the clause, however, 'a republican form of government' was not clearly defined in this provision. Neither was it clearly set out which part of the federal government was to act as the enforcer of this clause. Since its inception, the meaning and importance of the Guarantee Clause has, therefore, been a subject of academic, judicial, and political debate.

The chapter will firstly examine what a republican form of government that is guaranteed under Article IV section 4 can be characterised as in light of the originalist method of interpretation. It will, thus, aim to establish what a republican form of government may have been understood as in 1787, by examining the ancient and modern ideals of a republican government, and will place a particular emphasis on the works of Montesquieu, who, as it will be argued, highly influenced the ideologies of the Founding Fathers. It will subsequently assess whether United States of American may be regarded the first federalist state embracing the modern republican ideals and whether the Constitution itself may be regarded a republican instrument under these principles. It will consequently examine the history of the drafting and adaptation of the Guarantee Clause at the Constitutional Convention.

Afterwards, the chapter sets out to examine how the concept of the republican form of government has been applied in the separate branches of the federal government, and how the meaning of what a republican government entailed had transformed

[107] Constitution of the United States of America 1787, Article IV section 4.

through the various interpretations adopted about this clause. The chapter will also study whether Congress, the President, or the Supreme Court has assumed the role of the enforcer of this clause, and if and when they did so, whether they have performed their role successfully.

The chapter aims to demonstrate the hidden potentials of this current 'sleeping giant',[108] and will argue that whether this giant will be awaken at any point in time will always depend on whether a federal government will risk intervening in highly sensitive, but fundamental, political questions.

II. A republican form of government

Article IV section 4 of the Constitution guarantees 'a republican form of government' to each State in the United States. In order to fully analyse the development and importance of the Guarantee Clause in light of the living constitutional values approach, what may constitute a republican government shall be defined first. This will involve an analysis of what a republican form of government could be defined as in 1787 in light of the originalist interpretation.

As a political and philosophical concept, the republican government has been present since ancient times, and has been examined and applied in various historical eras.[109] During this process, the understanding of what such government may entail has also widened and, in certain situations, transformed. It, therefore, has to be examined further how this understanding has transformed and what the republican form of government was characterised as at the time of the drafting of the Constitution.

The word republic originates from the Latin '*res publica*', which is translated to 'the shared or common thing'.[110] A republican government, however, has been identified

[108] *Congressional Globe,* 40th Cong, 1st Sess 614 (1867) and Jacob M Heller, 'Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions' (2010) 62 Stanford Law Review 1711, 1715; Wiecek (n 51) 168.
[109] Samuel B Johnson, 'The District of Columbia and the Republican Form of Government Guarantee' (1994) 37 Howard Law Journal 333, 358.
[110] AW Saxonhouse, 'Republic' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier Science Ltd 2001) 13193.

variably by different people during history.[111] The thesis will follow the approach adopted by Pocock, who asserts that the understanding of a republican form of government can be separated into two groups: the ancient and the modern ideal.[112]

II.1. The ancient republican government

The inception of the ideal of a republican government is attributed to Cicero and Titus Livius.[113] Cicero identified the 'republic' as a state that is the property of the people, where the laws are consequently enacted for the common good of the population.[114] He further argued that in a republican government, the establishment of certain institutions becomes necessary to ensure that the common good is always observed.[115] It has, therefore, been an accepted view that Cicero and Titus Livius introduced the concept of the 'checks and balances' into the republican government.[116]

The followers of the ancient ideal of the republican government also believe that a republican government can only exist in a small state, such as a city-state, since this form of government requires the direct representation of the people themselves, which can only be viable and effective in a small state.[117] Since the citizens of such a state are also limited in number, this will enhance the possibility of determining the common good for the population in a harmonious and effective manner.[118]

II. 2. The reshaping of the ancient ideal

The ancient ideal of the republican government has been revived and reshaped in various stages of history. In the Middle Ages, a republican government was understood as a political organisation against the canonic institutions, whilst towards the end of

[111] Johnson (n 109) 358.
[112] JGA Pocock, 'America's Foundations, Foundationalisms, and Fundamentalisms' (2005) 49 Orbis 53, 53.
[113] Sellers (n 61) 13204.
[114] ibid 13205.
[115] ibid 13204.
[116] ibid.
[117] Pocock (n 112) 53; Sellers (n 61) 13205.
[118] Sellers (n 61) 13205.

the era, it became identified as the form of government opposed to tyranny.[119] During the Italian Renaissance, a republican government was categorised as one promoting 'the political liberty of the Roman Republic'.[120] Machiavelli revived the checks and balances concept of the ancient ideal, and further claimed that states in history had two forms: a republican or a principality.[121] In the seventeenth and eighteenth century England, a republican form of government was characterised as one where the aristocratic class participated in politics.[122]

It may, therefore, be argued the ancient ideal of the republican government required the creation of laws for the common good, and the direct participation by the citizens in the political life of the state, which was only possible in a small state.

Moreover, this ideal, in its reshaped form, allowed for the creation of different hierarchical classes of society, such as the aristocracy.[123] Sunstein argued that the creation of these classes also assisted in the determination of common good, since such good was identified as the 'common interests among members of different social classes'.[124] It is, however, argued that the existence of different classes will make the determination of the common good more challenging. In a small state, it may be easier for the different classes to assemble than in a large state with a large population. Depending on the size of these different classes, they may be able to influence the determination of the common good, which may result in a decision favouring their private or class interests. This decision, on the other hand, can be easily regarded as one against the common good, favouring the private interests of a specific class instead. If one follows the ancient interpretation of the common good, that only applied to certain members of the society, who were allowed to participate in politics. Slaves or women, for instance, were not provided with the opportunity to do so.

[119] Saxonhouse (n 110) 13194.
[120] ibid.
[121] ibid.
[122] ibid.
[123] Cass R Sunstein, ‘Beyond the Republican Revival’ [1988] Yale Law Journal 1539, 1543.
[124] ibid 1565.

Consequently, it may be asserted that the ancient ideal of the republican government is not a suitable form of government for most contemporary societies, hence the lack of its application for centuries.

II.3 The modern ideal of republican government

Since the ancient ideal of the republican government has been deemed an unfeasible form of government, it underwent a radical transformation, thus, creating the modern ideal. Since the Constitution of the United States is often referred to as the 'original modern republican constitution',[125] it can be argued that the first state to apply the principles developed under the modern ideal of republican government and the solutions devised for its incidental evils was the United States.

The origins of this transformed or modern ideal of the republican government are first identifiable in *The Spirit of the Laws* by Montesquieu, where he argued that a republican government is one ‘in which the people as a body, or only a part of the people, have sovereign power,’ and where ‘political virtue’, meaning the love of the homeland, makes the government move.[126] He further made the claims that in a republic ‘men are equal’ and its spirit is ‘peace and moderation’.[127] Montesquieu also introduced the ideology that a republican government should function as a shield against the harmful effects of 'excess democracy,'[128] and further claimed that a federation of republican states will also operate more effectively as a shield against external violence on the state.[129] The latter argument was also supported by Hume and Kant, and was also adopted by the Founding Fathers upon the creation of the

[125] Charles de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989) Vol I, Book 9, Chapter 2, 140; Richard Bellamy, ‘Republicanism, Democracy and Constitutionalism’ in Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2007) 160.
[126] Montesquieu (n 125) 10 and xli.
[127] ibid 75 and 132.
[128] David Miller, ‘Republicanism, National Identity and Europe’ in Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2007) 135.
[129] Sellers (n 61) 13205; Pettit (n 61) 150; Miller (n 128) 135.Sellers (n 6) 13205, Pettit (n 21) 150 and Miller (n 33) 135.

United States.[130] Later parts of the chapter will discuss how Montesquieu's ideologies were supported by the Founding Fathers.

Prominent proponents of this view further identified key characteristics of a modern republican government. Sellers, for instance, argued that according to the modern understanding of a republican government, the state has transformed its main aim as the promotion of 'freedom as non-domination' from the simple 'pursuit' of 'freedom as non-domination' of the ancient ideal.[131] Pettit also claims that the followers of the modern ideal identify the 'subjection to the law and magistrates, acting for the common good,' as opposed to their private interests by freedom.[132] It may, thus, be argued that the freedom that citizens possess in a republican government is 'a shield against arbitrary decision of others and equal subjection to the rule of laws'.[133]

Moreover, Pettit, claimed that in order to create a modern republican government, one of the characteristics the state must possess is to become a 'good international citizen,' and a member in regional or international systems to ensure its secure position, protected from external forces.[134] Whether this statement holds true nowadays is questionable, as it is seemingly evident that the interests of the United States seem to occupy a more important position than being 'a good international citizen.'

Furthermore, the modern ideal, similar to the ancient ideal, requires the laws to be enacted for the common good of the citizens to ensure their freedom.[135] Sellers, on the other hand, preferred to refer to this concept as the 'common purpose', which takes priority over the private interests of individuals for the benefit of the state.[136] Pettit also characterised the relationship between the government and the people as one where the people act as trustors, placing their trust in the government that they will not act arbitrarily.[137] It may also be argued that the government, consequently, will ensure the

[130] Sellers (n 61) 13205; Saxonhouse (n 110) 13195; Gordon S Wood, 'Democracy and the Constitution' in Robert A Goldwin and William A Schambra (eds), *How Democratic is the Constitution?* (American Enterprise Institute Constitutional Studies 1980) 11; Miller (n 128) 135.
[131] Sellers (n 61) 13207.
[132] As cited by ibid 13204.
[133] ibid 13205.
[134] Pettit (n 61) 171.
[135] ibid; Pettit (n 61) 8.
[136] Sellers (n 61) 13206.
[137] Pettit (n 61) 8.

promotion of the freedom of the people.[138] Another key element of the modern republican government identified by both Sellers and Pettit is the separation of powers that they argue has been essential for the creation of such government since the eighteenth century.[139]

One of the advantages of the modern republican ideal is that since it lacks a clear definition, it has become a dynamic concept, which can be adapted to any previously unknown situation.[140] This nature of the modern republican ideal gains increased importance, where the freedom element may be in jeopardy by an 'arbitrary government' which aims to dominate the people it governs.[141]

Therefore, it is argued that if a clear definition had been provided of what a republican government entailed in the Constitution, it would not allow for the Constitution to apply in situations that may have been unconceivable at the time of its drafting.

On the other hand, this situation creates a constitutional uncertainty. With the lack of a definition, it will be up to the government of each era to determine what constitutes a republican government. Bonfield and Hasen argue that such a decision would depend on the current 'values' of society[142] and 'theories of natural justice.'[143] However, a constitutional uncertainty arises when the values of society would differ greatly between different eras. In such a situation, the non-originalist interpretation and specifically the living constitutional values approach provides those applying the Constitution with the tools to ensure it adapts to the transformed values since 1787.

One such change in values that was apparent in the United States of America was the abolishment of slavery in the Thirteenth Amendment. As it will be analysed in the Chapter 3, the position of slavery also highlighted another crucial constitutional uncertainty in the United States: the divide between federal and state powers. Since

[138] ibid.
[139] ibid 178.
[140] Sellers (n 61) 13208; Pettit (n 61) 180–183.
[141] Sellers (n 61) 13208; Pettit (n 61) 180–183.
[142] Arthur E Bonfield, 'The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude' (1961) 46 Minn. L. Rev. 513, 560.
[143] ibid 529; Rick Hasen, 'Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Non-Justiciability of Guarantee Clause Cases' Loyola Law School (Los Angeles) Public Law and Legal Theory Research Paper 15 <http://ssrn.com/abstract=385920> accessed 1 November 2012.

the Constitution did not outlaw slavery, it remained accepted in the Southern states before the Civil War, whereas it was outlawed in most Northern states.[144] Thus, a situation similar to *Dredd Scott*[145] could arise, where federal constitutional uncertainty emerged due to the different legal statuses of slaves and manumitted ex-slaves in different states,.[146] The Thirteenth Amendment, providing a federal ban on slavery, aimed to resolve this uncertainty.[147] It may, thus, be argued that with this transformation of values and following the adoption of this Amendment, a state could only be deemed republican after outlawing slavery. However, whether this was the case will be examined below.

Another threat posed by the lack of clear definition of what a republican form of government entails is highlighted by Pettit.[148] He argues that this may lead to government officials being more inclined to act arbitrarily. [149] Whilst this position is not disputed, Pettit also recognised that government officials may also use this uncertainty to take actions for the 'common good' of the people that they could otherwise not take.[150] Acting so would be in line with the aim of a republican government, however, whether this could be guaranteed at all times in practice is highly doubtful.

The uncertainties of the modern republican ideal also resurface in certain 'inherent' threats that can be detected in the ideal of the republican government.[151] Any republican system must, consequently, find a prevention mechanism for these threats and these mechanisms and their implementations distinguish governments from each other.[152]

II.4. Threats to a republican government and solutions

The main threat present in any republican system is the emergence of a dominating ruler. Such rulers may be identified as monarchs or tyrants and may also include public

[144] See Chapter 5, section V.1 of this work.
[145] *Dredd Scott v John F A Sandford* (1857) 60 US 393.
[146] See Chapter 5, section V.1 of this work.
[147] Constitution of the United States of America 1787, Amendment XIII.
[148] Pettit (n 61) 175.
[149] ibid.
[150] ibid.
[151] Saxonhouse (n 110) 1394.
[152] ibid.

officials.[153] As it has been demonstrated above, these rulers may commence to rise as dominating governors of the people through acting arbitrarily, considering their own private interests, as opposed to the common good of the people who they govern.[154]

There have been various ideological solutions offered to the above threats that should be applied in a republican government to stabilise the republic in the ancient and modern ideal. Pettit, for instance, argued that there are three conditions by which the instruments controlling the arbitrary exercise of power should be exercised.[155] He claimed that, firstly, - adopting the ideology of James Harrington - 'an empire of laws and not of men' should exist.[156] Secondly, he argued that the different powers of government should be 'dispersed' and, thirdly, he claimed that the laws should be 'relatively resistant to majority will'.[157] He further asserted that republican governments should establish 'screen' mechanisms before imposing any 'sanctions'.[158]

In order to prevent the threat of a dominating ruler rising to power, Sellers and Saxonhouse argued - similar to the previous claims of Cicero and Machiavelli for the ancient ideal - that to control the arbitrary exercise of power, republican governments should introduce 'checks and balances' into their systems.[159] Saxonhouse further argues that to ensure that the republican government will not transform into a monarchy or tyranny, 'institutions protecting against oppression' should be established, which will also ensure that those who are elected as public officials will not become corrupt and exercise their power arbitrarily.[160]

As it has been mentioned above how the Constitution may be deemed the first to have embodied these modern republican ideals, a thorough examination of how the Founding Fathers applied these principles and solutions during the creation of the Constitution is required.

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[153] Pettit (n 61) 171; Pocock (n 112) 55; Sellers (n 61) 13205.
[154] Sellers (n 61) 13205; Pettit (n 61) 171.
[155] Pettit (n 61) 173.
[156] ibid.
[157] ibid.
[158] ibid 220.
[159] Sellers (n 61) 13206 and 13208; Saxonhouse (n 110) 1395.
[160] Saxonhouse (n 110) 1394.

III. The United States, a novel federalist republican government

After becoming independent from the British Empire, the Founding Fathers were faced with the challenge of having to create an effectively functioning system in which the separate States were not administered by identical forms of government. Highly influenced by the ideology of Montesquieu, they, however, seemed to believe that in order to ensure the effective functioning of such system, each state had to adopt like forms of government.[161] Montesquieu argued that compared to Holland and Switzerland, where identical forms of government existed at the time, Germany possessed a more 'imperfect' system where the cities and states it consisted of were allowed different forms of government.[162] Moreover, he argued that the forms of government that the states that are part of a confederate government could adopt were either a monarchy or a republican government, however, these two systems could not co-exist within a confederation. [163]

The Spirit of Laws by Montesquieu identified three forms of government, which the Framers could endorse in the creation of the new federal system of government.[164] These were a republican, monarchical or a despotic one.[165] A republican government was characterised by Montesquieu as one 'in which the body, or only a part of the people' is given 'the supreme power.' [166] A democracy, he claimed, is established when the body of the people are given this supreme power. [167] An aristocracy is created when only part of the people are given such powers, according to Montesquieu. [168] In a monarchy, he argued, 'a single person governs by fixed and established laws,'

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[161] Jonathan Toren, 'Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4' (2006) 2 NYUJL & Liberty 371, 392; United States Constitutional Convention, James Madison and Adrienne Koch, 'Introduction', *Notes of Debates in the Federal Convention of 1787 with an introduction by Adrienne Koch* (W W Norton 1987) xx.

[162] Charles de Secondat Montesquieu, *The Spirit of the Laws* (London 1794) Vol I, Book IX, Chapter II, 140 <http://find.galegroup.com.ezphost.dur.ac.uk/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=duruni&tabID=T001&docId=CW124479092&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE> accessed 1 September 2017.

[163] ibid.

[164] Montesquieu (n 125) Book II, Chapter I, 10.

[165] ibid.

[166] ibid.

[167] Montesquieu (n 163) Vol I, Book II, Chapter II, 8.

[168] ibid.

whereas in a despotic government 'a single person' governs 'without law and without rule, direct everything by his own will and caprice.' [169]

Understandably, as opposed to the tradition of the British Empire, the Framers were opposed to the idea of establishing a monarchical government in the United States.[170] Moreover, as one of the main objectives of the Framers in creating the new government separate from the British Empire is argued to have been to ensure that no tyranny would ever exist in the United States, the choice of adopting a despotic form of government proved unsuitable for the Framers as well. The suggestion of Montesquieu of adopting republican governments, consequently, seemed to be the most ideal choice for the Founding Fathers.[171] Whilst such a form of government usually involved a republican system within one state only, the Framers took this ideal one step further and, as a political innovation of their era, devised a federalist system where the federal system and the states were deemed to be republican as well.[172] An advantage of this federal republic was, highlighted earlier by Montesquieu, when he claimed that an exceptional characteristic of such system would be its equipment with the characteristics of a republican government internally and with the 'force of a monarchy' externally.[173] This suggests that whilst the Framers were opposed to establishing a monarchy in the United States, they did recognise the importance of showing the strength of the new state externally.

As it is clearly seen from the textual provision of the Guarantee Clause, the Framers did not provide a guideline or a standard in the clause about what a republican government entailed. This, therefore, makes the work of those adopting the originalist interpretation approach to the Constitution even more difficult. Those adopting the textualist interpretation are thus not able to rely on this specific clause to argue that the Constitution clearly laid down what a republican form of government entails. The originalist method of relying on the intentions of the Framers could consequently prove

[169] Montesquieu (n 125) Book II, Chapter I, 10.
[170] Toren (n 162) 392; Wiecek (n 51) 43 and 70; Laurence H Tribe, *American Constitutional Law*, vol 1 (3rd edn, Foundation Press 2000) 133 and 909; Bernard Schwartz, *A Commentary on the Constitution of the United States, Part I Vol I* (The Macmillan Company 1963) 7.
[171] Toren (n 162) 372; Bonfield (n 143) 522; Wiecek (n 51) 18–20 and 73.
[172] United States Constitutional Convention, Madison and Koch (n 162) xx.
[173] Montesquieu (n 125) 131.

more fruitful in the search for these intentions. During this search one would have to examine various other sources from the era of the framing and adoption of the Constitution. Adopting the living constitutional values approach would, also require examining the intentions of the Framers: the values they envisaged a republican form of government to entail and the consequences they aimed to avoid.

Based on the above examination of the three choices of government the Framers could choose from according to Montesquieu, it may be argued that one of the consequences the Framers wished to avoid by adopting a republican form of government was the formation of a monarchy or a despotic state in the United Stated. Moreover, whilst Montesquieu further characterised a republican form of government into two subcategories, namely, a democracy and an aristocracy, the Founding Fathers opted for the support of the encompassing ideal of a republican form of government in the guarantee clause. A criticism of this system, however, is that it allows for the governing power to accumulate in the hands of only 'part of the people' in line with the ideologies of Montesquieu. [174] It, thus, follows that excluding certain parts of society, such as slaves or women, to possess governing powers was not contrary to the republican ideals, whilst it would not have suited a democratic form of government. In a democracy, Montesquieu claimed, people exercise sovereignty through 'their suffrages, which are their own will.'[175]

III.1. The Constitutional Convention

During the Philadelphia Convention, even though the Framers did not expressly identify what a republican government was, they identified some of the key principles that are essential in the creation of a republican government. Wilson identified this principle as 'the confidence of the people',[176] while Mason determined these as 'love, affection, attachment of citizens to their laws, their freedom and to their country'.[177]

[174] ibid Book II, Chapter I, 10.
[175] Montesquieu (n 163) Vol I, Book II, Chapter II, 8.Charles de Secondat Montesquieu, *The Spirit of the Laws* (London 1794) Vol I, Book II, Chapter II, 8.
[176] Max Farrand, *The Records of the Federal Convention of 1787*, vol 1 (Yale University Press 1937) 49.
[177] ibid 112.

Whilst these principles provide vague guidelines for the understanding what a republic form of government entails, they fail to provide a clear viewpoint about the constitutional structure and functioning of a state. Moreover, as will be discussed in the next chapter, the claim that in a republican state, citizens are attached to 'their freedom',[178] only applied to a select group of individuals at the time. More controversially, while this select group of individuals obtained their freedom from the British Empire, they did not find denying the freedom of the slaves they owned contrary to this ideal.[179] Therefore, whilst these statements might have allowed for wider rights and protection for individuals than a monarchy, it must be emphasised that those who were able to benefit from these were only a select group of individuals. This, however, as highlighted earlier was a key differentiating characteristic between a republican and a democratic form of government according to Montesquieu. Thus, it is argued, the Framers may have intentionally chosen to establish a republican form of government over a democracy in order to maintain the ruling majority in the hands of the select few that belonged to the social group that created the Constitution.

If this approach was adopted by originalists, it would be difficult to reconcile this with the subsequent constitutional developments. The non-originalist approach, however, is more apt to allow for this restrictive reading of the republican form of government in the eighteenth century to adapt to changes in society: if the understanding of who the select few who benefit from this form of government changes, the interpretation of the Constitution, according to the non-originalist method, would also follow suit.

Departing from the above methods of leaving the republican form of government undefined in the Constitution, Madison attempted to lay down certain constitutional aspects of a republican system while characterising such form of government. He firstly claimed that in a republican state, an 'extent' that would 'render combinations on the ground of interest difficult' would be necessary. [180] Secondly, he argued that 'the representation of the People' should be refined through an election.[181] Thus, it is argued, that in line with Montesquieu's ideals, Madison was in favour of a republican

[178] ibid.
[179] Wiecek (n 51) 138–139.
[180] Farrand (n 177) 146.
[181] ibid.

government where the supreme power would be given to the body or part of the people.[182]

While discussing the new form of representation in Congress of the people and not of the states in the novel system, Mason, however, also mentioned that 'improper elections' on many occasions were an inherent characteristic of a republican government.[183] He reasoned that no form of government was 'free from imperfections and evils' and as such, improper elections can be identified as one such imperfection of a republican government. [184] By 'improper elections,' Mason made a reference to the claim of Wilson, who argued that improper elections would not arise in 'larger districts.'[185] He asserted that '[bad] elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office.'[186]

On the other hand, in line with the principles of the ancient ideal that it is the nature of republics to occupy 'a small territory', Elseworth also argued during the Convention that the states with the least efficient governments were those with large territories, including Virginia, Massachusetts and Pennsylvania.[187] Thus, if one is to rely on the arguments of Mason, improper elections would remain a constant characteristic of the republican system. However, the approach where it is argued that if a change in fundamental values in the United States occurred, it would take form in the results of the election with the victory of those advocating for such changes would therefore be in constant jeopardy. If elections are in a constant threat of bringing improper results, it would, logically, fall in the hands of those unelected to protect those fundamental values that those are elected opposed. Thus, the role of the Supreme Court, from the outset, may be argued to have occupied a key position as the defender of the fundamental values of the Constitution.

Another principle that assists with the maintenance of fundamental constitutional values is the separation of powers, which is set out to guarantee that each institution

[182] Montesquieu (n 163) Vol I, Book II, Chapter II, 8.Charles de Secondat Montesquieu, *The Spirit of the Laws* (London 1794) Vol I, Book II, Chapter II, 8.
[183] United States Constitutional Convention and Madison (n 36) 75.
[184] ibid.
[185] ibid.
[186] ibid.
[187] Farrand (n 177) 190.

within the federal government acts within the bounds of the Constitution. Thus, if an institution is an elected one, the other institutions would be able to assist in ensuring the institution does not breach its bounds of power.

The Convention also addressed the characteristics of a republican government. In South Carolina, Pinckney highlighted the power of the people to 'form the legislature' as one characteristic. [188] In Pennsylvania, Wilson claimed that a republican and a democratic government were identical, as they were characterised by the people possessing the sovereign power.[189]

Despite these discussions, the Guarantee Clause did not lay down conditions that the states had to fulfil in order to be characterised as republican states. It is also interesting to highlight that the form of government of the federal state, however, is not discussed in this clause and no guarantee is provided to the people about the maintenance of the republican form of government at federal level, similar to that of the states in this clause.

III.2. The Federalist interpretation of a republican government

Since it remained unclear in the Constitution what a republican government entailed in the Constitution, the discussion about the characteristics of a republican government continued in the Federalist Papers. Hamilton, subsequently, identified four essential characteristics of a republic: the separation of powers, 'checks and balances' over the legislature, courts composed of judges with 'good behaviour' and the 'representation of the people' by elected representatives in the legislature.[190] He further added – contrary to the viewpoint of Elseworth - that in order to maintain an effectively functioning republican government, the 'orbit' of the system should be increased.[191] He argued that this could be achieved either through increasing the

[188] Akhil Reed Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator' 981 Yale Law School Faculty Scholarship Series 758 <http://digitalcommons.yale.edu/fss_papers/981> accessed 5 January 2013.
[189] ibid.
[190] Hamilton and Madison (n 46) No 9 43.
[191] ibid.

territory of a state (contrary to the ancient ideal) or through the creation of a confederation.[192]

Madison further characterised a republican government as one 'in which the scheme of representation takes place' and that acquires 'all its powers from the great body of the people' and the administration is performed by officers who perform their tasks for a short time 'during pleasure […] or good behaviour'.[193] He also distinguished between a democracy and a republic in these Papers, arguing that in a republic, the governing powers are delegated to a limited number of elected representatives and that such a system is better suited for a state laying on a wide territory and possessing an extensive population.[194] Once again, contradicting the viewpoint of Elseworth and that of the ancient ideal of a republican government, the Federalists were in agreement that the only system suited for such a large territory as the United States was a republican form of government.

It is also argued that the standpoint that the concept of the republican government should be regarded as a 'dynamic term' has been implemented by the federal government since the adoption of the Guarantee Clause.[195]

The claim that this perspective has been adopted by the federal government may be supported by Toren. [196] He claimed that a consensus now exists - following Madison's claim in The Federalist Papers,[197] which will be analysed later in this work - that to avoid a breach of the Guarantee Clause, state governments merely need to remain 'substantially republican.'[198] This means that governments only need to ensure that the outcome of their actions is republican in nature.[199] The adaptation of this position will, on the other hand, doubtlessly create a legal uncertainty as to what constitutes a republican form of government in each era.[200] This may, therefore, either facilitate

[192] ibid.
[193] ibid No 10, 51 and No 39, 193.
[194] ibid No 10 51.ibid No 10, 51.
[195] Wiecek (n 51) 76; Amar, *America's Constitution: A Biography* (n 47) 371.
[196] Toren (n 162) 392.
[197] Hamilton and Madison (n 46).
[198] Toren (n 162) 392.
[199] Bruce Ackerman, *We the People: Transformations*, vol 2 (The Belknap Press of Harvard University Press 1998) 108..
[200] Wiecek (n 51) 75; Hasen (n 144) 16.

more suitable actions being taken by the federal government towards the common good, or allow for arbitrary and subjective interpretation of the clause.[201]

As it has been demonstrated above, even though the Framers of the Constitution seemingly aimed to devise a new republican federal system comprised of republican states, they failed to lay down the exact definition of what a republican form of government is. Nevertheless, it was argued by the Framers themselves that certain characteristics of a republican government may always be identifiable, such as 'the confidence of the people',[202] or the 'love, affection, attachment of citizens to their laws, their freedom and to their country'.[203]

III.3. The Constitution of the United States, a republican instrument

Whilst the Constitution fails to explicitly claim whether it is a republican instrument, it is argued that a republican form of government may only be effectively protected by republican methods. Otherwise, a risk that the methods employed by those enforcing republican values may not hold true and may also overthrow any republican government. Thus, it is required to assess whether the methods devised in the Constitution entail a republican one. In order to successfully assess whether the Constitution of the United States is, in fact, a republican instrument, this section will analyse the provisions of the Constitution based on the principles that may be identifiable in a republican government.

The republican ideals may first be found in the Preamble of the Constitution, which claims that the power rests with the people in the United States, and states that the Constitution was established for stabilising the federal state and ensuring that the freedom of the people is preserved.[204] This provision firstly observes the principle of the republican government, supported by Montesquieu, by claiming that the people are the ultimate sovereigns in a republican state.[205] Secondly, by declaring that the main purpose of the Constitution is the promotion of freedom of the people by requiring

[201] Wiecek (n 51) 75; Hasen (n 144) 16.
[202] Farrand (n 177) 49.
[203] ibid 112.
[204] Constitution of the United States of America 1787, Preamble.
[205] Montesquieu (n 125) 10 and xli.

its preservation, the Constitution supports one of the main aims of a republican government identified by Sellers,.[206]

The Constitution divides the federal government into three separate branches. Article I section 1 identifies Congress as the legislature, Article II section 1, the President as the executive and, Article III section 1, the Supreme Court as the federal supreme judiciary. This demonstration of the separation of the powers principle, ensuring that a checks and balances system is introduced for the maintenance of a non-arbitrary government in a republican state,[207] has been identified as a characteristic of a republican government since its ancient interpretation.

Article V, allowing the creation of amendments to the Constitution, supports the view that a republican government shall be regarded as a 'dynamic' concept,[208] since the amendments will ensure that the Constitution can be adapted to any new situation that the federal government may have to tackle. This provision, thus, also supports the ideology that the Framers accepted that the circumstances may change and the Constitution should not be regarded a static document. Therein lies the key challenge for those adopting the originalist approach. However, those adopting this approach may subsequently claim that it is only the amendments to the Constitution that should be regarded as true transformations in the constitutional values, all other changes should not be regarded constitutional until laid down in form of a constitutional amendment. Such an approach, however, if history teaches us anything, may not prove the most effective – one needs to look no further than the issue of slavery, which will be discussed in more detail in the next chapter.

Through the procedural guarantees set out for the adoption of these amendments, such as support from 'two thirds of both houses,' is argued to ensure that these amendments would only be made for the common good of the people, following republican ideals.

It is also argued by Johnson that the Constitution ensures that people continue to possess the sovereign power in the United States by a 'circuitous process', in which

[206] Sellers (n 61) 13204.
[207] ibid 13208; Pettit (n 61) 180–183.
[208] Bonfield (n 143) 530–551.

Congress action can be vetoed by the President.[209] The President can subsequently lose his position in the next election by the will of the people.[210] In this process, a legislative act can also be held unconstitutional by the Supreme Court. However, the Constitution may be amended by the people through their representatives, thereby transforming the actions that had been held unconstitutional by the Court previously.[211] Thus, an originalist argument that is only when constitutional amendments are adopted that constitutional values are transformed may be rebutted: if an amendment gets adopted, it must mean that such values have commenced to be recognised to have transformed in the first act of this process. Therefore, a non-originalist approach would allow for a swifter adoption of these transformed values. After all, allowing a conflict in these values to persist for an extended period of time only resulted in a Civil War.

Maddox further argues that the provision under Article II, which states that the President shall be elected, and only for a limited time, also secures that no monarch can be established in the United States.[212] This further supports the ideology of a republican ideal and has been regarded as it has been regarded one of the main threats to a republican government. [213] Consequently, it may also be argued that Article IV further ensures that no monarch can emerge in any of the states of the federation.

Despite providing support for the republican form of government in the Constitution, it was highlighted above that the Guarantee Clause did not make a choice between the two subsections identified by Montesquieu for such a system: democracy or aristocracy. However, it may be argued that since Article I section 9 subsection 8 prevents the creation of the aristocratic class, it is claimed that the Framers did, in fact, make a decision between creating an aristocracy or a democracy from Montesquieu's point of view. However, an aristocratic class, is also an essential element of any monarchy, and by refusing the availability to be granted a 'title of nobility' by the federal

[209] Constitution of the United States of America 1787, Article I Section 7, subsection 2.
[210] Johnson (n 109) 361. Amendments are made possible to the Constitution under Article V, which is agreed upon through the representatives of the citizens in Congress.
[211] ibid.
[212] Graham Maddox, 'James Bryce: Englishness and Federalism in America and Australia' (2004) 34 Publius 53, 60.
[213] ibid.

government, it is argued that the republican government as opposed to the monarchic system was the one supported by the Framers.[214]

It may also be argued that Article IV section 4, by guaranteeing each state a republican form of government without defining what such government entails, also ensures the inclusion of not only all of the above mentioned characteristics, but those regarded as a characteristic in a republican government in all contemporary societies. Article IV section 4 can further be regarded as the provision that ensures that – in line with Montesquieu's ideology - the status quo of the federal system is maintained by ensuring that all states remain republican at all times.[215]

It is thus argued that the fundamental principles of the ideal of a republican government have become entrenched in the Constitution by the inclusion of the above provisions. Furthermore, under Article VI section 2, by elevating the Constitution to the status of the 'supreme law' of the United States, these principles have become crucial elements in all actions of the federal government. This standpoint may also be supported by Article VI section 3, which requires all public officials to be sworn into acting pursuant to the provisions of the Constitution. This firstly supports the ideal supported since the ancient ideals of a republican form of government that decisions in such government would be taken for the common good. This provision, thus, aims to ensure that these officials do not decide arbitrarily, but based on the common good. Moreover, it is also argued that since it has been demonstrated above that the Constitution entrenches the republican ideals of government, this provision provides a further guarantee that the public officials will respect the above-mentioned principles of the modern republican state, as set out in the Constitution.

It has been demonstrated above that the United States itself can be regarded as the first example of a modern republican federation of modern republican states. This has made the adoption of the principles attributed to such states in the laws of the country possible and has also given rise to the inclusion of the Guarantee Clause in the

[214] Constitution of the United States of America 1787, Article I Section 9, Clause 8.
[215] Morton H Halperin and Kristen Lomasney, 'Toward a Global "Guarantee Clause"' (1993) 4 Journal of Democracy 60, 61; Bonfield (n 143) 522; Toren (n 162) 408–409; Douglas G Smith, 'Natural Law, Article IV, and Section One of the Fourteenth Amendment' (1997) 47 Am UL Rev 351, 386..

Constitution of the United States, guaranteeing the dynamic principles under this form of government to all generations.

IV. The history of the Guarantee Clause

While it has been demonstrated above that the Constitution embodied the principles of a modern republican government, in order to ensure that the Constitution remains a republican instrument, these fundamental principles and values must be encompassed in the interpretation of the Constitution, regardless of the method adopted. In this section it will be examined how the Guarantee Clause came to be conceived and what the aim including this clause in the Constitution may have been. To unveil these, the intention of the Founding Fathers will be examined below.

The Guarantee Clause was not included in its current form in the original proposals for the Constitution, and it underwent various alterations before its adoption. The inclusion of this clause in the Virginia plan was first suggested by Madison, based on the concept that he formulated in the Vices of the Political System of the United States and in a letter sent to Governor Randolph of Virginia on 8 April 1787.[216] In these works, he argued that in order to ensure the efficient functioning of the federal system, a guarantee had to be bestowed upon states of their 'constitutions and laws' under the Constitution against internal rebellions and external attacks.[217]

Subsequently, the Virginia plan presented by Randolph during the Federal Convention proposed a guarantee of a republican government and the territory of the states to ensure their security against the above two attacks.[218] The proposal, however, was later changed by Madison, and supported by Randolph, to a guarantee of 'a republican constitution, and its existing laws […] to each state,' following the oppositions to the territorial guarantee by the smaller states.

The representatives of these states were concerned about the reduced importance of their states under the previous proposal against the larger ones, based on the

[216] Wiecek (n 51) 40, 41 and 51.
[217] ibid 40 and 41.
[218] Farrand (n 177) 22 and 28.

territorial guarantee.[219] Thus, this guarantee was subsequently omitted from the novel proposal, and included a guarantee of the constitution and laws of each state. Some Framers, on the other hand, were not pleased with this approach, as it allowed for the laws of states to be guaranteed that they did not regard the most suitable to be deemed protection. Morris, for instance, was strongly opposed to having the then laws of Rhode Island guaranteed.[220] Houston further highlighted the risk of having the then laws of each state, such as the 'a very bad' Constitution of Georgia preserved.[221] It thus seems that both Morris and Houston also recognised the importance of allowing for a dynamic interpretation of what a republican government entailed. After all, guaranteeing the then existing laws to apply at all times would have definitely inhibited any societal, economic, or political progress.

Before the first part of the clause was presented in its current form, Randolph further emphasised that both purposes of the clause should be fulfilled: first, to secure a republican government to each state, and, second, to 'suppress domestic commotions'.[222] Subsequently, the current form of the Guarantee Clause was proposed by Wilson,[223] and later adopted by the Committee in Detail.[224] This Committee argued that the aim of the part of the Guarantee Clause referring to the republican government was 'to prevent the establishment of any government, not republican.'[225]

During the state ratifying conventions, Wilson set out his position in Pennsylvania on the Guarantee Clause once again.[226] He argued that – similar to the ideology of Montesquieu – in a republic, the 'right of suffrage is fundamental to politics' as the electors would be able to take control of the government in a state with such form of government.[227]

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[219] Max Farrand (ed), *The Records of the Federal Convention of 1787*, vol 2 (Yale University Press 1937) 194 and 206; Wiecek (n 51) 52–53; Herman Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History* (Burt Franklin 1970) 170.
[220] Farrand (n 220) 48.
[221] ibid.
[222] ibid 47.
[223] ibid 48.
[224] Wiecek (n 51) 60–61.
[225] ibid 61.
[226] ibid 69.
[227] ibid.

In North Carolina, Iredell claimed that including the Guarantee Clause was necessary in the Constitution for two reasons. Firstly, he claimed, supporting the ideology of Montesquieu, that in order to ensure the survival and the 'harmony' of the newly devised federal system, states where governments have similar characteristics must be created and maintained.[228] Secondly, he argued – following the statement of the Committee in Detail during the Convention – that this provision guaranteed that no monarchy or aristocratic class would emerge in the United States. [229]

Support for the inclusion of the Guarantee Clause also emerged in The Federalist Papers.[230] Hamilton, for instance, claimed that if no guarantee was provided by the federal government to ensure that the states would remain republican, it would 'deprive us of one of the principal advantages to be expected from the union'.[231] He claimed that the right of states to change their constitutions would not be hindered by this provision, provided it was performed 'in a legal and peacable mode.'[232] It was only when these changes were 'effected by violence,' however, the federal government could not provide 'too many checks' against these.[233] He thus claimed that by placing the power in 'the hands of the people,' the only 'natural cure for an ill administration' would be a 'change of men.'[234] However, as discussed earlier, if in a republican government it is expected hat improper elections may take place, such an argument would not uphold. Thus, in such an instance, it is argued that the federal government should be able to provide protection for the fundamental values that a republican form of government encompasses.

Madison further supported the inclusion of this provision in the Constitution through claiming that this section would 'defend the system against aristocratic or monarchical innovation'[235] at state level, in addition to the already existing provisions of the Constitution preventing this on a federal level.

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[228] 4 Elliot 195.
[229] ibid.
[230] Hamilton and Madison (n 46).
[231] ibid No 43, 174.
[232] ibid.
[233] ibid.
[234] ibid.
[235] ibid No 43, 281.

Madison further claimed that with a 'more intimate nature' of the union of states within the new federal system, 'the greater interest have the members in the political institutions of each other.'[236] He argued that the federal government would, therefore, have 'greater right to insist that the forms of government under which the compact was entered into should be substantially maintained.'[237] Explicitly referencing Montesquieu's ideology that in a federation, all states must adopt like forms of government, he thus claimed that all states must adopt a republican form of government.[238]

However, Madison did not seem to support the ideal of a dynamic interpretation of the republican form of government, as he claimed that this guarantee 'supposes a pre-existing government of the form which is to be guaranteed.'[239] Therefore, as long as 'the existing republican forms are continued by the States, they are guaranteed by the federal Constitution.'[240] However, he does recognise that changes may be made to the state constitutions, which he claimed, would be guaranteed federal protection, as long as they maintained their republican nature.[241] However, what constituted a republican or an 'anti-republican Constitution,' based on his previous claim for the aim of this clause, would mean that as long as no aristocracy or monarchy was established in these states, they would be regarded as republican.

Since no amendments were made to the Guarantee Clause after the ratification of the Constitution, a constitutional uncertainty about the meaning of the Guarantee Clause was created. This, therefore, allowed for a dynamic interpretation of this term,[242] but has also resulted in various different applications of this clause.

Since it is often unforeseeable how a government with unrepublican values may emerge, it is argued that the dynamic interpretation of the Guarantee Clause and a republican ideal prepares the United States to be able to respond to these. However, the federal government will, in such situation, be faced with political and legal

[236] ibid.
[237] ibid.
[238] ibid.
[239] ibid No 43, 282.
[240] ibid.
[241] ibid.
[242] Wiecek (n 51) 76.

obstacles. Firstly, it will have to determine that the government of the state is unrepublican and, secondly, it will have to establish which branch of the federal government should enforce the Guarantee Clause against the state to solve such a crisis.

It is therefore argued that the Guarantee Clause possesses two aspects in line with the two approaches to constitutional interpretation. Following the non-originalist method of interpretation, as Wiecek highlights, the Guarantee Clause adopted a positive aspect, which allowed for 'innovation' to 'be possible within the republican framework.'[243] However, the Guarantee Clause - following the originalist method - also has a negative aspect that 'was designed to prohibit monarchical or aristocratic institutions in states.'[244] The application of both aspects and methods of interpretation of this clause will be examined in the subsequent section.

V. The application of the Guarantee Clause

When delegating the task of enforcement of the Guarantee Clause to the federal government as a whole, the Founding Fathers created a vast uncertainty as to which branch of the government should enforce this clause.

The application of this clause would firstly require declaring a state unrepublican. This would not only raise political questions, but may also ultimately challenge the fundamental pillars of the federal system. For instance, it may result in questioning whether a state has a right to secede from the United States.[245] With the increased discussions about similar actions around the world, such as Catalonia or Scotland or the decision of the United Kingdom to withdraw from the European Union, it would not be unexpected if such debates came to the limelight in the United States once again.

[243] ibid 62.
[244] ibid.
[245] Schwartz (n 171) 73. For the most recent discussion about a state's right to secede see for example Manny Fernandez, 'With Stickers, a Petition and Even a Middle Name, Secession Fever Hits Texas' *The New York Times* (New York) <http://www.nytimes.com/2012/11/24/us/politics/with-stickers-a-petition-and-even-a-middle-name-secession-fever-hits-texas.html> accessed 5 January 2013.

Nevertheless, if no action is taken to adequately enforce the Guarantee Clause, its incremental potential under the Constitution will remain hidden and could render this clause meaningless.[246] It may therefore be argued that it is crucial to establish which of the three separate branches of the federal government is to act as the enforcer of the Guarantee Clause and how the clause should be applied in a situation when a state with the potential of becoming unrepublican emerges.

It will, therefore, be examined below whether any of the separate branches has acted previously as the enforcer of this clause, and whether their performance of such role has resulted in their branch becoming the indisputable enforcer of the Guarantee Clause. During this examination, it is also necessary to investigate whether any of the branches of the government has utilised this clause in the positive aspect, allowing for the advances in society, economy and/or politics to be integrated into constitutional law.

V.1. The application of the Guarantee Clause by Congress

In the leading cases of *Luther v Borden*[247] and *Pacific States v Oregon*,[248] that will be analysed later, it was argued by those supporting a textual interpretation of the clause, that based on its position in the Constitution, Congress is the indirectly recognised branch of government that is granted enforcement powers under the Guarantee Clause.[249] They supported this view by claiming that since Article IV section 3 delegates powers to the Congress to admit new states, and Article V gives the powers to Congress to propose amendments to the Constitution, Article IV section 4 must have been intended to delegate the enforcement powers of the Guarantee Clause to Congress.[250] However, as Hasen highlights, this interpretation is strongly in opposition of the other clauses included in the Constitution that specifically grant Congress with

[246] Wiecek (n 51) 168; Bonfield (n 143) 514.
[247] *Martin Luther v Luther M Borden and Rachel Luther v Luther M Borden* (1849) 48 (7 How) US 1.
[248] *Pacific States Telephone & Telegraph Co v Oregon* (1912) 223 US 118.
[249] Hasen (n 144) 8.
[250] ibid.

power, since those commence with 'Congress shall.'[251] No such wording can be found in the Guarantee Clause.

V.1.1. Congress, the Guarantee Clause and slavery

The Guarantee Clause soon emerged during the debates of Congress, for instance, about the admission of Missouri in 1818 and 1819, which state did not outlaw slavery at the time.[252] During these debates, the representatives of the Northern states also claimed that the Constitution of Illinois was unrepublican as the Northwest Ordinance of 1787 prohibited slavery, which was allowed under its constitution.[253]

It is intriguing to highlight that the Framers in 1787 did not regard a state unrepublican if slavery was existed within the state. Thus, if one is to follow the originalist and textualist method of interpretation solely based on the Guarantee Clause, a state may be deemed republican even if slavery existed within it. However, a non-originalist interpretation of the Constitution would allow for a state to be deemed unrepublican if slavery existed within its boundaries, if it could be demonstrated that the values of society have changed sufficiently for the freedom of all individuals to be deemed a fundamental constitutional value at the time.

The debate surrounding slavery and the Guarantee Clause appeared once again with the Tallmadge Amendment, which aimed to prohibit slavery in Missouri through the prohibition of new slaves and the manumission of the children of the slaves.[254] However, this amendment sparked a further fundamental debate that highlighted the different standpoints of the Southern and Northern states on the issues of slavery and a republican government. The Southern states argued the Guarantee Clause did not allow the federal government to interfere with the 'domestic institutions and internal affairs of the states.'[255]

[251] ibid.
[252] Bonfield (n 143) 531; Wiecek (n 51) 142.
[253] Wiecek (n 51) 142.
[254] Annals of Congress, House of Representatives, 15th Congress, 2nd Session 1169 and 1170; ibid 143.
[255] ibid.

Fuller, representing the views of the Northern states, highlighted that when Ohio and Indiana were admitted to the United States, based on the Northwest Ordinance of 1787, Congress was able to impose a condition on their admittance to outlaw slavery in their Constitution.[256] This would thus signal the adoption of the non-originalist method of interpretation of the Constitution by Congress, where the eradication of slavery was deemed to be a fundamental constitutional value.

However, Fuller also argued that Congress was unable to impose a similar condition for Missouri because of Article III of the Louisiana Purchase Treaty of 1803 between the United States and France.[257] This Article proclaimed:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.[258]

However, he argued that this Article could not apply in this case, since it would have bound Congress to act unconstitutionally by not abiding the federal Constitution when admitting the state.[259]

Fuller, seemingly adopting a non-originalist method of interpretation, further asserted that despite claims to the contrary, Congress does have a right, and 'a duty' to examine the state asking for admission.[260] He further argued that the Guarantee Clause granted Congress the power to examine the state, and required it 'to ascertain that her constitution or form of government is republican.'[261] While performing such examination, Fuller claimed, Congress should take into consideration Paragraph 2 of the Declaration of Independence that declared 'that all men are created equal.'[262] He

[256] Annals of Congress, House of Representatives, 15th Congress, 2nd Session 1171 and 1172.
[257] Louisiana Purchase Treaty of 1803 between the United States of America and the French Republic, Article III.
[258] ibid.
[259] Annals of Congress, House of Representatives, 15th Congress, 2nd Session 1172 and 1173.
[260] ibid 1179.
[261] ibid.
[262] Declaration of Independence 1776.

thus claimed that 'it cannot be denied that slaves are men,' and, thus, 'in a purely republican government born free.'[263] Fuller reasoned that in determining whether slavery complied with republican ideals, Congress could rely on the Declaration of Independence. He argued that this was possible since the Declaration of Independence could be regarded as 'an authority admitted in all parts of the Union a definition of the basis of republican government,' based on which all men should have 'equal rights.'[264] However, this view did not prevail.[265] It did, however, signal that the Guarantee Clause could be utilised in its positive aspect, if a non-originalist method of interpretation was followed, allowing the advances in society regarding the transformed viewpoint on slavery to be incorporated into the Constitution. Moreover, it also signalled that the negative aspect of the Guarantee Clause and its originalist method of interpretation may also be utilised if states did not prohibit slavery, if such a transformed viewpoint was to be accepted.

The majority of Congress, composed of Southern states preceding the Civil War, however, clearly rejected a dynamic interpretation of a republican government. They claimed that since the states where slavery still existed were regarded republican when they were admitted to the United States, they could not be held unrepublican based on a changing viewpoint because they did not 'substantially deviate' from a republican form of government.[266] The Northern states, however, aimed to rely on the Guarantee Clause to argue that slavery was contrary to the ideals of a republican government, as proclaimed in the Declaration of Independence.

It is fundamental to highlight that such a debate could emerge because no clear definition of what a republican form of government under the Guarantee Clause was provided. Therefore, it became a constitutional uncertainty that had to be managed by Congress at the time.

V.1.2. Congress, the Guarantee Clause and the early stages of Reconstruction

[263] Annals of Congress, House of Representatives, 15th Congress, 2nd Session 1180.
[264] ibid 1181.
[265] Bonfield (n 143) 531–532.
[266] ibid 532.

As a subsequent step in the development of the Guarantee Clause, President Lincoln in July 1861 declared that if a state wished to secede from the United States, it was no longer regarded a republican government under the Guarantee Clause.[267] He stated, '[to] prevent its going out is an indispensable *means* to the *end* of maintaining the guaranty mentioned.' In other words, he argued for the prevention of secession through the use of the Guarantee Clause.[268]

Several proposals were subsequently submitted to Congress to address the Reconstruction and possible re-admission of the Southern states to the Union after the end of the Civil War. The first of such proposals was submitted by Baker, who claimed that the federal government should govern these states 'as territories' following the conclusion of the Civil War.[269] This would involve, he maintained, sending governors to control these states.[270] Additionally, Sumner proposed a more radical resolution in the Senate in the subsequent session. He argued that the seceded states lost all their 'constitutional and legal right.'[271] He further claimed, similar to the previous arguments of Fuller, that slavery could not exist in a republican government.[272] Moreover, he argued that the seceded states should not be governed as territories, but control over them should be 'assumed' by Congress.[273] It was only providing Congress with these powers, Sumner claimed, that the inhabitants of these states would be provided with the protection of their rights under the Constitution.[274]

Until 1864, however, it was the President, who led the Reconstruction under the Guarantee Clause and 'appointed military and civilian governors for the seceded states' once they were under Union control.[275] In his Ten Percent Plan for Reconstruction, President Lincoln argued that the seceded states would be given the protection of the Guarantee Clause.[276] However, this required ten percent of those

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[267] Abraham Lincoln, 'Special Session Message July 4, 1861' <http://www.presidency.ucsb.edu/ws/?pid=69802> accessed 1 September 2017; Wiecek (n 51) 171.
[268] Lincoln (n 268); Wiecek (n 51) 171.
[269] *Congressional Globe* 37th Cong, 2nd Session 45 (1861).
[270] ibid.
[271] *Congressional Globe* 37th Cong, 2nd Session 46 (1861).
[272] *Congressional Globe* 37th Cong, 2nd Session 47 (1861).
[273] ibid.
[274] ibid.
[275] Wiecek (n 51) 184.
[276] ibid.

who were entitled to vote in 1860 to organise a government that 'recognised emancipation under executive order […] or congressional statute.'[277] This implies that the executive was presumed as the branch of the federal government responsible for enforcing the Guarantee Clause.

However, Congress challenged this authority soon after his Plan by passing the Wade-Davis Bill.[278] Davis argued that the Guarantee Clause - contrary to the claims of the President – vested Congress with 'a plenary, supreme, unlimited political jurisdiction, paramount over courts.'[279] Congress was thus allowed to enact 'every legislative measure necessary and proper to make it effectual; and what is necessary and proper.'[280] Crucially, he also argued that neither the President nor the Supreme Court could overrule the decisions of Congress in this regard, only the people.[281] Despite the Bill passing through both Houses, Lincoln vetoed the Wade-Davis Bill.[282]

Subsequently, President Johnson relied on the Guarantee Clause to claim that the President should act as the enforcer under this provision and appointed governors to the occupied states.[283] During the Thirty-Ninth Congress, however, Congress declared its will to assume powers under the Guarantee Clause. Colfax argued, relying on a non-originalist interpretation of the Constitution, that during the Reconstruction, the republican ideal that 'protection to all men in their inalienable rights' should be guaranteed by Congress.[284] He reasoned that this originated from the 'first and highest obligation' of Congress 'to guarantee to every state a republican form of government.'[285] It is argued that this method of interpretation was a non-originalist one as he did not rely on textualist techniques arguing that it was Congress who should take on the role of the enforcer and he did not rely on the original intent technique to infer these powers. Whether this non-originalist method of interpretation is, however,

[277] ibid.
[278] ibid 185.
[279] *Congressional Globe* 38th Cong, 1st Session App 82 (1864).
[280] *Congressional Globe* 38th Cong, 1st Session App 82 (1864).
[281] ibid.
[282] Wiecek (n 51) 187.
[283] ibid 189.
[284] *Congressional Globe* 39th Cong, 1st Session 5 (1865).
[285] Ibid.

correct is debatable as the Constitution did not lay down specifically that it should be Congress adopting this role.

Sumner also reinstated the same position in his proposed bill in the Senate, and argued that since Congress was given powers to determine 'what is a republican form of government,' the seceded states cannot be considered republican.[286] He further proposed that where no state government had been established, no government could be considered as republican where manumitted slaves were denied the right to vote even though 'they constitute the majority of the citizens' of a state.[287] Whilst the proposals of Sumner were rejected, the same ideology resurfaced soon after. Shellabarger claimed - similar to the earlier positions submitted to Congress by Sumner - that the seceded states ceased to be able to claim any protection under the Constitution once they rebelled and, in fact, ceased to be states.[288] Thus, in order to be readmitted to the United States, these states had to satisfy the Guarantee Clause and establish republican forms of government.[289]

Subsequently, Sumner, once again, submitted a resolution to the Senate based on the Guarantee Clause. He argued that based on this clause, 'no oligarchy, aristocracy, caste, or monopoly' could exist and individuals could not be denied their rights based on their 'color or race.'[290]

The first time that similar proposals would be passed was in 1866, when Congress passed the following resolution submitted by Broomall:

> That whenever the people of any state are thus deprived of all civil government [by rebellion], it becomes the duty of Congress, by appropriate legislation, to enable them to organize a state government, and in the language of the Constitution, to guarantee to such state a republican form of government.[291]

Thus, Congress, with the passage of this resolution, assumed the power of enforcer under the Guarantee Clause. A crucial moment, following this declaration, was the

[286] *Congressional Globe* 39th Cong, 1st Session 2 (1865).
[287] ibid.
[288] *Congressional Globe* 39th Cong, 1st Session 142 (1866).
[289] Ibid.
[290] *Congressional Globe* 39th Cong, 1st Session 592 (1866).
[291] Wiecek (n 51) 199.

passing of the Civil Rights Bill despite the veto of the President.[292] Lawrence, in highlighting the importance of the Bill, argued that a state cannot be regarded republican without it guaranteeing the protection of 'political' and 'essential civil rights, recognized and confirmed by the Constitution' of all its citizens.[293] The guarantee of such a form of government was, however, entrusted upon Congress, as Lawrence claimed, and, thus, had to be applied.[294]

In the Report of the Joint Committee on Reconstruction, the ideals above seemed to emerge in a consolidated manner.[295] The Report claimed that the federal government could 'take notice' of no constitutions of the rebel states.[296] It, in effect, argued that no state constitution was left in these states because they withdrew 'their representatives in Congress,' renounced 'the privilege of representation, by organizing a separate government,' and levied 'war against the United States.'[297] Moreover, it declared that only Congress was granted powers to recognise the forms of government in the readmitted states as republicans under the Guarantee Clause.[298] Therefore, states should be required to organise constitutional conventions and submit the draft constitutions to the people before they could be re-admitted.[299] It is only then that a legislature may be formed as a republican form of government, and could ask for representation at Congress.[300]

The forerunner of the Military Reconstruction Act 1867 utilised the Guarantee Clause to argue that the governments in the seceded states were of military origin and, thus, could not be considered republican. The Reconstruction Act, on the other hand, abandoned the Guarantee Clause as it major constitutional basis.[301]

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[292] ibid 200.
[293] *Congressional Globe* 39th Cong, 1st Session 1836 (1866).
[294] ibid.
[295] Report of the Joint Committee on Reconstruction (20 June 1866).
[296] Report of the Joint Committee on Reconstruction (20 June 1866) VIII.
[297] ibid.
[298] Report of the Joint Committee on Reconstruction (20 June 1866) XIV and XV.
[299] Report of the Joint Committee on Reconstruction (20 June 1866) XV.
[300] Ibid.
[301] Wiecek (n 51) 205–207.

V.1.3. Congress, the Guarantee Clause and the later stages of the Reconstruction

The withdrawal of claims for powers under the Guarantee Clause may also be observed in the later stages of the Reconstruction. As Wiecek highlights, there had been many instances where Congress could have utilised its powers under the Guarantee Clause following the adoption of the Military Reconstruction Act 1867.[302] Such instances, he argued, were expelling black members from the legislature in Georgia in 1868, 'the near-civil war in Arkansas from 1872 to 1874,' or 'similar conditions in Louisiana in 1872.'[303]

Despite both the President and the Supreme Court allowing and even explicitly asking Congress to act under the Guarantee Clause in these instances, Congress refrained from taking any actions.[304] The members of Congress, although claiming that the purpose of this clause was to 'enable them to keep the states in their orbits, to preserve them from anarchy, revolution and rebellion,'[305] thus, left these crises to be solved by the President.

Even though Georgia denied the rights of black men to sit in the legislature, the Congress did not address whether this complied with the ideals of a republican government when re-admitting the state.[306] The only condition that was imposed on Georgia was that of ratifying the Fifteenth Amendment, which ensured that after ratification, all necessary votes were guaranteed in Congress for the passing of this Amendment.[307]

In the meantime, the position of Congress on what constituted a republican form of government transformed substantially from the views of, for instance, Sumner, which were presented during the earlier stages of the Reconstruction era. Howard, thus, claimed during the Forty First Congress that 'a republican government is a government in which the laws of the community are made by their representatives, freely chosen

[302] ibid 210.
[303] ibid.
[304] ibid 210–211.
[305] *Congressional Globe* 40th Congress, 1 Session 193 (1867).
[306] Wiecek (n 51) 216–219.
[307] ibid 219.

by the people.'[308] He subsequently claimed that it was 'impossible […] to give the word "republic" any more exact or precise meaning than that.'[309] Thus, Congress seemed to shy away from the vast responsibility of enforcing the Guarantee Clause and determining what a republican government would have entailed.

This position became even more apparent during the Arkansas crisis of 1872 to 1874. Despite his initial hesitation, President Grant declared that the group supporting Baxter in Arkansas, as opposed to the other three groups claiming power, was the republican form of government in the state, and thus ordered those opposing Baxter to cede.[310] A House Select Committee on Arkansas Affairs was subsequently established to determine which government of the state was 'republican.'[311] The conclusions of this Committee further demonstrated that Congress did not desire to act as the enforcer of the Guarantee Clause or act as the check on the powers of the President exercised under this clause.[312] The Committee concluded that the government of Arkansas, backed by the President, was 'republican in form' and there was 'reasonable peace and quiet' in the state.[313]

The support of Congress for nominating itself as the enforcer of the Guarantee Clause received the final blow in its response to the Louisiana crisis. In this response, despite a bill having been submitted based on the Guarantee Clause for Congress to settle the crisis, Congress rejected this bill.[314] This rejection was based on the argument that the Guarantee Clause could not be used to resolve this crisis because the powers granted to the federal government under it were 'too great' and would be 'too extreme a remedy.'[315]

V.1.4. Congress, the Guarantee Clause and its silence

[308] *Congressional Globe* 41st Congress, 1st Session 2022 (1870).
[309] *Congressional Globe* 41st Congress, 1st Session 2022 (1870).
[310] Wiecek (n 51) 221–223.
[311] ibid 224.
[312] ibid 225.
[313] ibid.
[314] ibid 228–229.
[315] ibid 229.

The silence of Congress on the Guarantee Clause continued into the twentieth century. For instance, Congress failed to invoke any powers it may possess under the Guarantee Clause, even when Huey P Long, 'the American Hitler,'[316] governed Louisiana in an undeniably unrepublican way.[317] The legislative provisions that the 'Kingfish' enacted included the creation of a 'secret police', the imposition of state censorship against any criticism of his government, and of 'martial laws without any opportunity for judicial review'.[318] It may, however, be also highlighted that when Congress could have had the opportunity to decide whether the government of Louisiana, led by the 'Kingfish,' was acting in breach of the Guarantee Clause, Huey P Long was assassinated.[319]

Based on the above analysis, it is thus argued that Congress will only invoke its above powers 'in the most egregious cases', which raise such a level of public interest that Congressional action will be unavoidable.[320] What would constitute such case, however, still remains to be seen. Accordingly, it may be argued that the emergence of a 'rotten'[321] state, if it does not attract sufficient public interest, may continue without intervention from Congress, even though according to the decisions of the Supreme Court in two of its leading cases, Congress is the branch that is supposed to be able to effectively enforce the Guarantee Clause in these circumstances.

V.2. Application by the President

Even though the President is rarely mentioned by commentators as the person who is supposed act as the enforcer of the Guarantee Clause, it should be highlighted that the second part of the Guarantee Clause nominates the President as the enforcer of measures necessary to protect a state from 'domestic violence'. This position will also allow the President to invoke his powers as the commander in chief of the federal

[316] Gerard N Magliocca, 'Huey P. Long and the Guarantee Clause' (2008) 83 Tul L Rev 1, 4.
[317] ibid; Ackerman, *We the People: Transformations* (n 200) 108.
[318] Magliocca (n 317) 4.
[319] ibid.
[320] Erwin Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (1993) 65 U Colo L Rev 849, 876; Charles R Brock, 'Republican Form of Government Imperiled' (1921) 7 ABAJ 133, 134.
[321] Toren (n 162) 378.

armed forces under Article II section 2. It could, thus, follow that if one is to adopt the same textualist arguments that those that claim that Congress should act as the enforcer of this clause, that one could claim that it is, in fact, the President who should act as the enforcer of this clause. The same question, however, arises as a result: why the President is not specifically mentioned in this clause.

It may, on the other hand, be highlighted that Congress has been granted the power to call upon the army to 'execute the laws of the Union, suppress insurrections and repel invasions' under Article I section 8 subsection 15 of the Constitution. The President was, however, granted the same powers under the Militia Act 1792. Indeed, President Washington subsequently invoked these powers to defeat the Whiskey Rebellion in 1794.[322] Similar provisions to those in this Act, after it expired in 1794, can also be found in the Enforcement Act of 1795.[323] In 1807, a further Act was adopted, which allowed the President to 'use regular army forces' and the federal army 'for law enforcement purposes.'[324]

As preparation for the potential Civil War, Congress further enacted the Suppression of the Rebellion Act in 1861, which was later modified in the Ku Klux Klan (Civil Rights) Act of 1871.[325] The above Acts were codified in the Revised Statutes of the United States in 1875 and can now be found in their revised forms in the United States Code,[326] which is also referred to as the Insurrection Act.[327]

It would therefore seem that it was the President that was granted with enforcement powers under the part of the Guarantee Clause that authorises the federal government to protect the states against invasion or domestic violence.

V.2.1. The President: The enforcer of the Guarantee Clause during the Civil War and the Reconstruction

[322] Act of 2 May 1792, ch 28, 1 Stat. 264 (1792); Wiecek (n 51) 81; Thaddeus Hoffmeister, 'An Insurrection Act for the Twenty-First Century' (2010) 39 Stetson L Rev 861, 878–879.
[323] Act of 28 Feb 1795, ch 36, 1 Stat 424; Wiecek (n 51) 80–81; Hoffmeister (n 323) 879–880.
[324] Act of 3 March 1807, Ch 30, 2 Stat 443; Wiecek (n 51) 81.
[325] Hoffmeister (n 323) 887 and 885.
[326] 10 United States Code, sections 331 - 335.
[327] ibid.

As demonstrated in the previous section, Presidents assumed the role of the enforcer of the Guarantee Clause on various occasions during the Civil War and the Reconstruction era.

As mentioned above, President Lincoln declared that the President was entitled to act against those states that rebelled against the United States.[328] Until 1864, the President 'appointed military and civilian governors for the seceded states' once they were under Union control and led the Reconstruction.[329] He further stopped any efforts of Congress, such as the Wade-Davis Bill, that claimed that they were responsible for enforcing the Guarantee Clause – as opposed to the President.[330]

After President Lincoln, President Johnson also relied on the Guarantee Clause to claim that he was to act as the enforcer under this provision and appointed governors to the occupied states.[331] However, following the passing of the Civil Rights Bill, despite his veto, Congress took on the role of the enforcer under this clause.[332] The power, however, returned to the President in the later stages of the Reconstruction, when Congress shied away from taking on this role. President Grant, therefore, had to assume this role and decide which governments within opposing sides within the states in Arkansas and Louisiana were republican.[333]

Contrary to the actions of Congress and despite initial hesitations to assume this role, the President has been called upon as the enforcer of the Guarantee Clause following the Reconstruction era.

V.2.2. The President: The enforcer of the Guarantee Clause under the Insurrection Act

During the 1992 Los Angeles Riots, the President used the powers granted to him under section 331 of the Insurrection Act, which allowed him to request the deployment of armed forces when requested by the legislature or the governor of a state to

[328] Lincoln (n 268); Wiecek (n 51) 171.
[329] Wiecek (n 51) 184.
[330] ibid 187.
[331] ibid 189.
[332] ibid 200.
[333] ibid 221–223.

suppress any insurrection.[334] The same power is also vested in the President when he considers that the enforcement of the federal laws is being made 'impracticable' by the 'unlawful obstructions, combinations, or assemblages, or rebellion' under this section.[335] Most importantly, President Eisenhower had to invoke his powers under section 332 when sending militia to Arkansas to enforce the desegregation order of *Aaron v Cooper;*[336] which held that black students should be allowed to attend 'white high schools'[337] following the major decision in *Brown v Board of Education*, which signified one of the major milestones in non-originalist interpretation, accepting that circumstances have changed to the extent that desegregation in schools was no longer acceptable.[338]

It may further be argued that the particular powers of the President under section 333 (1) may provide the legal basis of him acting as the enforcer of the Guarantee Clause. This section confers the above powers on the President when 'any insurrection, domestic violence, unlawful combination, or conspiracy' would lead to any or some of the people of the states being deprived of a 'protection named in the Constitution' where the state is 'unable, fail or refuse to protect' this right.[339]

It has been demonstrated above that the President has, indeed, assumed the role of the enforcer of the Guarantee Clause during various stages of history, such as the Reconstruction. Moreover, under the powers granted to him in the Insurrection Act, it is also further argued that he has the responsibility of enforcing the Guarantee Clause. It may, consequently, be also contended that if both the Supreme Court and Congress fail to act as the enforcers of the Guarantee Clause, the President has the responsibility of performing this task. It may, however, be emphasised that this is only likely to occur in the current political climate if the President would be under an extremely high level of public and political pressure, and the acts in the states were exceptionally outrageous.

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[334] 10 United States Code, section 333 (1).
[335] 10 United States Code, section 333 (1).
[336] *Aaron v Cooper* (1957) 156 F Supp 220.
[337] Hoffmeister (n 323) 891.
[338] ***Brown v Board of Education*** *of Topeka*, 347 U.S. 483 (1954).
[339] 10 United States Code, section 333 (1).

V.3. Application by the Supreme Court

Undeniably, and following *Marbury v Madison*,[340] a fundamental and traditional task of the Supreme Court is to act as the 'interpreter' of the Constitution,[341] and to exclusively settle the complaints of individuals based on their 'merits'[342] and the facts.[343] Because of this position, it may be claimed that the Supreme Court is better equipped to fulfil the enforcement role of the Guarantee Clause than Congress or the executive.[344] On the other hand, in order to effectively perform this task, the Court is faced with the challenge of the constitutional uncertainty through the lack of an unambiguous standard of what a republican form of government is, which, unsurprisingly, has caused some reluctance to make a decision on this issue.[345]

V.3.1. *Luther v Borden* and *Pacific States v Oregon*

As it has been argued above, no enforcement action may be commenced until a determination has been made that a state is, in effect, unrepublican under the Guarantee Clause. As illustrated above, there have been debates since the Civil War on whether Congress or the President is responsible for making this determination. These debates have also reached the Supreme Court.

[340] *William Marbury v James Madison, Secretary of State of the United States* (n 63).
[341] Catherine Engberg, 'Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government' (2001) 54 Stan. L. Rev. 569, 581.
[342] ibid; Louise Weinberg, 'Political Questions and the Guarantee Clause' (1993) 65 U Colo L Rev 887, 889; Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 865.
[343] Catherine A Rogers and David L Faigman, 'And to the Republic for Which It Stands: Guaranteeing a Republican Form of Government' (1996) 23 Hastings Const LQ 1057, 1067; Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 865.
[344] Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 851; John R Vile, 'John C. Calhoun on the Guarantee Clause' (1988) 40 SCL Rev 667, 675.
[345] Jonathan K Waldrop, 'Rousing the Sleeping Giant-Federalism and the Guarantee Clause' (1999) 15 JL & Pol. 267, 269–270.

In the leading cases of *Luther v Borden*[346] and *Pacific States v Oregon*,[347] in support of the political question doctrine, the Supreme Court held that Congress should be conferred with the enforcement powers under the Guarantee Clause.[348]

Luther v Borden, [349] the first leading case under the Guarantee Clause, was brought to the Supreme Court following Dorr's Rebellion in Rhode Island. The case concerned a trespass action brought by a supporter of the Rebellion against Rhode Island government soldiers, because they searched his property 'for incriminating evidence'.[350] With the Rebellion, two governments had been created within Rhode Island, and it was argued that it was up to the Supreme Court to decide which of the two governments was the 'real' republican government.[351] Moreover, if the government instructing the defendants was held to be the 'real' government, the Supreme Court also had to decide whether their departure from the principles of republican government were in breach of the Guarantee Clause.[352] Chief Justice Taney, however, held that it was the exclusive right of Congress and not of the Supreme Court to decide whether a government established in a state is republican.[353] This argument was not only supported by the political question doctrine, but it may also be argued that Chief Justice Taney supported the republican ideal himself by refraining from making a decision about which government was that of the people. Adopting this approach guaranteed that the Court would not make an arbitrary decision based on the private views of the judges, but aimed to ensure that the view of the people would be upheld instead. However, this approach also seems to contravene the ideal that to manage the issues that may arise as a result of improper elections, the Supreme Court should take on the role of enforcing the fundamental constitutional values in order to ensure the maintenance of these. Shying away from this responsibility in politically sensitive

[346] *Luther v Borden* (n 248).
[347] *Pacific States Telephone & Telegraph Co v Oregon* (n 249).
[348] *Luther v Borden* (n 248) 42; *Pacific States Telephone & Telegraph Co v Oregon* (n 249) 118 and 150.
[349] *Luther v Borden* (n 248).
[350] Tribe (n 171) 368; Wiecek (n 51) 113–114.
[351] Tribe (n 171) 368; Bonfield (n 143) 534.
[352] Tribe (n 171) 368; Bonfield (n 143) 534.
[353] *Luther v Borden* (n 248) 42.

matters, thus, indicates that the Court was not willing to take on this highly important role.

Pacific States v Oregon[354] followed this argument. In this case it was held that since a decision whether a government is of republican nature is a political question, that required a decision about whether a state can be deemed a state, which is a determination that can only be made by Congress.[355] The above two cases have also contributed towards the affirmation of the political question doctrine, which claims that the Supreme Court should refrain from enforcing certain breaches of the constitution despite all the conditions being met to do so, when it includes a political question and it should leave such enforcement action to the other branch of the government designated to perform this task.[356] It may also be asserted that this doctrine supports the principle of the separation of powers principle of the ideal of the republican government.

Whilst the separation of powers is a fundamental pillar of the federal republic, the protection of republican values under the Constitution has been endowed upon the 'federal government' in the Guarantee Clause. If, as demonstrated above, Congress shies away from this responsibility even though under the political question doctrine it is that institution that is supposed to act as the enforcer of this clause, the only branch of the federal government that will be left to enforce this clause is the President based on the above decision and this doctrine. This position, however, completely contravenes the idea of the Framers that power should not accumulate in the hands of one person only, since that may lead to a tyranny. Therefore, one is left with the same situation as the one the Framers aimed to avoid with the Guarantee Clause, if it ever comes to the use of this clause at some point in the future.

Moreover, if the Supreme Court refuses to enforce the Guarantee Clause and Congress possesses an 'uncontrollable authority' of being able to determine whether a government is republican, it undoubtedly generates the risk of reversing the fundamental agent-principal or trustor–trustee relationship between Congress and the

[354] *Pacific States Telephone & Telegraph Co v Oregon* (n 249).
[355] ibid 118 and 150.
[356] Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 853.

people.[357] Such an agent-principal relationship is created when the citizens vote for members of Congress to represent their views. However, if members of Congress act as the principals of the individuals instead of their agents, it is questionable whether that forms a republican government, where people are invested with the power to govern.

In addition, without the possibility of a judicial review of the actions of the Congress, it is argued, in line of the arguments of Congress following the Louisiana crisis, that the powers of Congress may become limitless and the representatives may be inclined to act arbitrarily, resulting in their actions eventually becoming unconstitutional.[358] This will further result in the threat to a republican government arising within the state where public officials act arbitrarily, for which the theoretical solutions suggested by commentators, such as Saxonhouse and Sellers, is the system of checks and balances.[359]

Therefore, it is argued that the Supreme Court, by not accepting responsibility for enforcing the Guarantee Clause has placed the republican values in constant jeopardy. It has not only risked placing too big a power in the hands of Congress, but its decision may ultimately result in an uncurbed and unlimited power granted to one person only, the President.

V.3.2. The aftermath of *Luther v Borden*

Following and implementing the decision of Justice Taney in *Luther v Borden*,[360] holding that Congress can exclusively enforce the Guarantee Clause, it has also been widely argued that the Supreme Court should abstain from such enforcement action under the political question doctrine.[361]

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[357] Schwartz (n 171) 73–74; Earl M Maltz, *Civil Rights, the Constitution and Congress 1863-1869* (University Press of Kansas 1969) 133.
[358] Schwartz (n 171) 73–74; Maltz (n 358) 133.
[359] Saxonhouse (n 110) 1395; Sellers (n 61) 13206 and 13208.
[360] *Luther v Borden* (n 248).
[361] Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 849; Thomas C Berg, 'The Guarantee of Republican Government: Proposals for Judicial Review' [1987] The University of Chicago Law Review 208, 208; Engberg (n 342) 570; Heller (n 108) 1726.

In *Georgia v Stanton*, Justice Nelson re-affirmed the position of the Supreme Court that cases involving the Guarantee Clause would be 'political, and not judicial' questions.[362] In *Texas v White*, Chief Justice Chase, also confirming the decision in *Luther v Borden*,[363] argued that Congress has the power to decide whether a state is republican.[364] Since it was, however, the President that installed a governor in Texas following the Civil War, Chief Justice Chase concluded that the President must have only been provided with 'provisional' powers under the Guarantee Clause to be able to do so.[365]

Since 1962, the application of the political question doctrine has also had to satisfy the five criteria laid down by Justice Brennan in *Baker v Carr*.[366] Firstly, the provision must designate the enforcement to 'another branch of government;' secondly, it must not set out an identifiable or working 'standard;' thirdly, the breach must demand a political decision; fourthly, a potential judgment should demonstrate disrespect 'for the other branches of the federal government;' and lastly, the question should raise a 'need for "unquestioning adherence to a political decision already made"' or could lead to humiliation following various statements.[367]

The Guarantee Clause, however, apart from the second, does not seem to satisfy the criteria laid down in the above case. Firstly, the Guarantee Clause does not designate the enforcement of this clause to Congress or the President if one is to adopt a textual interpretation and if one is to look for indisputable evidence of the intent of the Framers about this. It is also argued that according to the third criterion, the breach of republican values must demand a political decision, which is not always the case. For instance, if an act adopted by the state in question is in clear breach of the provision of a Constitution that was previously deemed unrepublican, that may constitute a constitutional, not a political question.

[362] *Georgia v Stanton* (1867) 73 US 6 Wall 50, 71.
[363] *Luther v Borden* (n 248).
[364] *Texas v White* (1868) 74 US 7 Wall 700, 730.
[365] ibid.
[366] *Baker et al v Carr et al* (1962) 369 US 186; Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 870–874.
[367] Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 870–874.

In response to the fourth criterion, ruling that a state is unrepublican would not demonstrate disregard towards Congress or the President on all occasions. One of the few instances where it would do so if these branches previously ruled in favour of the state in question. Moreover, this statement seems to disregard the republican separation of powers principle if it places the sentiments of the members of the other branches over the checks and balances that exists as part of such a government.

It is also claimed that political decisions according to the fifth criteria could be deemed more important than the fundamental constitutional values that the Supreme Court was set up to uphold according to the non-originalist method advocated for in this thesis. Whether the approach adopted by Justice Brennan would result in the protection of these values is highly debatable.

The Supreme Court has also refrained from performing the enforcement role of the Guarantee Clause in other cases based on this doctrine. In *In re Duncan*,[368] Chief Justice Fuller argued that it was 'the right of the people to choose their own officers for governmental administration, and pass their own laws' under a republican government, and thus the 'legitimate acts' of the officers were 'those of the people themselves.'[369] However, he further asserted, that the people have written constitutions that had limited the 'governments, national and state,' thus placing 'bounds to their own power as against the sudden impulses of mere majorities.'[370] Chief Justice Fuller, thus, held that 'whether certain statutes have or have not binding force' could only be determined by the states themselves, without involvement from the federal government.[371] This approach, however, as demonstrated in the beginning of this Chapter is in complete contravention of the intents of the Framers, who hoped for the federal government to be able to act in these instances specifically.

In *New York v United States,*[372] whilst Justice O'Connor upheld the decision in *Luther v Borden,*[373] she mentioned that according to the claim in *Reynolds v Sims*[374] that

[368] *In re Duncan* (1891) 139 US 449; Berg (n 362) 214.
[369] *In re Duncan* (n 369) 461.
[370] ibid.
[371] ibid.
[372] *New York v United States* (1992) 505 US 144.
[373] ibid 185.
[374] *Reynolds v Sims* (1964) 377 US 533, 582.

'some,' not all questions are non-justiciable.[375] Thus, she argued, in certain questions the Supreme Court may rule on the merit of the cases, as suggested by Tribe.[376]

On the other hand, whether the use of the political question doctrine as a justification for the lack of judicial enforcement has been the correct decision is questionable. Even though this may assist in achieving judicial impartiality in highly political questions, the Supreme Court, as Chemerinsky rightly argues, should nevertheless only accept to refrain from ruling on a case when either Congress or the President are in a better position to do so.[377]

Bonfield also identified a further group of cases where unsuccessful attempts have been made that certain provisions violated not only Guarantee Clause, but, more importantly, the Fourteenth Amendment.[378] These cases, for instance, held that the judiciary determining the municipal boundaries of the state was not possible because that could only be performed by the state.[379] Relying on the Guarantee Clause also proved unfruitful in *Mountain Timber Co v Washington,* where the political question doctrine was upheld. [380]

However, signals of Justices of the Supreme Court adopting a non-originalist method of interpretation may also be observed about the Guarantee Clause. The claimants in the above cases may, however, also be found to have demonstrated support for the dissenting opinion of Justice Harlan in *Plessy v Feguson*[381] which claimed that whether a government was republican had to be decided based on 'contemporary theories of natural justice',[382] which theories may also be held to be found in the Fourteenth Amendment.

[375] *New York v United States* (n 373) 185.
[376] ibid 185.
[377] Nelson Lund, 'From Baker v Carr to Bush v Gore, and Back' (2012) 62 Case Western Law Review 1, 1; Jesse H Choper, 'Observations on the Guarantee Clause-As Thoughtfully Addressed by Justice Linde and Professor Eule' (1993) 65 U Colo L Rev 741, 743; Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 875.
[378] Bonfield (n 143) 550–552.
[379] *Forsyth v Hammond* (1897) 166 US 506 519; Bonfield (n 143) 551.
[380] *Michigan ex rel Kies v Lowrey* (1905) 199 US 233; Bonfield (n 143) 551.
[381] *Plessy v Ferguson* (1896) 163 US 537; Heller (n 108) 1732.
[382] Bonfield (n 143) 550.

Whilst the federal Supreme Court has been hesitant in ruling in cases brought before them under the Guarantee Clause, a certain movement has been identified by commentators, where they have highlighted that the supreme courts of individual states have become more inclined to decide in such cases. This approach can be divided into two separate groups.

Firstly, in a small proportion of cases, as Heller highlighted, the supreme courts of the states were audacious enough to make a decision based on the merits of the case that were submitted based on the Guarantee Clause.[383] These cases, for instance, determined that provisions such as tribal immunity,[384] the abrogation of the judicial immunity of state judges,[385] and racial segregation[386] were violations of the Guarantee Clause because these actions had resulted in harm to one or more of the values of the republican government.[387] The second group of cases decided in these supreme courts was further identified by Waldrop, which he categorised as cases holding that any provision for taxation that had an object other than the 'public purpose' were violations of the Guarantee Clause.[388]

Thus, it is argued that the national supreme courts have been more inclined to adopt a non-originalist interpretation of the Constitution, where upholding the fundamental constitutional values has been deemed more important than relying on textual interpretations and debating whether they have powers to rule on such matters.

Whilst it may be argued that there has been a tendency amongst national supreme courts towards the judiciary accepting and performing their tasks as the enforcers of the Guarantee Clause, the federal Supreme Court has failed to take on this role to date. The Supreme Court has further employed other justifications for the apparent lack of acknowledgement of the enforcement role of the federal judiciary. Whereas in *Pacific States v Oregon*[389] it was argued that the Court could not rule on a claim about

[383] Heller (n 108) 1729.
[384] *Agua Caliente Band of Cahuilla Indians v Superior Court* (2006) 148 P3d 1126; Heller (n 108) 1729.
[385] *Gregory v Ashcroft* (1991) 501 US 452; Heller (n 108) 1730–1731.
[386] *Plessy v Ferguson* (n 382).
[387] Heller (n 108) 1729–1732.
[388] *Beach v Bradstreet* (1912) 82 A 1030; *Heimerl v Ozaukee County* (1949) 40 N W 2d 564; Waldrop (n 346) 297.
[389] *Pacific States Telephone & Telegraph Co v Oregon* (n 249).

a 'state as a state',[390] in the earlier case of *Luther v Borden*,[391] Justice Taney argued that declaring a state unrepublican would result in a 'legal chaos'.[392] The latter view thus claims, that in such a situation, all governmental actions could be revoked retrospectively, which was also referred to as a 'parade of horribles' situation in *Pacific States v Oregon*.[393]

Accordingly, it may be argued that the Supreme Court, similar to Congress, will also refrain from any enforcement action based possibly on the political question doctrine when a 'rotten' state emerges. [394]

V. 4. Application by co-operation

It has been examined and argued that the separate branches of the federal government are reluctant to take on the role of the enforcer of the Guarantee Clause. It is therefore proposed that instead of making a determination separately about whether a state is republican, the separate branches may divide the enforcement role between themselves and co-operate, in a sequential order, in the enforcement of the Guarantee Clause. Such co-operation is proposed based on the application of the Guarantee Clause as explained above.

Based on the political question doctrine, which claims that it is the exclusive right of Congress to decide whether a government established in a state is republican,[395] it is suggested that Congress may occupy the role of the decision-maker on whether the state in question is ruled by a republican government. Subsequently, the Supreme Court may, following this determination, be able to decide whether a certain national law and any action authorised by it may be held to be a breach of the Guarantee Clause. This is based on their exclusive ability to settle the complaints of individuals

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[390] Toren (n 162) 403.
[391] *Luther v Borden* (n 248).
[392] Ari J Savitzky, 'The Law of Democracy and the Two Luther v Bordens: A Counterhistory' (2011) 86 New York University Law Review 2039 <http://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=00287881&AN=70242333&h=4cyefKc1sdMi6%2Fop1LDZeUgCI8acj1LkIgag%2BhFOf3RlefO3dUQYjfAZy6bpDozmRS1Jdj3AkRwtLcu5si9w0w%3D%3D&crl=c> accessed 25 March 2014.
[393] Hasen (n 144) 5.
[394] Toren (n 162) 378.
[395] *Luther v Borden* (n 248).

based on their 'merits'[396] and the facts.[397] It is further proposed that based on the Insurrection Act, the President may then be able to send troops to the state in question to ensure that they comply with the determination of Congress and the decision of the Supreme Court.

Whilst this method of co-operation may at first sight seem to contravene the principle of separation of powers, because of its sequential order, it is argued, it allows for this principle to be applied. If the decision of each branch of government was held to be contrary to the Constitution, the other branches would be able to keep these in check. Moreover, as the Supreme Court is argued to have been given the ultimate power to review decisions following *Marbury v Madison.*[398] However, if a branch does find that the actions of another branch are contrary to the Constitution, this may jeopardise the concentrated action against the state in violation of the republican values. If a situation similar to that of the rule of law crisis of the European Union emerged in the United States, it is thus argued that this may result in a similar stand-off to that of the European Union. However, in the United States the focus of this standstill would be placed on the question of which branch is to act, whilst in the European Union the question is whether the European Union can act.

This proposal is further argued to be in line with the principles examined under the modern republican ideal. This mechanism would increase the possibility of the enforcement action being performed for the common good, since the people will have an increased number of representatives in all branches of the federal government, as opposed to simply one of them. It is also argued that through this process, the trustor-trustee position of the people and the federal government regarding the promotion of the freedom of the citizens from non-domination may strengthen if a dominating and arbitrary government is suppressed. Moreover, it is claimed that the co-operation procedure would also enable the further development of the concept of the republican government as a dynamic term, since this procedure would allow the application of this term to a new situation that may arise. Furthermore, this procedure may also act

[396] Engberg (n 342) 581; Weinberg (n 343); Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 865.
[397] Rogers and Faigman (n 344) 1067; Chemerinsky, 'Cases under the Guarantee Clause Should Be Justiciable' (n 321) 865.
[398] *William Marbury v James Madison, Secretary of State of the United States* (n 63).

as the screen and sanction mechanism devised by Pettit and would allow the government in question to rectify any of its unrepublican provisions and actions before a sanction is imposed on them.[399] The co-operation procedure may also provide a more effective preventive measure against the rise of a dominating government in a state if put into action, and may also serve as a deterrent for potential dominating public officials that unrepublican action would not be tolerated in a republican federation comprised of republican states.

VI. The importance of the Guarantee Clause

In light of the above, it may be argued that the Guarantee Clause occupies a hidden fundamental position in the US Constitution and federal system.

Firstly, the clause could give rise to the determination of the definition of what a republican form of government even before an enforcement action is invoked. Whilst the clause itself was mainly regarded by the Framers of the Constitution as a tool to ensure that no monarchy would be created within the United States,[400] the constant developments of society and the dynamic nature of the republican ideal allowed for the Guarantee Clause to bring republican advancements to the society, such as the abolition of slavery or the granting of the universal voting rights. It should therefore be emphasised that the adoption of a general standard instead of a clear definition has played an augmented role in allowing these changes in society to occur under the ideal of the republican government. It is consequently argued that while adopting a clear definition may create legal certainty, it would not allow for these changes.

Secondly, when its enforcement is invoked, the clause could challenge what its contemporary purpose is. It may be argued that despite the developments of what is interpreted as republican, this has not changed the purpose that was initially intended by the Founding Fathers for the clause, since the main concern of the drafters of the Constitution was seemingly the maintenance of the stability and welfare of the federal system and the protection against tyranny. On the other hand, with current world

[399] Pettit (n 61) 220.
[400] Toren (n 162) 392; Wiecek (n 51) 43; Tribe (n 171) 133 and 909; Schwartz (n 171) 7.

advancements and challenges, it may be argued that this purpose could change. Consequently, the clause would then have to adapt to such transformation in values.

Thirdly, with the increased role of the United States as the promoter and exporter of the ideologies of republicanism and democracy,[401] the clause also occupies a hidden fundamental position in determining what is deemed republican globally. Careful attention must, however, be paid to certain aspects of the inclusion of such exported philosophies in binding legal instruments as the adoption of certain unambiguous terms in fundamental provisions may create critical legal uncertainties as to the fundamental pillars of a legal and governmental systems.

Lastly, in line with the argument that the clause is a guarantee to the people of a state, it may be argued that the clause provides a double shield for its citizens in guaranteeing them a republican form of government and the protection of the inherent fundamental rights of the citizens deriving from the ideal of the republican government. A thorough examination of the guarantee in Article IV section 4 demonstrates that the people of the state are firstly guaranteed a republican form by way of a shield being formed for certain aspects of the sovereignty of their states against any intended dominating impositions by the federal government.[402] The particular aspects that this shield protects based on the study of the Guarantee Clause above may be argued to include the 'pre-existing' form of government,[403] 'the rule of law' in the state[404] and the 'inherent and constitutional right' of national governments to arrange themselves 'as they see fit' as long as they remain republican in form.[405] Once this condition is breached, however, the shield can become a sword used by the federal government against the state.[406] On the other hand, as it has been demonstrated in the previous part of the chapter, it is highly unlikely that the first strike of such a sword will be prompt or will even occur. Consequently, as long as the states adhere to the arguably single

[401] Halperin and Lomasney (n 216) 60–63.
[402] Tribe (n 171) 909–910; Deborah Jones Merritt, 'The Guarantee Clause and State Autonomy: Federalism for a Third Century' (1988) 88 Columbia Law Review 1, 26.
[403] Magliocca (n 317) 42; Bonfield (n 143) 519 and 521.
[404] Timothy Sandefur, 'A Private Little Bush v Gore, Or, How Nevada Violated the Republican Guarantee and Got Away with It' (2004) 9 Tex. Rev. L. & Pol. 105, 145; Thomas A Smith, 'The Rule of Law and the States: A New Interpretation of the Guarantee Clause' [1984] Yale Law Journal 561, 561.
[405] Magliocca (n 317) 27.
[406] ibid 26.

restriction contained in the clause, which forbids their governments from adopting a non-republican constitution,[407] claimants are arguably expected to face difficulties when attempting to claim that a violation of the Guarantee Clause occurred.

The second shield of the Guarantee Clause is arguably created around the fundamental rights granted to the people under federal laws [408] and under the modern ideal of the republican government. This shield ensures that the principles of the republican government are also protected from the threats that may be posed to the government and therefore also to the promotion of freedom as non-domination of their citizens, such as the emergence of arbitrary decision-makers. The methods by which this shield may provide protection to the citizens of a state will be examined in Chapter 3, examining the incorporation doctrine.

It may thus be argued that even though the clause is a 'sleeping giant',[409] the fears about its awakening have resulted in the creation of a hidden fundamental importance of the clause, which may only come to light when the clause is used as a sword against a 'rotten'[410] state.

VII. Conclusion

In conclusion, the chapter has examined what protections are at the disposal of the federal government under the Constitution of the United States that are similar to that of Article 7 Treaty on European Union,[411] which aims to set out a mechanism for the protection of the fundamental values of the European Union. Whilst initially it may seem that the Guarantee Clause may have entrusted the federal government with wide-ranging powers in this area, this Chapter has demonstrated that this aspect has not, in fact, been the focus of development in this area.

The chapter has firstly examined what 'a republican form of government' under the Guarantee Clause could be characterised as and the two main motives for the creation

[407] Ackerman, *We the People: Transformations* (n 200) 105.
[408] Bonfield (n 143) 570.
[409] *Congressional Globe*, 40th Congress, 1st Sess 614 (1867); Heller (n 108) 1715; Wiecek (n 51) 168.
[410] Toren (n 162) 378.
[411] 'Consolidated Version of the Treaty on European Union' (n 3) Art 7.

of this clause: the distrust and antipathy of the monarchical form of government, and the protection of the people as sovereigns under the republican government ideal. It has further highlighted that no clear definition or standard has emerged about what a republican form of government is, which has created a constitutional uncertainty, consequently resulting in the enforcement of the clause being a challenging task. It has, however, further emphasised that the lack of a clear definition has provided the opportunity for diverging methods of constitutional interpretation to emerge and, ultimately, a dynamic mechanism may emerge, enabling advancements in the contemporary values of republican governments. This was demonstrated, for instance, through the clear juxtaposition that has emerged between slavery in a republican government, where ideals around the provision 'all men are born equal'[412] are constantly evolving.

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The chapter has subsequently demonstrated the reasons why the Guarantee Clause is considered the 'sleeping giant'[413] of the US Constitution through looking at how the federal government would enforce the clause against an emerging 'rotten'[414] state. It has further analysed the importance of the existence of such giant through the debates about the issues created by the clause.

It has further emphasised that the constant disagreement between the separate branches of the federal government, especially between Congress and the President about which of them should enforce this clause, has led to a critical uncertainty, which may impair the federal government from taking any action against an emerging 'rotten'[415] state. A clear illustration of this was provided above through the Reconstruction era, when Congress would assume the role of the enforcer of this Clause, but would subsequently stay silent and rely on the President to fulfil this task. It was also highlighted that the Supreme Court, relying on the political question doctrine, has further refrained from making any decisions based on this Clause, thus,

[412] Declaration of Independence 1776.
[413] *Congressional Globe***,** 40th Congress, 1st Sess 614 (1867); Heller (n 108) 1715; Wiecek (n 51) 168.
[414] Toren (n 162) 378.
[415] ibid.

making it unclear nowadays which branch is, in fact, supposed to act as the enforcer of the Clause.

This chapter has, thus, proposed a co-operation enforcement mechanism that requires the separate branches of the federal government to co-operate during the enforcement of the clause. This would remedy the lack of enforcement actions taken under the Guarantee Clause, while keeping the republican values in sight.

The chapter has, lastly, identified four hidden fundamental important positions that the clause arguably occupies within the US Constitution, the federal system and on global scale. Whereas it is understood that an unforeseen threat to the republican values is not predicted to emerge in the foreseeable future within a state in the United States of America, it should not be forgotten that the current rule of law crisis of the European Union was not foreseen either, hence contributing to the lack of preparation by the European Union to handle the crisis.

Chapter 3: Providing a uniform protection of the fundamental rights of individuals throughout the United States

The constitutional value set out in the Fourteenth Amendment

I. Introduction

While Chapter 2 focused on the protection of the fundamental constitutional value of protecting the United States from a tyranny to emerge through the establishment and development of a novel federalist republican system of government, this Chapter will examine how the individuals have been afforded protection of certain of their fundamental rights. It will further focus on how the constitutional uncertainties surrounding the protection of the fundamental rights of the individuals in the United States of America have developed.

Whilst for the Guarantee Clause, the constitutional uncertainties that also resulted in different methods of interpretation arose from the provisions of the federal Constitution, in the area of protection of fundamental rights of individuals the constitutional uncertainties were present on state level even before the drafting of the Constitution. Following the American Revolution, the previous colonies did not immediately adopt uniform constitutions that would have created a uniform manner of protecting these rights. However, as with the Guarantee Clause, diverging interpretations of the protection of these rights emerged. Therefore, it is argued that the constitutional uncertainties in this area arose from the constitutional protections provided by the states, not the federal government.

This Chapter will, thus, commence with examining the state of the protection of the fundamental rights of individuals in the United States of America before the adoption of the Constitution. This will require the study of different state constitutions and bills of rights, and an analysis of the similarities and differences between them.

Subsequently, the reasons for the lack of a Bill of Rights from the original federal Constitution will be examined. It will further have to be determined whether the so-

called 'dual federalist'[416] structure of the United States afforded adequate protection of the fundamental rights of the individuals.

As it will be demonstrated below, the lack of the Bill of Rights from the Constitution provided such a fundamental debate following the Constitutional Convention that it even threatened its ratification. Therefore, the Federalist and Anti-Federalist viewpoints of this debate will have to be investigated further. After an analysis of the federal Bill of Rights and whether these could be applied against the states, *Barron v Baltimore*,[417] the first key decision of the Supreme Court in the area of fundamental rights will be examined further.

Following the study of the status of slavery and its role in the Civil War, the constitutional consequences of the Civil War in the protection of the fundamental rights of individuals, especially the manumitted ex-slaves will be examined further. Subsequently, the chapter will examine how the constitutional uncertainties and the diverging methods of interpretation regarding the incorporation doctrine contributed towards the adoption of an approach that selectively incorporates provisions of the federal Bill of Rights against the states.

II. Protection of fundamental rights in individual states

In order to investigate the current state of play of the protection of fundamental rights in the United States, this thesis will adopt the living constitutional values method of interpretation of the Constitution, devised in Chapter 1. This will, therefore, first require the examination of the intents of the Framers.

To examine the intents of the Framers, this work also sets out to understand how the fundamental rights came to be included in the Constitution. This, however, requires studying the protection of these rights before the adoption of the Constitution. During these times, the only protection afforded to the fundamental rights of citizens was in

[416] Corwin (n 101) 481.
[417] *Barron v Mayor & City of Baltimore* (1833) 32 US 243.

the form of the colonial charters, declarations of rights, and the state constitutions adopted only after the adoption of the Declaration of Independence. Moreover, it was not only the nature of the documents, but their contents as well that diverged. Thus, the subsequent adoption of a uniform approach to the protection of fundamental rights would, unsurprisingly, prove challenging.

In order to understand the differences between these documents, it is important to examine what their legal status was and where the ideal to enumerate fundamental rights in these originated from.

II.1. The colonial charters

The thirteen colonies that emerged as the states that subsequently formed part of the United States were recognised as colonies by royal charters. The royal charters were also issued for the protection of 'property, power and immunities' in Britain and were therefore mostly regarded as contracts.[418]

In the colonies, however, these charters came to occupy a more essential function than a contract over the years. The contractual nature of the charters was apparent in the availability of remedies for breaches of the terms of the charter. However, the remedies that citizens of the colonies were also commencing to seek were against the arbitrary actions of their governors, for which they resorted on more and more occasions to the other protections afforded to them by the colonial charters.[419] This would, thus, signify that these charters could be regarded as documents that were more than contracts – they also afforded protection to the citizens against their governors. This would suggest that these documents granted the citizens with certain rights to protect from these actions.

[418] Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (Madison House 1992) 27; Donald S Lutz, *The Origins of American Constitutionalism* (Louisiana State University Press 1988) 37.
[419] Jack N Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A Knopf 1996) 296.

However, these documents were not static documents either: they were, in fact, frequently amended, allowing them to adopt to changes. The provisions contained in them, furthermore, were also left open-ended: they, therefore, allowed for an interpretation that incorporated changes to society, similar to the non-originalist constitutional interpretation method. Another key characteristic of these charter was the uneven allocation of powers between the colonies and Britain.[420] Intriguingly, a common characteristic of the colonial charters was that they vested to the British settlers the privileges and immunities that had already been granted to them as British citizens under the British legal system and bestowed the same rights on their descendants.[421] In these colonies the fundamental rights of these citizens would, thus, be guaranteed protection. Since the colonies did not have authority as independent states to adopt constitutions, the above characteristics of these would suggest that these charters could be elevated to the status of quasi-constitutions of these colonies.[422] The subsequent adoption of the charters of Connecticut and Rhode Island as state constitutions after the adoption of the Declaration of Independence also supports the ideology that the charters were regarded as such.[423]

It shall, however, also be highlighted here that differences were present in the colonial charters regarding the protection of fundamental rights. Some included only protection of the values that they regarded most fundamental, such as the freedom of religion included in the Royal Charter of Rhode Island.[424] Some, on the other hand, provided a comprehensive list of fundamental rights, such as the Charter of Privileges of Pennsylvania.[425] The charter of Georgia, opted for a different method and instead of

[420] Lutz (n 419) 37.
[421] Leonard W Levy, *Origins of the Bill of Rights* (Yale University Press 1999) 1; Schwartz (n 419) 27.
[422] Lutz (n 419) 37; Schwartz (n 419) 53.
[423] George Jellinek and Max Farrand, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (Henry Holt and Company 1901) 22; Lutz (n 419) 6.
[424] Patrick T Conley, 'Rhode Island: Laboratory for the "Lively Experiment"' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 124 and 130.
[425] John K Alexander, 'Pennsylvania: Pioneer in Safeguarding Personal Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 309–314; Levy (n 422) 7 and 9.

enumerating these rights, it catered for the guarantee of the same rights that British citizens possessed to those of Georgia.[426]

A fundamental change in the approach of the governors towards the governance of the colonies also had an effect on their quasi-constitutional structure. Whilst the governors of the colonies initially aimed to represent the interests of the British King and Parliament, during the eighteenth century, they commenced to give priority to the interests of the citizens of the colonies over the interests of the monarchy or Parliament.[427] This change could be argued to have been a result of the shift in the main concerns of the individuals as citizens of the colonies from religion to the 'political and economic interests' of the colonies and their citizens.[428] Thus, it is argued that whilst these charters were initially set out to be mere contracts between Britain and the colonies, with the governors representing Britain, the changes in society over the years and the non-static nature of these documents allowed for these documents to become quasi-constitutions. The signs of these documents becoming quasi-constitutions further suggests (with the benefit of hindsight) that the feeling of belonging to Britain would transform over time. This transformed approach to the self-governance of the colonies also resulted in a general view that the colonies were 'ruled by a foreign country' as opposed to their 'mother country.'[429] This standpoint also ultimately resulted in the American Revolution, and the subsequent adoption of the Declaration of Independence on 4th July 1776.

II.2. State constitutions

After obtaining independence from the British Empire, the Congress of the colonies requested the colonies to adopt state constitutions, and the request was subsequently satisfied by eleven states. [430] The adopted constitutions were important milestones in

[426] Kenneth Coleman, 'Frontier Haven: Georgia and the Bill of Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 444.
[427] Peter Kolchin, *American Slavery* (Penguin Books 1993) 36; Jellinek and Farrand (n 424) 78.
[428] Jellinek and Farrand (n 424) 78.
[429] ibid.
[430] ibid 22.

not only American, but global history, since these essentially became the first written constitutions, some of which also contained the first declarations of rights.[431] On the other hand, whilst these unarguably amounted to the adoption of innovative political ideals of the era, ideologies similar to those included in the constitutions and declarations of rights had been formulated beforehand.

One such ideology, which requires special attention, is the higher law approach, according to which there exists a natural law, higher than the laws of any government that grants protection of the 'inalienable' and 'inherent' rights to all individuals.[432] This ideology further asserts that the enactment of laws by governments that include these rights does not amount to granting novel rights to individuals, it is merely a discovery of these rights and the declaration of their existence.[433] Proponents of the natural law approach also claim that these 'natural' or 'inherent' rights had been in existence long before the adoption of any laws containing them as these are 'antecedent and superior' to all governments.[434] They further assert that the fulfilment and protection of these rights is the goal of a government, which may only be created by the consent of the governed individuals.[435] The main aim of a constitution or a declaration of rights, therefore, is to guard these natural rights of individuals against violations by both individuals and the state under this ideology.[436] This approach is also argued to have been disseminated especially during sermons in the United States, making explicit references to the ideologies of John Locke,[437] although Cicero, Coke and Blackstone may also be mentioned as key advocates of this approach.[438]

The living constitutional approach advocated for by this work thus also coincides with natural law. It is inferred that if it is the goal of a government to fulfil and protect these

[431] ibid 18–19.
[432] Edward Samuel Corwin, *The 'Higher Law' Background of American Constitutional Law* (Great Seal Books 1955) 24.
[433] ibid 5.
[434] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 86; Jellinek and Farrand (n 424) 48.
[435] Jellinek and Farrand (n 424) 48 and 83; Lutz (n 419) 76.
[436] Henkin (n 435) 85 and 87.
[437] Corwin (n 433) 74.
[438] ibid 30 – 31, 56 – 58, 61 and 74.

rights and the powers of the government in the United States originate from the Constitution, the aim of the Constitution itself may be established as the fulfilment and protection of these rights. Since the living constitutional values may be regarded as rights of individuals (for instance, the protection against tyranny) that may be attained by the application of principles (for instance, the separation of powers), it is argued that the protection of values and not just rights should be regarded as the aims of the Constitution.

It will be demonstrated below that the individual colonies and states had played an essential role in devising protective measures of certain fundamental rights of their citizens, as firsts in the world. It shall, however, also be highlighted that as the adoption of these legal documents occurred at state level and not in a uniform federal level, differences can be found between all legal documents and provisions on state level.

II.2.1. States with no bills of rights

The differences between the states with regard to the protection of fundamental rights become apparent as some states, such as New York, had decided against the adoption of a state bill of rights. It, however, did opt to enact a Constitution in 1777, which contained, for instance, in Article XLI, the right of its citizens to trial by jury.[439] Most importantly, despite not being enumerated in the state Constitution, the freedom of the press, 'a "principal pillar" of free society,' was afforded protection in New York.[440] This followed from the decision to acquit John Peter Zenger from seditious libel for printing materials, which were critical about the royal governor disregarding the then existing legal provisions.[441]

It can further be shown that even though not contained in legal provisions enacted by the government, the state of New York respected the right to bail and the prohibition

[439] Constitution of New York 1777; Milton M Klein, 'Liberty as Nature's Gift: The Colonial Origins of the Bill of Rights in New York' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 215.
[440] Klein (n 440) 227 – 228.
[441] ibid 228.

against self-incrimination.[442] Klein supports this position by illustrating that the protection of the latter can be identified in cases in front of the Privy Council, where the defendants had indeed, made self-incriminatory remarks.[443] Article XL of the New York Constitution further required its 'able-bodied men' to bear arms, while Article XXXVIII regarded freedom of religion as a natural right that had to be protected.[444] Moreover, it provided protection for its citizens from the quartering of soldiers in the Declaration of Rights that was adopted in 1787.[445]

While it has been demonstrated that New York did provide certain protections of the fundamental rights of its citizens, New Jersey was less generous. With no bill of rights, the Charter of Fundamental Laws of West New Jersey, adopted in 1677, afforded protection to certain fundamental rights to its citizens.[446] This charter, however, included the protection of merely two fundamental rights, the freedom of religion and the right to trial by jury.[447] Despite the lack of a Bill of Rights in its subsequent Constitution adopted in 1776, Article XIX of the said Constitution continued to afford protection of the freedom of religion and so did the right to trial by jury under Article XXII.[448]

Despite having been devised in 1669 by the Earl of Shaftesbury and John Locke himself, the Fundamental Constitutions of Carolina, which guaranteed some fundamental rights for its citizens, were never fully implemented in either states of Carolina.[449] However, the Constitution of South Carolina, subsequently adopted in 1778, provided protection to three fundamental rights: that of the freedom of religion

[442] ibid 236–237.
[443] ibid 237.
[444] Constitution of New York (n 440), Articles XL and XXXVIII; Klein (n 440) 225 and 240.
[445] Klein (n 440) 238.
[446] Eugene R Sheridan, 'A Study in Paradox: New Jersey and the Bill of Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 267; Levy (n 422) 7.
[447] The Charter or Fundamental Laws, of West New Jersey, Agreed Upon 1676, Chapters XVI and XVII; Sheridan (n 447) 267–268.
[448] Constitution of New Jersey 1776, Articles XIX and XXII.
[449] William S Price, '"There Ought to Be a Bill of Rights": North Carolina Enters a New Nation' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 425–427.

under Article XXXVIII, the right to trial by jury in Article XLI and the freedom of the press in XLIII.[450]

It thus emerges that in states with no bill of rights, there was limited guarantee that the fundamental rights of the citizens would be afforded protection by their states. The only right that was afforded protection in all of the above states with no bill of rights was that of the right to trial by jury. This would, therefore, suggest that in the event of a dispute, it was important that the People would have the final say. It would, thus, mean that the power placed in the hands of the very few, one of the key principles of the modern republican ideal, may also be observed in these documents.

Since the protection of fundamental rights was quite limited in states with no bills of rights, it would, therefore, be a logical deduction that where these bills of rights were adopted, the fundamental rights of the citizens would be granted a wide and effective protection.

II.2.2. States with bills of rights

From the previous Thirteen Colonies, only a few adopted constitutions following the request of Congress and before the adoption of the federal Constitution. In 1776, being the first Constitution 'framed by an American Commonwealth', New Hampshire adopted its first Constitution laying down important frames for government, such as the requirement of all legislation to pass through the two branches of legislature, the Council and the Assembly.[451] A new, more advanced, Constitution replaced the above in 1783, which also included a Bill of Rights.[452] The first part of the Constitution that contained the Bill of Rights, in Article 2, importantly emphasises the support for the natural law theory and claims that 'all men have certain natural, essential, and inherent

[450] An Act for Establishing the Constitution of the State of South Carolina 1778, Articles XXXVIII, XLI and XLIII.
[451] Constitution of New Hampshire 1776.
[452] Frank C Meyers, 'New Hampshire Accepts the Bill of Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 165–166.

rights.'[453] Some of these rights were also – contrary to the natural law approach – enumerated in this Article: ' enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.'[454] Further protection was afforded to the right of freedom of religion in Article 5, the right of revolution in Article 10, the prohibition of self-incrimination in Article 15, the right to a trial by jury, and the prohibition of double jeopardy in Article 16.[455]

Chapter I of the Constitution of Vermont, adopted in 1777, also constituted its Bill of Rights.[456] Article I of this Constitution also proclaimed support for the natural law theory, by declaring that all men have 'certain natural, inherent and unalienable rights.'[457] More importantly, as the first state to promulgate such measure, this Article also banned slavery for men after the age of 21.[458] Article III also guaranteed the protection of freedom of religion, Article X provided protection against self-incrimination and the right to trial by jury, the latter also being guaranteed under Article XIII.[459] Article XIV, importantly, guarantees the freedom of speech and press, whilst Article XV also guaranteed the right to bear arms to the citizens of Vermont.[460]

In 1641, Massachusetts adopted a statute called the Body of Liberties, which was arguably 'the first comprehensive bill of rights in the history of mankind.'[461] Together with the Declaration of Rights of 1780, the citizens of Massachusetts were granted protection of several fundamental rights in these documents.

[453] New Hampshire Bill of Rights 1783, Article 2.
[454] ibid.
[455] ibid Articles 5, 10, 15 and 16.
[456] Constitution of Vermont 1777, Chapter I.
[457] ibid Article I.
[458] ibid Article I; Levy (n 422) 10.
[459] Constitution of Vermont (n 457), Articles III, X and XIII.
[460] ibid, Articles XIV and XV.
[461] John M Murrin, 'From Liberties to Rights: The Struggle in Colonial Massachusetts' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 70; Levy (n 422) 6.

Articles 1 and 18 – 55 of the Body of Liberties, for instance, afforded protection against unreasonable searches and seizure, and against cruel and unusual punishments and the guarantee of procedural rights of a person accused of a criminal offence.[462]

The first state to adopt a declaration of rights that was also termed as such of the thirteen original colonies was Virginia.[463] Mason - one of the later Founding Fathers - was the 'primary architect of the Declaration of Rights' and enumerated several fundamental rights that the citizens of the state possessed, such as 'the enjoyment of life, liberty and property and the pursuit of happiness' in Article I, 'the free exercise of religion' in Article XV, and 'the freedom of the press' in Article XII. [464] The Declaration further established in Article I that 'all men' were free and possessed inherent rights that could not be breached and gave sovereign power to the people.[465] Whereas the constitutional status of the colonial charters were questionable, the inclusion of the Declaration of Rights in the state constitution of Virginia, without a doubt, elevated the declaration to constitutional status.[466] Whilst it may seem that the adoption of these bills of rights – even if not called so – guaranteed protection of the fundamental rights of its citizens, the next state to be examined, had demonstrated the contrary.

Maryland, 'the safe haven for Roman Catholics,' despite enacting 'the first American bill of rights' in the form of the Act for the Liberties of the People in 1637/1638, it only formally adopted a Declaration of Rights and Constitution in 1776, following the adoption of the Declaration of Rights of Virginia.[467] Resembling the colonial charters, Article III of the Declaration of Rights of Maryland provided the citizens of Maryland

[462]The Body of Liberties, Massachusetts 1641, Articles 1 and 18 - 55; Murrin (n 462) 73, 74 and 88; Levy (n 422) 7 and 10.
[463] Jellinek and Farrand (n 424) 18.
[464] Virginia Declaration of Rights 1776, Articles I, XV and XII; Levy (n 422) 9 and 14; Warren M Billings, '"That All Men Are Born Equally Free and Independent": Virginians and the Origins of the Bill of Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 339.
[465] Virginia Declaration of Rights (n 465), Article I; Levy (n 422) 9.
[466] Levy (n 422) 9 and 14; Billings (n 465) 339.
[467] A Declaration of Rights, and the Constitution and Form of Government agreed to by the Delegates of Maryland, in Free and Full Convention Assembled 1776; Gregory A Stiverson, '"To Maintain Inviolate Our Liberties": Maryland and the Bill of Rights' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 371, 373 and 388.

with the 'same Rights, Liberties, Immunities, Privileges and free Customs as any natural born English subject.'[468] Article XXI further prohibited the imprisonment, disseizure or dispossession of property other 'than according to the laws of' Maryland.[469]

The Constitution of North Carolina was more advanced than the Constitution of South Carolina in terms of the protection of fundamental rights, as it commenced with a Declaration of Rights.[470] Article VII of this Declaration prohibited self-incrimination, provided the right to trial by jury under Article IX and the freedom of the press under Article XV.[471] Article XVII provided protection of the right to bear arms, Article XVIII of the right of assembly, while Article XIX protected the freedom of religion.[472]

William Penn, who became the Proprietor of Pennsylvania in 1681, was a key advocate of the natural law approach.[473] Due to the laws that were proposed by Penn - following the natural law approach - effectively acting as a bill of rights in the state, Pennsylvania subsequently became identified with 'having one of the freest societies in the world.'[474] These laws, called the Frame of Government, stated, for instance, in Article XXXV Laws Agreed upon England, that the citizens of Pennsylvania were free to exercise their chosen form of religion, were also guaranteed freedom of speech, assembly and petition, were entitled to a speedy trial by jury in Article VIII of the Laws agreed upon England, and were protected against paying excessive bails and fines, some of which were also repeated in the Charter of Privileges enacted in 1701.[475] Interestingly, Article XXX of the Laws Agreed Upon England of the Frame of Government further declared that those spreading 'false news,' would 'be accordingly severely punished, as enemies to the peace and concord of this province.'[476] This,

[468] A Declaration of Rights, and the Constitution and Form of Government agreed to by the Delegates of Maryland, in Free and Full Convention Assembled (n 468), Declaration of Rights, Article III.
[469] ibid, Declaration of Rights, Article XXI; Stiverson (n 468) 374–375.
[470] Constitution of North Carolina 1776; Price (n 450) 430.
[471] Constitution of North Carolina (n 471), Articles VII, IX and XV.
[472] ibid Articles XVII - XIX.
[473] Alexander (n 426) 308.
[474] ibid 309.
[475] ibid 309–314; Levy (n 422) 7 and 9.
[476] Frame of Government of Pennsylvania 1682, Laws Agreed Upon England, Article XXX.

therefore, indicates that attempting to protect individuals from such news in the name of the protection of 'peace' has been present in the United States since this era, and is thus, not a novel phenomenon.

Whilst affording its citizens a wide range of protection of their fundamental rights, Pennsylvania did not seem to hold that the right of freedom of the press and speech were such fundamental rights that would deserve protection in its Charter of Privileges of 1701. It became 'the first colony' that prosecuted 'a printer for seditious libel in 1692' and its assembly seemed to hold that no right to freedom of press and speech existed by arresting several individuals criticising them.[477] On the other hand, in Article XII of its subsequent Constitution of 1776 - which contained a Declaration of Rights resembling that of Virginia - the state legislature recognised the fundamental nature of these rights and expressly provided for their protection.[478]

Thus, despite the request of the colonial Congress and before the adoption of the federal Constitution, it has been demonstrated above that not all states adopted a written constitution subsequently. Moreover, the ones that had done so, were not able to provide a comprehensive list of the fundamental rights of their citizens that were to be protected, even when they adopted declarations of rights. Furthermore, the protections that were guaranteed by these declarations differed widely and no uniform approach can be identified within all states.

Whereas the above can be highlighted as key defects of the constitutional systems of the colonies and states that came to the form the United States of America, the supporters of the natural law theory would argue otherwise. Since they advocated the existence of inalienable rights of individuals that are present in their natural state, the existence of these declarations or the non-inclusion of a certain right might firstly be held to be irrelevant. Another approach adopted by the supporters of this viewpoint claims that only those fundamental rights can be enumerated in declarations of rights

[477] Alexander (n 426) 317–321.
[478] Constitution of Pennsylvania 1776, Article XII; Alexander (n 426) 321–323.

that have been discovered by the people.[479] Following this standpoint, it may thus be argued that since the citizens of distinct states formed distinct societies, they discovered different rights at different points in time. This, in effect, created differing legal provisions in the states. However, this also allowed for the distinct laws of each state to reflect the circumstances at their own states at the time and to progress as their societies did.

If one is to adopt the approach that certain rights may not have been discovered by the citizens of a state at a certain time, but they may discover these at a later state clearly signals supports for the non-originalist interpretation method of the Constitution. If one was to only look for rights that existed at the time of the adoption of these laws, no progress would be able to be acknowledged in the future. However, if societies change and discover certain new values at some point, adopting the natural law and the living constitutional values approach would allow for the Constitution to adapt to these new circumstances.

The above examination demonstrates that when the Framers of the Constitution of the United States convened in Philadelphia, they had to acknowledge the existence of these various legal documents that provided for an inconsistent protection of fundamental rights in the different states.[480]

III. The Original Federal Constitution

The Founding Fathers were bestowed with the task of having to create a novel federal system for and based on the already existing political and legal systems of the ex-colonies. As demonstrated above, these distinct systems did not provide for the protection of the fundamental rights of individuals at all times. It is argued that some Founding Fathers, such as Jefferson, had adopted the social contract theory in their approach to their duties of creating the new federal system.[481] According to this theory,

[479] Corwin (n 433) 5.
[480] Lutz (n 419) 97.
[481] Henkin (n 435) 87.

the protection of the rights of the citizens could be best achieved by limiting some of their rights.[482] It would, therefore, follow that when providing for the federal protection of these rights, some other federal provision could limit other rights of the individuals and may affect the rights protected by their states. This was necessary in the creation of a novel agreement for the governance of the society that the Constitution created.[483]

It, however, seems that the main task that the Framers of the Constitution focused upon was the development of the organisation and functioning of the new system. The protection of the fundamental rights only came to the foreground of debates subsequently, upon the proposal of the Constitution having been sent to the states for ratification.

III.1. The Constitution of the United States

Whilst the Framers were given the task of creating a Constitution for the new federal system during the Philadelphia Convention and debated several essential matters for the functioning of such system, little reference can be found in the records of their debates about the inclusion of a bill of rights or the protection of the natural rights of individuals in the proposed Constitution. The Constitution does, however, contain certain provisions guaranteeing rights of individuals against the federal government, such as the same 'privileges and immunities' afforded to its citizens in all states under Article IV section 2. The guarantees formed to establish a republican federation, such as the principle of the separation of powers, is also argued to have sought to provide the citizens of the United States with protection against the arbitrary actions of the new federal government.[484]

Certain fundamental rights that would later be included in the Bill of Rights can, however, be found in two proposals submitted to the Convention. The first one proposed by Pinckney included provisions such as the preservation of the freedom of

[482] ibid.
[483] ibid.
[484] ibid; Henry J Abraham and Barbara A Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (Oxford University Press 1998) 29.

the press, the outlawing of religious tests or qualifications, and the quartering of soldiers in times of peace with the consent of the owner only.[485] The second proposal submitted by Mason – the framer of the Bill of Rights of Virginia[486] - argued for the inclusion of a Bill of Rights in the 'preface' of the Constitution.[487] This proposal included fundamental rights such as the freedom of the press or the right to trial by jury in civil cases.[488] Both proposals, on the other hand, were defeated during the Convention.[489]

The defeat of these proposals can be attributed to various reasons. Firstly, it seems that there had been a general consensus amongst those opposing the proposals that the Bill of Rights of states provided 'sufficient' protection of the fundamental rights of the citizens of these states. [490] Secondly, the protection of these rights was regarded to be the task of state governments as opposed to the novel federal government. This can be ascribed to have been the accumulated effect of the general concern that this new government posed threats to the citizens and the higher sense of loyalty that citizens felt towards their state governments rather than the federal one.[491] Thirdly, it has also been argued that the original federal Constitution did not contain a declaration of rights because the idea was suggested towards the end of the Convention and the delegates were keen to conclude their almost four-months-long discussions about the Constitution and return home.[492] A fourth reason could be identified as the argument of some Framers that the Preamble of the Constitution sufficed as the declaration of the general rights of individuals.[493] According to this point of view, since the clear constitutional status of the state bill of rights was debatable, following the traditions of the states, the federal constitution was not required to contain such declaration.[494]

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[485] James Madison, *Notes of Debates in the Federal Convention of 1787 with an Introduction by Adrienne Koch* (W W Norton 1987) 486; Charles Pinckney, 'Observations on Plan of Government' in Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press 1937) vol III 122; Farrand (n 220) 334–335 and 341.
[486] Levy (n 422) 9 and 14; Billings (n 465) 339.
[487] Madison (n 486) 630; Farrand (n 220) 588.
[488] Farrand (n 220) 640.
[489] Madison (n 486) 630; Farrand (n 220) 588.
[490] Madison (n 486) 630.
[491] Louisa MA Heiny, 'Radical Abolitionist Influence on Federalism and the Fourteenth Amendment' (2007) 69 The American Journal of Legal History 180, 183.
[492] National Archives, *The Charters of Freedom: "A New World Is at Hand"* <http://www.archives.gov/exhibits/charters/constitution_history.html> accessed 1 June 2013.
[493] Rakove (n 420) 317.
[494] ibid.

Moreover, it may be argued that the Framers may have adopted the natural law approach by allowing amendments to be made to the Constitution in Article V, thus enabling the discovery of rights at any certain point in time in the future. This approach further supports a non-originalist method of interpretation of the Constitution in line with the natural law approach that would allow this document to adapt to changes in society in the future. A constitutional amendment could, however, demonstrate that the values of society have changed if these had been present in any earlier actions based on the non-originalist method of interpretation.

Recognising all the above reasons, it may, thus, be argued that the Framers opted for the adoption of a more republican approach. They firstly recognised the existence and importance of state constitutions. They subsequently created a federal system, where the state constitutions were arguably placed on equal footing as the new federal Constitution in matters that the latter did not include. One such matter was the protection of fundamental rights, which could be found in various state constitutions and bills of rights. However, it is also important to emphasise that not all states adopted bills of rights and constitutions and, thus, the protection of fundamental rights within the states depended on other legal provisions adopted by the states or were not guaranteed at all.

Thus, it is argued that the Framers of the Constitution adopted a view whereby they created not only a dual political, but a 'dual constitutional' structure as well. [495] This structure comprised of a federal and a state level, with distinct constitutions adopted at the different levels.

[495] *Barron v Mayor & City of Baltimore* (n 418); Robert Schutze, ' 'European Fundamental Rights and the Member States: From "Selective" to "Total" Incorporation?' [2012] Cambridge Yearbook of European Legal Studies 14, 17.

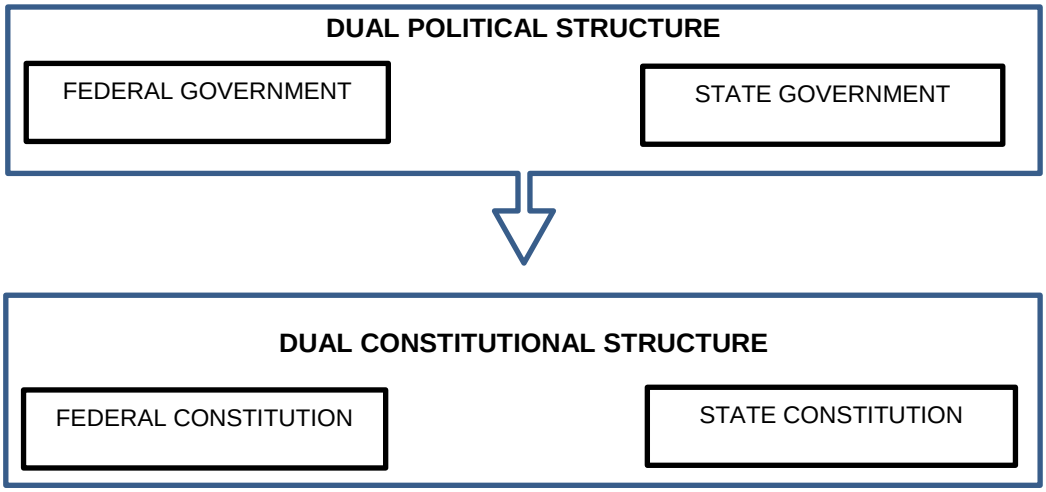

Figure 1 The dual political structure resulting in a dual constitutional structure in the United States of America

The aim of this system was also expected to amount to the dual protection of the fundamental rights of the citizens, which they would have been able to invoke under two separate constitutions, the federal and the state ones. Whilst it is recognised that some Framers argued that the declarations of rights in existence in various states afforded adequate protection of the fundamental rights of citizens, it is key to highlight that this approach fails to acknowledge that the protections that were provided to the citizens of various states differed based on the state they were the citizen of. If the protections of the fundamental rights were only provided for on state level, and in the declarations of rights of different states, no uniform protection of the fundamental rights of citizens was created within this new system. Moreover, citizens were only able to invoke these uniform, federal, rights against the federal government under this structure, and not against their state. Consequently, the protections offered by state constitutions could only be invoked against the states, not the federal government. Therefore, as the protection of the fundamental rights was not expressly declared and emphasised in the original federal Constitution, the Framers failed to attain the protection of fundamental rights in a uniform manner all across the states.

As it has been demonstrated above, various opposing viewpoints surfaced to the proposed inclusion of a declaration of rights in the Constitution. The lack of this declaration of rights also rapidly became the main tool for advocating for the non-

ratification of the Constitution, and the delegates of the Convention were, indeed, frequently challenged about their failure to include this in the Constitution in the ensuing ratification debates.[496]

III.2. The Federalist-Anti-Federalist Debate

The adoption of the novel federal constitution, unsurprisingly, resulted in significant political debates that led to further debates about fundamental constitutional ideas. After the drafting of the Constitution, these emerged as two main political ideologies, which also influenced the ratification debates of the proposed Constitution.

III.2.1. The Federalists

As mentioned in Chapter 1, those supporting the adoption of the Constitution came to form the political group of The Federalists. Their main argument was for a powerful federal government to become the supervisor of state and local governments.[497] However, the powers of the federal government could not become limitless in such a system. Moreover, they also had to consider that federal and state level regulations had to co-exist in this novel system.

Another key policy initially adopted by the Federalists was their opposition to the inclusion of a Bill of Rights in the Constitution.[498] The reason for this viewpoint was manifold. Firstly, important members of the group, such as Hamilton and Madison, emphasised the non-existence of bill of rights in various states, and, therefore, claimed there was a lack of need for a federal bill of rights.[499] They further argued that even the existence of these bills did not automatically guarantee adequate protection for the citizens.[500] Madison even called the state bills of rights 'parchment barriers.'[501] Thus,

[496] Farrand (n 220), vol III 143; Rakove (n 420) 318.
[497] Eileen Hunt Botting, 'Protofeminist Responses to the Federalist-Antifederalist Debate', *The Federalist Papers* (Yale University Press 2009) 533.
[498] Levy (n 422) 20.
[499] ibid 20–22; Hamilton and Madison (n 46) 432–433 No 84.
[500] Levy (n 422) 20–22.
[501] Rakove (n 420) 326; Levy (n 422) 22.

it may be deduced that they argued that the adoption of a bill of rights in the Constitution, would not guarantee the protection of these rights by the federal government.

Secondly, some members of this group also seem to have adopted the natural law approach. Hamilton, for instance, contended that since people possess the sovereign power in the United States, a federal bill of rights would not grant any additional guarantees to them. [502] By becoming sovereign, the people of the United States, Hamilton argued, retained all the power in cases where no 'reservations' were placed in the original Constitution. [503] They could, therefore, not be required to 'surrender' anything.[504] They, thus, argued – based on the natural law approach – that the people already possess those rights that would be enumerated in the bill of rights in their natural state. Including these rights in a bill of rights would have required their surrender from this natural state, which did not follow the ideology of the natural law theory.

Thirdly, following from the above, Hamilton took this standpoint further and claimed that enumerating the fundamental rights of the people 'would even be dangerous.' [505] He reasoned that such enumeration could allow for claims to be made for rights that were not initially intended to be established by the Framers.[506] For instance, he argued that the freedom of the press could not be adequately protected by such bill of rights.[507] The reason he provided for this claim was that no definition of the concept could be provided, creating undesired uncertainty, which would lead to the ineffective protection of such right.[508] It may, however, be highlighted that whilst he argued that the protection of a provision was not adequate in the federal constitution if no clear definition of it could be provided, many other provisions in the already accepted text of the Constitution at the Philadelphia Convention, such as commerce, remained

[502] Hamilton and Madison (n 46) 432–433 No 84.
[503] ibid No 84.
[504] ibid No 84.
[505] ibid 433.
[506] ibid.
[507] ibid 434.
[508] ibid.

undefined. Thus, his opposition to the inclusion of rights that are not clearly defined seems to be in contravention of other main provisions of the Constitution and thus cannot be held to be validly supported.

Fourthly, relying on the dual constitutional structure approach and addressing the constant conflict that emerged between the federal and state governments, the Federalists also claimed that the inclusion of a Bill of Rights was unnecessary and inadequate in the federal Constitution. They accordingly argued that under the dual constitutional structure, the states were more suited to protect the rights that would be included in a federal bill of rights, since state governments were the ones entrusted with the application of the rights excluded from the federal Constitution.[509] Thus, the protection of these rights was seen as traditionally belonging to the states, the power over which could not be transferred to Congress.

However, one key element missing from such an argument is that if the individual was placed in the focus, it would only provide them with protection of their rights against their state, not the federal government. Unless, based on the above constitutional structure, the argument is for the states to be able to claim on behalf of the individual that their rights have been breached on federal level. However, such a position would have defeated one of the main aims of the Constitution of creating a uniform system whereby individuals would have been afforded different levels of protection depending on which states they were the citizens of.

Fifthly, Hamilton also suggested that, despite all the above, the Constitution itself could be considered a bill of rights of the federal system.[510] His claim was based on the position that, – similar to the Constitution of New York, – the federal Constitution possessed ‘various provisions in favour of particular privileges and rights’ in its original form.[511] He asserted that the most important of these ‘privileges and rights’ were ‘the

[509] ibid.
[510] ibid 435; Levy (n 422) 17.
[511] Hamilton and Madison (n 46) 431.

privilege of the writ of habeas corpus',[512] the prohibition of 'bills of attainder or ex-post-facto' laws[513] and of granting titles of nobility.[514]

Whilst it has become apparent from the above that the Federalists were fundamentally opposed to the idea of a federal bill of rights in the Constitution, some members had expressed support for certain rights not included in the Constitution to come under federal protection through the Constitution. Madison, for instance, highlighted these as the 'individual and minority rights' that he believed were not afforded adequate protection by the states.[515] This position, however, also indicates a firm belief and divide between state and federal rights, adopting a dual federalist approach with defined limits to each right.

Another political grouping, however, also emerged that placed the key policy of the non-inclusion of a federal Bill of Rights in the Constitution under substantial scrutiny.

III.2.2. The Anti-Federalists

The opposition political group that had an influence over the ratification debates of the Constitution was the Anti-Federalists, who were fundamentally opposed to the adoption of the Constitution and aimed to call a second convention.[516] One of their main criticisms of the proposed Constitution was that it created a federal government that possessed powers too great without allocating adequately wide powers to the states.

Their other crucial continuous request was the greater protection of 'individual rights' in the federal system.[517] DeWitt, however, argued that in order to attain this, a federal

[512] Constitution of the United States, Article 1 section 9 clause 2.
[513] Constitution of the United States, Article 1 section 9 clause 3.
[514] Constitution of the United States, Article 1 section 9 clause 7; Hamilton and Madison (n 46) 431.
[515] ibid 52 No 10; Hubert L Will, 'Why the Bill of Rights Does Apply to the States' (1987) 26 The Judges Journal 28, 32.
[516] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Bobbs-Merril 1965) 39.
[517] Botting (n 498) 533.

Bill of Rights proved necessary. [518] He claimed that in such a bill the people would be able to enumerate their natural rights that they are willing to 'surrender' to create the novel, federal, society.[519] This viewpoint, unsurprisingly, clearly contradicted the natural law approach of the Federalists. Whilst they claimed that a citizen should not have to surrender any of their rights under natural law in the novel federal system, the Anti-Federalists argued – seemingly in line with the social contract theory - that such surrender was necessary.

Furthermore, whilst Hamilton was opposed to the inclusion of terms with no clear definition due to the uncertainty they would create,[520] the Anti-Federalists supported the inclusion of such terms. DeWitt, for instance, claimed that the rights to be included in such a bill should be provided by general terms and 'not with too much precision and accuracy'.[521] Arguably, in favour of a non-originalist method of interpretation, he maintained that the advantage of this would be that rights could be implied to have been included in such bill of rights in the future.[522] This approach would, thus, allow for the advancements of society to be adopted as part of the Constitution. These would be allowed either through the enactment of federal regulation or the interpretation of the Constitution at the Supreme Court, representing the views adopted at the time.

As mentioned above, the two ideologies supported by the Federalists and the Anti-Federalists divided the opinions during the ratification debates. It may, therefore, be important to examine why the Constitution was ratified in its original form without a bill of rights. Based on the analysis of these, to those familiar with the Constitution, it may seem apparent that the Anti-Federalists had succeeded during the ratification debates, since a Bill of Rights now forms part of the Constitution of the United States.

III.2.3. The Ratification Debates

[518] John Dewitt No II Morton Borden (ed), *The Antifederalist Papers* (Michigan State University Press 1965).
[519] John Dewitt No II ibid.
[520] Hamilton and Madison (n 46) 434 No 84.
[521] John Dewitt No II Borden (n 519).
[522] John Dewitt No II ibid.

As expected from the dominance of the above two political groupings during the ratification debates, the adoption of the Constitution was often in jeopardy. This would mostly be due to the extensive discussions around the omission of the bill of rights from it. It was therefore essential for the adoption of the Constitution for this position to be clarified and remedied. After several states voted for the adoption of the Constitution with subsequent amendments to be made, the ratification of the Constitution mainly depended on the actions of two states, Pennsylvania and Virginia.[523]

III.2.3.1. The Pennsylvania Convention

In a state that adopted a bill of rights, it was hardly surprising that the delegates to the Federal Convention had to face a serious questioning for the reason why a bill of rights was not proposed as part of the new federal constitution.[524] Wilson, one of the delegates to the Federal Convention, presented many of the arguments that were previously presented in the thesis. For instance, he claimed that the omission of a bill of rights was due to the proposals for it being submitted during the late stages of the Convention, which were therefore not taken into full consideration.[525] He subsequently turned to the Federalist arguments to justify the lack of a federal bill of rights. He firstly claimed that a bill of rights was 'neither an essential nor a necessary instrument in framing a system of government'.[526] This was, on the other hand, a courageous position to support in Pennsylvania, where a bill of rights occupied an important role in the constitutional system. By stating the above, he, effectively, asserted that the ideal that originated from the late Proprietor of Pennsylvania were unnecessary in his own state.

Secondly, following the natural law theory adopted by the same late Proprietor, he argued that a bill of rights was unnecessary since the liberty of the citizens could be

[523] Levy (n 422) 30-31 and 40-41.
[524] McMaster and Stone, 'James Wilson in the Pennsylvania Convention' in Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press 1937) vol III 143.
[525] ibid.
[526] ibid.

present and protected without such bill, since these rights were present in the natural state of the citizens.[527] He, thirdly, claimed, supporting the natural law standpoint, that a Bill of Rights was omitted from the Constitution because a list of 'all the rights of the people' would not only have been 'impracticable', but an imperfect list would have resulted in the omitted rights not being afforded protection.[528] It is therefore argued that Wilson advocated for a non-originalist method of interpretation of the Constitution by acknowledging that the Constitution would have to be able to adapt to changes in society.

Despite having been faced with strong opposition and having been presented debatable arguments, the Federalist majority voted for the ratification of the Constitution in this state. The Anti-Federalists, in response, published their proposed amendments nationwide, in which they argued for the protection of the fundamental rights of citizens.[529] Moreover, supporting a dual federalist approach, they also called for an amendment to be adopted that all unenumerated rights in the Bill of Rights should be reserved to the states, thus ensuring that the powers of the newly created federal government would also become limited in this area.[530] However, as for the Federalist arguments, the key one focusing on whether the federal government was to act contrary to the diverging state rights seemed to have gone unaddressed.

III.2.3.2.The Virginia Convention

After the ratification of the Constitution by the Pennsylvania ratifying convention, all eyes turned to Virginia. This was the state of Mason, who devised its Declaration of Rights, and joined the Anti-Federalists, as a key figure. On the other side stood James Madison, another delegate to the Federal Convention who joined the Federalists. In order to ensure the adoption of the Constitution and that the Anti-Federalists did not gain a political advantage that would result in the calling of a second convention, Madison devised a politically strategic move with Nicholas, which, in effect, resulted in

[527] ibid.
[528] ibid vol III 143 and 162.
[529] Alexander (n 426) 328 – 329.
[530] ibid.

a complete change of the key policy of the Federalists on the omission of the Bill of Rights.[531] He declared that such a Bill of Rights should be included in the Constitution, although not in the original text but as amendments to it. In order to further ensure the ratification of the original Constitution, Madison also made a promise to the Virginia Convention that he would personally formulate the proposal for an amendment to the Constitution to include a Bill of Rights, and enumerated all the rights that the Virginia Convention requested him to include.[532]

With this fundamental change of position of Madison, who previously referred to bills of rights as 'parchment barriers,' [533] the Federalists subsequently won the debate, and the Constitution was ratified by the Virginia Ratifying Convention. On the other hand, Virginia joined the line of states that only voted for the ratification of the Constitution with proposed amendments.[534] Rhode Island and New York, for instance, argued for the inclusion of certain fundamental rights, such as the freedom of religion in the new Constitution.[535] North Carolina also argued for a Declaration of Rights to be added to the Constitution, that would have protected, for instance, the freedom of speech and the freedom of assembly.[536]

IV. The Bill of Rights

IV.1. The proposed amendments for the Bill of Rights

During and after the ratification debates the citizens of the United States seemingly grew more concerned about the protection that they would be afforded against arbitrary actions of the federal government.[537] Delivering on his promise to the ratifying convention in Virginia, Madison, the 'father of the Bill of Rights,' presented to the First

[531] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Bobbs-Merril 1965) Brant (n 517) 40 – 41; Levy (n 422) 32, 39 and 41.
[532] Brant (n 517) 41.
[533] Rakove (n 420) 326; Levy (n 422) 22.
[534] Levy (n 422) 31–32.
[535] Ratification of the Constitution by the State of Rhode Island 1790; Ratification of the Constitution by the State of New York 1788.
[536] Ratification of the Constitution by the State of North Carolina 1789.
[537] Brant (n 517) 3.

Congress his proposed amendments to the Constitution.[538] From the seventeen amendments Madison submitted to Congress, many were adopted from the Declaration of Rights of Virginia, resembling some provisions of the Magna Carta and further included some proposals suggested by the ratifying conventions.[539] It is, however, to be highlighted that Madison originally argued for the amendments to be made in the original text of the Constitution by adding the specific sections to specific articles in the original Constitution.[540] However, ten of the proposed seventeen amendments by Madison were subsequently adopted as amendments and were added to the end of the original Constitution. Madison subsequently claimed, that this resulted in 'great quiet' in between the people for calling for a federal Bill of Rights.[541]

IV.2. The Bill of Rights

Even though the 'American Magna Carta'[542] comprises of ten amendments, an amendment is often found to include several rights guaranteed to the citizens of the Unites States against the federal government. The First Amendment, for example, contains a prohibition of the adoption of laws that would be in breach of either of four separate rights that can be found in the bill of rights and constitutions of most states of the United States of America. These are namely the 'establishment' and 'exercise' of religious freedom, 'the freedom of speech or of the press' or the right of peaceful assembly, and the right 'to petition the Government for redress of grievances.'[543]

The Second Amendment ensures the establishment and maintenance of the armed forces of a state in its preamble, and grants people the right 'to keep and bear arms.'[544] Even though this right is often debated at current times, the provision to bear arms

[538] Levy (n 422) 34.
[539] Brant (n 517) 41; Levy (n 422) 34.
[540] Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press 2006) 200.
[541] Levy (n 422) 43.
[542] *Campbell v Georgia* (1852) 11 GA 353, 367 - 368; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998) 155.
[543] Constitution of the United States of America 1787, Amendment I.
[544] Levy (n 422) 133.

could notably even be found in the bill of rights of several states, such as Massachusetts and New York, not as a right, but as a legal requirement.[545]

Whilst the Third Amendment grants protection to the people of the United States from the quartering of soldiers in times of peace and war, similar to the provisions available in Massachusetts and New York, the Fourth provides protection against unreasonable searches and seizure, similarly to the protections in Massachusetts and Delaware.[546]

The Fifth Amendment contains five procedural fundamental rights mostly aimed at the protection of a person accused of a crime, some of which could also be found in the laws of Connecticut, Rhode Island, New Hampshire, Vermont, New York, New Jersey, Delaware, Pennsylvania, South Carolina and Georgia.[547] The Fifth Amendment firstly guarantees a trial by grand jury for capital or 'infamous crimes;' secondly, prevents a person to be placed in double jeopardy for the same offence; thirdly, protects individuals self-incrimination; fourthly, prohibits the deprivation of ' life, liberty, or property, without due process of law;' and fifthly requires 'just compensation' to be provided when a 'private property' is nationalised.

The Sixth Amendment also guarantees further protections for the accused person in criminal proceedings. These include the guarantee of 'a speedy and public trial by an impartial jury' in the state where the crime was committed, the right to be informed

[545] Murrin (n 462) 73; Klein (n 440) 225 and 240.
[546] Murrin (n 462) 10 and 88; Klein (n 440) 238; Gaspare J Saladino, 'Delaware: Armed in the Cause of Freedom' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 294–295; Levy (n 422) 10.
[547] Christopher Collier, 'Liberty, Justice, and No Bill of Rights: Protecting Natural Rights in a Common-Law Commonwealth' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 110–113; Conley (n 425) 132; Meyers (n 453) 168 – 171 and 175; H Nicholas Muller III, 'Freedom and Unity: Vermont's Search for Security of Property, Liberty, and Popular Government' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 202; Levy (n 422) 7, 9 and 10; Klein (n 440) 236 – 237; Sheridan (n 447) 267–268; Saladino (n 547) 294–295; Alexander (n 426) 309–314; Sheridan (n 447) 267–268; Saladino (n 547) 294–295; Alexander (n 426) 309–314; Michael E Stevens, '"Their Liberties, Properties and Priviledges": Civil Liberties in Sourth Carolina 1663 – 1791' in Patrick T Conley and John P Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison House 1992) 412 and 420; Coleman (n 427) 453–454.

about the charges against them, 'to be confronted with the witnesses', to obtain witnesses in their favour and the right to instruct a defence counsel.

Whilst the Seventh Amendment only provides for a single guarantee of a civil law 'trial by jury' for cases arguing for more than 'twenty dollars', this could be found in most laws of the states that have provisions similar to the Fifth Amendment. The Eighth Amendment prohibits three separate breaches of rights. These are the prohibition of 'excessive bail' and 'fines' – similar to the provisions of Delaware, Pennsylvania, South and North Carolina and Georgia[548] - and the prohibition of the infliction of 'cruel and unusual punishments', parallel to the laws of Massachusetts, Connecticut, Delaware and South Carolina.[549]

As a resolution to avoid the criticism that the Bill of Rights does not enumerate all fundamental rights of the citizens of the United States, and following the proposal of the Anti-Federalists of the Virginia Convention, the Ninth Amendment provides a guarantee of the protection of rights not listed in the Constitution. This amendment further seems to signal that the Framers of the Constitution adopted the natural law approach: they were aware that not all rights could be enumerated in the Constitution as these may not have been discovered yet. Therefore, it is claimed, that the non-originalist interpretative method of the Constitution would be the most appropriate to allow for new rights or values to be included in the Constitution, in line with the developments of society. Therefore, if one was to follow the originalist method interpretation, this may prove more challenging as it could only be the rights not enumerated at the time of the adoption of the Bill of Rights that would be acknowledged as those deemed to be protected under this amendment.

The Tenth Amendment, similar to Article IV of the Declaration of Rights of Massachusetts, further grants powers 'to the States respectively, or to the people' when those are not delegated to the federal government in a constitutional

[548] Saladino (n 547) 301; Alexander (n 426) 309–314; Levy (n 422) 7 and 9; Stevens (n 548) 420; Price (n 450) 430; Coleman (n 427) 453–454.
[549] Murrin (n 462) 73, 74 and 88; Levy (n 422) 10; Collier (n 548) 110–113; Saladino (n 547) 301; Stevens (n 548) 420.

provision.[550] Whilst this amendment aims to address a fundamental constitutional uncertainty over where the powers of the states commence and end, due to the unclear provisions that grant powers to the federal government, it becomes quite uncertain when the power of the states would stay with a state or be granted to the federal government.

IV.3. The proposed Amendment number XIV by Madison: The origins of the incorporation doctrine

Whilst it is argued that the Bill of Rights was originally proposed to serve as a protection against the federal government only, in the proposals submitted by Madison, his intention to also make some of the fundamental rights applicable against the states can be identified. From the seventeen amendments that he submitted, the amendment under the number XIV that he proposed stated:

'No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press.'

This amendment, which Madison himself regarded as 'the most valuable' of all the amendments, was, however, voted against in the Senate. Lamentably, however, no records were kept from their secret debates of the Senate at the time, and consequently the reasons for the rejection of this provision remains unexplained.[551] The adoption of this amendment would have created an indisputable provision granting certain fundamental rights by the federal government applicable against the states, therefore, seemingly sowing the seeds of the idea of the incorporation doctrine. In opposition to the general viewpoint of the era that state governments acted as the protectors of fundamental rights, Madison predicted that a threat was going to emerge, whereby the fundamental rights he aimed to protect in his proposed amendment could be violated by the state governments.[552] The solution that he proposed was the

[550] Murrin (n 462) 95.
[551] Levy (n 422) 40; Will (n 516) 31–32; Stephen J Wermiel, 'Rights in the Modern Era: Applying the Bill of Rights to the States' (1992) 1 William & Mary Bill of Rights Journal 121, 123.
[552] William J Brennan Jr, 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights' (1986) 61 NYUL Rev 535, 536–537; Will (n 516) 31–32.

guarantee of these fundamental rights by the federal government against state governments.[553] This solution also seems to follow the natural law theory, whereby he claimed that the four fundamental rights enumerated in the amendment were so inalienable in nature, that these had to be protected from interferences by both the federal and the state governments. On the other hand, this close-ended enumeration of the four fundamental rights could have easily resulted in the incorporation of only these four rights against the states. This could have also arguably halted the advancements of any future political or legal developments.

As it has been demonstrated above, the federal Bill of Rights had caused various important debates even before its inception. Once adopted and added to the original Constitution, it had not brought the expected 'great quiet.'[554] Whilst it had brought under a uniform federal protection various fundamental rights of the citizens of various states, it had only provided this protection against the federal government. Whereas the threat of violation of rights by the federal government seemed to have been eliminated by the adoption of the Bill of Rights, another issue came to the foreground of debates.

The citizens of various states could previously turn to their state governments confidently for violations of their fundamental rights either based upon their bills of rights, constitutions or colonial charters. However, with the federal Bill of Rights, they seemed to have been left with no recourse for violations of these federal rights by their state governments and vice versa. Thus, it is not surprising that when the states do not afford protection to these federal rights, the citizens turned to the federal Bill of Rights for protections against these violations by their states. They, however, have been faced with various challenges along the way, even up to nowadays.

IV. 4. *Barron v Baltimore*,[555] the rejection of the incorporation doctrine

[553] Brennan Jr (n 553) 536–537.
[554] Levy (n 422) 43.
[555] *Barron v Mayor & City of Baltimore* (n 418).

Even before the decision in the first Supreme Court case arguing for the incorporation of a right included in the Bill of Rights, several key lawyers started supporting the ideology that certain provisions of the Bill of Rights should be held to be applicable against state governments. These included Justice Johnson arguing for the incorporation of the right to a trial by jury in civil cases under the Seventh Amendment in *Bank of Columbia v Okley*,[556] and the prevention of double jeopardy under the Fifth Amendment in *Houston v Moore*.[557] Rawle, for instance, consequently argued for the incorporation of all the provisions of the Bill of Rights against state governments.[558]

Subsequently, *Barron v Baltimore*[559] was the first leading case in the Supreme Court where the appellant attempted to argue that the Bill of Rights was applicable against not only the federal, but the state governments as well.[560] In this case, the appellant, a wharf owner, brought action against the Mayor and City Council of Baltimore for compensation for damages caused by the diversion of water in the harbour to his wharf.[561] He argued that the rights that he had been granted under the Fifth Amendment clause guaranteeing 'just compensation' for the taking of his 'private property […] for public use,' should have been applicable against the individual states.[562]

The Supreme Court, however, was not prepared to accept his argument. Chief Justice Marshall, in delivering the opinion of the Court, asserted that the Constitution, and thus the clause of just compensation of the Fifth Amendment, was only applicable against the federal government and not the individual states.[563]

In coming to this conclusion, his decision was based on two main arguments. He firstly claimed that no express language indicated the intent of the Framers of the Bill of

[556] *Bank of Columbia v Okley* (1819) 17 US (4 Wheat) 235, 240–242.
[557] *Houston v Moore* (1820) 18 US (5 Wheat) 1, 22–34.
[558] William Rawle, *A View of the Constitution of the United States of America* (H C Carey and I Lea 1825) 120–130; Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 145.
[559] *Barron v Mayor & City of Baltimore* (n 418).
[560] ibid.
[561] ibid 243–244.
[562] ibid 246.
[563] ibid 247.

Rights for it to be incorporated against state governments.[564] Whilst the Framers of the Constitution provided such language in Article I section 10 of the Constitution by using the words 'No State shall,' he argued that no such words were found in the Bill of Rights, and thus it could not be held to be incorporated against state governments.[565] This originalist method of interpretation adopted by Chief Justice Marshall clearly demonstrates the limitations of this approach.

It is, thus, important to highlight that in reaching his decision, Chief Justice Marshall only examined the words of the Bill of Rights without looking at their historical origins. Had he performed such investigation, he would have found that the most valuable amendment proposed by Madison contained the exact same words. Despite the amendment not being adopted by the Senate, this provision still demonstrated an indication that there had been supporters of the idea of incorporation even at the time of the framing of the Bill of Rights.

His second argument for the rejection of the incorporation doctrine was based on the ideology of the 'dual constitutional structure' of the United States. Following this ideology, he held that the only rights granted to the citizens that were applicable against their states were those granted by the constitutions of their states.[566] Under this system, if individuals wished to bring actions for the protection of any of their rights under the Bill of Rights, they could only do so if these rights were breached by the federal government. They might have been able to argue that the rights enumerated in the federal Bill of Rights were also afforded protection against their state governments, but they could only argue so based on the inclusion of these same rights in their state constitutions or state bills of rights, and not based on the federal Bill of Rights. If such provisions were unavailable in state level legislation, they were left with no course of action that would have protected their inalienable rights under the natural law theory.

[564] ibid 248–250.
[565] ibid.
[566] ibid 247; Schutze (n 496) 17.

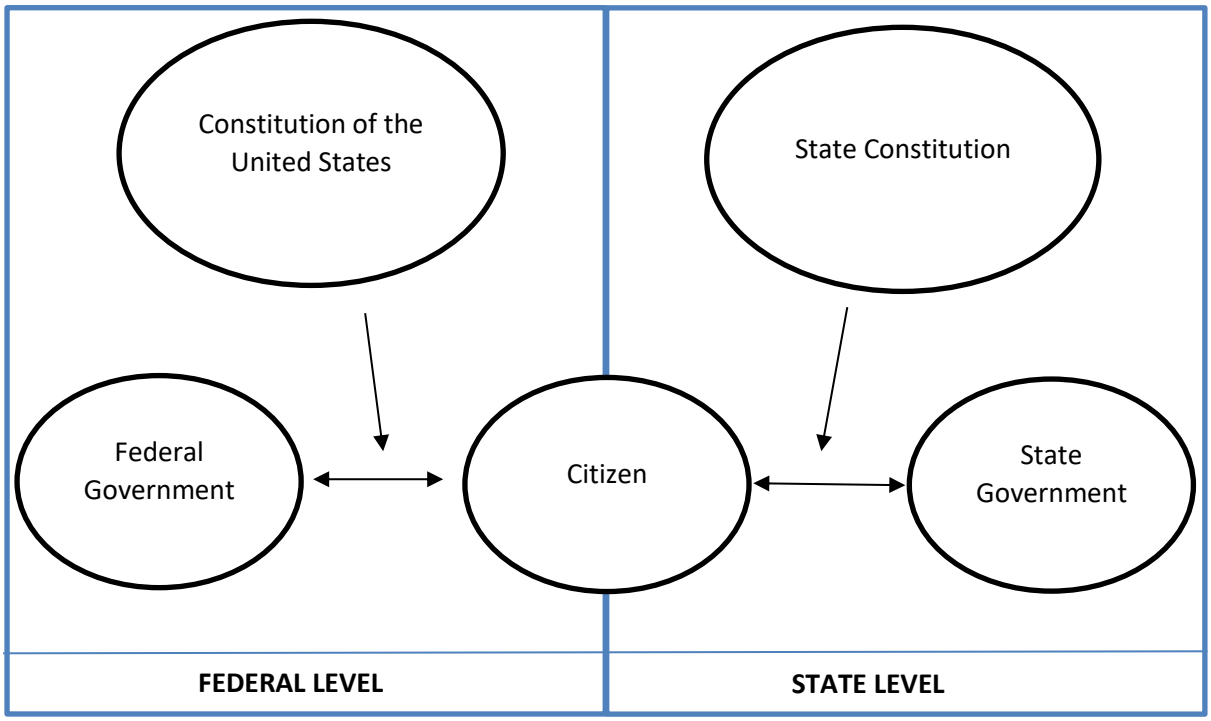

Figure 2 Protection provided to a citizen in the dual federalist structure

Whilst it is recognised that an advantage offered by this system was the double protection of certain fundamental rights of citizens on both state and federal level, it also resulted in several crucial problems. Firstly, while some rights were afforded dual protection, others were afforded protection only against one of these governments, or even afforded none at all if they were not included in these constitutions. Secondly, an underlying conflict had also been created in this system. What would happen if the two different levels of the structure enacted legislation on the same issues remained unanswered. This problem, however, did surface later when the response of the states in such instances was to declare the federal legislative measures void.[567] Thus, it seemed that this underlying conflict could not be resolved without declaring one level supreme over the other. Chief Justice Marshall, however, was not willing to resolve this conflict in his decision. He thus decided to maintain this conflict by adopting a neutral position by declaring both levels of the structure to stand at the same level of priority.

[567] David Goldfield, *America Aflame: How the Civil War Created a Nation* (Bloomsbury Press 2011) 71.

It is interesting to highlight that the decision in the above case seemed to have disappeared from the limelight up until the end of the Civil War.[568] On the other hand, an argument attacking this decision emerged soon afterwards in *Holmes v Jennison*.[569] Van Ness, in this case, argued for the differentiation of the various provisions of the Bill of Rights as 'limitations of power' or 'declarations of rights.'[570] In his unsuccessful oral argument before the court, he claimed that those belonging to the latter category based on their inalienable nature could be violated by 'no power,' including the state governments.[571]

Two further cases were argued in the Supreme Court of Georgia where certain provisions were, in effect, held to be incorporated against the state government. In *Nunn v Georgia*[572] Chief Justice Lumpkin held the Second Amendment to be incorporated against the state government.[573] In *Campbell v Georgia*[574] he took a step further and argued that all the provisions of the Bill of Rights – by their inalienable nature – bound state governments as well.[575] In order to support this standpoint, he adopted the natural law approach, that these rights are so inalienable in nature, that protection for these should be afforded against both the federal and state governments.[576]

The above instances, as Amar highlights, however, did not constitute the majority viewpoint of the time and following the decision in *Barron v Baltimore*[577] the 'dual constitutional structure' view of the United States prevailed for a long time as the tool for the protection of fundamental rights.[578] The issue had further been pressed to the background when another crucial unresolved matter seemed to occupy the minds of

[568] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 146.
[569] *Holmes v Jennison* (1840) 39 US (14 Pet) 540; Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 153.
[570] *Holmes v Jennison* (n 570) 555 - 556.
[571] ibid 556 - 557.
[572] *Nunn v Georgia* (1846) 1 GA 243; Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 154.
[573] *Nunn v Georgia* (n 573) 250.
[574] *Campbell v Georgia* (n 543).
[575] ibid 367 - 368.
[576] ibid 367.
[577] *Barron v Mayor & City of Baltimore* (n 418).
[578] Schutze (n 496) 17.

the citizens of the United States: slavery. This nature of the matter of slavery, uniquely, resulted in one of the greatest internal conflicts of the United States: the Civil War.

V. The Civil War

V.1. The Causes of the Civil War

Several issues have been identified as the causes of the Civil War, however, two main unresolved constitutional problems can be highlighted as such.[579] The first reason may be identified as the status and the emancipation of slaves, which will be discussed in detail below. The second reason revolved around the unanswered question of which level of the dual constitutional structure occupied a supreme position in the still somewhat novel federal system. Based on the ideal of state sovereignty, the Southern states commenced to support the position more widely that it was the state government that occupied a supreme position over the federal government.[580] This, unsurprisingly, resulted in these states seceding from the United States. What is surprising, however, is that Madison had warned about this threat during the ratification debates of the federal Constitution,[581] and it had remained ignored by the majority and unresolved up until this point.

Whilst the latter is regarded as one of the causes of the Civil War, the diverging position on slavery has remained to be mostly referred to as its main cause. A more detailed examination of the constitutional status of slavery is, thus, required.

America quickly came to be known as the land of the free after the foundation of the colonies, with several liberties afforded to its citizens, even though no clear definition of what liberty was ever emerged.[582] It is, thus, challenging to reconcile this position

[579] For a further discussion about the causes of slavery see eg Bruce Levine, *Half Slave and Half Free: The Roots of the Civil War* (Hill and Wang 2005) 227; Phillip S Paludan, 'A Crisis in Law and Order' in Kenneth M Stampp (ed), *The Causes of the Civil War* (Prentice-Hall 1959) 59–62; Brant (n 517) 319.
[580] Arthur M Schlesinger, 'The State Rights Fetish' in Kenneth M Stampp (ed), *The Causes of the Civil War* (Prentice-Hall 1959) 47–51.
[581] Brennan Jr (n 553) 536–537; Will (n 516) 31–32.
[582] Levine (n 580) 122.

with how slavery could be in existence in a state that prided itself as the protector of liberties.

Slavery had been present in various states since ancient times and had featured in many ideals as 'an acceptable part of social order.'[583] Slavery also emerged in the United States in the eighteenth century as the dominant system of labour in the Southern colonies.[584] However, similarly to the divide between the states about their stance on the bill of rights, a difference of standpoint about slavery emerged in the states as well. This difference, however, was mostly based on geographic location and a divide between the North and the South emerged as a result. Slavery did not gain the widespread popularity it achieved in the South in the Northern colonies. Due to these differences in the states that formed from these colonies, after the adoption of the federal Constitution, the issue of slavery was maintained in the state level legislation of the dual constitutional structure and no uniform approach emerged.[585]

With the subsequent spread of the ideologies of Enlightenment, capitalism and religious developments and with the increased intellectual activities of the class of 'educated gentlemen,' the contradicting nature of slavery commenced to surface in political and legal debates, although mostly in Northern states.[586] Three key approaches may therefore be identified that have supported the abolition of slavery due to its irreconcilable nature.

Amar highlights the antagonism that if the United States was to protect the liberties of individuals that were in existence in their natural state based on the natural law theory, the involuntary servitude of individuals could not be reconciled with these ideals.[587] It is therefore also peculiar from this angle that Virginia, the state that adopted the Declaration of Rights that later influenced the drafting of the Bill of Rights, was the 'principal slaveholding state' in the United States in the nineteenth century.[588]

[583] Kolchin (n 428) 64.
[584] ibid 3 and 6.
[585] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 160.
[586] Kolchin (n 428) 65–69.
[587] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 161.
[588] Levine (n 580) 5.

However, in parallel with the natural law approach becoming adopted by many, especially in most Northern states, calls for the abolition of slavery also gained further widespread support.[589] The support for the abolition may be illustrated by the fact that in 1840 all black men were free in the Northern states.[590] It is also to be emphasised that the dissemination of this approach may be claimed to have been further supported by the religious beliefs of the 'evangelical Northeners.'[591] According to this belief, people possessed 'individual spiritual rights,' and it was the 'duty' of a Christian to actively participate in the making of 'social policy.'[592] Thus, the deprivation of people of these rights was irreconcilable with such beliefs and those following these ideals believed that it was their duty to make things right. The existence of slavery, as Lincoln highlighted, was also irreconcilable with the ideology of popular sovereignty. This ideology was adopted by many Northerners, and claimed that 'no man should govern another without' the consent of that other.[593] Thus, involuntary servitude of another should not exist in societies where this ideology was supported.

Many Southerners, on the other hand, argued that religious beliefs should be separate from politics, and firmly believed that 'slavery was no sin.'[594] They also associated their right to own slaves as their most important liberty as they seem to have failed to adopt the determination of the word liberty from a natural law point of view, and merely identified their liberties with the 'English liberties' they enjoyed by tradition.'[595] These would, accordingly, allow for slavery and protect it as one of the individual liberties of the slave-owners. This approach, however, only allowed for one segment of society – the slave-owners – to exercise their individual liberties. However, the natural law approach offered a more advanced view, affording protection to all individuals, and,

[589] Kolchin (n 428) 81.
[590] ibid.
[591] Goldfield (n 568) 35.
[592] ibid.
[593] ibid 102.
[594] ibid 35.
[595] Kolchin (n 428) 91.

thus, allowing a better fulfilment of the provision of the Declaration of Independence that 'all men are created equal.'[596]

Whilst the issue of slavery emerged in religious, political and legal debates, its importance may also be emphasised by its emergence in popular literature. The view that there was increased interest of individuals in this issue is also supported by the fact that the second most widely sold book in 1852 was a book by Harriet Becher Stowe entitled Uncle Tom's Cabin.[597] This book had been fundamental in transforming the generally adopted viewpoint on slavery of several of its readers as it portrayed slaves as human beings.[598] Lincoln even highlighted that this book, its increased popularity and transformation in the viewpoint of many, has been one of the main causes of the Civil War. [599]

In this climate, the ideal of the abolition of slavery commenced to attain wider acceptance. In Georgia, for instance, slavery was banned between 1735 and 1750 and several acts of manumission were also enacted in other states.[600] These included manumission of slaves, when they obtained a certain age, for instance, 28 years in Pennsylvania.[601] Whilst other states did not abolish slavery, they allowed for the manumission of slaves in private wills, such as those of George Washington and John Randolph.[602] It may, however, be intriguing to highlight that not all of the 277 slaves belonging to George Washington were manumitted as it was later held that he did not have authority to free all his slaves and therefore only less than a half of them could become free.[603]

Despite not enacting a law on the abolition of slavery on federal level, there were instances when the issue of slavery was addressed in legislation at the federal level.

[596] Declaration of Independence 1776. It is intriguing to highlight, however, that it was Thomas Jefferson, a Southerner, who drafted the original version of this document.
[597] Goldfield (n 568) 79–80.
[598] ibid 79.
[599] ibid.
[600] Kolchin (n 428) 64.
[601] ibid 77.
[602] ibid.
[603] ibid 77–78.

Such occasions were the enactment of the Northwest Ordinance in 1787, which prohibited slavery in the North West territories, and the prohibition of slave trade in The Act Prohibiting Importation of Slaves of 1807.[604] Whereas these two Acts had made steps towards the recognition of slavery as an irreconcilable system in the United States of America, a novel Act took a different approach.

The Fugitive Slave Act of 1850 criminalised the assistance to escaped slaves, rendering any state legislation having not declared such actions criminal void.[605] The Act further suspended the rights of detainees to habeas corpus, and the right to trial by jury.[606] This Act raised concerns with many of the Northern states, since they widely felt that slavery had become protected at federal level with the adoption of this Act. The tensions between the North and South about the issue of slavery became even more apparent after the delivery of the decision of Chief Justice Taney in *Dredd Scott v John F A Sandford*.[607]

In the case of *Dredd Scott*[608] the appellant of African American descent relied on the natural law approach in his claim before the Supreme Court. He argued that upon ceasing to be a slave, he should have been granted the same privileges and immunities as other citizens of the United States.[609] The appellant firstly claimed that by moving with his previous master to the state of Illinois, where slavery was abolished, and then back to Missouri, he had become a free citizen.[610] He was, however, subsequently passed to Sandford, the executor of the estate of his previous master, as a slave.[611] He argued that Sandford had assaulted him, his wife and his two children, who at the time were free citizens and not slaves, and, thus, should have been entitled to protection against such acts.[612]

[604] ibid 79 and 84.
[605] Goldfield (n 568) 71.
[606] ibid.
[607] *Dredd Scott v John F A Sandford* (n 146).
[608] ibid.
[609] ibid 393 - 394.
[610] ibid 394.
[611] ibid 396.
[612] ibid.

Dredd Scott previously unsuccessfully argued for his freedom in a case at the Supreme Court of Missouri in 1852, that was rejected on grounds of non-application of extra-territoriality, holding that he should have applied for his freedom while living in a state where slavery was abolished (i.e. Illinois).[613] When his case re-emerged in 1854 in the United States Circuit Court of Missouri, it unarguably became a political issue seeking a determination on the issue of slavery from the judicial branch of the federal government.[614]

Whilst it has been argued that if advancements in society took place that did not result in an amendment to the Constitution, it would be up to the Supreme Court to acknowledge that such advancements have take place. One method that the Justices could utilise to do so is the non-originalist method of interpretation.

Before the delivery of the opinion of the Court, the decision that was due to be delivered as the majority opinion of the Court seemed to only be supported by Justices from Southern states. In an astonishing request, which raises questions about the upholding of the value of the separation of powers at this instance, Justice Canton turned to the President Elect to persuade Justice Corier of Pennsylvania to join the majority opinion.[615] It is even more startling to find that the President Elect, in return for the favour, was provided with the decision of the Court in advance, raising further questions of the upholding of the separation of powers in this case.[616]

Whilst it would be less surprising to find that the Supreme Court adopted an originalist interpretative method in this decision, instead of the non-originalist method, the choice of deciding not to follow one of the key originalist method of interpretation – namely that of providing republican guarantees to the individuals through the separation of powers – left a very limited choice of interpretative methods for the Justices.

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[613] Alfred H Kelly, Winfred A Harbison and Herman Belz, *The American Constitution: Its Origins and Development* (W W Norton and Company 1991) 269 vol I.
[614] ibid.
[615] ibid 270.
[616] ibid.

Moreover, this position also highlights that if it is a constant threat in a republican government that the elections may be improper, as discussed in Chapter 2 if it was the Supreme Court which would be able to guarantee that the fundamental constitutional values are upheld, the Court failed to demonstrate in this case that it would be able to take on these responsibilities.

The interpretative method chosen by Chief Justice Taney, in delivering the majority opinion of the Court, distinguished individuals living in the United States from its citizens.[617] He identified citizens as 'the people of the United States,' who were able to hold political citizenship rights, such as electing representatives to the federal government.[618] Since those who were of African descent were not entitled to these political rights, he concluded they were not deemed to be citizens of the United States.[619] He further explained this highly controversial decision by claiming that black men were merely 'a subordinate and inferior class of beings, who had been subjugated by the dominant race.'[620] Thus, he adopted the viewpoint of the majority of Southern states from the outset of his decision. Whilst he might have regarded slaves as individuals, they were definitely not entitled to the same privileges as his race, according to his viewpoint.

Subsequently, he also relied on the dual constitutional structure of the United States to ensure that this viewpoint would be upheld at the federal level. Whereas he acknowledged that manumitted slaves could become citizens of a state, this did not automatically grant them rights to become citizens of the United States at federal level.[621] Thus, people entitled to citizenship of the United States at federal level, were only those who were classed as citizens of the different states at the time of the adoption of the Constitution.[622] This position, thus, excluded manumitted slaves and the foreigners immigrating to the United States, who became naturalised citizens.[623]

[617] *Dredd Scott v John F A Sandford* (n 146) 404.
[618] ibid.
[619] ibid.
[620] ibid 404 - 405.
[621] ibid 405 - 406.
[622] ibid 406 and 417 - 418.
[623] ibid.

Those who had been granted their freedom under state laws were thus, he argued, excluded from claims for such citizenship rights. [624] Subsequently, those who did not belong to a particular race could not hope to ever get these rights if this decision was to be followed. Due to these highly restricted criteria, the problem thus created became that emancipated slaves did not have any rights guaranteed, which were attached to citizenship, and were consequently not protected against violations of such rights. This, however, is in apparent contradiction of the natural law theory, the ideology widely supported by most Northern states.

Chief Justice Taney, further claimed, relying on the dual federalist approach, that the rights granted to individuals under the Bill of Rights, such as freedom of religion, speech or press or the right to bear arms, were only enforceable at state level.[625] However, he extended this position by claiming that Congress did not have a legal authority to legislate in matters included in the Bill of Rights, since these would then interfere with the rights granted to the states under the dual constitutional structure.[626] While upholding the dual constitutional structure, it seems that Chief Justice Taney adopted the prior position of the states to resolve the question of supremacy by declaring federal acts void. Whereas he argued that Congress acted outside its powers when enacting the federal Bill of Rights, the idea also seemed to emerge that Chief Justice Taney was in support of states occupying a supreme position over the federal government.

Chief Justice Taney also voiced his opinion about the role of the Supreme Court and the non-originalist interpretative method when he stated that he recognised that the opinion of the public might have been different at the time of the decision in the case. However, he held that a change in public opinion did not mean that the interpretation of the Constitution should be changed by the Supreme Court.[627] He argued that this was not the task that was entrusted upon the Supreme Court, and therefore, the Constitution and any other related legal provisions had to be interpreted as they stood

[624] ibid 417 - 418.
[625] ibid 433.
[626] ibid.
[627] ibid 426.

at the time of their adoption.[628] However, this is a highly controversial and regressive viewpoint. If this approach was adopted in all legal systems around the world, they would fall behind any advancements in society. Merely observing how much our lives have changed since the adoption of the Constitution demonstrates such controversy. How would the Founding Fathers respond if they were to draft the Constitution today? They would not be arguing over the same matters in the same environment and would have to develop a document that reflects the values no only of our current society, but to cater for generations to come as well.

It may then be argued that the decision in *Dredd Scott*[629] was important for two reasons. Firstly, it did not only affect Dredd Scott himself, but it also resulted in the elevation of slavery to a constitutional question. Secondly, the decision also ignited key constitutional debates. Whereas slavery remained a state issue up to the delivery of the above decision, it then seemed that slavery had become a federal matter and was even afforded protection against any acts for its abolition by the federal government.[630] This position, however, only seemed to be compatible with ideologies supported by the Southern states and were in clear contradiction to those held by Northern states. Several arguments of Chief Justice Taney in his decision were also in clear contradiction to the various values held by citizens of many Northern states, such as the recognition of the basic humanity of slaves.[631]

The nation thus became even more divided as a consequence of the above decision, where division peaked by the commencement of the Civil War. Even though the Northern states became victorious over the Southern States at the end of the Civil War, this did not lead to an automatic uniform position adopted immediately in their political and legal systems.

V.2. Consequences of the Civil War

[628] ibid.
[629] ibid.
[630] Goldfield (n 568) 141; Kelly, Harbison and Belz (n 613) 274.
[631] Goldfield (n 568) 141.

The victory of the North over the South did not instantly result in a complete overhaul of the then existing political and legal systems of the Southern states. Overall, the armed conflict was not a solution for the underlying political and legal conflicts, but was merely their result. In order to devise a resolution to these conflicts, the adoption of one side of the arguments that caused these conflicts was required uniformly over the whole of the United States of America. With their victory, the Northern states felt empowered and entitled to demand the adoption of the ideologies they supported, as opposed to those followed in Southern states.[632] These, as discussed previously, could be claimed to have been the support of the natural law theory, popular sovereignty, and the abolition of slavery. With this abolition, however, the problems generated by the decision in *Dredd Scott*[633] still remained: emancipated slaves did not become citizens of their states, and thus could not ask for the protection of their fundamental rights that were attached to state citizenship.

The Reconstruction programme to create a truly united and uniform federal political and legal system was thus set.[634] First, slavery had to be abolished. Second, emancipated slaves had to be guaranteed protection of their fundamental rights.[635] Third, it had to be established which level of the dual constitutional structure occupied a supreme position.[636] To attain the latter goal, the decision of *Dredd Scott*[637] had to be overruled. These solutions came in the form of three constitutional amendments, often referred to as the Civil War or Reconstruction Amendments. The first of these, the Thirteenth Amendment abolished slavery.[638] The subsequent Fourteenth Amendment was aimed at providing a tool to invalidate the decision in *Dredd Scott*,[639] and solve the supremacy question of the dual constitutional structure.[640] The Fifteenth Amendment completed the resolution of the remaining problems by granting voting

[632] Kolchin (n 428) 214; Goldfield (n 568) 422.
[633] *Dredd Scott v John F A Sandford* (n 146).
[634] Tribe (n 171) 549.
[635] ibid.
[636] ibid.
[637] *Dredd Scott v John F A Sandford* (n 146).
[638] Constitution of the United States of America 1787, Amendment XIII.
[639] *Dredd Scott v John F A Sandford* (n 146).
[640] Constitution of the United States of America 1787, Amendment XIV.

rights to the citizens of the United States regardless of their 'race, color, or previous condition of servitude.'[641]

V.2.1. The first solution: the abolition of slavery

The Thirteenth Amendment declared the abolition of slavery at federal level, therefore solving the issue of slavery and asserting support for the views of the Northern states. However, during the ratification process of the Thirteenth Amendment it was not only the Northern states that showed their support of this, but six ex-confederate Southern states also ratified this amendment.[642] It is key to highlight that without their support, the Amendment would not have obtained the required three-fourth majority for its adoption.[643]

The abolition of slavery, nevertheless, left the newly freed ex-slaves in a vulnerable position.[644] According to most state laws and the decision in *Dredd Scott*,[645] the freedmen were not granted citizenship rights.[646] They were, therefore, further left with no protection of the fundamental rights that were granted to the citizens of states as individuals, unless those were explicitly conferred on them.[647] This was exhibited in the adoption of the Black Codes, which aimed to bring back slavery to the states by the back door, and ensure that the newly freed people were not granted any fundamental rights.[648] The further widespread 'violence directed at blacks and white Unionists in the immediate post-war South' was only a further demonstration of the failed goals of the Amendment.[649]

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[641] Constitution of the United States of America 1787, Amendment XV.
[642] Ackerman, *We the People: Transformations* (n 200) 101; Forrest McDonald, 'Was the Fourteenth Amendment Constitutionally Adopted' (1991) 1 Ga. JS Legal Hist. 1, 12.
[643] Ackerman, *We the People: Transformations* (n 200) 101; McDonald (n 642) 12.
[644] *Congressional Globe,* 39th Cong, 1st Sess 24 -30 (1866); Kolchin (n 428) 209; Michael Perman, *Emancipation and Reconstruction* (2nd edn, Harlan Davidson 2003) 19.
[645] *Dredd Scott v John F A Sandford* (n 146).
[646] Brant (n 517) 4.
[647] Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke University Press 1986) 29.
[648] Paul Finkelman, 'John Bingham and the Background to the Fourteenth Amendment' (2002) 36 Akron L. Rev. 671, 672.
[649] ibid 671–672 and 679; Eugene Gressman, 'Postwar Revolution in Civil Rights – and Judicial Counter-Revolution' in Arnold M Paul (ed), *Black Americans and the Supreme Court since Emancipation: Betrayal or Protection?* (Holt, Rinehart and Winston 1972) 11; Perman (n 644) 20.

It would therefore seem that if the newly freed individuals were to be granted these fundamental rights based on the dual constitutional structure, the effective protection of these was only achievable by recognising the supremacy of the laws at federal level. Thus, the original position of the states acting as protectors of fundamental rights had effectively transformed, and it was then the states against whom individuals, especially freedmen, needed protection.

It might have initially seemed that the first solution had been provided to obtain a uniform federal system for the protection of the fundamental rights of all individuals in the United States. However, as apparent from the above brief examination, no such system would be obtained until the other underlying problems of the system were resolved. The solution for these arrived shortly in the form of another constitutional amendment.

V.2.2. The solution to the other conflicts: The Fourteenth Amendment

The Fourteenth Amendment was aimed to offer a solution to the other remaining underlying problems of the era. It will therefore have to be fully evaluated whether the Fourteenth Amendment was the most effective solution for these problems.

Before the adoption of the Fourteenth Amendment, Congress recognised that the freedmen were not granted citizenship rights and were, as a result, not guaranteed protection of their fundamental rights. Congress, however, also had to understand that the most effective solution to this problem was to declare the federal constitutional level supreme over the state level. As a solution, they first enacted the Civil Rights Act, which was aimed to provide protection to the newly freed men by recognising them as citizens of the United States and grant them with certain 'basic rights', such as being able 'to own property', 'to sue and to be sued' and 'to enjoy the same legal protection as white citizens'.[650] This Act, however, was vetoed by the Tennessean President

[650] Curtis (n 229) 29 and *Congressional Globe,* 39th Cong, 1st Sess 27 (1866).

Johnson, who used this power for the first time.[651]. It was, on the other hand, subsequently passed by a three fourths majority in Congress over the veto of the President.[652]

Since the status of the Civil Rights Act could, thus, be questionable at any point, Congress, thus, had to provide a more effective solution to these problems.

The Thirty-Ninth Congress provided a platform for such 'constitutional statemenship,' as it took place during a time where the society of the United States was undergoing key transformations.[653] The Fourteenth Amendment not only provided this opportunity for the members of Congress, but the Amendment was also expected to provide a tool to adapt to and enable the advancement of these changes.

Section 1 of the Fourteenth Amendment consists of four separate clauses. The citizenship clause grants citizenship rights to 'all persons born or naturalised in the United States'. The second clause prohibits states from enacting or enforcing any law that is in breach of 'the privileges and immunities' of the citizens. The third clause demands that if a person is deprived of their 'life, liberty, or property', it shall be performed with 'due process of law' and the fourth clause guarantees 'equal protection of the laws' to all persons.

With the proposed Fourteenth Amendment, it is claimed that Congress aimed to provide a solution to the underlying conflicts that were still present after the adoption of the Thirteenth Amendment. These solutions were firstly, to afford protection of the fundamental rights to the freedmen, secondly, while doing so to grant them with the status of citizens. This resulted in the third solution, which was declaring the supremacy of the federal government over state governments in the dual constitutional and political structure.

[651] Goldfield (n 568) 426–427.
[652] ibid.
[653] Herman Belz, 'The Civil War Amendments to the Constitution: The Relevance of Original Intent' (1988) 5 Const. Comment. 115, 116.

In light of the originalist approach, if one is to find what the intent of the drafters of the Fourteenth Amendment was, the study would have to commence at the Congressional records.

As apparent from the speeches of many in the floor of Congress, the primary purpose of the adoption of the Fourteenth Amendment was to grant protection of fundamental rights to the newly freed black men.[654] In order to achieve the above, Congress, however, first had to devise a system whereby these uniform rights would apply to all individuals. The first step in doing so was the conferring of federal citizenship to all individuals, including the freedmen with the citizenship clause. This clause, in effect, overrode the decision in *Dredd Scott*.[655] Whilst previously federal citizenship depended on state citizenship, with the citizenship clause, the position was interchanged. Subsequently, it was the status of federal citizenship that occupied a primary position from which state citizenship derived.[656] As Davis argued, this position, however, resulted in an 'anomaly' whereby the people 'owed supreme allegiance to the Federal Government and subordinate allegiance to [… their] state.'[657]

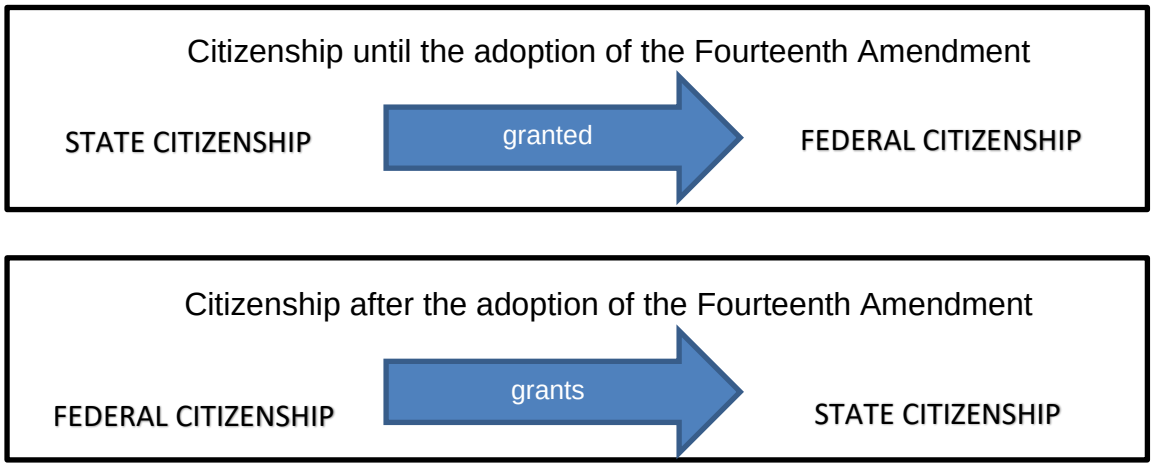

Figure 3 Citizenship granted to individuals before and after the adoption of the Fourteenth Amendment

[654] *Congressional Globe,* 39th Cong., 1st Sess. 1065, 1095, 2467, 2469, 2501, 2530, 2765, 2766, 2897 (1866).
[655] *Dredd Scott v John F A Sandford* (n 146).
[656] Gressman (n 649) 14.
[657] *Congressional Globe,* 39th Cong, 1st Sess, 1084 (1866).

With the bestowal of federal citizenship, the assignment of uniform federal fundamental rights to citizens at state level was only a logical consequence.[658] On the other hand, these uniform federal fundamental rights had already been devised in the form of the Bill of Rights, thus, all that was required was the incorporation of all its provisions against the states.[659] This would have provided the most effective protection of the fundamental rights of not only the freedmen, but all citizens of the United States, and would have also created a uniform system of fundamental rights in the state level as well.

Despite the adoption of the above viewpoint by many, some Congressmen failed to recognise this problem and argued that the protections provided by state constitutions were adequate.[660] In order to demonstrate that this was not the case, Bingham, 'the Madison of section 1 of the Fourteenth Amendment,'[661] relied on the decision in *Barron v Baltimore*.[662]

As confirmed by the decision in this case, before the adoption of the Fourteenth Amendment, the newly freed men were left in a position, where they could not claim that the provisions of the Bill of Rights should have protected them against the actions of the states where they resided.[663] This was due to the Bill of Rights only providing protection against the federal government, and not the states. Bingham further demonstrated the inadequate protection of the rights contained in the federal Bill of Rights at state level through the decision in *Livingston v Moore*,[664] where the appellants argued that the acts of Pennsylvania about the sale of lands previously belonging to an indebted ex-comptroller-general of the state were in breach of the Ninth Amendment, that was not afforded protection under the state laws.[665] Bingham

[658] *Congressional Globe,* 39th Cong, 1st Sess, 1034 and 1084 (1866).
[659] *Congressional Globe,* 39th Cong, 1st Sess, 1034, 2765, 2766 and 2769 (1866).
[660] *Congressional Globe,* 39th Cong, 1st Sess, 1064 – 1065 and 2530 (1866).
[661] *Adamson v California* (1947) 332 US 46 74.
[662] *Barron v Mayor & City of Baltimore* (n 737) and *Congressional Globe,* 39th Cong, 1st Sess, 1089 (1866).
[663] *Congressional Globe,* 39th Cong, 1st Sess, 1089 (1866).
[664] *Lessee of Livingston v Moore and Others* (1833) 32 US (7 Pet) 469.
[665] ibid 469 and 551.

subsequently highlighted, that similar to the decision in *Barron v Baltimore*,[666] Justice Johnson held in this case that it was 'settled' that the Amendments to the Constitution that formed the Bill of Rights did 'not extend to the States.'[667]

In order to resolve the inadequate protection of the rights contained in the Bill of Rights at state level, Bingham argued for the incorporation of all the provision of the federal Bill of Rights against any actions of the states that would deprive individuals of these.[668] He firstly claimed, following the ideology of Webster, that since the Constitution was addressed to the people, the Constitution should thus ensure the protection of the rights of the individual contained in it.[669] By pledging alliance to the Constitution, he further asserted that government officials on both levels should be held to be accountable for their violations of any of the provision of the Bill of Rights.[670]

Another problem that needed resolution was that Congress could not claim to hold any power to bring actions against the states for violations of the rights enumerated in the Bill of Rights against the citizens of the state in question. Bingham, thus, proposed that under the Fourteenth Amendment, Congress would be granted the additional 'power to hold them [the states] to answer […] for the violation of their oaths and of the rights of their fellow men.'[671]

It is therefore recognised that the Thirty Ninth Congress intended to find and apply the most effective solution to the underlying problems of the era and create a united federal state that afforded uniform protection of the rights of its citizens. The way the solution was applied, however, leads to a crucial questioning of the ultimate constitutional validity of the Fourteenth Amendment.

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[666] *Barron v Mayor & City of Baltimore* (n 418).
[667] *Congressional Globe,* 39th Cong, 1st Sess, 1089 (1866). See also Richard L Aynes, 'On Misreading John Bingham and the Fourteenth Amendment' (1993) 103 Yale Law Journal 57, 72..
[668] *Congressional Globe,* 39th Cong, 1st Sess, 1089 – 1090 (1866).
[669] *Cong. Globe,* 39th Cong., 1st Sess. 1090 (1866). See also the last speech of Bingham before the adoption of the Fourteenth Amendment in *Congressional Globe,* 39th Cong, 1st Sess, 2542 (1866).
[670] *Congressional Globe,* 39th Cong, 1st Sess, 1090 (1866).
[671] *Congressional Globe,* 39th Cong, 1st Sess, 1090 (1866).

Firstly, the ex-Confederate states were denied representation in the Thirty Ninth Congress.[672] Therefore, the Fourteenth Amendment that was mostly aimed to apply to Southern states was proposed by a Congress in which they could not participate. It is thus, hardly surprising, that this formed their first objection against the Amendment.[673] Secondly, it is also interesting to mention that the required two-thirds majority in the Senate for the Fourteenth Amendment could only be achieved by expelling a member.[674] Curiously, this decision was taken by one vote majority, which majority vote was a member of the Senate who changed his vote overnight.[675] Thirdly, it would also follow from the first objection that if a state was not offered representation in Congress, it would not receive any proposed legal measures by that institution for ratification.

Events, however, took an interesting turn when the Amendment was sent for ratification to the eleven ex-Confederate states, not represented at the Congress at the time, as well.[676] Out of these eleven states, only Tennessee ratified the Amendment and the representatives of the state immediately regained their seats in Congress, therefore seemingly setting a precedent for the re-admission of ex-confederate states.[677]

The Southern states, however, committed a great mistake when receiving the proposals for the ratification of the amendment. They engaged in a game of 'masterly inactivity,' whereby they did not vote on the ratification of the amendment.[678] This delay may be explained by the expectations of these states that their supporters would occupy the seats of Congressmen after the upcoming elections, who would not vote for the ratification of this amendment.[679] This resulted in the non-adoption of the

[672] Ackerman, *We the People: Transformations* (n 200) 110; McDonald (n 642) 1.
[673] Ackerman, *We the People: Transformations* (n 200) 110; Douglas H Bryant, 'Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment' (2001) 53 Ala. L. Rev. 555, 559.

[674] McDonald (n 642) 7.
[675] ibid.
[676] Bryant (n 673) 563; McDonald (n 642) 8; Ackerman, *We the People: Transformations* (n 200) 110.
[677] McDonald (n 642) 3; Kelly, Harbison and Belz (n 613) 334; James M McPherson and James K Hogue, *Ordeal by Fire: The Civil War and Reconstruction* (McGraw-Hill Higher Education 2010) 560.
[678] Kelly, Harbison and Belz (n 613) 334–335; Ackerman, *We the People: Transformations* (n 200) 189.
[679] Kelly, Harbison and Belz (n 613) 334–335; Ackerman, *We the People: Transformations* (n 200) 189.

Amendment and the representatives of the Northern states saw this as a warning sign that their solution to the problems of the era would not be adopted. They, therefore, had to opt for more radical measures if they wanted to pass the Amendment: they declared that the usual process of Article V for constitutional amendments no longer applied.[680]

Congress firstly declared the ten states that refused to ratify the Amendment unrepublican under the Guarantee Clause.[681] Yet, interestingly, the only change in the constitutions of these states since the period before the Civil War had been the abolition of slavery.[682] In effect, these had been the same governments that were required merely a few years previously to ratify the Thirteenth Amendment and were regarded republican then.[683]

Congress, secondly, devised a radical measure through the Military Reconstruction Act 1867 and divided these ten states into five military districts.[684] Under this Act, the military supervision of the Southern states would be lifted once they adopt a republican constitution, and subsequently ratify the Fourteenth Amendment, gaining readmission to the Congress.[685] The citizens of Southern states, however, attempted to use the strategy of inactivity in the polls once more to rebel against the imposition of Northern values on them. The then Fortieth Congress was prepared to go even further to address this issue. They enacted the Fourth Military Reconstruction Act stating that a simple majority decision for ratification of the Amendment by those present at the polls would suffice.[686]

The Fourteenth Amendment, after having played a key role in the constitutional development of the solutions for the various problems that were present in the era,

[680] Ackerman, *We the People: Transformations* (n 200) 111.
[681] Bryant (n 673) 561.
[682] ibid.
[683] Ackerman, *We the People: Transformations* (n 200) 109.
[684] Military Reconstruction Act 1867.
[685] McPherson and Hogue (n 677) 565; Lucas A Powe, *The Supreme Court and the American Elite, 1789 – 2008* (Harvard University Press 2009) 126.

[686] Fourth Military Reconstruction Act, 11th March 1868, 15 Stat. 41, c.25.

served as the main political campaigning tool for Republicans in 1866. Similar to the history of the ratification of this Amendment, its subsequent development followed an akin path.

With the adoption of the Fifteenth Amendment, granting voting rights to citizens of the United States regardless of 'race, color or previous condition of servitude,' the Civil War Amendments had run their full course. It seemed as if the federal government, and especially Congress, had obtained the applications of the solutions to the previously underlying constitutional problems of the United States. Slaves had been emancipated, granted citizenship status, and guaranteed protection of their fundamental rights.

VI. The Incorporation Doctrine at the Supreme Court

Whilst the Thirty Ninth Congress expected that it would be the Congress in the future that would continue to perform the task of ensuring the resolution of the various problems that had previously existed, it will be demonstrated below that Congress had, subsequently, lost these powers. It was, in fact, the federal judiciary that continued with this role, thus limiting the powers of Congress.[687] This new role that was bestowed upon the Supreme Court of the United States provided new challenges for individuals that argued for the incorporation of their rights under the Fourteenth Amendment. The Justices, following the originalist method of interpretation, would have to analyse the development and adoption of the Fourteenth Amendment from a historical angle in order to be able to continue the work of the Congress. They would also have to examine the claims under the Fourteenth Amendment arguing for the incorporation of a fundamental right against states from two angles. They firstly had to identify what the rights protected by section 1 of the Fourteenth Amendment were. In explaining the above, they also had to examine the method by which these rights were held to be covered by the Amendment. They, secondly, had to establish who these rights were applicable against: the federal government, the states and/or other individuals.

[687] Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (Oxford University Press 2006) 45.

Whether the Supreme Court has, however, performed their above task successfully still remains open to questions. After the initial rejection of the incorporation doctrine, their position has transformed over the years, however, it still has not resulted in the incorporation of all the provisions of the Bill of Rights against the states.

VI.I. The rejection of the incorporation doctrine by the Supreme Court

The first opportunity was provided to the Supreme Court soon after the adoption of the Fourteenth Amendment to interpret this newly adopted Amendment in the *Slaughter House Cases.*[688] The appellants in this case brought action against the state of Louisiana for having enacted an Act that effectively granted monopoly to a single company to 'have and maintain slaughter-houses' as 'a police regulation for the health and comfort of the people'.[689]

The appellants attempted to claim that their rights granted under the privileges and immunities clause of the Fourteenth Amendment had been violated by this Act. They specifically argued that the 'privileges and immunities' that were conferred upon them included their right to 'use […] their own property, and to labor in such their honest and necessary business.'[690] They further argued that the above rights constituted their 'privileges and immunities' under the Fourteenth Amendment. They argued that these could be identified as:

> the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognised as forming the basis of the institutions of the country.[691]

When arguing for the above, they recognised that one of the unresolved problems of the era remained whether the federal government and Constitution were supreme over

[688] *The Slaughter House Cases* (1872) 83 US 36.
[689] ibid 36 - 37.
[690] ibid 51 and 55.
[691] ibid 55.

the states. The appellants, however, decided to take a different approach from that of the Thirty Ninth Congress. They argued that the Fourteenth Amendment, in effect, made the state governments and constitutions irrelevant in the protection of the fundamental rights included in the Bill of Rights.[692] They, therefore, essentially attempted to claim that with the adoption of the Fourteenth Amendment, the dual constitutional structure of the United States was abolished, and their rights under the Fourteenth Amendment thus became incorporated against states.

This argument, however, was rejected by the majority opinion of the Supreme Court, delivered by Justice Miller, who held that the dual constitutional structure of the United States was still in existence.[693] He maintained the structure remained intact by the Fourteenth Amendment, and both levels occupied equal hierarchical ranking, while remaining thoroughly distinct.[694] He claimed that holding otherwise would 'radically change[s] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.'[695] In support of their argument, and adopting an originalist method of interpretation, he argued that the Supreme Court Justices could find no such intended result by either the Thirty Ninth Congress or during the ratifying conventions.[696]

He subsequently established that the rights that the appellants claimed that were protected under the privileges and immunities clause of the Fourteenth Amendment could only be protected by their state government instead of the federal one. [697] He therefore argued that their claim against their state for the breach of their privileges and immunities under the Fourteenth Amendment could not succeed.[698]

It is not disputed that Justice Miller followed the arguments of the Thirty Ninth Congress in part, as he did not reject the existence of the dual constitutional structure.

[692] ibid 51 - 52.
[693] ibid 74.
[694] ibid.
[695] ibid 78.
[696] ibid.
[697] ibid 76 - 80.
[698] ibid.

It is, nevertheless, claimed that despite adopting an originalist method of interpretation, he failed to adopt the method devised in the Fourteenth Amendment as advocated for by Congress, which argued for the transformation of the dual constitutional system and the supremacy of the federal laws in this system. Since this has also been argued to have been one of the solutions to the underlying problems of the era immediately after the Civil War, it seems that the Supreme Court Justices were not prepared to accept and apply this solution.

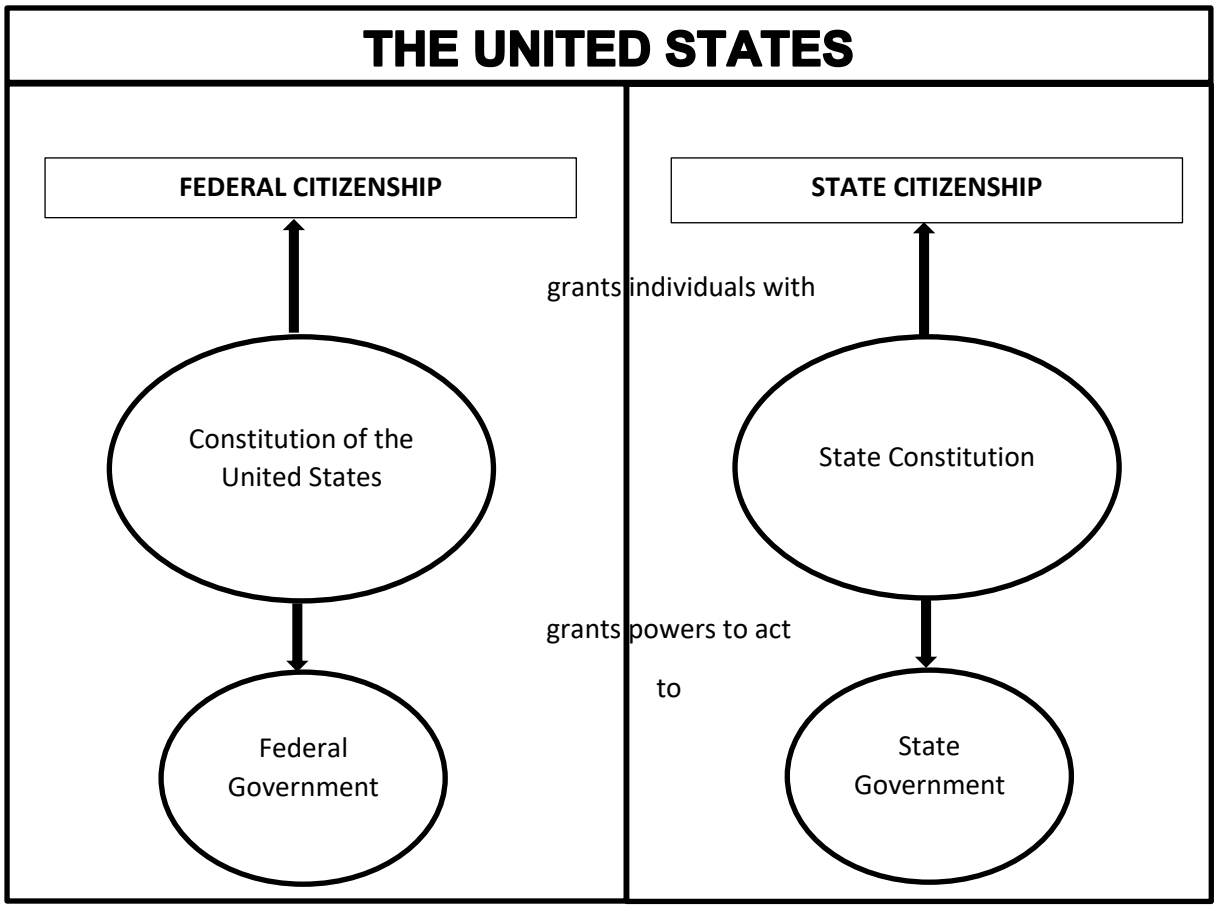

Figure 4 The protections and powers granted by the federal and state constitutions in the dual constitutional structure according to Justice Miller

Since Justice Miller established that the privileges and immunities clause did not provide protection of the rights claimed by the appellants, he subsequently and unsurprisingly rejected the claim that the Act enacted by Louisiana constituted a deprivation of property without due process of law. He based the above decision on

the argument that this clause, in the majority opinion of the Justices, was no more than the repetition of the already existing provision about the due process of law requirement in the Constitution under the Fifth Amendment.[699]

It shall, however, also be highlighted that Justice Miller delivered the majority opinion of the Court, and the minority opinions did indicate that some Justices of the Supreme Court were prepared to adopt and continue to perform the task previously carried out by Congress. For instance, Justice Field, in his dissenting opinion, effectively adopted the arguments of the Framers of the Fourteenth Amendment that the federal citizenship and laws took priority over state legislation in the dual constitutional structure.[700] He argued that the Fourteenth Amendment afforded protection of the 'common rights' of 'the citizens of the United States' under the privileges and immunities clause, and claimed that these rights were incorporated at the state level and were therefore enforceable against the states.[701]

Justice Bradley, in his dissenting opinion, joined Justice Field in adopting the approach that is argued in this thesis to have been advocated for by the Framers of the Fourteenth Amendment. He maintained that the dual constitutional structure still persisted in the United States, but citizenship of the United States had become supreme to state citizenship.[702] He consequently argued that all citizens of the United States should be entitled to the 'privileges and immunities' under the Fourteenth Amendment. [703] These 'privileges and immunities' he also identified as those that are granted to 'citizens of any free government.' [704] Based on the above argument, he further claimed that these rights should be held to be applicable against both the federal government and state governments.[705]

[699] ibid 80 - 81.
[700] ibid 89 and 95 - 96..
[701] ibid.
[702] ibid 112.
[703] ibid 114 - 119.
[704] ibid.
[705] ibid.

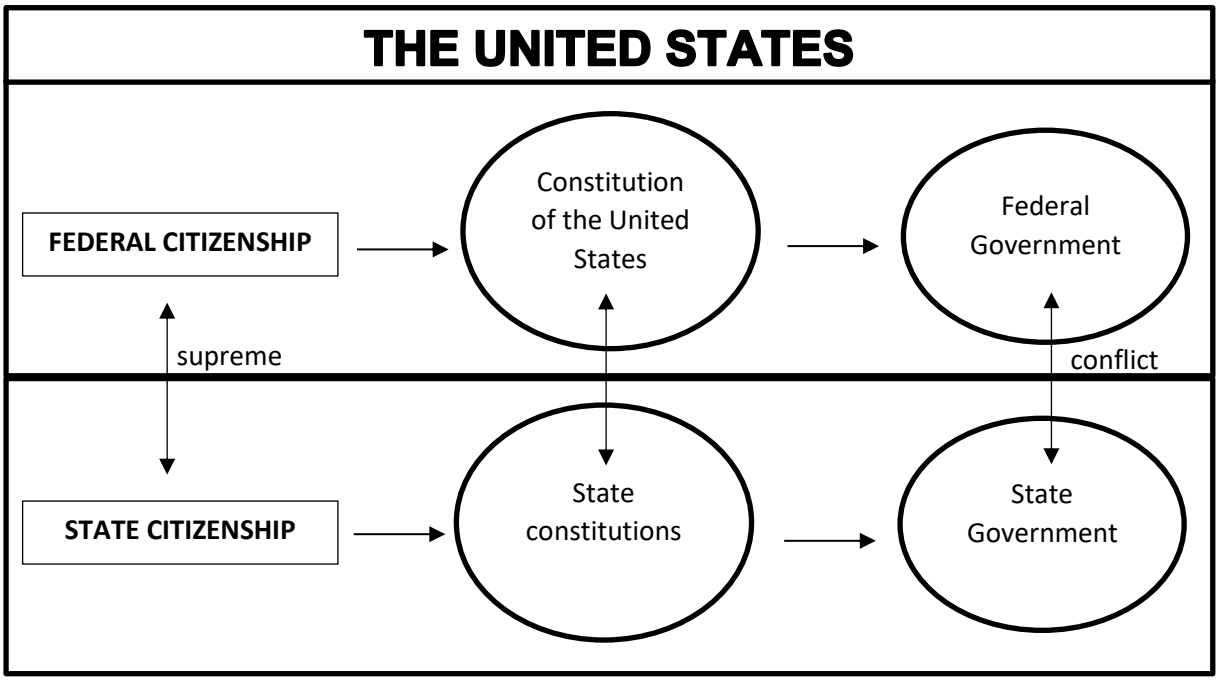

Figure 5 The protections and powers granted by the federal and state constitutions in the dual constitutional structure according to Justices Bradley and Field

Justice Bradley further claimed that the rights of the appellants under the due process clause of the Fourteenth Amendment were also violated, since the creation of a monopoly was a deprivation of liberty and property of 'a large class of citizens,' without due process of law.[706] In arguing for the above, he further asserted that the Louisiana Act deprived the appellants of their right to adopt 'a lawful employment' or follow 'a lawful employment previously adopted.'[707]

Even though, as demonstrated above, the above dissenting opinions formed a strong opposition to the majority decision, and adopted the approach advocated for by the Framers of the Fourteenth Amendment, the decision in the *Slaughter House Cases*[708] ensured that the dual constitutional structure of the United States as it existed before the adoption of the Fourteenth Amendment was maintained. In doing so, the Supreme Court rejected any claims that, through the privileges and immunities clause, the Fourteenth Amendment granted any privilege and immunity that would be applicable

[706] ibid 122.
[707] ibid.
[708] ibid.

against a state. The above decision therefore made the privileges and immunities clause a 'dead letter' clause that, according to the majority decision in the case, served no purpose.[709] As a consequence, it also seemed that the newly freed men would not be able to argue for the protection of their rights against state governments, further elevating the problem that the Fourteenth Amendment was set out to resolve.[710]

The original dual constitutional structure was also maintained following the decision in *United States v Cruikshank,*[711] in which the appellants were convicted for 'banding and conspiring together to deprive their victims of various constitutional rights' during the Colfax Massacre.[712] Chief Justice Waite, while expressing his support for the original dual structure further developed this ideal by claiming that a citizen was entitled to different citizenship rights under the different constitutional structures, which 'were established for different purposes'.[713] He asserted that the powers granted to the federal government were found in the Constitution of the United States, and all other powers were 'reserved to the States or the people'.[714] This structure, he claimed, amounted for the 'whole' system, 'with a complete government,' where the federal and the state level were placed on equal footing.[715]

In line with his argument about this constitutional structure, Chief Justice Waite subsequently, held that the rights that were set out to be protected under the First and Second Amendments, claimed to have been breached in this case by the state, were only enforceable against the federal government, and not the states.[716] In reaching his decision, Chief Justice Waite argued that these amendments were not incorporated at state level because the rights they guaranteed had been previously under the

[709] Christopher L Eisgruber, 'The Fourteenth Amendment's Constitution' (1995) 69 S. Cal. L. Rev. 47, 77; Peter W Lewis and Joseph Gary Trichter, 'The Nationalization of the Bill of Rights: History, Development and Current Status' (1980) 20 Washburn L J 195, 204; Abraham and Perry (n 485) 43; Erwin Chemerinsky, 'The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise' (1991) 25 Loyola of Los Angeles Law Review 1143, 1146; Brant (n 517) 344.
[710] William W Wiecek, *Liberty Under Law: The Supreme Court in American Life* (The John Hopkins University Press 1988) 97.
[711] *United States v Cruikshank* (1876) 92 US 542.
[712] *McDonald v City of Chicago, Illinois et al* (2010) 561 US 742 9.
[713] *United States v Cruikshank* (n 711) 549 - 550.
[714] ibid 551.
[715] ibid 550.
[716] ibid 552 and 553.

protection of the states and they should continue to be so.[717] Thus, a situation according to this viewpoint could not arise where it would the states in breach of these rights.

The decision further set out that the due process clause of the Fourteenth Amendment did not grant any additional rights for cases against individuals.[718] Chief Justice Waite emphasised that this clause acted as a mere guarantee against any arbitrary action of the state government, which would have breached 'the fundamental rights which belong to every citizen as a member of society.'[719] It may therefore be argued that he demonstrated an inclination to incorporate certain fundamental rights against the states under the due process clause. However, he was not willing to extend this protection against individuals.

VI.2. Developing a test for incorporation under the due process clause

Since it seemed that the rights granted under the Fourteenth Amendment could not be held to have been incorporated against states under the privileges and immunities clause, citizens of the United States could only argue that they were conferred additional rights over their rights guaranteed at state level through the due process clause of the Amendment. The appellant in *Hurtado v California*,[720] subsequently, claimed that his rights to a grand jury under the Fifth Amendment – that he claimed had become applicable against his state, California, by the due process clause of the Fourteenth Amendment – were breached during his trial for murder of first degree.[721]

Justice Matthews, while delivering the opinion of the Court to determine the above, firstly attempted to provide a definition for due process of law as a 'process of law' that was 'not […] forbidden.'[722] He, however, also stated that such process had to be shown to be a 'settled usage' both in England and in the United States. [723] He subsequently

[717] ibid 552.
[718] ibid 554.
[719] ibid.
[720] *Hurtado v California* (1884) 110 US 516.
[721] ibid 518 - 519.
[722] ibid 528.
[723] ibid.

held that in order to determine whether the provision was in breach of the due process of law, they had to establish whether the provision was 'in conflict with any of' the provision of the Constitution of the United States.[724]

He then asserted that if it was held not to be in such conflict, it had to be examined whether any of the 'settled usages and modes of proceedings' that existed in 'England before the emigration of our ancestors' and which had been in usage since then in the United States were breached.[725] It was also confirmed by Justice Matthews that a 'legal proceeding' that was intended for 'the general public good, which regard[ed] and preserve[d] the[se] principles of liberty and justice' also amounted to due process of law.[726] It may, thus, be argued that Justice Matthews opted for an approach of selective incorporation. Using this method allowed the Supreme Court Justices to decide whether the rights would qualify to be incorporated under his test of interpretation of the due process clause of the Fourteenth Amendment. This facilitated the assessment of each right granted under the Bill of Rights to be examined separately, on a case-by-case basis. Whereas this could require the extensive scrutiny of each right, the protection that the newly freed men could have benefited from with the total incorporation of the Bill of Rights, was far in the future.

It is also argued that such a method of incorporation is in line with the living constitutional values method of interpretation of the Constitution. It first commences with establishing what values the Framers of this Amendment could have regarded fundamental under this provision. Intriguingly, in order to determine the above Justice Matthews argued for the original purpose of these values to be examined even as back as the laws of England, not only to those of the Constitution. Thus, it is argued that he even extended the scope of the original fundamental values to those in Britain before the foundation of the United States.

[724] ibid.
[725] ibid.
[726] ibid 537.

Justice Matthews subsequently had to examine whether the right in question, that to trial by grand jury under the Fifth Amendment amounted to due process under the selective incorporation test he devised. Afterwards, he would have to determine whether it was intended to be made applicable against states under the due process clause of the Fourteenth Amendment.[727] Justice Matthews, when performing this examination concluded that this right did not constitute due process and was therefore not granted to the citizens of the United States against their states under the Fourteenth Amendment.[728] He further argued that if this had been the intent of the framers of the Fourteenth Amendment, they would have been able to find 'express declarations to that effect' in the Amendment, which they failed to do so.[729] This position, however, seems to contradict his earlier claims that establishing whether something constituted due process could be derived from 'settled usages and modes of proceedings'[730] and would not necessarily require enumeration in the Constitution.

The clear transformation of the point of view of the Supreme Court, however, only occurred in the later case of *Twining v New Jersey.*[731] The appellant directors of a company in this case were found guilty of producing 'false papers' of the company to a representative of the State Banking Department with the 'intent to deceive him as to the condition of the company.' [732] They subsequently argued that their right of 'exemption from compulsory self-incrimination' under the Fifth Amendment had been violated by their state.[733] They held that this right should be held enforceable against their state under the Fourteenth Amendment, either under the privileges and immunities or the due process clause.[734]

Justice Moody, in upholding the decision in the *Slaughter House Cases*[735] held that the right claimed under the Fifth Amendment could not be held to be enforceable

[727] ibid 535.
[728] ibid 535 and 558.
[729] ibid.
[730] ibid.
[731] *Twining v New Jersey* (1908) 211 US 78.
[732] ibid 79.
[733] ibid.
[734] ibid.
[735] *The Slaughter House Cases* (n 688).

against states under the privileges and immunities clause of the Fourteenth Amendment.[736] He further emphasised, in support of the original dual constitutional structure ideal, that the rights contained in the federal Bill of Rights could not be enforceable against the States under the privileges and immunities clause.[737] This, he reasoned, was because those were rights contained in the federal Constitution that were only enforceable against the federal government.[738]

Whereas Justice Moody rejected the argument of incorporation of the fundamental rights of individuals under the privileges and immunities clause, he held that under the due process clause, certain provisions of the first eight Amendments might be argued to be applicable against states.[739] On the other hand, his approach to selective incorporation claimed that the rights that were to be incorporated at state level under the due process clause of the Fourteenth Amendment depended on their nature and not on their inclusion in the Bill of Rights.[740] He emphasised that no clear definition of 'due process of law' was provided by the Supreme Court, despite the analysis of such in *Hurtado v California*.[741] He, thus, identified a three-step process to determine whether a right that was enumerated in the Bill of Rights could be considered 'due process of law.'[742] He argued, relying on the decision of Justice Matthews in *Hurtado v California*,[743] that firstly, it had to be examined whether the right was 'settled usage both in England and' in the United States.[744] Secondly, he affirmed that the confirmation of the right as 'settled usage' did not guarantee the right the automatic status as 'due process of law.'[745] He thirdly confirmed, adopting a non-originalist method of interpretation, that if the right was such an 'immutable principle of justice' that it had to be protected against 'arbitrary' government action in a free government, it should be considered to amount to 'due process of law.'[746] Therefore, as it has been

[736] *Twining v New Jersey* (n 731) 97.
[737] ibid 98 - 99.
[738] ibid.
[739] ibid 99.
[740] ibid.
[741] *Hurtado v California* (n 720).
[742] *Twining v New Jersey* (n 731) 100 - 101.
[743] *Hurtado v California* (n 720) 528.
[744] *Twining v New Jersey* (n 731) 100 - 101.
[745] ibid 101.
[746] ibid 101 - 102.

illustrated above, despite Justice Moody claiming that no clear definition of due process of law had been provided previously by the Supreme Court, he relied quite heavily on the opinion of Justice Matthews in *Hurtado v California*.[747] It is claimed that the living constitutional values method of interpretation surfaced in this decision. Whilst relying on originalist methods of interpretation to establish original intent, the approach of Justice Matthews also took into consideration the advancements in society.

After concluding that the exemption from self-incrimination contained in the Fifth Amendment did not constitute due process of law, Justice Harlan, in his dissenting opinion, claimed that the privileges, immunities and rights, granted both under the privileges and immunities and the due process clauses, should be held to be applicable against states.[748] He, therefore, argued that the right to 'immunity from self-incrimination' should be applicable against states.[749]

Whilst it seemed that with the passage of time, the Justices of the Supreme Court recognised that the application of the solutions provided by the Thirty Ninth Congress should be guaranteed, they were not willing to hold any provisions of the Bill of Rights to be incorporated against states for a long time. Furthermore, they did not opt to overrule the *Slaughter House Cases*,[750] but, instead, devised a way to circumvent it through the due process clause.

VI.3. The first provision of the Bill of Right incorporated

The Supreme Court finally seemed prepared to hold a right to be incorporated against the states only in 1925 in the decision of *Gitlow v New York.*[751] The appellant in this case was convicted for criminal anarchy, and he claimed that his right of free speech under the First Amendment was breached by the state court of New York.[752] Justice Sanford held in this case that it was assumed by the Court that the guarantee of free

[747] *Hurtado v California* (n 720) 528.
[748] *Twining v New Jersey* (n 731) 122 - 123.
[749] ibid 124 - 125.
[750] *The Slaughter House Cases* (n 688).
[751] *Gitlow v New York* (1925) 268 US 652.
[752] ibid 654 and 664.

speech was one of the 'fundamental personal rights and "liberties"' that was incorporated against states under the due process clause of the Fourteenth Amendment.[753] It is, however, lamentable that he did not engage in a further discussion as to the reasons why this right was assumed to have been incorporated against states under the due process clause. Nevertheless, he dedicated his opinion to the question whether the protection of right of free speech was, in effect, violated by the state court, which he held that it was not.[754] It is, however, interesting to highlight that little attention was devoted to the importance of the incorporation of this provision and this position even remained unchallenged by the state of New York.[755]

It is unfortunate that this case became the first decision in which the Supreme Court held a right under the Bill of Rights to be applicable against states under the Fourteenth Amendment. This is due to the lack of extensive reasoning for the decision of the Court to incorporate this right under the Fourteenth Amendment. On the other hand, this case became the starting point of the actual incorporation of rights contained in the Bill of Rights under the selective incorporation method, which claims that the incorporation of the rights included in the Bill of Rights should be assessed on a right-by-right basis.[756]

VI.4. Redefining the test of selective incorporation

Whilst certain provisions of the Bill of Rights could be held to be incorporated against the states, which rights would be incorporated had to be decided on a case-by-case basis. This approach clearly demonstrates a living constitutional values method of interpretation of the Supreme Court, which would allow to grant rights to individuals to be protected against state actions as society progresses on a case-by-case basis. This would also allow for the Constitution to adapt to any changes without the need for any constitutional amendments.

[753] ibid 666.
[754] ibid 673.
[755] Kelly, Harbison and Belz (n 613) 517 - 518.
[756] Lewis and Trichter (n 709) 207.

The following case with main influence on the incorporation doctrine followed in 1937. Justice Cardozo in *Palko v Connecticut*[757] rejected the argument of the appellant that his protection from double jeopardy under the Fifth Amendment was breached by the state of Connecticut when he was placed on trial for the same offence and convicted for murder in the first degree.[758] In arguing the above, he further rejected the approach adopted by the Framers of the Fourteenth Amendment that the due process clause of the Fourteenth Amendment incorporated all provisions of the Bill of Rights against states.[759]

Nonetheless, he did not reject the application of the ideologies of the Framers of the Fourteenth Amendment completely, as he adopted a new approach to selective incorporation still under the due process clause based on a test of 'a scheme of ordered liberty.'[760] This test argued that for a right included in the Bill of Rights to be held to be incorporated against states under this approach it had to "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[761] This approach is claimed to support the living constitutional values method of interpretation that would take into consideration both original intent (i.e. traditions) and possible transformed values (i.e. conscience of the people).

Justice Cardozo subsequently held that the double jeopardy the plaintiff was subject to did not 'violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' under this test.[762] Therefore, this right enumerated in the Fifth Amendment, had not been incorporated against states.[763]

[757] *Palko v Connecticut* (1937) 302 US 319.
[758] ibid 320 - 322.
[759] ibid 323.
[760] ibid 325; Tinsley E Yarbrough, 'Justice Black, The Fourteenth Amendment, and Incorporation' (1976) 30 University of Miami Law Review 231, 236.
[761] *Palko v Connecticut* (n 757) 325; Yarbrough (n 760) 236.
[762] *Palko v Connecticut* (n 757) 325.
[763] ibid.

The above approach of selective incorporation has also been termed as the fundamental fairness test and has been followed by the Supreme Court ever since.[764] This test, adopting a non-originalist method of interpretation, requires the Justices of the Supreme Court to determine on a right by right basis whether the right is part of the 'fundamental principles of liberty and justice' that form the pillars of the 'civil and political institutions' of the United States.[765] It is, however, important to highlight that the test of fundamental fairness does not base the decision on a standard or a definition found in the Constitution itself, but applies a subjective standard applied by the Justices at the time when the case is decided.[766] The advantage of this approach may arguably be that with the lack of a clear definition, as argued previously, the advancement of the understanding of current concepts in society may be allowed. Furthermore, this also allows the Justices to assess what is fundamentally fair outside the scope of the Bill of Rights.[767]

On the other hand, it should be emphasised that this is a subjective determination by the Justices of the Supreme Court.[768] They will be the ones deciding whether such rights satisfy the fundamental fairness test. This subjective determination of whether a right under the Fourteenth Amendment is applicable against the states and the lack of a clear and objective standard has also provided significant uncertainty to the states in their subsequent actions.[769]

Based on the above, it may be established that Justice Cardozo in *Palko v Connecticut,*[770] rejected the total incorporation approach of the Bill of Rights that was the intended purpose of the Framers of the Fourteenth Amendment. He nevertheless

[764] 'Rethinking the Incorporation of the Establishment Clause: A Federalist View' (1992) 105 Harvard Law Review 1700, 1701; Robert L Cord, 'The Incorporation Doctrine and Procedural Due Process under the Fourteenth Amendment: An Overview' [1987] Brigham Young University Law Review 867, 871–872; Will (n 516) 29; Yarbrough (n 760) 236.
[765] *Palko v Connecticut* (n 757), 325.
[766] 'Rethinking the Incorporation of the Establishment Clause: A Federalist View' (n 764) 1701.
[767] ibid.
[768] ibid; *Duncan v Louisiana* (1968) 391 US 145, 168 - 169.
[769] Lewis and Trichter (n 709) 209–210.
[770] *Palko v Connecticut* (n 757).

devised a novel approach to selective incorporation based on fundamental fairness that came to be adopted by subsequent Supreme Court decisions as well.

VI.5. Total incorporation resurfaces

The appellant in the subsequent case of *Adamson v California,*[771] who was convicted of murder in the first degree claimed that his right to be immune from self-incrimination under the Fifth Amendment, was breached by the state court of California.[772] In attempting to claim so, he argued that his right under the Fifth Amendment was incorporated under the privileges and immunities and the due process clauses of the Fourteenth Amendment.[773]

Justice Reed, in delivering the opinion of the Court, held that it was 'settled law' that such right was not applicable against states under the privileges and immunities clause of the Fourteenth Amendment.[774] Relying on the decisions in *Barron v Baltimore,*[775] the *Slaughter House Cases*[776] and *Twining v New Jersey,*[777] he further affirmed that the original dual constitutional structure of the United States granted different rights against the federal and state governments.[778] After further rejecting the argument of total incorporation based on the decision in *Palko v Connecticut,*[779] and applying the fundamental fairness approach devised by Justice Cardozo in the above case,[780] he further held that the right claimed under the Fifth Amendment was not applicable against states under the due process clause either.[781]

Justice Frankfurter, concurring with the decision, further argued that despite one Justice arguing for the total incorporation approach, the Supreme Court had until then

[771] *Adamson v California* (n 661).
[772] ibid 47 - 48.
[773] ibid 47 - 50.
[774] ibid 51.
[775] *Barron v Mayor & City of Baltimore* (n 418).
[776] *The Slaughter House Cases* (n 688).
[777] *Twining v New Jersey* (n 731).
[778] *Adamson v California* (n 661).
[779] *Palko v Connecticut* (n 757).
[780] Cord (n 764) 871–872.
[781] *Adamson v California* (n 661) 53 – 58.

adopted the selective incorporation approach.[782] He, however, argued that instead of the subjective test applied by the Justices through the fundamental fairness test of the selective incorporation approach, a more suitable test should be followed.[783] He therefore claimed that what constituted due process should be determined using the selective incorporation approach, based on a test whether it was part of the minimum benchmarks that were 'of the very essence of a scheme of ordered liberty.'[784] Whilst this test would seemingly differ from that of the fundamental fairness, it is claimed that it still applied the living constitutional values interpretative method of the Constitution.

The crucial influence of this decision, however, can be found in the dissent of Justice Black, with whom Justice Douglas concurred. His dissenting opinion stated that he firstly recognised that the Bill of Rights was adopted to protect people against the federal government, which argument was also adopted in *Barron v Baltimore*.[785] On the other hand, he further emphasised that the decisions should have devoted particular attention to the historical evidence from the Congress debates about the drafting of the Fourteenth Amendment.[786] These records, he argued, provided evidence that all provisions of the Bill of Rights should be held to be incorporated against states under the Fourteenth Amendment.[787] It therefore seems that he became the first person to recognise and expressly argue for the application of the solutions devised by the Framers of the Fourteenth Amendment mentioned above, relying on a very clear originalist method of interpretation of the Constitution.

Justice Black, with his dissenting opinion, became 'the architect of the incorporation theory' arguing for the approach referred to as total incorporation to be adopted for these purposes.[788] Even though this approach has been mentioned in decisions since,

[782] ibid 62 and 65.
[783] ibid 65.
[784] ibid 65 and 68; *Palko v Connecticut* (n 757).
[785] *Barron v Mayor & City of Baltimore* (n 418); *Adamson v California* (n 661) 70 - 71.
[786] *Adamson v California* (n 661) 73 - 75.
[787] ibid 89; Brant (n 517) 344; Aynes (n 667) 63–64.
[788] Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard University Press 1977) 135; Lewis and Trichter (n 709) 211; Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 139.

the Supreme Court has failed to adopt this 'closed-ended' approach in its decisions.[789] This opinion, however, has been a pioneer in commentators attempting to re-discover the original intent of the framers of the Fourteenth Amendment.[790]

Justice Murphy, with whom Justice Rutledge concurred, in his dissenting opinion formulated a different approach to incorporation, which is also referred to as the 'ultra-incorporationist' approach.[791] In advocating for this approach he claimed that the due process clause of the Fourteenth Amendment should not only afford protection to citizens of their rights under the Bill of Rights against states, but also of their 'fundamental rights' that were not included in the latter.[792] This ultra-incorporationist approach would have amalgamated the total incorporation approach of Justice Black and the fundamental fairness approach devised by Justice Cardozo in *Palko v Connecticut.*[793] This approach would have also arguably adopted the natural law ideology because it conferred protection on those rights that were left outside the remits of the written declarations of rights. However, as it will be demonstrated below, applying such an approach would have required a significant departure from the selective incorporation approach adopted in previous cases.

VI.6. The era of successful selective incorporation claims

The Supreme Court subsequently commenced to successfully hold the provisions of the Bill of Rights enforceable against states in the respective cases. The appellant, for instance, in *Mapp v Ohio*[794] claimed that her right of protection against unreasonable searches and seizure under the Fourth Amendment was violated, when her property was searched without a valid search warrant by state officials.[795] Justice Clark after analysing the previous decisions of the Supreme Court about the incorporation of the

[789] Cord (n 764) 878–880; Frank W Daykin, 'The Constitutional Doctrine of Incorporation Re-Examined' (1970) 5 USFL Rev 61, 62; Tribe (n 171) 772.
[790] Gerard N Magliocca, 'Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century' (2009) 94 Minn. L. Rev. 102, 103.
[791] Cord (n 764) 878–880.
[792] *Adamson v California* (n 661) 124; Cord (n 764) 878–880.
[793] *Palko v Connecticut* (n 757).
[794] *Mapp v Ohio* (1960) 367 US 643.
[795] ibid 643 - 645.

Fourth Amendment through the due process clause of the Fourteenth Amendment held that the right claimed was, in effect, enforceable against the states.[796] He based his decision on the non-originalist argument that the enforcement of the protection against unreasonable searches and seizure was 'necessary in the true administration of justice.'[797] This seems to imply that he also adopted the fundamental fairness method of the selective incorporation approach.[798]

Justice Harlan, Frankfurter and Whittaker, on the other hand, strongly disagreed with the opinion of the majority, and argued that the Court should not have overruled the decision in previous cases that held the Fourth Amendment inapplicable against states.[799]

Another case where the Supreme Court was willing to incorporate a provision of the Bill of Rights, even if it had to overrule previous decisions, was *Malloy v Hogan*.[800] The appellant claimed in this case that his 'privilege against self-incrimination' under the Fifth Amendment was applicable against states under the Fourteenth Amendment.[801] Justice Brennan, overturning previous decisions of the Court, ruled for the appellant and decided that the claimed right was, in fact, incorporated against states under the due process clause of the Fourteenth Amendment.[802] In doing so, it may be argued that he also adopted the living constitutional values method of interpretation as he claimed:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution depending on whether the claim was asserted in a state or federal court. [803]

[796] ibid 655 and 660.
[797] ibid 660.
[798] ibid.
[799] ibid, 672 - 686.
[800] *Malloy v Hogan* (1964) 378 US 1.
[801] ibid 1 and 2.
[802] ibid 3 and 9.
[803] ibid 11.

This decision, in effect, became another pioneer following *Gitlow v New York,*[804] that successfully incorporated a provision of the Bill of Rights under the selective incorporation approach.

VI.7. Justice Black supports selective incorporation

The decision in *Duncan v Louisiana*[805] became important for two main reasons. Firstly, it incorporated a further provision of the Bill of Rights, and, secondly, Justice Black departing from his previous approach, lastly expressed his support of the selective incorporation approach.

The appellant in *Duncan v Louisiana*[806] argued that his right to trial by jury under the Sixth Amendment had been violated by the state court when he was convicted of battery without such trial.[807] Justice White held that the right to trial by jury under the Sixth Amendment had, in fact, been violated by the state of Louisiana under due process clause of the Fourteenth Amendment.[808] In reaching his decision he adopted the fundamental fairness test of selective incorporation about the incorporation of the Fifth and Sixth Amendment against the states.[809] He further held that the rights protected under these amendments should be held to be incorporated against states.[810]

In his concurring opinion, Justice Black, with whom Justice Douglas concurred, argued that if his approach of total incorporation was not to be adopted by the Supreme Court, he was willing to support the approach of selective incorporation.[811] Moreover, he rejected the fundamental fairness test to incorporation because of its subjective

[804] *Gitlow v New York* (n 751).
[805] *Duncan v Louisiana* (n 768).
[806] ibid.
[807] ibid.
[808] ibid 149.
[809] ibid 148.
[810] ibid.
[811] ibid 164.

nature, and vouched for the selective incorporation approach, which as he claimed, had already incorporated most provisions of the Bill of Rights.[812]

VI.8. *Slaughter House Cases* still valid law

Recently, the petitioners in *McDonald v City of Chicago*[813] argued that their right to bear arms under the Second Amendment was breached by a regulation of Chicago, which required a registration certificate to be held if a person was to keep arms.[814] Another interesting feature of this case was that the appellants argued that their above right was incorporated against their state based on the privileges and immunities clause.[815]

Justice Alito, when delivering the opinion of the Court, refused to overrule the decision in the *Slaughter House Cases*[816] and held that the only clause of the Fourteenth Amendment where a provision of the Bill of Rights could be made applicable against states was the due process clause.[817] He further identified five characteristics of the approach adopted by the Supreme Court when considering the incorporation doctrine.[818] First, he explained, the Court considered the due process clause distinctly from the privileges and immunities clause. [819] The approach under the latter has been that the privileges and immunities protected under the clause had not been incorporated against the states. On the other hand, under the due process clause the Supreme Court had adopted a selective incorporation approach, whereby they incorporated only certain rights protected by the Bill of Rights. Secondly, he argued that only those rights were incorporated under the due process clause that were "of

[812] ibid 168 - 169 and 171.
[813] *McDonald v City of Chicago, Illinois et al* (n 712).
[814] ibid 2.
[815] Dale E Ho, 'Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism' (2010) 19 William & Mary Bill of Rights Journal 369, 381–382; Christian B Corrigan, 'McDonald v City of Chicago: Did Justice Thomas Resurrect the Privileges or Immunities Clause from the Dead? (And Did Justice Scalia Kill It Again?)' (2011) 60 University of Kansas Law Review 435, 455–459.
[816] *The Slaughter House Cases* (n 688).
[817] *McDonald v City of Chicago, Illinois et al* (n 712) 10.
[818] ibid 11.
[819] ibid.

such a nature that they are included in the conception of due process of law."[820] Thirdly, he stated that the Court seemed to have used the criteria whether "a civilised system could be imagined that would not accord the particular protection" to decide if a provision of the Bill of Rights was incorporated against states.[821] Fourthly, the Court assessed certain rights as having been incorporated under the due process clause, but also held that some were not.[822] Lastly, Justice Alito highlighted that even if a provision of the Bill of Rights had been held incorporated under the due process clause, the remedies for the breach of the right differed between the state and the federal government.[823]

Justice Alito further emphasised that even though the Court failed to adopt the total incorporation theory of Justice Black, it was in effect moving towards this approach by fully incorporating most of the provisions of the Bill of Rights, under the selective incorporation approach, whilst overruling previous decisions.[824] He also argued that, in doing so, the Court abandoned three of the above identified approaches and the focus rested upon whether the right in question was 'fundamental to our system of ordered liberty and system of justice,' he highlight this was effectively the test devised by Justice Cardozo in *Palko v Connecticut*.[825]

After examining the right to bear arms under the Second Amendment, Justice Alito held, by adopting the fundamental fairness approach, - that this right was 'among those fundamental rights necessary to our system of ordered liberty.'[826] He thus held that it was enforceable against states.[827]

Whilst it may seem that the Supreme Court still adopts the fundamental fairness approach of selective incorporation, it has effectively arrived at the position where only

[820] ibid.
[821] ibid 12.
[822] ibid 13.
[823] ibid.
[824] ibid 15 - 16; Corrigan (n 815) 448.
[825] *Palko v Connecticut* (n 757); *McDonald v City of Chicago, Illinois et al* (n 712) 16.
[826] *McDonald v City of Chicago, Illinois et al* (n 712) 31.
[827] ibid.

a few of the provisions of the Bill of Rights remain unincorporated. These are the prohibition on the quartering of soldiers clause of the Third Amendment, the guarantee of a grand jury under the Fifth Amendment and to that of a civil jury trial for civil cases of more than twenty dollars under the Seventh Amendment and the protection against excessive bails and fines under the Eight Amendment.[828] It may therefore be argued that the Supreme Court, despite its initial rejection to apply the solutions that the Framers of the Fourteenth Amendment proposed for the underlying constitutional and political problems, has, over the years, changed its approach. By selectively incorporating most of the provisions of the Bill of Rights, it has been recognised that the Supreme Court might ultimately adopt the total incorporation approach, as arguably intended by the Framers of the Fourteenth Amendment. On the other hand, when and whether this will happen remains to be seen.

VII. Conclusion

As demonstrated above, the protection of the fundamental rights of citizens in the United States of America has amounted to one of the greatest constitutional uncertainties. Through the varying protections afforded to citizens in the colonial charters, and subsequently state constitutions and bills of rights, it was established that it was highly challenging to subsequently devise a novel federal system that would be able to integrate all provisions of these om a uniform manner.

The reason for the lack of a Bill of Rights in the original Constitution that would have provided for a uniform protection of the fundamental rights of the citizens of the United States was, therefore, examined further. Debates surrounding the relationship between the federal and state government, thus, also surfaced and it was argued that since it was the state governments that were to provide the protection of these rights to the citizens, and not the federal government, under the original approach of the dual federalist structure, the need for a federal Bill of Rights did not arise.

[828] Ho (n 815) 380–381; Richard J Jr Hunter and Hector R Lozada, 'A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited' (2010) 35 Oklahoma City University Law Review 365, 381.

However, the issue of the lack of the Bill of Rights, as it was argued above, occupied a key position during the ratification debates and in the Federalist - Anti-Federalist debate. Despite the Federalists arguing that the inclusion of the Bill of Rights was redundant in the Constitution, it was demonstrated that it was Madison, a Federalist, who did, in fact, argue for the need to include such a Bill in the Constitution during the Virginia Ratifying Convention.[829]

The Chapter subsequently examined how the Bill of Rights was adopted as amendments to the original Constitution, and provided an overview of the protections that it guaranteed. It has also devoted special attention to the proposed amendment number XIV by Madison, which would have made some provisions of the Bill of Rights applicable against state governments, sowing the seeds of the later selective incorporation approach.[830]

After examining how the incorporation doctrine was rejected due to the dual constitutional structure of the United States by the Supreme Court in *Barron v Baltimore,*[831] the Chapter set out to examine the two main constitutional causes of the Civil War. It discussed in further detail the irreconcilable status of slavery with the natural law ideology and how a great division existed about this issue between most of the Northern and Southern states. Such a state of affairs crucially highlighted that if a constitutional uncertainty remains unresolved when it is at the limelight, it may lead to disastrous consequences.

The chapter subsequently analysed the Civil War or Reconstruction Amendments from a problem-solution approach and examined the intentions of the Framers of the Fourteenth Amendment with the adoption of that Amendment further. Based on a historical analysis, it was established that the Civil War Amendments provided the application of the three solutions to the underlying constitutional problems of the

[829] Brant (n 517) 41.
[830] Levy (n 422) 40; Will (n 516) 31–32; Wermiel (n 552) 123.
[831] *Barron v Mayor & City of Baltimore* (n 418).

United States: the abolishing of slavery, the protection of the fundamental rights of the freedmen and the declaration of the supremacy of the federal level in the dual constitutional structure.[832] It was also argued that the Framers of the Fourteenth Amendment may be observed to have devised the Amendment to provide for total incorporation of the Bill of Rights against the states.

The focus then turned to the federal Supreme Court and how it continued the work of the Congress in applying the solutions the latter devised as the Civil War Amendments. It has been demonstrated that the Supreme Court, however, had initially rejected this approach and was only prepared to incorporate the provisions of the Bill of Rights under the selective incorporation approach, while assuming an active role in the further development of the incorporation doctrine.

The Supreme Court firstly argued that no incorporation was possible under the privileges and immunities clause of the Fourteenth Amendment in the *Slaughter House Cases*,[833] which approach has been widely adopted by the Supreme Court since. It, therefore held that the only way of incorporation of fundamental rights against the states was under the due process clause of the Fourteenth Amendment.[834] Even though this chapter argued that the purpose of the Fourteenth Amendment may be held to be total incorporation of the Bill of Rights against the states, it has been demonstrated that, apart from featuring in dissenting opinions, this approach has not been adopted by the Supreme Court so far. The decisions of the Court under this clause are rather based on the selective incorporation approach, which requires the analysis of each case 'clause by clause and right by right' and if a provision is considered fundamentally fair, it may then be held to have been incorporated against the states.[835] This approach, it has been claimed, also falls in line with the living constitutional values approach advocated for by this work, as it would allow the examination of each provision from the angle of what value it was set out to protect. It

[832] Tribe (n 171) 549.
[833] *The Slaughter House Cases* (n 688).
[834] ibid 80 - 81.
[835] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 139 and 219; Brennan Jr (n 553) 545.

would, secondly, allow for such values to be interpreted in light of the developments of each era, thus, allowing the Constitution to become a living instrument.

Amar has also proposed another approach to the incorporation doctrine, which he called the 'refined incorporation' approach, under which he claimed that every privilege and immunity of the original Constitution should be held to have been incorporated under the Fourteenth Amendment.[836] He further established that these privileges and immunities may be identified on a case by case basis where it has to be established whether a clause is 'a private right of the citizen' or that of the state or the people as a whole.[837] He subsequently proposed that those rights that can be regarded as private rights, should be held to have been incorporated under the Fourteenth Amendment.[838] So far, this approach has not, however, been presented in the decision of the Supreme Court.

It is, therefore, argued that even though the Framers of the Fourteenth Amendment set out as the purpose of the Amendment the total incorporation of the Bill of Rights against the states, this approach has been rejected in the decisions of the Supreme Court so far. On the other hand, this chapter also claims that by selectively holding that separate guarantees of the Bill of Rights incorporated under the due process clause of the Fourteenth Amendment against the states, the Supreme Court is, effectively, heading towards the acceptance of the total incorporation approach once all provisions of the Bill of Rights become incorporated against the states.

Another key lesson that this chapter has demonstrated is that once a constitutional uncertainty arises as a problem in the underlying constitutional structure of a state, it should not be ignored. The delay in handling such an issue could lead not only to the escalation of the further problems it generates, but could also result in dire consequences, such as the Civil War in the United States, for all actors in a state, from individuals with no fixed abode, to executives of states.

[836] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 219.
[837] ibid 222.
[838] ibid.

Chapter 4: Creating and subsequently protecting a uniform national market in the United States: Part I

The constitutional value set out in the Dormant Commerce Clause

I. Introduction

Whilst the United States of America often provides a point of comparison with the European Union for the regulation of its national market, it is important to highlight that the Constitution of the United States of America does not include a provision for the creation of such a national market. The only provision of the Constitution alluding to this is Article I, section 8, clause 3 of the Constitution. The Commerce Clause states that '[Congress shall have power …] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'[839]

The chapter explains the constitutional uncertainties that have arisen in the interpretation of this clause since its drafting, and how these have been managed by the United States. The chapter also aims to demonstrate that even though no express provision about the creation of a national market exists in the Constitution, such may be identified as one of the purposes for the adoption and the subsequent application of the Commerce Clause. It will, thus, also argue that this purpose may also be regarded the constitutional value worthy of protection under the living constitutional values approach.

The chapter is divided into three parts based on key milestones in the interpretation of this clause. Firstly, the reasons for the adoption of the Commerce Clause are examined in line with the originalist and living constitutional values method of constitutional interpretation. The chapter explores how the economic situation of the states and their commercial relationship with each other were vital in the drafting and adoption of the Constitution, and specifically this clause. Particular attention is placed

[839] Constitution of the United States of America 1787, Article I section 8 clause 3.

on the text of the Commerce Clause. Since no definitions of the various terms of the Clause have been provided, an examination of the definitions prior to and during the adoption of the Constitution will also be required to effectively analyse the constitutional uncertainties this position has created.

Secondly, the chapter analyses the most influential decisions of the Supreme Court about the negative aspects of the Commerce Clause. It discusses the relationship between the interpretation of the Constitution and the development of the negative side of the Commerce Clause. Furthermore, it examines how this aspect of the Commerce Clause aims to resolve the constant conflict created by the Constitution by setting out the extent to which the rights of the states are limited to regulate in the same area as Congress. Particularly, an emphasis is placed on whether the ideology of the creation of a national market has influenced the main judgments of the Supreme Court and which methods of constitutional interpretation the Supreme Court has adopted since the ratification of the Constitution.

Lastly, the chapter assesses the modern interpretation of the negative or Dormant Commerce Clause, and the development of the current two-tier test. It argues that even though there is a strict scrutiny on state laws under the modern test, a new trend of cases, characterised into four separate groups, seems to be emerging in the Supreme Court, which seems to regard the protection of state powers more significant than that of the creation and protection of the uniform federal market.

II. Interstate commerce after the American Revolution

It is reasonable to assume that during the creation of an effective national market in a novel legal system would require laying down legal uncertainties. However, this section illustrates the challenges faced by the Founding Fathers when they had to decide on the extent at which terms of the Constitution should be defined and clarified in this area.

II. 1. Interstate commerce

Instead of a reference to a national market, the Commerce Clause of the Constitution of the United States of America, on its face, grants Congress with the authority to 'regulate […] commerce among the states.'[840] In order to fully understand the meaning of this expression at the time of the adoption of the Constitution in light of the originalist interpretative method of the Constitution, the interpretation of 'commerce' and 'among the states' in the era after the American Revolution, and particularly during the eighteenth century, is analysed separately.

II.1.a. 'Commerce'

As with many terms included in the Constitution by the Framers, no uniform interpretation of 'commerce' can be identified at the time of its drafting and adoption. Thus, if one is to adopt an originalist method of interpretation of the Constitution, they would be faced with quite an obstacle to determine what commerce meant at the time of the drafting and adoption of the Constitution. The various understandings of commerce, as illustrated by various commentators, can be categorised into three different groups based on the range of activities 'commerce' was associated with.

II.1.a.i. Commerce as intercourse

The first group of commentators claim that 'commerce' referred to a broader range of activities in the eighteenth century than economic activities as it may be understood nowadays.[841] Commerce was understood as 'intercourse' with sound 'social connotations.'[842] Samuel Johnson defined commerce as the 'interaction and exchange between persons,' including all economic and non-economic activity related

[840] Constitution of the United States of America 1787, Article I section 8.
[841] Jack M Balkin, 'Commerce' (2010) 109 Michigan Law Review 1, 5; Amar, *America's Constitution: A Biography* (n 47) 107.
[842] Balkin (n 841) 16.

to commerce.[843] The term, thus, included manufacturing, selling, importing, and/or exporting goods. Such meanings of commerce can be identified in a dictionary written in the same time as the Constitution that defined commerce as "intercourse; exchange of one thing for another" and a "common or familiar intercourse."[844] Various other textual references from the era also associate 'commerce' with interactions, such as "free and easy commerce of social life," focusing on what Balkin highlights as the interaction between people rather than the exchange of goods.[845] Amar, however, also identified references that referred to 'commerce' as interactions wider than those between people. For instance, he highlights that references can be found from the era that refer to "domestic animals which have the greatest Commerce with mankind" and "our Lord's commerce with his disciples."[846]

A wider understanding of commerce was also used by the economists of the era, such as Tench Coxe or Adam Smith, who claimed that 'commerce' included not only 'trading goods but also manufacturing, mining, grazing, agriculture, fisheries, banking, insurance, and corporations.'[847] Nelson and Pushaw further argued that commerce at the time could, in effect, be identified with any 'gainful activity.'[848]

If such a broad interpretation of commerce was to be associated with the Commerce Clause, the newly created federal government of the United States of America would have held unlimited powers over any interactions of the federal government with other nations. Moreover, the federal government would have possessed the same powers to regulat any interactions between the states. However, such an interpretation would have rendered several provisions of the original Constitution and the subsequent Amendments to it unnecessary. For instance, the Tenth Amendment states that any power not granted to the federal government is to remain with the states or the people.[849] Thus, if the federal government was to regulate all interactions of the states

[843] ibid 5; Amar, *America's Constitution: A Biography* (n 47) 107.
[844] Balkin (n 841) 15; Amar, *America's Constitution: A Biography* (n 47) 107.
[845] Balkin (n 841) 16; Amar, *America's Constitution: A Biography* (n 47) 107.
[846] Amar, *America's Constitution: A Biography* (n 47) 107.
[847] Grant S Nelson and Robert J Pushaw, 'Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues' (1999) 85 Iowa Law Review 1, 15–16 and 20.
[848] ibid 13–20.
[849] ibid.

or the people, the latter two would have been left with no powers at all over themselves. This interpretation would have contravened many of the ideals supported by the Founding Fathers in their entirety, discussed further in the earlier chapters, including the creation of a republican government as opposed to a despotic one. Regardless of the broad use of 'commerce' at the age, it is still contended that the Founding Fathers could have not supported an interpretation that would have created the opportunity to create a despotic government regulating all matters.

It is thus claimed that the interpretation of commerce in its widest sense may be utilised by those adopting the originalist method of interpretation to argue that Congress was granted with unlimited powers over the states in this area

II.1.a.ii. Commerce as manufacturing, agriculture and commerce

A second group of scholars argues that at the time of the adoption of the Constitution, commerce encompassed a somewhat narrower extent of activities. Tushnet argues that these activities were still, however, a wider definition of commerce than it is generally understood nowadays, and included the three main economic activities of the states: 'manufacturing, agriculture and commerce.'[850] To support his viewpoint, he argues that commerce was used in this sense in various 'newspapers and legislative debates' in the era.[851] Nelson and Pushaw also demonstrated through the definitions of commerce in various English dictionaries at the time and other sources, such as writings of Daniel Defoe or Adam Smith, that commerce included not only the general 'buying and selling of goods,' but also the activities that produced these goods, such as manufacture and agriculture.[852]

If this interpretation of commerce would be adopted when interpreting the Commerce Clause from an originalist perspective, it is argued that it would provide a more suitable interpretation than the one offered by the first group of commentators. This interpretation would, however, still involve a wide array of activities that would have

[850] Tushnet (n 83) 162.
[851] ibid.
[852] Nelson and Pushaw (n 847) 15–16.

previously belonged to the states to regulate. Therefore, whilst this interpretation would be the most suitable to argue for the extensive powers of the federal government to regulate commerce, this would also become a point of contention between the federal and state governments.

II.1.a.iii. Commerce as trade

If a more definite line of division between federal and state powers to regulate commerce is to be sought based on the interpretation of commerce at the era, the most suitable method of interpretation, it is argued, would be the third group of commentators.

Noyes, Nelson and Pushaw highlighted that a third interpretation of commerce existed at the Founding era. This interpretation particularly restricted the understanding of commerce to activities that would normally be regarded as 'trade' or an 'exchange of merchandise between different places.'[853] Such an exchange of merchandise would only take place, according to Barnett, if the merchandise was 'produced by agriculture and manufacturing.'[854]

Cooke supports an even narrower understanding of commerce by claiming that it was essentially understood as 'transportation […] of persons or property.'[855] He thus identified interstate commerce as such transportation 'between points in different States.'[856] It is fundamental to highlight, however, that if commerce is to include only transportation and the trade of merchandise, the production of such cannot be held to be included in the definition of commerce.[857]

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[853] Walter C Noyes, 'Development of the Commerce Clause of the Constitution' (1906) 16 Yale Law Journal 253, 255; Robert J Pushaw, 'Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers' (2012) 2012 University of Illinois Law Review 1703, 1710; Nelson and Pushaw (n 847) 17.

[854] Randy E Barnett, 'Is the Rehnquist Court an Activist Court-The Commerce Clause Cases' (2002) 73 University of Colorado Law Review 1275, 1284. Nelson and Pushaw, however, claimed that these activities would be classified as 'merchandize' during this era. See Nelson and Pushaw (n 847) 17.

[855] Frederick H Cooke, 'The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce' (1910) 20 Yale Law Journal 297, 299.

[856] ibid.

[857] Noyes (n 853) 256–257; Barnett (n 854) 1284.

As illustrated above, the interpretation of commerce at the time of the adoption of the Constitution was not uniform and it is argued that it could have been foreseen that the understanding of commerce could subsequently become one of the main areas of dispute about the Commerce Clause. One of the fundamental reasons for these disputes would emerge as the dispute over which part of the newly devised constitutional system of the United States would have power to regulate these activities: the federal government or the states.

II.2. Commerce among the states

To determine the extent to which Congress would regulate interstate commerce, and consequently restrict the states in the exercise of these powers, it is necessary to further study the meaning of 'among' at the time of the adoption of the Constitution and immediately preceding it in line with the originalist method of interpretation.

Nelson and Pushaw argued that 'among' was understood as 'the mingling of' or 'associated with' at the time of the adoption of the Constitution.[858] The meaning of 'among the states,' it is argued, may therefore be interpreted as including activities that involved more than one state. This could therefore also imply a certain out-of-state element, usually the import or export of an article of commerce from or to another state. However, if one is to adopt a wider interpretation of commerce, this would include all activities of a state with another.

As it will be demonstrated below, due to the development of the states during this era, interstate commerce was, however, less common than the more practical and easily accessible commerce within the boundaries of a state.[859] This may therefore explain why this part of the provision would not subsequently provide such an area of debate as the interpretation of 'commerce' would.

[858] Nelson and Pushaw (n 847) 43.
[859] Gregory E Maggs, 'Translating Federalism: A Textualist Reaction' (1998) 66 The George Washington Law Review 1198, 1198.

II. 2. Interstate commerce before the Constitutional Convention

The political and economic independence of the previous colonies from Britain unsurprisingly created new challenges.

One of the responses of Britain to this newly gained independence of the old colonies was the imposition of various measures restricting the ability of the latter to engage in trade with Britain and 'its colonies in the West Indies'.[860] In order to strengthen their own economic performance, the states turned to concentrate on the development of their local economies and commerce.[861] The manufacture and agricultural production mainly focused on serving those 'in the immediate vicinity' and for producing goods for home-consumption.[862] The interstate commerce that existed before and at the time of the adoption of the Constitution seems to have been limited, and consisted mostly in the transportation of goods between states by means of 'vessels, […] stage coaches, wagons and pack-horses.'[863] However, many legislators in the states at the time believed that the out-of-state flow of commerce could have harmed their economy, which effectively resulted in many states enacting laws that clearly placed the economic actors situated within their boundaries in a more favourable position over those operating out of the state boundaries.[864]

The situation did not change with the adoption of the Articles of Confederation either. The draft Articles proposed by Dickinson contained a measure prohibiting discrimination of out-of-state citizens, especially 'in matters of trade' and these citizens were also to be granted the same 'Rights, Liberties, Priviledges [sic] Exemptions & Immunities in Trade, Navigation & Commerce' as those living in a state.[865] The

[860] Barry Friedman and Daniel T Deacon, 'A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause' [2011] Virginia Law Review 1877, 1887; Jacques LeBoeuf, 'The Economics of Federalism and the Proper Scope of the Federal Commerce Power' (1994) 31 San Diego Law Review 555, 595–596.
[861] Julian N Eule, 'Laying the Dormant Commerce Clause to Rest' (1982) 91 Yale Law Journal 425, 430; Norman R Williams, 'Why Congress May Not "Overrule" the Dormant Commerce Clause' (2005) 53 UCLA Law Review 153, 162.
[862] Noyes (n 853) 254.
[863] ibid.
[864] Eule (n 861) 430; Williams, 'Why Congress May Not "Overrule" the Dormant Commerce Clause' (n 861) 162.
[865] Brannon P Denning, 'Confederation-Era Discrimination against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine' (2005) 94 Kentucky Law Journal 37, 78.

committee in charge of the drafting of the Articles, however, disagreed with these proposals and transformed these into affirmative powers possessed by Congress, whereby it could impose 'duties and imposts on foreign commerce.'[866] It thus became apparent that whilst Congress was given several powers under this document, the various states remained reluctant to grant the power to Congress to address the restrictive measures of Britain, which would have allowed it to use a collective national voice and regulate interstate trade.[867] The measures enacted by states discriminating against each other through duties imposed on interstate trade within the Confederation thus remained. [868]

It is also interesting to note that whilst the proposed Articles referred to trade, the ones adopted used the term commerce. This could thus imply that the terms either allowed for the interchangeable use of trade and commerce or that the adopted Articles intended for an extended interpretation of trade. However, it is important to highlight that these terms were utilised to refer to foreign commerce only, not for the regulation of commerce between the states. Nevertheless, it is argued that the regulation of foreign commerce could give indications as to the interpretation of commerce by those drafting the Articles. It is, thus, highlighted that their intentions were to impose 'duties and imposts on foreign commerce,'[869] which would imply that they accepted that commerce included navigation, the main form of foreign commerce at the era, especially with Britain.

With the economy gradually weakening, the adoption of local protectionist measures, such as discriminatory trade duties, undeniably escalated in states with a dominant position in a particular area of trade.[870] In the meantime, the states with a less influential position adopted measures that allowed the free flow of commerce into and out of their states.[871] One such instance was the establishment of free ports in

[866] ibid 79.
[867] Friedman and Deacon (n 860) 1887.
[868] Noyes (n 853) 253–254.
[869] Denning (n 865) 79.
[870] Noyes (n 853) 254; Friedman and Deacon (n 860) 1888; Hugh Brogan, *The Penguin History of the United States of America* (Penguin Group 1999) 193; Nelson and Pushaw (n 847) 24. For a description of these measures in Virginia, New York, Connecticut, Massachusetts. Rhode Island and South Carolina see Denning (n 865) 60–66.
[871] Friedman and Deacon (n 860) 1888.

Connecticut, Delaware and New Jersey, whilst in New York a law enacted in 1785 imposed the same duties on goods imported from Connecticut, New Jersey, Rhode Island and Pennsylvania as those from Britain.[872] This measure effectively resulted in a trade war between the above states.[873]

Whilst these conflicts may have resulted in harm to the economies of various states, they also prompted a debate about the solution of these conflicts in the newly created union of states. One such solution was proposed by the reformists of the era, such as Madison, who claimed that Congress should be given powers to enact 'a uniform trade policy' in order to repair the 'leak' in the 'vessel' of the Confederacy.[874] This statement was clearly in support of the ideal of creating a uniform system of interstate commerce to protect the interest of the nation as a whole. This reformist idea, however, would have required to grant powers to Congress that had clearly belonged to the states previously and this ideology, unsurprisingly, was not welcomed by all states.[875] To discuss the various options available to solve these problems, an interstate conference was called in Annapolis, which ultimately resulted in the call for the Constitutional Convention in Philadelphia to alter the Articles of Confederation.[876]

II. 3. Interstate commerce and the Constitutional Convention

The delegates to the Constitutional Convention arrived at Philadelphia in the times of this 'economic chaos,'[877] which was dominated by discriminatory commercial measures between the states within the union. Understandably, many of the delegates therefore aimed to devise a solution to this problem, and several proposals were presented to the Convention that aimed at tackling this particular issue. The main solution also included addressing a fundamental feature of the novel system: to what

[872] ibid; LeBoeuf (n 860) 597.
[873] Eule (n 861) 430; Friedman and Deacon (n 860) 1889; Tribe (n 171) 1044; *H P Hood & Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (1949) 336 US 525, 533.
[874] Friedman and Deacon (n 860) 1888; Denning (n 865) 55.
[875] Denning (n 865) 52.
[876] Friedman and Deacon (n 860) 1891; Amar, *America's Constitution: A Biography* (n 47) 254; Brogan (n 870) 194.
[877] Patrick C McGinley, 'Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra' (1992) 71 Oregon Law Review 409, 412.

extent could Congress regulate interstate commerce, and, as a result, take these regulatory powers away from the states?

The new ideal by the reformists claiming that Congress should be granted with powers to enact uniform trade policies had already been present in the proposals submitted to the Convention. Whilst the proposals of Hamilton and Randolph did not explicitly mention commerce, these suggested a more open-ended interpretation of the powers of the 'Legislature of the United States.'[878] Hamilton even argued – in line with a later non-originalist method of interpretation - for the 'Legislature' to be able 'to pass all laws […] which they shall judge necessary to the common defence and general welfare of the Union.'[879] This would have, however, resulted in a legislature with almost unlimited powers as it would have required a further determination of what the latter reference to 'the common defence and general welfare of the Union'[880] entailed. This statement could have, clearly, been interpreted in the widest sense, including any activity of the Union, which would have - similarly to the widest interpretation of commerce - contravened fundamental underlying principles, guiding the creation of this novel federal system.

Randolph also suggested to impose some limitations on the power of the 'Legislature,' but he did not propose such an open-ended and seemingly limitless power as Hamilton.[881] He imagined that the legislature would enact laws in cases where 'the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation […].'[882] Whilst somewhat limited in his interpretation, the proposals of Randolph would have also created wide powers for the legislature and would have allowed for the non-originalist method of interpretation of the Constitution to flourish: it would have been able to adapt to all current states of society as the 'harmony of the United States' would clearly depend on the state of play at each ear. The support of both Hamilton and Randolph of a uniform regulatory system, if deemed necessary, however, is apparent in their approaches.

[878] Albert S Abel, 'The Commerce Clause in the Constitutional Convention and in Contemporary Comment' (1940) 25 Minnesota Law Review 432, 433.
[879] ibid.
[880] ibid.
[881] ibid.
[882] ibid; Amar, *America's Constitution: A Biography* (n 47) 108.

Pinckney and Paterson, on the other hand, offered a more limited solution in its extent, expressly aiming to target the issues present in the area of interstate commerce. Pinckney proposed for Congress to have 'the exclusive power, of regulating the trade of the several states as well with foreign nations as with each other - of levying duties upon imports and exports.'[883] The proposal of Paterson, similarly to that of Pinckney, argued for Congress to be able 'to pass acts for the regulation of trade as well with foreign nations as with each other.'[884] The solution presented to the Convention through these plans was the transfer of regulatory authority to Congress in the area of interstate commerce, and the consequent creation of a uniform system of interstate commerce. Interestingly, however, most of the proposals that specifically addressed this area did not refer to interstate 'commerce,' but 'trade.'[885] This could indicate that whilst the proposed novel system was to transfer regulatory powers to the federal legislature over this area, what activities would be regulated by this institution was to be quite restrictive and only encompass activities that were discussed above under the first and second interpretation of commerce discussed in the beginning of this chapter at the time.

Nonetheless, Nelson and Pushaw also identified support for the uniform regulation of commerce in a wider sense during the Convention.[886] In the opening speeches, for instance, Randolph claimed that a transfer of regulatory power over commerce to the federal government would boost not only 'trade, but also "navigation," "agriculture," "manufactures," and "great national works."[887] What these works are, it is claimed, could be defined differently at each era subsequently according to a non-originalist method of interpretation. Adopting an originalist interpretation method of these works, it is argued, could entail only works that were deemed "great" at the time of the adoption of the Constitution. Pinckney also seemed to support a wider understanding of commerce, as he referred to the 'commercial interests' of the United States not only

[883] Abel (n 878) 434.
[884] ibid.
[885] ibid.
[886] Nelson and Pushaw (n 847) 41.
[887] Pushaw (n 853) 1719.

as "trade," but "fisheries," and crops such as "[w]heat," "tob[acco]," and "[r]ice & [i]ndigo."[888]

Another question, however, arose from this transfer of power to Congress, as it did not clarify whether the states were intended to be limited in their actions in the area of interstate commerce. It will therefore be first examined whether the Framers of the Constitution intended an exclusive power to be granted to Congress in this area. It will subsequently be explored whether it was the intention of the Framers to limit the states in this area if such power was granted to Congress.

II.3.1. Exclusive grant of power to Congress

Whilst creating a novel federalist system, the Framers also created a new nation that was to become an 'indestructible union composed of indestructible states.'[889] Such a system, however, required certain areas that were of concern to the federal nation to be addressed uniformly by the federal government.[890] Interstate commerce emerged as one such area during the debates at the Convention. In an era governed by protectionist and discriminatory commercial measures imposed by the various states, the 'nearly universal'[891] solution that developed during the debates was the creation of a 'centrally regulated'[892] 'uniform system'[893] regulating interstate commerce.

The support that this solution received from the delegates firstly demonstrated that almost all of them recognised that there was a fundamental hindrance to the regulatory power over interstate commerce in the then existing system under the Articles of Confederation.[894] Since in that system the states were the ones who had power to

[888] ibid.
[889] Robert A Sedler, 'The Constitution and the American Federal System' (2009) 55 Wayne Law Review 1487, 1490.
[890] Balkin (n 841) 12.
[891] Abel (n 878) 443.
[892] Jennifer L Larsen, 'Discrimination in the Dormant Commerce Clause' (2004) 49 South Dakota Law Review 844, 845.
[893] Eule (n 861) 435. See also McGinley (n 877) 412–413; Brannon P Denning, 'Reconstructing The Dormant Commerce Clause Doctrine' (2008) 50 William and Mary Law Review 417, 481.
[894] Abel (n 878) 446.

regulate commerce with other states, the Congress of the Confederation was unable to respond to any discriminatory regulatory measures, which affected more than one state or interstate commerce as a whole. Secondly, this common understanding, however, also served as an indicator that the delegates might not have considered it necessary to state the 'obvious' reasons for the creation of this uniform system.[895] Various commentators, such as Denning or Eule, have, however, subsequently attempted to identify these 'obvious' reasons as the guarantee of the 'interstate commercial harmony'[896] and also the strengthening of the 'national unity.'[897]

The method of creating this uniform system of interstate commerce also indicated that the Framers were in general agreement about the solution to the problem of regulating this area: they unanimously adopted Article I section 8 of the Constitution of the United States, which granted regulatory power over this area to Congress.[898] The so-called Commerce Clause, the third clause of this section, as subsequently ratified, states that '[Congress shall have power …] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'[899]

Whereas it was clear that Congress was granted regulatory powers over the area of interstate commerce, it was, however, still unclear whether this grant of power was an exclusive grant of power to Congress, and whether this resulted in states losing their regulatory authority over the same area. The delegates were faced with the above fundamental question even before discussing the regulation of interstate commerce or the supremacy clause.[900] Abel argues that the majority of the delegates, in effect, seemed to have supported the idea that when state acts would regulate an area, where the regulatory power had been granted to the federal government in the Constitution, the state acts could be held unconstitutional.[901] This, they claimed, would ensure that

[895] ibid; *H P Hood & (and) Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (n 873). 534.
[896] Denning (n 893) 481.
[897] Eule (n 861) 435. See also Abel (n 878) 443–444.
[898] Norman R Williams, 'The Foundations of the American Common Market' (2008) 84 Notre Dame Law Review 409, 423.
[899] Constitution of the United States of America 1787, Article I section 8.
[900] Article VI, paragraph 2 of the Constitution of the United States states: 'This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'
[901] Abel (n 878) 483–485.

the state and federal laws would be 'complementary' to each other.[902] This position, however, leaves it up to the interpretative method of the Constitution adopted what areas Congress is held to have power to regulate. Thus, whilst the federal and state laws were proposed to be complementing each other, the regulation of an activity belonging to commerce was already set out to pose a challenge due to the various interpretations of commerce since firstly, it was undefined what activities commerce included and, secondly, it was unclear what the extent of the powers of Congress was. Thus, the laws regulating these activities that depended on the interpretation of commerce by the individual states and the federal government separately, would always remain in a position of conflict in case of different approaches adopted by either government.

Some delegates, nevertheless, considered that the opportunity may arise where state and federal laws may overlap, and it would subsequently have to be decided which laws were to prevail. For such instances, Randolph proposed that the federal government should have rights to invalidate state laws contrary to 'the articles of the Union,'[903] which position was extended to include 'any treaties subsisting under the authority of the union.'[904] Even though defeated conclusively, Pinckney even proposed for this provision to be broadened to include 'all laws which to them [the federal government] shall appear improper.'[905] Various other statements of the delegates at the Convention, as highlighted by Abel, also demonstrate that the delegates widely supported the ideal that when the federal government was entrusted with the powers over one area, that was to exclude the states from regulating in the same subject matter.[906]

It may thus be deduced from the above examination that Congress was granted with exclusive regulatory powers over the area of interstate commerce. On the other hand, it still remained unclear how this affected the regulatory powers of the states in the

[902] ibid.
[903] ibid 485.
[904] ibid 485 – 486.
[905] ibid 486.
[906] ibid 486–488. Abel also highlighted, for instance, statements of Butler, Lansing, King and Sherman in support of this ideology.

area that previously belonged to them: whether these would be withdrawn or whether they were still allowed to regulate certain areas of interstate commerce.

II.3.2 Limitations on state powers

As highlighted by Abel, the regulation of interstate commerce was discussed on nine occasions during the Convention.[907] Even though this seems to be a limited opportunity to discuss whether the solution to the discriminatory state commercial measures was the deprivation of the states of their legislative rights in this area, this question, in effect, constituted one of the key issues addressed by the delegates about interstate commerce. As Abel identified, the Commerce Clause, according to the uniform position of the delegates, was to become a preventative national measure against the discriminatory and protectionist state regulations.[908] Conversely, the delegates did not seem to adopt a uniform measure as a means to achieve this goal.

In order to target the national measures against other states, the question inevitably arose over the extent of the powers of Congress and, thus, the limitations of state powers in this area.

One group of delegates supported the ideology that states should be allowed to retain those powers over commerce that concerned activities that were 'purely local in character.'[909] Sherman, for instance, argued that the states would 'never give up all power over trade.'[910] This view also seems to have been supported by Bedford, who argued that the states, at least, should retain their 'independent power to encourage local industries by bounties and similar devices.'[911]

The opposing view, that states should be deprived of all their powers over commerce, seems to have been indirectly supported by another group of delegates. For example, Madison – supported by others, such as Langdon and Pinckney - provided his

[907] ibid 470.
[908] ibid 470–472.
[909] Nelson and Pushaw (n 847) 44.
[910] Abel (n 878) 490. Note the referral to 'trade' and not 'commerce.'
[911] ibid 490–491; Nelson and Pushaw (n 847) 44..

viewpoint in the last days of the Convention, stating that he "was more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority."[912] Moreover, this position of Madison can also be identified in a letter included in the Records of the Federal Convention, that stated that there was a general consensus between the delegates of the Convention, that claimed that the states were incompetent to regulate in the areas of foreign and interstate commerce because of the discriminatory measures that the states imposed in these areas.[913]

It is the view adopted by several commentators that the majority of the delegates supported the ideology of the latter group, and the position that by granting Congress the authority to regulate interstate commerce, states were effectively deprived of their powers to regulate the same area.[914] Such a strong federal government that was to be created with this novel system would have, however, required a very clear transfer of powers from the states over all areas of commerce related to interstate commerce. Whether a novel system was more equipped for this task than the previous one would only be proven with the passage of time. However, the necessity and the purpose of the creation of this novel system cannot be ignored when such an examination is made.

It will thus have to be investigated further whether the deprivation of states from their rights to regulate interstate commerce remained the position after the Constitution was sent for ratification to the states.

II. 4. Ratification of the Constitution and the Federalist – Anti-Federalist debate

II.4.1 Ratification debates

[912] Farrand (n 220) 625; Abel (n 878) 492.
[913] Scott Boykin, 'The Commerce Clause, American Democracy, and the Affordable Care Act' (2012) 10 The Georgetown Journal of Law & Public Policy 89, 94.
[914] Abel (n 878) 493; Williams, 'The Foundations of the American Common Market' (n 898) 423–424; McGinley (n 877) 413; Larsen (n 892) 846; Denning (n 893) 486.

It is essential to highlight that during the period of the ratification debates in some states, the ratification of the Constitution also resulted in the repeal of some of the discriminatory measures enacted by the states. This illustrates that despite the states giving up their powers to regulate these areas, the importance of the creation of a national market was deemed more crucial than the loss of their powers.

For instance, in Virginia, the import duties imposed on 'liquor, wine, flour, sugar and coffee'[915] was repealed before the state ratified the Constitution.[916] The revocation of this act was called for by those engaged in the trade of these, who argued that this import duty was "inconsistent with the spirit of the Union."[917]

Furthermore, in North Carolina, for example, Davie highlighted that 'the general objects of the Union' were 'to promote the commerce, agriculture and manufactures, of America.'[918] This signalled clear support for the creation of a uniform national market.

The main discussions about the regulatory powers of Congress and the states over the area of interstate commerce at the time of the ratification debates can be mostly identified in the discussions of those who belonged to one of the two main political groupings at the time.

II.4.1.a. The Federalist – Anti-Federalist debate

The adoption of the novel federal Constitution, unsurprisingly, resulted in significant political debates that also influenced certain constitutional ideas. After the drafting of the Constitution, two main political ideologies emerged, which also influenced the ratification debates of the proposed Constitution.

[915] *An Act for ascertaining certain Taxes and Duties, and for establishing a permanent Revenue (*1781).
[916] Denning (n 865) 60–61.
[917] ibid 61.
[918] Randy E Barnett, 'The Original Meaning of the Commerce Clause' (2001) 68 The University of Chicago Law Review 101, 121.

II.4.1.a.i The Federalists

As already discussed in the previous chapters, those supporting the adoption of the Constitution came to form the political group of 'The Federalists', who argued for a powerful federal government to become the supervisor of state and local governments.[919]

Interstate commerce was viewed by the Federalists as a reasonably important fundamental keystone of the novel federalist system. Hamilton emphasised on various occasions in the Federalist Papers that commerce had been a motive for numerous wars up until the creation of the United States.[920] He further elaborated upon the causes of these wars. For instance, after having obtained their independence from Britain, Hamilton also recognised that the various states had attempted to unsuccessfully address the restrictive measures of Britain by themselves.[921] He further identified that the states became even more disunited by engaging in a commercial war between each other, thereby restricting interstate commerce.[922] He claimed that this war resulted from the common situation where neighbouring states 'are natural enemies of each other' based on a 'secret jealousy' towards each other.[923]

He thus claimed that in the novel 'commercial republic' of the United States of America, the peaceful method to terminate this situation was for the states to organise themselves in a 'confederate republic.'[924] In such a system, the commercial interests of all the states, including those of manufacture and agriculture, would be represented collectively by a united government.[925] Accordingly, Hamilton claimed that it had become a widely adopted position that for the advancement of trade and 'the relationship between the Northern and Southern economies', the regulation of

[919] Eileen Hunt Botting, 'Protofeminist Responses to the Federalist-Antifederalist Debate', *The Federalist Papers* (Yale University Press 2009) 533.
[920] Alexander Hamilton and James Madison, *The Federalist Papers* (Yale University Press 2009) No 6 26 and No 7 33-34.
[921] ibid No 22 107 – 108.
[922] ibid No 32 155 – 156.
[923] ibid No 6 31.
[924] ibid No 6 28.
[925] ibid No 11 54 and No 12 73-74; Nelson and Pushaw (n 847) 41.

interstate commerce should be placed in the hands of 'a federal superintenden[t].'[926] Madison was also in support of the 'new power'[927] that the Constitution created in the area of commerce as he considered one of the functions of the newly created union to act as the 'guardian of commerce.'[928]

Therefore, it appears that the Federalists were strongly espousing the ideal that the regulation of interstate commerce should be placed in the hands of Congress. The viewpoint of Madison and Hamilton, on the other hand, seem to have diverged on whether this resulted in the transfer of power from the states to the federal government in this area.

To determine whether interstate commerce was intended to be an exclusive regulatory area under the commerce clause, one may turn to Hamilton, who defined three ways in which the 'sovereignty' of the states in certain areas could be 'exclusively delegated to the United States.'[929] Firstly, where delegation of powers occurred through 'express terms' in the Constitution.[930] Secondly, where the federal government was given express authority in an area and the states were forbidden from regulating 'the like' area.[931] The third instance, he claimed, was where the federal government was given powers in an area and the exercise of 'a similar authority in the States would be absolutely and totally contradictory and repugnant.'[932]

[926] Hamilton and Madison (n 920) No 11 54 and No 22 107; Nelson and Pushaw (n 847) 41.
[927] Hamilton and Madison (n 920) No 45 238.
[928] ibid No 14 67.
[929] ibid No 32 155-156.
[930] ibid No 32 156.
[931] ibid.
[932] ibid.

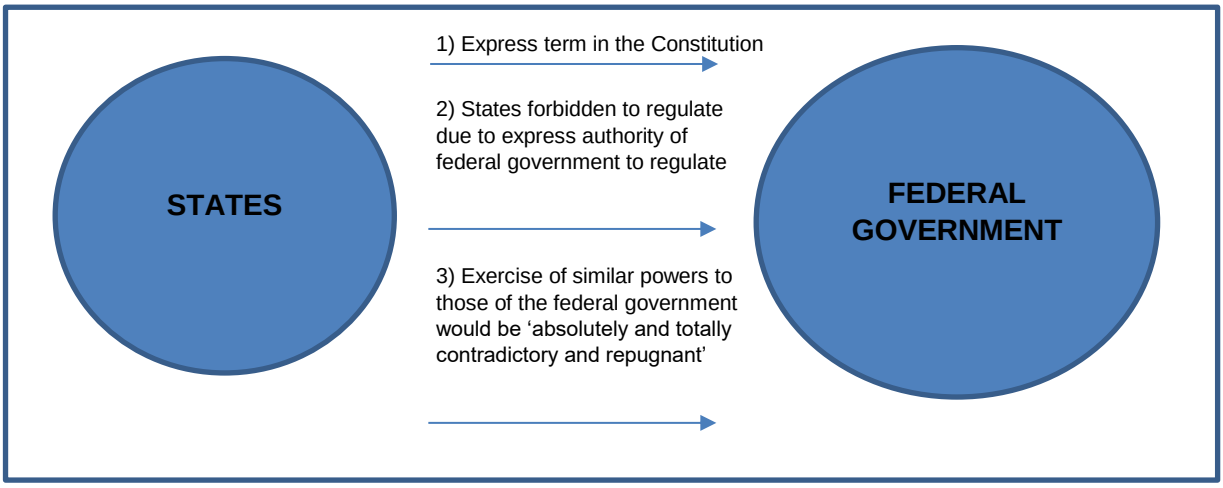

Figure 6 Three methods of exclusive delegation of authority by the States to the Federal Government according to Hamilton

Interestingly, whilst he elaborated upon what limitations would be placed on the states to act in an area in the second and third categories, he did not discuss how the powers of the states would be limited in the first category when setting out these categories.

Consequently, he classified the Commerce Clause under the first category, where Congress was granted with the powers of 'exclusive legislation' over the area of interstate commerce.[933] On the other hand, he did not necessarily regard the grant of this exclusive authority a limitation on the states in the same area. He thus argued that when it was the intention of the Framers to deprive the states of their powers in an area, where they were considered to be the improper guardians of the same powers, a 'negative clause' was drafted by the Framers.[934] It may therefore be asserted that Hamilton did not support the ideal that states should be deprived of their authority completely to regulate interstate commerce as no 'negative clause' can be found in the Constitution that would expressly state the above.[935]

It is intriguing to highlight that even Hamilton relied on the textualist interpretation of the Constitution this early on following the drafting of the Constitution. Madison was, however, in support of a different method to attain the uniform regulation of interstate

[933] ibid.
[934] ibid No 32 158.
[935] ibid.

commerce. Relying on a non-textualist method of interpretation, he claimed that the Commerce Clause was, in fact, intended as a 'negative and preventive' measure to eliminate the discriminatory protectionist laws enacted by the states.[936] It is thus argued that he claimed that the Commerce Clause also served as a limitation on state authority in the area of interstate commerce, relying on the intent of the Framers instead of text.[937]

It consequently appears that the Federalists have adopted a wider understanding of the term 'commerce,' which included the areas of manufacture and agriculture. This also signified that the reach of the federal government would be in the middle line, between the two interpretations of commerce at the extreme discussed at the beginning of this chapter. The Federalists further understood the part 'among the States' of the Commerce Clause to refer to activities 'between the states.'[938] They appeared to be in support of the viewpoint that to provide a solution to the discriminatory protectionist measures imposed by the states after the Revolution, the power over interstate commerce had to be transferred to the federal government. On the other hand, they seem to have disagreed about the means to achieve such a system and have argued for different means to attain the same end relying on two different approaches about the interpretation of the Constitution immediately following its drafting.

II.4.1.a.ii The Anti-Federalists

As discussed in Chapter 1, the opposing political group that had an influence over the ratification debates of the Constitution was 'The Anti-Federalists,' who were fundamentally opposed to the adoption of the Constitution and aimed to call for a second Convention.[939] One of their main criticisms of the proposed Constitution was

[936] Letter of February 13, 1829, to J. C. Cabell, Farrand (n 68) vol 3 478 - as referred to from Abel (n 878) 469. See also Tribe (n 171) 1044–45; Mehmet Konar-Steenberg, 'One Nation or One Market? Liberals, Conservatives, and the Misunderstanding of HP Hood & Sons v Dumond' (2009) 11 University of Pennsylvania Journal of Constitutional Law 957, 962.
[937] Eule (n 861) 431; McGinley (n 877) 413.
[938] Nelson and Pushaw (n 847) 44 – 46.
[939] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Bobbs-Merril 1965) 39.

that it created a federal government that possessed powers too great without allocating adequately wide powers to the states.[940]

The extent and severity of the problems posed by the discriminatory measures can be clearly derived from the fact that disagreements were surprisingly almost non-existent between the Federalists and the Anti-Federalists in the area of interstate commerce.[941] Those who were strongly opposed to the idea of a centralised power in the hands of the federal government, it is thus argued, also considered it necessary for the federal government to be entrusted with the creation of a uniform system of interstate commerce.

Nonetheless, the method of obtaining this uniform system was still unclear: Congress was granted the exclusive authority to regulate interstate commerce based on the text of this clause, however it was still not determined what was to happen to the discriminatory measures enacted by the states.

III. The development of the application of the Dormant Commerce Clause

The search for a solution to the above question has been on-going since the adoption of the Constitution. The Commerce Clause has thus unsurprisingly become one of the most litigated areas of the federal Constitution, with disagreements about its meaning and the appropriate method of interpretation of this constitutional provision continuing up to date.

Whilst searching for the above solution, the interpretation of the Commerce Clause has also developed a double - an affirmative and a negative – understanding. This dual understanding of the Commerce Clause has developed around the two main questions posed previously. The affirmative understanding involves the authority of Congress and the limitations of these powers of Congress. The negative aspect examines the Commerce Clause from the angle about which the Constitution

[940] Wiecek (n 51) 68.
[941] Nelson and Pushaw (n 847) 36; Friedman and Deacon (n 860) 1894.

remained silent: whether the grant of power to Congress limits the authority of the states to regulate in this area. This dual understanding of the Commerce Clause creates the constant conflict between the state and federal powers, since the extension of the limitations of the powers of the states will inevitably restrict the powers of the federal government and vice versa.

In the following, the chapter will investigate the interpretation of the Commerce Clause through the main judgments of the Supreme Court in this area and how these provided a solution to the two main fundamental questions that originate from the interpretation of the Commerce Clause. It will also place a special emphasis on the development of the definition of interstate commerce by analysing the understanding of 'commerce' and 'among the states,' where possible, in the judgments.

III. 1. The first answer: dual federalism

The first main case of the Supreme Court that required the interpretation of the Commerce Clause was *Gibbons v Ogden*.[942] This case concerned the operation of steamboats in the interstate route between New York and Elizabethtown.[943] Gibbons operated his steamboats with a licence granted under federal laws on this route, which had been stopped from navigating the waters of New York.[944] Ogden, when filing for the injunction to request the above, claimed that Gibbons violated the license requirement imposed by the state of New York for intrastate navigation that had created exclusive rights for him to navigate the waters of New York from 1808 until 1838.[945] Gibbons, in response claimed that the New York law was contrary to – among others - the Commerce Clause of the federal Constitution.[946]

Before declaring whether this state law contravened the federal Commerce Clause, Chief Justice Marshall started by firstly defining interstate commerce. He thus first held

[942] *Gibbons v Ogden* (n 100).
[943] ibid 2–4.
[944] ibid.
[945] ibid 4–8.
[946] ibid 186.

that commerce was to be defined widely and should be identified as 'intercourse'.[947] This 'organic conception of commerce,'[948] he held, clearly included navigation.[949] It is also interesting to highlight that the future Chief Justice Marshall also advocated for the same interpretation of commerce during the ratifying convention of the Constitution in Virginia.[950]

Chief Justice Marshall, in his decision in this case, subsequently adopted the view that 'commerce among the states' was to be understood as 'intercourse' that was to do 'with the states,' that 'intermingled with' the states and that 'concern[ed] more States than one.'[951] This viewpoint seems to be in direct support of the first ideology about the wide definition of commerce in the times of the adoption of the Constitution. Consequently, this would also allow for the federal government to regulate areas that would have belonged to the states previously.

On the other hand, if one is to follow the ideology that the Framers of the Constitution only wished for the economic areas of commerce to be included in the Commerce Clause, it may be argued that Chief Justice Marshall, in effect, extended the definition of commerce to areas that might not have been intended to be included in the Constitution by the Framers.[952]

After having established that the regulation of interstate navigation falls under the Commerce Clause, Chief Justice Marshall held – adopting the approach of Federalists - that Congress had been given exclusive powers to regulate interstate commerce.[953] He consequently held - following the approach advocated for by Madison - that while Congress was granted with exclusive powers over interstate commerce, states were still able to exercise their regulatory power in areas that concerned 'their own purely internal affairs, whether of trading or police.'[954] Such subject matters, in the opinion of Chief Justice Marshall, included "inspection laws, quarantine laws, health laws of

[947] ibid 189 – 190 and 193-194.
[948] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Quadrangle Books 1964) 42.
[949] *Gibbons v Ogden* (n 100) 193 - 194.
[950] Barnett (n 918) 123.
[951] *Gibbons v Ogden* (n 100).
[952] Tushnet (n 83) 162–163.
[953] *Gibbons v Ogden* (n 100) 199 - 200; Corwin (n 101) 484.
[954] *Gibbons v Ogden* (n 100) 209 - 210.

every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, [and] ferries."[955]

Thus, states were still able to regulate commerce, but only those activities that concerned the so-called 'police power[s]' of the state.[956] A particular characteristic of these activities was that they could still be held constitutional even if they had 'considerable influence on commerce' as the power to regulate these belonged to the states and not the federal government.[957]

The above approach adopted by Chief Justice Marshall demonstrated the initial support for the ideal of the 'dual federalist' system of the United States.[958] Adopting this ideology, it may be argued that two separate spheres of regulatory power exist in the area of commerce based on the subject matter of the regulation. Correspondingly, the regulatory power over interstate commerce was granted to Congress and that over intrastate commerce – or as Chief Justice Marshall characterised these as 'police powers'[959] - was still possessed by the states.

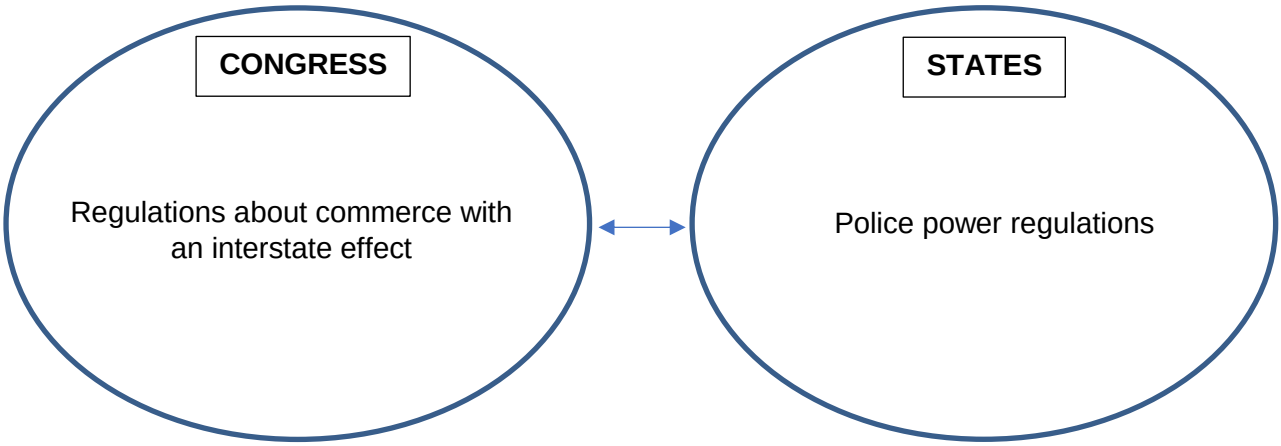

Figure 7 Chief Justice Marshall's dual constitutional approach to the Commerce Clause

[955] ibid 209–210.
[956] Corwin (n 101) 480.
[957] Chemerinsky, *Constitutional Law* (n 77) 462.
[958] Corwin (n 101) 481.
[959] ibid 480.

An implication of this model addresses the negative understanding of the Commerce Clause. If Congress was to have exclusive powers over interstate commerce, the states, adopting the Madisonian approach, were implied not to possess any regulatory power in this area. This provides the Supreme Court with the ability to hold state regulations unconstitutional under the Commerce Clause in this dual federalist model. In order to do so, the Supreme Court would rely on the subject matter of the regulation and decide which government was to regulate such activity. A further aspect of this approach is that it would be the Supreme Court who would be able to determine the limits of the powers of the states in regulating interstate commerce, and, as a consequence, would possess the power to extend or limit their regulatory powers.[960] This gave the power to the Supreme Court to rule on the interpretation of commerce, and specifically, interstate commerce at the time when the cases were decided. Moreover, through this interpretation, the Supreme Court was also able to define the line between federal and state powers based on the circumstances present when the case is decided.

Furthermore, many ensuing cases involved the interpretation of the Commerce Clause from this negative understanding. One such case was *Willson v Black Bird Creek,*[961] where Chief Justice Marshall characterised this negative understanding as the 'dormant' aspect of the Commerce Clause.[962] This case concerned a state law that allowed for the building of a dam on Black Bird Creek that was argued to be unconstitutional under the 'dormant state' of the Commerce Clause as it 'interfered with interstate navigation.'[963] Chief Justice Marshall subsequently held that the state law in question was not unconstitutional as no act by Congress was passed that would have regulated the activity performed by the builders of the Black Bird Creek.[964] He thus seemed to adopt the approach that the state law was merely the exercise of the police powers of the state that was to be regulated by the state, as opposed to the federal government. This exercise of powers further resulted in the improvement of

[960] Frankfurter (n 948) 18.
[961] *Willson v Black-Bird Creek Marsh Co* (1829) 27 US (2 Pet) 245.
[962] ibid 252; Frankfurter (n 948) 28; Friedman and Deacon (n 860) 1920.
[963] Peter C Felmly, 'Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism' (2003) 55 Maine Law Review 467, 472.
[964] *Willson v Black-Bird Creek Marsh Co* (n 961) 252.

'the health of the local inhabitants,' as argued by the plaintiffs, the regulatory power over which, based on this decision, clearly belonged to the state.[965]

Whilst an emphasis has been placed upon it, the above cases did not result in the adoption of the expression 'Dormant Commerce Clause' for the negative aspects of the Commerce Clause immediately. Since the successor of Chief Justice Marshall did not agree with the formulation of this dual federalist approach to the Commerce Clause, the majority of constitutional scholars and Supreme Court judges originate the term Dormant Commerce Clause from the decision in *Gibbons v Ogden.*[966] Moreover, most of the succeeding challenges under the Commerce Clause argued in front of the Supreme Court for an extensive time concerned the interpretation of this negative aspect. The successor of Chief Justice Marshall, Chief Justice Taney, was thus entrusted with the task of engaging in the further interpretation of the negative aspect of the Commerce Clause.

III. 2. The concurrent authority approach

Whilst Chief Justice Marshall adopted the view that the states did not possess powers to regulate interstate commerce as that power had been exclusively granted to Congress under the Commerce Clause, this standpoint appeared to be unacceptable for his successor, Chief Justice Taney.

He, instead, formulated a novel position, which claimed that the regulatory powers of the states under the Commerce Clause were not limited in all instances. According to his approach, the states had regulatory powers over interstate commerce, when Congress had not legislated in the same area that the states had done so. This approach would consequently result in the Supreme Court being deprived of its tasks - as understood by Chief Justice Marshall - of determining the limits of the powers of the states in such instances.[967] Such limits of these powers were to be subsequently

[965] Russell Chapin, 'Chadha, Garcia and the Dormant Commerce Clause Limitation on State Authority to Regulate' (1991) 23 The Urban Lawyer 163, 165.
[966] *Gibbons v Ogden* (n 100).
[967] Denning (n 893) 432; Arthur Lang, 'The Marshall Doctrine, The Taney Doctrine and Calhounian Federalism' (2012) 10 The Dartmouth Law Journal 76, 79; McGinley (n 877) 413.

determined by Congress, not the Supreme Court. Chief Justice Taney, thus, established an ideology - strongly in opposition to the ideology developed by Chief Justice Marshall - of 'concurrent authority' over interstate commerce between Congress and the states in *The Licence Cases,*[968] upholding the laws of 'Massachusetts, Rhode Island, and New Hampshire to regulate the sale of liquor' including those imported into the states.[969]

Following this approach, the states were able to exercise regulatory powers that would have been held unconstitutional under the dual federalist theory. However, the 'concurrent authority' approach recognised that the states had, before and since the adoption of the Constitution, been enacting legislations that had regulated the area of interstate commerce.[970] Chief Justice Taney refused to invalidate these laws based on the distinction established by *Gibbons v Ogden*[971] between commerce and police powers, since he claimed that the above characterisation based on the subject matter of the regulation was 'untenable.'[972]

Under the dual federalist approach, states would not have been recognised as holding any regulatory powers over interstate commerce as that was claimed to be an area, the regulation of which had been exclusively granted to Congress. The concurrent authority approach, on the other hand, claimed that the states were allowed to regulate the same areas as Congress in the limited instances where Congress was silent, i.e. it had not legislated, in the subject matter in question. This viewpoint also seemingly rejects the ideology that the grant of regulatory powers to Congress under the Commerce Clause was exclusive, since states could still regulate the same area. Accordingly, states were allowed to retain their regulatory authority over a wider area of commerce than under the previous dual federalist approach.

Chief Justice Taney also devised an additional way to restrict the powers of Congress, which, curiously, focussed on a method that he declared to be 'untenable:' the subject

[968] *The Licence Cases* (1847) 46 US 504, 579.
[969] ibid; Denning (n 893) 434; Friedman and Deacon (n 860) 1930.
[970] Frankfurter (n 948) 51; Denning (n 893) 432.
[971] *Gibbons v Ogden* (n 100).
[972] *The Licence Cases* (n 968) 622; Frankfurter (n 948) 51; Denning (n 893) 432.

matter in question. For instance, in *The Passenger Cases*[973] he argued that the 'intercourse of persons' could still be regulated by the states, since such acts did not constitute commerce.[974]

This novel standpoint also addressed the question whether the Commerce Clause posed a limitation on the regulatory powers of the states in interstate commerce. Chief Justice Taney claimed that such a limitation might only exist when Congress had enacted a legislation about the same subject matter that the states had done so.[975] It is interesting to highlight that this determination adopted the approach previously developed by Chief Justice Marshall, whose decision in *Gibbons v Ogden*[976] Chief Justice Taney was so strongly opposed to.[977] What was important, still, according to him, was the subject matter of the regulation. On the other hand, he did not adopt the approach fully as in *The Licence Cases*[978] he held that a state regulation could only be held unconstitutional under the Commerce Clause if the subject matter of both the state and federal regulations was a 'truly national concern.'[979] Unsurprisingly, he failed to identify what regulations would constitute a 'truly national concern' in the four key Dormant Commerce Clause cases presented to the Supreme Court while he served as its Chief Justice.[980] On the other hand, it would seem that with acknowledging that certain subject matters were of 'truly national concern,'[981] he, in effect, recognised that a uniform national system was required to regulate such matters.

It may also be argued that the non-existence of a clear definition of what would constitute the above concern, allowed the non-originalist method of interpretation to flourish in this area. This expression could, thus, become a dynamic concept, capable of adapting to the changes in society and economics.[982] Justice Holmes, for instance, in *Towne v Eisner* claimed, in support of such an ideology, that:

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[973] *The Passenger Cases* (1849) 7 How 283, 474 and 493.
[974] ibid.
[975] Frankfurter (n 948) 50.
[976] *Gibbons v Ogden* (n 100).
[977] McGinley (n 877) 413.
[978] *The Licence Cases* (n 968).
[979] McGinley (n 877) 413.
[980] Friedman and Deacon (n 860) 1930; Denning (n 893) 432.
[981] McGinley (n 877) 413.
[982] Thomas Reed Powell, 'Current Conflicts between the Commerce Clause and State Police Power 1922-1927' (1928) 12 Minnesota Law Review 321, 322.

> a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[983]

It is nonetheless accepted that this would have not guaranteed legal certainty for cases arguing for the invalidation of state measures under the Commerce Clause. It would have, however, guaranteed for the protection of the fundamental values the Constitution was set out to embody and protect, such as the creation of a uniform approach towards interstate commerce and to protect the individuals from the detrimental consequences of diverging approaches to this area.

It may, consequently, be established that the model of the dual federalist approach seemed to have been partly rejected by the Supreme Court with the inception of the concurrent authority approach. Traces of the dual federalist approach could still be identified in the concurrent authority approach as, for instance, the characterisation of a regulation based on its subject matter was still utilised by the Court.[984] Another trace of the dual federalist approach present in this novel approach was that Congress and the states still possessed exclusive regulatory powers. Congress regulated subject matters of 'truly national concern'[985] that it assumed the exclusive regulatory power over when it enacted federal law about these. Until that point, the regulatory power over the subject matter of the regulation was an exclusive one of the states.

The concurrent authority approach, however, also created a novel problem as it became obvious that in certain subject matters both Congress and the states would wish to regulate and it therefore posed a challenge to decide which of them possessed regulatory powers over the subject matter in question with a test that lacked clear definition.

III. 3. The novel national – local test

[983] *Towne v Eisner* (1918) 245 US 418, 438.
[984] Tribe (n 171) 1046–1047.
[985] McGinley (n 877) 413.

The change that determined the method the Supreme Court applied in the interpretation of the Commerce Clause for the subsequent decades arrived in a case once again about navigation laws. In *Cooley v Board of Wardens of the Port of Philadelphia*[986] Cooley, the owner of two vessels was required to pay a fine for contravening a state pilotage law of Pennsylvania, which regulation, he argued, was invalid under the Commerce Clause.[987]

In delivering the opinion of the Court, Justice Curtis firstly held that it was 'settled' that the understanding of commerce encompassed navigation.[988] How 'settled' this understanding of commerce was, however, is questionable, since, for instance, the previous two approaches developed by the Supreme Court relied on two different understandings of commerce. Justice Curtis consequently argued that the regulation of the activities in the case of pilots:

> offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced,[989]

amounted to regulation about navigation and thus of commerce. It is thus apparent that in the area of navigation, Justice Curtis adopted the approach that argued for the wider understanding of commerce. This would, however, result in a wide range of powers granted to Congress in this area.

Justice Curtis subsequently claimed that it had not been addressed by the Court clearly beforehand whether Congress had been given exclusive authority to regulate interstate commerce that deprived states of all their authority.[990] He thus formulated the viewpoint that this was not the case and the grant of power to Congress under the Commerce Clause did not 'expressly exclude the States from exercising an authority

[986] *Aaron B Cooley v The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children* (1851) 53 US (12 How) 299.
[987] ibid 300–301.
[988] ibid 315.
[989] ibid 316.
[990] ibid 318.

over its subject-matter.'[991] He consequently declared that the states were still allowed to regulate the areas in interstate commerce that were 'imperatively demanding […] diversity' and could therefore only be adequately addressed by 'local' state regulation.[992] Consequently, Congress was to regulate only those 'national' areas of interstate commerce that required 'exclusive legislation by Congress.'[993]

This novel approach of 'selective exclusiveness'[994] seemingly rejects the interpretation of the Commerce Clause under the dual federalist approach as formulated by Chief Justice Marshall. Whilst he argued that both Congress and the states had exclusive powers to regulate the areas that they possessed based on a distinction characterised by the subject matter of the regulation, the selective exclusiveness approach made this dependent on the 'nature' of the subject matter. If the regulation concerned a subject matter of 'local' nature that required diverse application by the different states, the exclusive power to regulate remained with the states. If the regulation, however, concerned a subject matter that was of 'national' nature, requiring a uniform regulation by Congress, the exclusive powers above this area were granted to Congress.

On the other hand, as highlighted, this test still retained the characteristics of the dual federalist approach by claiming that both Congress and the states still possessed exclusive powers over the different areas of interstate commerce. It is thus argued that this approach was not a complete rejection of the dual federalist approach, but an alteration of it.

This standpoint thus addressed both the fundamental questions that originate from the Commerce Clause. Firstly, it claimed that Congress was granted exclusive powers, however, the extent of these was limited to areas of interstate commerce that were of 'national' nature. It also addressed the second question, arguing that the powers of the states were limited in the areas of interstate commerce as they could not regulate

[991] ibid; Friedman and Deacon (n 860) 1924.
[992] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986); Tribe (n 171) 1048–1049; McGinley (n 877) 414.
[993] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986); Tribe (n 171) 1048–1049.
[994] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 91.

areas of 'national' concern. On the other hand, they had powers to regulate areas of interstate commerce of 'local' concern, which Congress could not interfere with.

Another key characteristic of this approach is that it fails to clearly identify what matters of 'local' and 'national' nature were.[995] To determine the above, Justice Curtis in this case used a more technical approach, similar to the one adopted by Chief Justice Taney previously: he argued that what should be examined is whether a federal regulation had been enacted about a similar subject matter.[996] This, he held, would show how Congress regarded the nature of the subject matter. It may thus be argued that three situations could arise based on this approach:

(1) If Congress had enacted a regulation claiming that it was to regulate the subject matter, that was of 'national' nature;
(2) if Congress had enacted a regulation claiming that it is for the states to regulate a certain area, that was of 'local' nature and
(3) if Congress had not legislated in the area, it was to be held of 'local' nature.[997]

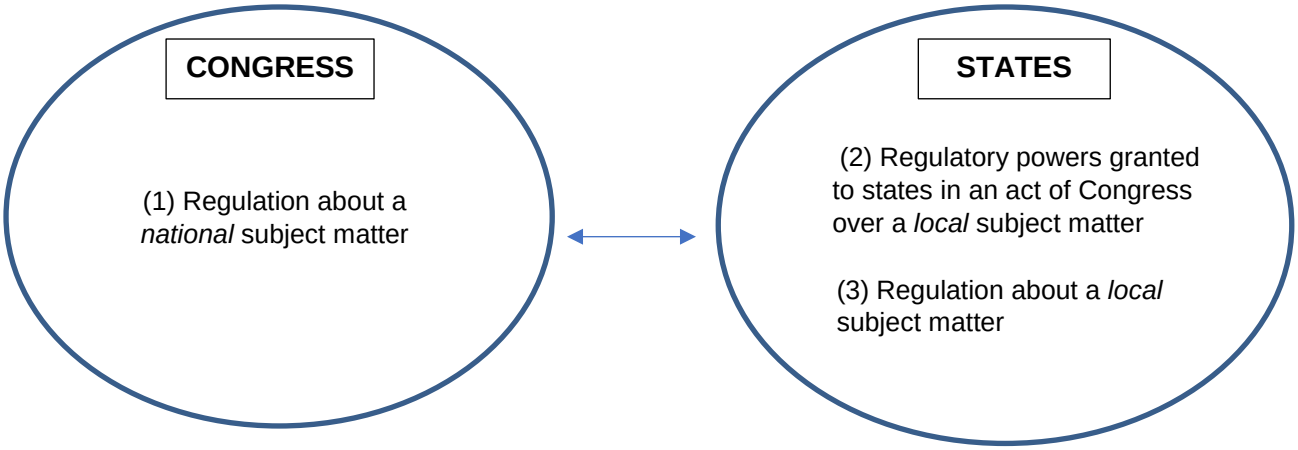

Figure 8 The selective exclusiveness approach of Justice Curtis to the commerce clause

[995] Felmly (n 963) 473.
[996] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).
[997] Schütze (n 994) 91; Lang (n 967) 80–81.

This part of his judgment, in effect, blended the previously adopted approaches to the interpretation of the Commerce Clause. The first category was already present under the dual federalist approach and the third category was an alteration of the concurrent authority approach.

The novel approach was, in fact, the second category, which allowed Congress to transfer its exclusive authority to the states in an area that it was assigned to regulate. This interpretation would have not existed under the dual federalist approach, and it may also be argued that this approach developed due to the recognition by Congress that states should possess regulatory powers over certain matters that might have been delegated to Congress in the Constitution. On the other hand, this raises further questions. If Congress is able to delegate its exclusive powers to the states, would it not act unconstitutionally as these powers had been granted exclusively for them for a uniform interpretation to be applied to interstate commerce? Or would Congress simply exercise its powers as it was 'necessary and proper' under Article I section 8?[998] These questions, however, remained unanswered in this case.

If one is to follow the dual federalist approach, such transfer of powers may, in fact, be regarded unconstitutional, if it is found that Congress is supposed to regulate the area exclusively. However, Congress could argue that since it possesses exclusive powers to regulate this area, it would be able to transfer its power to regulate, as part of the authority granted to it. Congress could further argue that such a transfer was 'necessary and proper' under Article I section 8, thus allowing for an interpretation of this Clause that could adapt to changes in society.[999] Moreover, the states would also find themselves in an advantageous position in this category, if they were able to regulate these areas and would be able to adopt distinct laws, unique to each state.

Justice Curtis subsequently found that section 4 of the Act of Congress 7th August, 1789 in question belonged to the second category, since it was, in effect, a grant of power to states to regulate 'all pilots in the bays, inlets, rivers, harbors, and ports of

[998] Constitution of the United States of America 1787, Article I section 8.
[999] ibid.

the United States' until Congress withdrew this authority.[1000] He thus held that the regulation of Pennsylvania was not unconstitutional under the Commerce Clause as its 'nature' had previously been declared by an act of Congress to be an area of 'local' concern, which could 'be the best provided for' by state regulation.[1001]

A characteristic of this novel approach that may be emphasised is that Justice Curtis, similar to the previous decisions, recognised that certain areas of interstate commerce that were of national nature required a uniform regulatory system. He, however, also recognised that the creation of such a market would not be the most suitable option for all areas of commerce. Where those local concerns were considered more important than national ones, he claimed that the local regulation would be a more suitable approach.

The new national-local test that he devised also provided a novel method for determining the limits of the regulatory powers of both Congress and the state in areas of interstate commerce. It also constituted a reconciliation attempt of the previous interpretations of the Commerce Clause: it retained characteristics of the dual federalist and concurrent authority approaches.[1002] A 'new era' thus commenced where the Supreme Court, by utilising this new test, could make the 'indefiniteness' of the Commerce Clause 'in some way manageable.'[1003] This new era, however, also required the Supreme Court to take into consideration the two fundamental questions that arose after the adoption of the Constitution and especially regarding the Commerce Clause.

III. 4. A narrower definition of commerce

[1000] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986) 317 - 319.
[1001] ibid 319.
[1002] Tribe (n 171) 1047; McGinley (n 877) 414.
[1003] Denning (n 893) 436.

A main feature of the cases following *Cooley v Board of Wardens of the Port of Philadelphia*[1004] was the interpretation of the understanding of commerce and how this affected the extent of the regulatory powers of Congress and the states.

Whilst in *Cooley v Board of Wardens of the Port of Philadelphia*[1005] it was claimed that the definition of commerce encompassed navigation, the concept of commerce as a whole was not clearly defined by Justice Curtis. This enabled the Supreme Court to create novel, more restrictive interpretations of the concept of commerce, and thus limit the powers of Congress to regulate this area.

Kidd v Pearson[1006] was such an instance. The interpretation of the definition of commerce adopted in this case stated that manufacture was inherently different from commerce.[1007] Therefore, any state law regulating manufacture could not be held unconstitutional under the Commerce Clause, since that area was not classed as commerce.[1008]

Whilst devising this interpretation, Justice Lamar adopted the test formulated by Chief Justice Marshall, which claimed that the determinant in the test was whether the states had regulatory powers over an area of interstate commerce. On the other hand, he argued that it had to be determined whether the subject matter of the regulation could be classified as commerce, which had to be determined based on its 'functions.'[1009] He consequently held that manufacture could not be categorised as commerce since its function, he argued, was 'the fashioning of raw materials into a change of form for use.'[1010] He distinguished this from the functions of commerce, which he held, involved 'the buying and selling and the transportation incidental thereto.'[1011]

Justice Lamar, further adopting the narrowest interpretation of the definition of commerce, which was classed under the third group in the beginning of this chapter,

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[1004] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).
[1005] ibid.
[1006] *Kidd v Pearson* (1888) 128 US 1.
[1007] ibid 20.
[1008] Norman R Williams, 'The Commerce Clause and the Myth of Dual Federalism' (2007) 54 UCLA Law Review 1847, 1867.
[1009] ibid.
[1010] *Kidd v Pearson* (n 1006) 20.
[1011] ibid 20.

argued that the definition of commerce did not only exclude manufacture but 'agriculture, horticulture, stockraising, domestic fisheries, mining – in short every branch of human industry' could not be classified as commerce either.[1012] Accordingly, if the state law was to regulate any of these activities, it did not regulate commerce and thus could not be held unconstitutional under the Commerce Clause.

By restricting the definition of commerce, Justice Lamar also restricted the regulatory powers of Congress in interstate commerce, as it could no longer legislate in areas that it might have been allowed to do so under the previous decisions. Correspondingly, this restriction also resulted in the increase of the activities that the states were allowed to regulate. This regulatory power of the states further expanded in various following cases and was held to include activities such as 'ginning,' 'the manufacture of oleomargarine' or mining.[1013] Moreover, once it was established that the function of the subject matter was the production of an article of commerce, the nature of the subject matter was no longer significant.

This position, therefore, not only adopted a restricted definition of commerce, but at the same time also created a transformed interpretation of the dual federalist approach to the Commerce Clause. Under this new approach, the regulatory powers of the states not only increased, but they were also allowed to exercise their regulatory powers in areas that could have been held to belong exclusively to Congress under the previous approaches. It could, however, also be claimed that this was a return to the position before the adoption of the Constitution, when these areas would have been regulated by the states, not a uniform federal government.

Congress was, on the other hand, still held to be able to exercise its exclusive regulatory powers over interstate commerce, but only over activities that were included in the narrow definition of commerce and that were interstate in nature. In order to determine what this concept included, Justice Lamar identified commerce as 'the buying and selling and the transportation incidental' to the production of an article of commerce.[1014] Such a restrictive interpretation of commerce would have arguably

[1012] John W Davis, 'The Growth of the Commerce Clause' (1907) 15 The American Lawyer 215.
[1013] Williams, 'The Commerce Clause and the Myth of Dual Federalism' (n 1008) 1868.
[1014] ibid.

excluded activities held to be included in the definition of commerce previously, such as navigation in *Gibbons v Ogden.*[1015] The contention stands unless one would argue that the navigation in that case was incidental to the production of an article of commerce. However, this would be a highly unlikely interpretation of the activities involved in the above case, since the operation of the steamboat was the main area of business concerned in the case.

Justice Lamar subsequently devised a test for the interpretation of when the powers of Congress over interstate commerce commenced. He held that such regulatory powers of Congress began to take effect from the time when the article of commerce was 'shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.'[1016] He thus created two further conditions for the regulation of interstate commerce to come into effect. Firstly, the article of commerce must be a final product. Secondly, it would have to be transported from one state to another. It is, however, argued that the crossing of state boundaries was not required for the regulatory powers to exist, the mere aim of setting out to be transported to another state was sufficient.

Therefore, even though the Commerce Clause initially granted regulatory powers over a wide range of activities to Congress, which is argued to have been implemented in the early decisions of the Supreme Court to assist in the creation of a uniform national market, the extent of these activities soon commenced to be restricted by the Supreme Court. This was based on the reasoning that states should be granted regulatory powers over certain areas as their interests should be placed above those of creating a uniform national and uniform market. Furthermore, these restrictions also became apparent in the interpretation of the definition of the 'commerce' and 'among the states' components of the Commerce Clause.

It is also argued that the diverging methods of interpretation of this Clause could develop due to two fundamental reasons: firstly, the lack of clear definition of what interstate commerce was, and, secondly, the climate of the era had transformed since the adoption of the Constitution and the approach of the Supreme Court, it is claimed,

[1015] *Gibbons v Ogden* (n 100).
[1016] *Kidd v Pearson* (n 1006).

in line with a non-originalist method of interpretation, had transformed as well. As a result, the powers of the states seemed to increase, while the powers of Congress began to be restricted by the Supreme Court. However, the living constitutional values approach advocated for by this approach would argue that the creation of a uniform national market and the protection of the citizens from the potential detrimental effects of the diverging approaches to interstate commerce were not fully objected to by the Supreme Court at this era. The Justices, merely, recognised that the interpretation of the Commerce Clause had to adapt to the changes in society, which at the time called for the restriction of the powers of the federal government in this era and allowing more control to the states.

III. 5. The direct-indirect burden test

The creation of the federalist system prompted the political, constitutional, and most importantly, the economic transformation of the United States.[1017] For instance, with the creation of interstate railways, it was becoming less problematic to produce 'goods that could be advertised and sold nationwide.'[1018] With such developments in interstate transportation, commerce - in its widest definition - began to transform. Particularly, the production, transportation and trade interstate became more regular.

This changing economic climate, however, required a uniform system of interstate commerce even more so than in 1787, where the flow of commerce would not have been restricted by discriminatory measures imposed by states on out-of-state commerce. On the other hand, following the national-local test of *Cooley,*[1019] the complete elimination of discriminatory measures would have required the Supreme Court to hold all areas of interstate commerce of 'national' nature. This would have necessitated a vast extension of the regulatory powers of Congress, and the reduction of the areas the regulatory powers over which were still held to belong to the states.

[1017] Denning (n 893) 437.
[1018] ibid 438.
[1019] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).

This position would also raise questions regarding the Tenth Amendment, which sets out that areas not delegated to the federal government still remain with the states.[1020] Based on the developments in technology, many cases from this era were inevitably brought as challenges to the regulation of activities related to the new railways.

The first group of cases that asked for the invalidation of state regulations under the negative aspect of the Commerce Clause were those that applied the test devised in *Cooley,*[1021] focusing on the nature of the subject matter. In *Smith v Alabama*[1022] the Supreme Court found the state regulation that required train operators to 'be licensed by a state board of examiners' to be of local concern, and thus constitutional under the negative aspect of the Commerce Clause.[1023] On the other hand, in *Wabash, St Louis & Pacific Railway Co v Illinois*[1024] the application of the national-local test resulted in holding the state regulation about 'the intrastate rates' that railway operators could be allowed to charge for out-of-state articles of commerce unconstitutional under the negative aspect of the Commerce Clause.[1025] Therefore, while following this approach resulted in the extension of the regulatory powers of the states in the area of licensing, contravening the ideal that uniform legislation was required by Congress exclusively in all areas of interstate commerce, they also reduced the regulatory powers of the states in the areas of import and export duties.

The second group of cases of this era devised a novel test, where the focus was placed on the interpretation of what constituted commerce 'among the states,' contrary to the previous focus placed upon 'commerce.' However, this test further adopted an approach that examined the effects of the subject matter, rather than its nature.

This method determined that if the state regulation was 'only indirectly, incidentally, and remotely' affecting interstate commerce, it was not unconstitutional under the negative Commerce Clause.[1026] Acts with such effect were held to be, for instance,

[1020] Constitution of the United States of America 1787, Amendment X.
[1021] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).
[1022] *Smith v Alabama* (1888) 124 US 465.
[1023] Chemerinsky, *Constitutional Law* (n 77) 464.
[1024] *Wabash, St Louis and Pacific Railway Company v Illinois* (1886) 118 US 557.
[1025] Tribe (n 171) 1048; Chemerinsky, *Constitutional Law* (n 77) 464.
[1026] Tribe (n 171) 1049; Denning (n 893) 438–439; Barry Cushman, 'Formalism and Realism in Commerce Clause Jurisprudence' (2000) 67 The University of Chicago Law Review 1089, 1111–1114.

the restriction of 'train speed within city limits' and the requirements to have a specific number of 'brakemen on freight trains of over 25 cars' in the area of railway regulations.[1027] Moreover, the similar test was also utilised when holding state laws about the quarantine of cattle or state blue sky laws constitutional.[1028]

Consequently, under this approach, the regulations that posed such a 'substantial' burden on interstate commerce that these were deemed to be a 'direct burden,' were held to be invalid under the negative aspect of the Commerce Clause, as the regulatory powers over such activities belonged exclusively to Congress.[1029] Such direct burden was found in *Seaboard Air Line Railway v Blackwell*,[1030] where under the state regulation an interstate train would have been required to come to a halt '124 times within 123 miles.'[1031]

Whereas it may seem that the Supreme Court upheld the distinction between the two distinct and exclusive regulatory powers over interstate commerce, the limits of these powers became highly blurred during this period. Whilst applying the *Cooley*[1032] test utilised the nature of the subject matter of the regulation, the direct-indirect test prioritised examining the effects of the regulation over its subject matter. Such an examination, however, relied on 'subjective, and eminently manipulable distinctions,' and effectively resulted in state regulations about the same subject matter being held constitutional in one case and unconstitutional in another.[1033]

It has been argued previously that the lack of a clear definition of a concept, such as 'a republican government' or 'commerce,' may prove beneficial in situations where it serves for the harmonisation of the laws with the advancements of society and the economy. One method of achieving this has been highlighted as the non-originalist

[1027] Tribe (n 171) 1049; *Accord, Erb v Morasch* (1900) 177 US 584; *Chicago, Rock Island & Pacific Railway Company v Arkansas* (1911) 219 US 453.
[1028] Cushman (n 1026) 1116 – 1117.
[1029] Tribe (n 171) 1049.
[1030] *Seaboard Air Line Railway v Blackwell* (1917) 244 US 310.
[1031] Tribe (n 171) 1049.
[1032] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).
[1033] Williams, 'The Commerce Clause and the Myth of Dual Federalism' (n 1008) 1869 and 1872. Two such subject matters of these cases were the taxation of out-of-state goods and racial segregation on modes of transportation, see ibid 1874 – 1876.

method that would allow for the advancements to be integrated into the decisions of the Supreme Court.

The legal uncertainty that this approach of the Supreme Court had, however, created to the negative aspects of the Commerce Clause in 1927 could thus be summarised by Powell as 'the states […] [were allowed to] regulate interstate commerce, but not too much.'[1034] The contradictory judgments about the same subject matter using different methods to interpret the same provision and the above statement clearly demonstrate that the lack of a clear standard created high legal uncertainty, which increasingly made the need for a reform in this area more apparent.

IV. The modern approach to the Dormant Commerce Clause

Towards the middle of the twentieth century, it became apparent for the Supreme Court that the direct-indirect approach previously adopted by the Supreme Court in Commerce Clause cases about its negative aspect would be unsuitable for the challenges argued in front of the modern Supreme Court.[1035] An important element that contributed toward this change was the various opinions of Chief Justice Stone, who was the main critic of the direct-indirect test.[1036] Therefore, as expected, another approach emerged in this era about the interpretation of the negative aspect of the Commerce Clause, which effectively transformed into the current modern approach.[1037]

A challenge to a state regulation under the now so-called Dormant Commerce Clause will have to satisfy a novel 'two-tiered standard' in order to be held unconstitutional:[1038] First, it will have to be deemed non-discriminatory under the first anti-discrimination

[1034] Thomas Reed Powell, 'Current Conflicts between the Commerce Clause and State Police Power 1922-1927' (1928) 12 Minnesota Law Review 470, 491.
[1035] Felmly (n 963) 475; Donald H Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 Michigan Law Review 1091, 1094.
[1036] Regan (n 1035) 1094. See *DiSanto v Pennsylvania* (1927) 273 US 34; *Southern Pacific Co v Arizona ex rel Sullivan, Attorney General* (1945) 325 US 761.
[1037] McGinley (n 877) 414.
[1038] David Day, 'Revisiting Pike: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine' (2003) 27 Hamline Law Review 45, 46–47; Friedman and Deacon (n 860) 1926; Felmly (n 963) 475; Larsen (n 892) 850.

tier. Second, it will have to satisfy a novel balancing test. In the following, the development of each of these tiers will be considered separately.

IV.1. The first tier test: the anti-discrimination principle

Modern cases addressing the Dormant Commerce Clause, somewhat surprisingly, and contrary to previous decisions, do not concentrate on the interpretation of either 'commerce' or 'among the states.' These cases have developed a novel test that focuses on an entirely different approach to the Commerce Clause: discrimination in the area of commerce between the states.

Even though it has been argued above that discriminatory and protectionist measures constituted one of the reasons that led to the call for the creation of a uniform system for the regulation of interstate commerce, Larsen highlights that these measures have failed to take centre-stage in decisions about the interpretation of the Commerce Clause until after the New Deal.[1039]

It is, however, argued that this method would, in fact, coincide with that of the living constitutional values approach. According to this approach, it may be established that since the values that the Framers wished to protect were the creation of a uniform national market and the protection of the citizens from the detrimental effects of for instance, potential trade wars. With the developments in society, it may be argued that this fundamental value has, in fact, transformed into one that calls for the protection from non-discrimination between the states in the area of interstate commerce.

Thus, in line with the modern approach to the Dormant Commerce Clause, state regulations challenged under the Dormant Commerce Clause have to be first examined based on their discriminatory nature. If a regulation is found to be discriminatory under this tier, it is subsequently held unconstitutional under the Dormant Commerce Clause doctrine, without it having to be examined further under the second tier.

[1039] Larsen (n 892) 844.

As with many times before in the case of commerce, for the purposes of the Dormant Commerce Clause analysis, the Supreme Court has opted for the adoption of a 'fairly broad' interpretation of 'discrimination,'[1040] which is now defined as 'any disparity in the treatment of in-state and out-of-state interests – whether business, users, or products -.'[1041] Larsen emphasised that such unequal treatment is commonly identified in constitutional law in three manners in a state regulation, which classification may also be adopted for cases discussing the Dormant Commerce Clause.[1042]

1.1. Facial discrimination: per se invalid

Firstly, Larsen categorises a state regulation as 'facially discriminatory' if it discriminates 'on its face.'[1043] Such a regulation was identified in *Dean Milk Co v City of Madison,*[1044] where the state law in question required the milk sold locally to have been processed within five miles of the City.[1045] Even though this law was silent on the out-of-state interests, Justice Clark declared that it, in fact, 'erect[ed] an economic barrier protecting a major local industry against competition from without the state.'[1046] He thus still found the law to be facially discriminatory and thus unconstitutional.[1047] Despite the act showing clear discriminatory characteristics, it was, surprisingly, still examined under the second tier test of the modern approach. [1048]

This requirement for the examination of facially discriminatory laws under the second tier test was, however, held to be unnecessary following the decision in *Philadelphia v New Jersey*.[1049] This case concerned a state regulation that prohibited the importation of out-of-state waste claiming that the state did not have enough space to

[1040] Tribe (n 171) 1059. Larsen also highlighted that the definition of discrimination 'remarkabl[y]' differs for the dormant Commerce Clause from the other constitutional doctrine. Larsen (n 892) 844 and 854.
[1041] Tribe (n 171) 1059; Larsen (n 892) 853; Denning (n 893) 496.
[1042] Larsen (n 892) 854.
[1043] ibid.
[1044] *Dean Milk Co v City of Madison* (1951) 340 US 349.
[1045] Tribe (n 171) 1083; Larsen (n 892) 863.
[1046] *Dean Milk Co v City of Madison* (n 1044) 354.
[1047] ibid 354.
[1048] Larsen (n 892) 863.
[1049] *Philadelphia v New Jersey* (1978) 437 US 617.

allocate to such waste.[1050] Furthermore, New Jersey claimed that 'the improper disposal' of the out-of-state waste would pose high risks to 'the public health, safety, and welfare.'[1051] The state regulation was held to be facially discriminatory, and thus unconstitutional, as the only reason for the prohibition of the importation of out-of-state waste was clearly its origin.[1052] The Supreme Court in this decision, however, created an exception to this category. It held that a state regulation, that is facially discriminatory, is prohibited under the Dormant Commerce Clause, unless 'there is some reason, apart from the[ir] origin [of articles of commerce], to treat them differently.'[1053] What would constitute such reasons, however, was not defined subsequently by Justice Stewart.

Baldwin v G A F Seelig Inc[1054] also involved a state regulation about dairy, asking for a minimum price to be paid for 'milk purchases' by dealers to producers.[1055] This, in effect, the Supreme Court held, resulted in an advantageous position for in-state milk producers.[1056] In reaching its decision, the Court declared the state law invalid under the Dormant Commerce Clause as it added extra costs on out-of-state dairy farmers and was therefore also discriminatory in effect.[1057] Another state regulation that was held to be unconstitutional based on its facially discriminatory nature was found in *Chemical Waste Management, Inc v Hunt*,[1058] in which the regulation in question imposed an additional fee expressly on 'hazardous waste' originating out-of-state disposed of in the state of Alabama.[1059]

[1050] ibid 625.
[1051] Timothy J Slattery, 'The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle' (2008) 17 William and Mary Bill of Rights Journal 1243, 1269; Andrew D Thompson, 'Public Health, Environmental Protection, and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure' (2004) 55 Case Western Reserve Law Review 226.
[1052] Amy M Petragnani, 'The Dormant Commerce Clause on Its Last Leg' (1994) 57 Albany Law Review 1215, 1218.
[1053] *Philadelphia v New Jersey* (n 1049) 626 - 627; Daniel A Farber, 'State Regulation and the Dormant Commerce Clause' (1986) 3 Const. Comment. 395, 397. and ibid 397.
[1054] *Baldwin, Commissioner of Agriculture & Markets, et al v GAF Seelig Inc* (1949) 294 US 511.
[1055] ibid 519.
[1056] ibid 522 - 524; Richard B Collins, 'Economic Union as a Constitutional Value' (1988) 63 New York University Law Review 43, 97.
[1057] Collins (n 1056) 97.
[1058] *Chemical Waste Management, Inc v Hunt* (1992) 504 US 334.
[1059] ibid 334; Larsen (n 892) 862; Tribe (n 171) 1065–1066.

In *Maine v Taylor*[1060] the Supreme Court, however, created another exception to this general rule. They held a facially discriminatory state law prohibiting the importation of baitfish from other states constitutional, reasoning that allowing such imports would contaminate the rivers of the state with 'parasites and alien fish species.'[1061] To justify the departure from the per se rule of invalidity, they examined the state law in question under the second-tier test, which will be analysed later.

1.2. Discrimination in effect

The second type of state regulation identified by Larsen that may not be upheld based on the grounds that the Act in question is contrary to the fundamental value of non-discrimination, is when the regulation is found to be 'discriminatory in effect.'[1062] Such discriminatory effect was held to exist when two separate regulations enacted by Massachusetts were 'operating together' in *West Lynn Creamery, Inc v Healy*,[1063] which were held to have created a disparate treatment of in- and out-of-state interests.[1064] The two acts in questions created a system where a monthly premium was paid by 'every dealer in milk products' to a fund that subsequently distributed these to in-state dairy dealers.[1065] The Supreme Court, however, held the state law invalid under the Dormant Commerce Clause and argued that this was because its discriminatory effects 'artificially encourag[ed] in-state production even when the same goods could be produced at lower cost in other States.'[1066] In reaching this decision, the Supreme Court also argued that the examination of the state law under the first tier had to occur on a "case-by-case analysis of purposes and effects" of the laws.[1067]

[1060] *Maine v Taylor* (1986) 477 US 131.
[1061] ibid as referred to from Bradford Mank, 'The Supreme Court's New Public-Private Distinction under the Dormant Commerce Clause: Avoiding the Traditional versus Nontraditional Classification Trap' (2009) 37 Hastings Constitutional Law Quarterly 1, 11.
[1062] Larsen (n 892) 854.
[1063] *West Lynn Creamery, Inc v Healy* (1994) 512 US 186.
[1064] Larsen (n 892) 855 – 856.
[1065] ibid 855.
[1066] *West Lynn Creamery, Inc v Healy* (n 1063) 193; Konar-Steenberg (n 936) 968.
[1067] Christopher R Drahozal, 'Preserving the American Common Market: State and Local Governments in the United States Supreme Court' (1999) 7 Supreme Court Economic Review 233, 244.

The discriminatory effect may, however, be present in one state regulation on its own, such as in *C & A Carbone, Inc v Town of Clarkstown*.[1068] The state regulation in this case required the waste of the city of Clarkstown 'to be processed at the local transfer station prior to leaving town,' which in its effects deprived waste haulers from the opportunity to choose a different place to process their waste other than the state appointed private station.[1069] This deprivation of free choice was thus held to be disparate treatment of the out-of-state actors of interstate commerce and was "a protectionist effect" and the act was therefore held unconstitutional.[1070]

1.3. Purposeful discrimination

The third approach identified by Larsen may also be argued to coincide with that of the living constitutional approach where the constitutional value of non-discrimination is protected. Following this approach, Larsen claims that a state regulation may show signs of 'purposeful discrimination' when the purpose behind the statute is to create an unequal treatment for in- and out-of-state interests.[1071] As finding such a purpose requires the examination of 'motives, objectives and end of the legislative body,' this type of discrimination is discovered less commonly than the other two types of discrimination.[1072] A fundamental decision where the test to identify such discrimination was developed was *Kassel v Consolidated Freightways Corp*,[1073] which concerned a regulation enacted by Iowa banning double-tractor trailers longer than sixty-five feet from their roads.[1074] Firstly, the Court analysed whether the 'safety objectives' of the act were valid, but found these 'illusory,' without 'any persuasive evidence' for the necessity of these.[1075] The Court subsequently investigated whether the act 'disproportionately burdened out-of-state interests,' and held that it indeed did

[1068] *C & A Carbone, Inc v Town of Clarkstown* (1994) 511 US 383.
[1069] Larsen (n 892) 856.
[1070] ibid.
[1071] ibid 854.
[1072] ibid 859.
[1073] *Kassel v Consolidated Freightways Corp* (1981) 450 US 662.
[1074] Larsen (n 892) 859.
[1075] *Kassel v Consolidated Freightways Corp* (1981) 450 US 662 671; Larsen (n 892) 859.

so.[1076] It lastly examined various statements of the Governor of Iowa and found that his support was based on protectionist and discriminatory reasons to benefit the interests of the citizens of Iowa over those coming out of the state.[1077]

It is, thus, argued that the approach of the Supreme Court may be categorised as one following the living constitutional values approach. They not only relied on originalist methods to identify the drafters of the Act in question, but had also integrated the transformed views on non-discrimination as a value that required protection. They further recognised that a novel test for the discriminatory measures was also necessary.

It may also be argued that in order for a state regulation to be held invalid under the first tier test of the modern approach, it will also have to satisfy another component identified by McGreal.[1078] He argued that it will also have to be established that the actors concerned by the state regulation in- and out-of-state are in fact 'compet[ing] with one another.'[1079] For instance, in *Parker v Brown*,[1080] this component was not satisfied: the producers of raisins were held not to be in competition with the 'distributors and consumers,' and thus the state regulation was held not to be discriminatory.[1081]

It may therefore be argued that if discrimination of any of the above three types is identified in the state regulation, it will be held invalid under the first tier test of the Dormant Commerce Clause and will not have to be examined under the second tier test of the modern approach. On the other hand, it will be demonstrated below that this has not always been followed by the Supreme Court.

[1076] Larsen (n 892) 860.
[1077] ibid. See also Tribe (n 171) 1072 – 1073.
[1078] Paul E McGreal, 'The Flawed Economics of the Dormant Commerce Clause' (1998) 39 William and Mary Law Review 1191, 1195.
[1079] ibid. This position was also previously identified by Regan (n 1035) 1096.
[1080] *Parker v Brown* (1943) 317 US 341.
[1081] Regan (n 1035) 1096.

1.4. A uniform national market

The emergence of this scrutiny of a state regulation from a discriminatory or protectionist perspective has also re-initiated the debate on whether it was the intention of the Framers to create an area of free trade within the United States with the adoption of the Commerce Clause. Such is argued to occupy a key fundamental value that the provision was set out to protect under the living constitutional values approach.

As one may expect, however, no uniform approach has been accepted about this ideology, but two fundamentally contrasting positions may be identified in the judgments of the Supreme Court and in academic commentaries.

1.4.a. Political justifications

The first position, embraced by Tribe, Regan, Kitch and Balkin, argues that the purpose of the Commerce Clause was - based on the 'political theory of union'[1082] - aimed at the promotion of the 'national connection and social cohesion.'[1083] Thus, a discriminatory or protectionist measure, following this viewpoint, should be held invalid if it posed a threat – as Hamilton stated during the Constitutional Convention - to the 'general welfare of the Union.'[1084] This threat may be identified in hostile and retaliatory measures by states against each other.[1085]

[1082] Tribe (n 171) 1057.
[1083] Balkin (n 841) 17; Regan (n 1035) 1114. – also making a reference to Kitch.
[1084] Abel (n 878) 433.
[1085] John Baker and Mehmet Konar-Steenberg, '"Drawn from Local Knowledge... And Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine' (2006) 38 Loyola University Chicago Law Journal 1, 30.

Another political justification for the development of the Dormant Commerce Clause can be identified in *McCulloch v Maryland*,[1086] where it was held by Justice Stone that when a law enacted by a state placed substantial burdens on out-of-state interests, that had to be reviewed by the judiciary as the interests of those out-of-state could not be adequately represented in the state legislation.[1087] The same justification reappeared in the subsequent case of *H P Hood & Sons v Du Mond*,[1088] in which the Supreme Court argued that as out-of-state interests are not represented politically within a state, it is for the Justices to guarantee that these are also taken into consideration and are not harmed by any actions of the state.[1089]

1.4.b. Economic justifications

The other position claims that the purpose of the adoption of the Commerce Clause was the creation of an area of free trade or a common market.[1090] Such was the standpoint adopted in *Commonwealth Edison Co v Montana*,[1091] where it was expressly held by the Supreme Court that the creation of such a market was 'the very purpose of the Commerce Clause.'[1092] Justice Cardozo famously characterised this approach as 'the peoples of the several states must sink or swim together' in *Baldwin v G A F Seelig Inc.*[1093] The same approach also seems to have been adopted in *H P Hood & Sons v Du Mond*,[1094] where it was held that the 'economic unit' of the United States of America 'is the Nation.'[1095] This unit was held not only to serve to advance the ideal of the free market for 'every framer and every craftsman,' but also to protect

[1086] *McCulloch v Maryland* (1819) 17 US (4 Wheat) 316.
[1087] ibid 429–430.
[1088] *H P Hood & (and) Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (n 873).
[1089] Farber (n 1053) 396; Chemerinsky, *Constitutional Law* (n 77) 460.
[1090] Farber (n 1053) 396; Regan (n 1035) 1092.
[1091] *Commonwealth Edison Co v Montana* (1981) 101 SCt 2946.
[1092] James M O'Fallon, 'The Commerce Clause: A Theoretical Comment' (1982) 61 Oregon Law Review 416.
[1093] *Baldwin, Commissioner of Agriculture & (and) Markets, et al. v. G. A. F. Seelig, Inc.* (n 1054).
[1094] *H P Hood & (and) Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (n 873).
[1095] McGreal (n 1078) 1222.

consumers from exploitation through the free competition that is offered within the nation.[1096]

According to Justice Jackson, to ensure that the above was maintained 'home embargoes […] customs duties or regulations' were meant to be abolished since the drafting of the Constitution.[1097] This approach can also be identified in *Philadelphia v New Jersey*,[1098] where it was held that facially discriminatory measures represented 'the evils of economic isolation' that could have a negative effect on the national area of free trade.[1099] By holding that the 'states are not separable economic units,' the Supreme Court also seemed to have adopted the above approach.[1100]

Another justification for the development of the first tier test can be identified in the claims of those who called for the elimination of protectionist measures and thus, indirectly, argue for a free national market. Such was the approach of Justice Scalia in *New Energy Co of Indiana v Limbach*,[1101] who held that the discriminatory measure could only be held valid if it was found not to relate to 'economic protectionism.'[1102]

Whilst not expressly stated in the Constitution, the adoption of the ideal of a national market within the United States, as rightly argued by Williams, may be the preferable justification constitutionally not only for the anti-discrimination principle, but for the Dormant Commerce Clause as a whole.[1103] In reaching this conclusion, he effectively blended the above two contrasting opinions into the second one. He thus argued that an area of free trade within the Union firstly 'promote[s] political union,' which in effect makes the first position of political theory part of the second standpoint of the common market.[1104] He also claimed that an area of free trade would 'reduce the likelihood of interstate retaliation.'[1105] Such retaliatory actions were not only demonstrated to have occurred before the Constitutional Convention, but it has also been established above

[1096] Tribe (n 171) 1058.
[1097] *H P Hood & (and) Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (n 873). 539.
[1098] *Philadelphia v New Jersey* (n 1049).
[1099] ibid 624; Felmly (n 963) 478.
[1100] *Philadelphia v New Jersey* (n 1049); Lang (n 967) 81.
[1101] *New Energy Co of Indiana v Limbach* (1988) 486 US 269.
[1102] ibid 274.
[1103] Williams, 'The Foundations of the American Common Market' (n 898) 426.
[1104] ibid.
[1105] ibid.

that these trade wars had played a fundamental role in the demand for the creation of a uniform regulation of interstate commerce. It may also be argued that discriminatory or protectionist measures could be classified as such retaliatory actions, and accordingly the creation of a national market, may provide a preventative measure against these. Furthermore, Williams argued that a national market would 'foster economic wealth,' which could be argued to form part of both the above contrasting standpoints.[1106]

The adoption of the novel first tier test for the Commerce Clause, is, hence, argued to be justifiable based on the premise that the Commerce Clause was set out to create a unified national market. This test would, further, concur with that of the living constitutional values approach that the premise of the Commerce Clause highlighted was, in fact, the fundamental value this provision set out to protect.

Therefore, if a state regulation is held to be discriminatory, it will be held invalid, without having to examine it under the next, second tier test. If a state regulation is, however, found to be non-discriminatory, it will have to satisfy the second tier of the modern approach test, to be upheld as a valid exercise of the regulatory powers of a state under the Dormant Commerce Clause.

IV.2. The *Pike* balancing test

The second tier test originated from the ideology developed by Justice Stone in three cases about the specifications of modes of transportation. Justice Stone first presented his understanding of the Dormant Commerce Clause in his dissenting opinion in *DiSanto v Pennsylvania*.[1107] He rejected the then applied direct-indirect test for being 'too mechanical, too uncertain in its application and too remote from actualities, to be of value.'[1108] He thus proposed that a state regulation should be firstly examined taking into account 'all the facts and circumstances, such as the nature of

[1106] ibid.
[1107] *DiSanto v Pennsylvania* (n 1036).
[1108] Denning (n 893) 444.

the regulation, its function, the character of the business involved and the actual effect on the flow of commerce.'[1109]

He further argued that a state law should subsequently only be upheld under the Dormant Commerce Clause if, firstly, 'the interests' concerned in the state regulation are 'peculiarly local' and, secondly, if the regulation is held not to encroach upon the 'national interest in maintaining the freedom of commerce across state lines.'[1110] This approach, therefore, seemed to adopt the previous national-local test, but in an amended form. Justice Stone claimed that it should be the interests in the regulation, and not the subject matter or the nature of the activities regulated that determine whether a violation of the Dormant Commerce Clause occurred. Moreover, this approach seemingly adopted the viewpoint demonstrated above, in accordance with the view that the Commerce Clause was created to ensure a uniform national market. This non-originalist interpretation method of the constitutional provision is further argued to be in line with the living constitutional values approach, where the creation and protection of a uniform national market constitutes a fundamental constitutional value.

The above method of Justice Stone was adopted soon after a decade in *South Carolina State Highway Department v Barnwell Brothers*.[1111] The state regulation concerned in this case was a seemingly non-discriminatory restriction imposed on 'the size and weight of trucks' using the state roads, which was upheld until Congress legislated in the area.[1112] On the other hand, Justice Stone argued that even if a state regulation is held to be non-discriminatory and provided that there is no federal regulation about the same subject matter, the courts had to assess the regulation from two aspects.[1113] They first had to examine 'whether the state legislature … has acted within its province.' Secondly, they had to establish 'whether the means of regulation chosen are reasonably adapted to the end sought.'[1114] Regarding the first aspect,

[1109] ibid.
[1110] ibid.
[1111] *South Carolina State Highway Department et al v Barnwell Brothers, Inc, et al* (1938) 303 US 177; Denning (n 893) 445.
[1112] Denning (n 893) 445.
[1113] *South Carolina State Highway Department et al. v. Barnwell Brothers, Inc., et al.* (n 1111) 190.
[1114] ibid 190; Noel T Dowling, 'Interstate Commerce and State Power' (1940) 27 Virginia Law Review 1, 9.

Justice Stone held that a non-discriminatory measure about the size and weight of trucks could be imposed by the states if it was "a safety measure and […] a means of securing the economical use of its highways."[1115] Under the second aspect, even though it was established that the state law was a means to attain the 'safe and economical use of [the] highways,' it was still held that it imposed an undue burden on interstate commerce and was thus held invalid under the Dormant Commerce Clause.[1116]It would, thus, seem that the above approach following the one he adopted in the earlier case as well: the constitutional value to be protected was that of the creation of a uniform national market, which required a non-originalist method of interpretation to ensure its protection to the fullest.

In *Southern Pacific Co v Arizona,*[1117] Justice Stone, acting as then Chief Justice of the Supreme Court, was finally provided with the opportunity to apply the test he previously developed. This case concerned a statute enacted in Arizona regarding the length requirements for 'passenger and freight trains' substantially distinct from the same requirements in the neighbouring states.[1118] Chief Justice Stone, however, decided to refine his previous approach, and stated that the Supreme Court first had to assess whether the subject matter of the regulation was of 'local' concern 'in character and effect.'[1119] In order to be upheld as a valid law, the state regulation in question also had to be demonstrated to have an 'impact on the national commerce' that 'does not seriously interfere with its operation.'[1120] This seems to support the ideology that the creation of the national market as a fundamental constitutional value was supported by Chief Justice Stone as well, since he also recognised that certain activities would have an impact on the national market that was worth protecting from harmful impacts. He consequently found the state law unconstitutional under the Dormant Commerce Clause, as he held that it, in effect, interfered with the operation of interstate commerce. He further held that the claims of the state that these requirements would be advantageous for interstate commerce were unfounded, as it

[1115] Winkfield F Jr Twyman, 'Beyond Purpose: Addressing State Discrimination in Interstate Commerce' (1995) 46 South Carolina Law Review 381, 391.
[1116] ibid 391 – 392.
[1117] *Southern Pacific Co v Arizona* 625 US 761 (1945); from Denning (n 49) 446.
[1118] Denning (n 893) 446.
[1119] ibid.
[1120] ibid.

was actually identified during the trial court decision that these requirements 'would actually raise the accident rate.'[1121]

The above methods devised by Chief Justice Stone formed the basis of the second tier test of the modern approach to the Dormant Commerce Clause. This new test was formulated in *Pike v Bruce Church Inc.*,[1122] which also concerned a state regulation enacted in Arizona, yet involved a different subject matter. The state law in question required the cantaloupes cultivated and marketed in Arizona to comply with packaging approved by the state.[1123] This requirement was argued to have been created by the state of Arizona out of:

> the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced.[1124]

Bruce Church Inc., a cultivator of cantaloupes, however, packed and processed their cantaloupes in California, which was argued to have contravened Arizona state law.[1125] When that law was challenged under the Dormant Commerce Clause, Justice Stewart devised the method of examining laws if they were found to be non-discriminatory under the now first tier enquiry. He held that first, one had to determine whether 'the statute regulates evenhandedly to effectuate a legitimate local public interest.'[1126] He subsequently held that in the case in question, the 'protecting and enhancing the reputations of the growers were "surely legitimate state interests."'[1127] The Court, however, also highlighted that this legitimate interest transformed into 'enhanc[ing] their reputation [of the State] through the reflected good will of the company's superior produce.'[1128]

[1121] Twyman (n 1115) 392–393.
[1122] *Pike v Bruce Church Inc* (1970) 397 US 137.
[1123] Edward A Zelinsky, 'The False Modesty of *Department of Revenue v* Davis: Disrupting the Dormant Commerce Clause through the Traditional Public Function Doctrine' (2010) 29 Virginia Tax Review 407, 414.
[1124] *Pike v Bruce Church Inc* (1970) 397 US 137 143; Day (n 1038) 50.
[1125] ibid.
[1126] *Pike v Bruce Church Inc* (n 1124) 142; James M O'Fallon, 'The Commerce Clause: A Theoretical Comment' (1982) 61 Oregon Law Review 395, 407.
[1127] Day (n 1038) 50.
[1128] *Pike v Bruce Church Inc* (n 1122) 144.

If a legitimate interest is found in the state regulation, the Court will have to perform a balancing enquiry to assess the extent of the effects of the regulation on interstate commerce. If this effect is found to be 'only incidental,' the regulation will be upheld, however, a 'clearly excessive' effect will result in the invalidation of the state law.[1129] When determining the above, the Court takes into consideration two aspects: 'the nature of the local interest involved,' and whether this interest 'could be promoted as well with a lesser impact on interstate activities.'[1130] This clearly seems to support the ideal that the creation and subsequent protection of the national market were, in effect, deemed to be fundamental constitutional values and were, thus, regarded to occupy a more important position than the upholding of state regulations in areas of 'local' concern.

It is to be highlighted that this balancing test will place a high judicial scrutiny on the state regulation, which at this point will have already passed a strict judicial scrutiny under the first-tier test. What the second-tier test, however, focuses on is not the interpretation of the definition of 'commerce' or 'among the states,' but rather the extent of the regulatory powers of the states. How the states exercise such a power is placed under scrutiny by examining the burdens and the effects of the regulations as a whole against the national market. However, it is argued that the Supreme Court still adopts an interpretation method to achieve this goal and the *Pike* test is, in effect, in line with the living constitutional values approach, where the creation and subsequent protection of the national market are seen as the constitutional values the Constitution and the Supreme Court set out to protect.

It would therefore seem that under the modern approach to the Dormant Commerce Clause, the powers of the states have decreased substantially, as their regulations will be scrutinised from several aspects under a two-tier test if they are found to be non-discriminatory.

[1129] ibid.
[1130] McGinley (n 877) 146; O'Fallon (n 1126) 407; Denning (n 893) 447.

IV.2.a. Discriminatory laws investigated under the balancing test

Even though many of the cases mentioned during the analysis of the first-tier test found that state laws were discriminatory and thus invalid, in many of them the Supreme Court still engaged in the examination of the state law under the second-tier test.

Despite *Pike v Bruce Church Inc*[1131] not having been decided at this point, origins of the subsequent balancing test can be found in *Dean Milk Co v City of Madison.*[1132] The Supreme Court, in this case, found that the state law aimed to regulate the commerce of milk to pursue a legitimate local public interest, which was the 'protection of the health and safety of state citizens' is a legitimate local purpose.[1133] However, the state wished to achieve this by protecting 'the economic welfare' of the state industry through prohibiting the sale of milk produced out-of-state completely.[1134] Regulation through these measures, the Supreme Court held, was not even-handed, as other measures were available to attain the same goal that were non-discriminatory, such as the wider inspection of the milk originating from out-of-state.[1135] Thus, whilst recognising that certain restrictions may be necessary, the Supreme Court already set out to protect the national market as a constitutional value in this case.

Even though the per se rule of invalidity had been established and *Pike v Bruce Church Inc*[1136] had already been decided by then, the state law imposing high fees on out-of-state hazardous waste in *Chemical Waste Management, Inc v Hunt*[1137] was still examined under the *Pike* test and was found to be unconstitutional under the Dormant Commerce Clause.[1138] The Supreme Court, following the same approach as above,

[1131] *Pike v Bruce Church Inc* (n 1122).
[1132] *Dean Milk Co v City of Madison* (n 1044).
[1133] Allison Q Gerhart, 'Dormant Commerce Clause Implications of Pennsylvania Dairy Regulations' (2011) 19 Penn State Environmental Law Review 361, 373.
[1134] ibid.
[1135] ibid.
[1136] *Pike v Bruce Church Inc* (n 1122).
[1137] *Chemical Waste Management, Inc v Hunt* (n 1058).
[1138] William J Cantrell, 'Cleaning Up the Mess: United Haulers, the Dormant Commerce Clause, and Transaction Costs Economics' (2009) 34 (1) Columbia Journal of Environmental Law 149, 159.

arrived at this decision by holding that there were other non-discriminatory means to attain the legitimate local interest end of limiting the amount of hazardous waste within the state that the state sought.[1139]

Whilst the decision in *Maine v Taylor*[1140] seemed to have departed from the first-tier test of holding a discriminatory state regulation invalid if it was discriminatory, as it passed the second-tier test, it was upheld as a constitutional exercise of the regulatory powers of the state under the Dormant Commerce Clause. According to the Supreme Court, the legitimate local purpose of the protection of the baitfish could only be attained by enacting the discriminatory measure and no other non-discriminatory measures were available for the state.[1141] Thus, the state could actually impose a discriminatory measure that affected interstate commerce. This decision, in effect, arguably also became an area where the regulatory powers of the states over interstate commerce could be extended to: the protection of local wildlife, which is unique to that area. It could, however, also be argued that if baitfish was a unique animal in that particular state out of the whole nation, the discriminatory measure in effect allowed for the protection of the national market as a whole, in line with the creation and protection of such as a constitutional value under the living constitutional values approach.

One trend that seems to emerge from these cases is that if an alternative, non-discriminatory, method is available that would achieve the desired results by the state, it is highly likely that the state regulation will be held unconstitutional.

Whereas it has been demonstrated above that under the modern approach to the Dormant Commerce Clause, a state regulation will have to satisfy the highly strict two-tier test, separate lines of cases also emerged that utilised this approach to extend the regulatory powers of the states in the area of interstate commerce.

[1139] William J Cantrell, 'Cleaning Up the Mess: United Haulers, the Dormant Commerce Clause, and Transaction Costs Economics' (2009) 34 (1) Columbia Journal of Environmental Law 149, 159.
[1140] *Maine v Taylor* 477 US 131 (1986).
[1141] Gerhart (n 1133) 374.

IV.3. The new trend: Increasing the powers of the states to regulate interstate commerce

The modern approach to Dormant Commerce Clause provides a clear demonstration of how the same method of constitutional interpretation may result in different outcomes. This approach may be utilised to restrict the activities that states are allowed to regulate, and may also result in the extension of the areas that the states are allowed to regulate. On the other hand, it is fundamental to highlight, that under the modern approach, contrary to the dual federalist approach, the decision whether a state regulation violates the Dormant Commerce Clause will not be made based on its subject matter, but on a case-by-case basis, scrutinising the state law from several distinct aspects. Hence, it may be argued that the characterisation of the regulatory powers of Congress and the states over interstate commerce as 'mutually exclusive' under the dual federalist approach is not only blurred, but inadequate.[1142] Furthermore, this approach provides a clear illustration of the non-originalist method of interpretation being used by the Supreme Court in order to apply the Constitution in light of the development of each era.

Furthermore, a new trend seems to have emerged in the Supreme Court, where it is highly likely that a decision whether a state regulation is valid under the Dormant Commerce Clause will be made in favour of the state. These cases may be divided into four main categories. Whilst these categories have been limited in number, while Justice Scalia – one of the key opponents to the ideal of a Dormant Commerce Clause and a devout originalist - was a Justice of the Supreme Court, this number has been extended by two to the total of four.

3.1. The market participant state

[1142] Williams, 'The Commerce Clause and the Myth of Dual Federalism' (n 1008) 1851; O'Fallon (n 1126) 396.

The first category of these cases includes state laws that regulate the activities of the states when it is acting as a participant in the market and not its regulator.[1143]

This extension of regulatory power originates from the decision in *Hughes v Alexandria Scrap*,[1144] which concerned a 'scheme' established by a law enacted by Maryland that allowed the state to purchase 'crushed automobile hulks from in-state scrap processors at a premium price.'[1145] The Supreme Court held that this law could not be challenged under the Dormant Commerce Clause because Maryland simply acted in its capacity as a market participant, specifically, 'as a purchaser' and 'was not interfering with the natural functioning of an interstate market.'[1146] Whilst this decision seemingly allowed the states to claim power to regulate wider areas of interstate commerce, the Supreme Court has not refrained from applying it in subsequent cases.[1147]

On the other hand, the Court having recognised that this extension of powers may 'undermine the national common market,' Williams and Denning highlight two limitations that have been placed on this expansion of powers.[1148] The first may be invoked where a state regulation has a "substantial regulatory effect outside of a particular market," where it has been held to act as the market participant.[1149] This limitation was devised in *South-Central Timber Development v Wunnicke,*[1150] where Alaska intended to regulate the 'timber-processing market,' when it was only a participant of the 'timber-sale market.'[1151] It was clear for the Supreme Court that the purpose of the regulation was 'to benefit the local timber-processing industry,' and the requirement of the state law of local processing of timber was consequently held invalid under the Dormant Commerce Clause for the above reason. [1152]

[1143] Norman R Williams and Brannon P Denning, 'The "New Protectionism" and the American Common Market' (2009) 85 Notre Dame Law Review 247, 294.
[1144] *Hughes v Alexandria Scrap Corp* 426 US 794 (1976).
[1145] Tribe (n 171) 1088.
[1146] ibid.
[1147] One such case was *Reeves, Inc v Stake* 447 US 429 (1980) and see also Tribe (n 171) 1089.
[1148] Williams and Denning (n 1143) 295.
[1149] ibid.
[1150] *South-Central Timber Development v Wunnicke* 467 US 82 (1984).
[1151] Williams and Denning (n 1143) 295.
[1152] ibid.

The second restriction was set on the taxes imposed by the states on businesses that are not parties to transactions with the state.[1153] Such was the case in *New Energy v Limbach,*[1154] where a tax credit was offered as an incentive for the 'sales of ethanol produced in the state.'[1155] Whilst Ohio argued that it should have been identified as the market participant when it offered this tax credit, the Supreme Court disagreed and held that 'the state was neither purchasing nor selling ethanol,' but was merely performing a 'governmental activity' of calculating taxes.[1156]

It may thus be argued that despite the two restrictions, a state may enact a valid discriminatory state regulation in the area of interstate commerce, if it can demonstrate that it acts as the 'market participant' in the area of commerce in question under the first group of cases of the new trend. It is key to highlight that no such distinction exists in the provision of the Constitution and the non-originalist method of interpretation in this area resulted in a different outcome. However, one may also argue that this method also followed the living constitutional values approach, where it found that it was actually the rights of states that should have been held to constitute these fundamental constitutional values.

3.2. Manufacture as opposed to commerce

Another way the powers of the states have been extended under this new trend occurred in the 2013 case *McBurney v Young*,[1157] where the Supreme Court extended the manufacture exception under the Dormant Commerce Clause, as devised by *Kidd v Pearson*,[1158] to state records. In this case, the Freedom of Information Act of Virginia was challenged by Mark J McBurney and Roger W Hurlbert under the Dormant Commerce Clause.[1159] Hurlbert argued that a state regulation that only allowed access to public records for citizens of the state was a violation of the Dormant Commerce

[1153] Williams and Denning (n 1143) 296.
[1154] *New Energy Co of Indiana v Limbach* (n 1101).
[1155] Williams and Denning (n 1143) 296.
[1156] ibid and Tribe (n 171) 1093.
[1157] *McBurney v Young* (2013) 569 US ____.
[1158] *Kidd v Pearson* (n 1006).
[1159] *McBurney v Young* (n 1157).

Clause because it prevented him, a citizen of another state, from conducting the inter-state business of procuring the 'real estate tax records' from Virginia.[1160]

The Supreme Court rejected his argument for various reasons. Justice Alito held that the state law did not perform any regulatory function and did not 'burden' interstate commerce.[1161] He argued that in previous cases where the state laws were invalidated under the Dormant Commerce Clause, it could be demonstrated that the regulation was a hindrance on 'the natural functioning of the interstate market' in two ways: either by the regulation imposing a ban or by the state enacting a 'burdensome regulation.'[1162] As Justice Alito could not demonstrate that the state regulation performed any of the above two, he argued that it effectively formed the 'benefit' of creating and providing 'to its own citizens copies […] of state records.'[1163]

Even though he consequently asserted that the case was 'not governed by the Dormant Commerce Clause,' he still devoted a part of his judgment to assessing whether the act would be invalid under the Dormant Commerce Clause. [1164] He then held that as Virginia was the 'sole manufacturer' of the state records, it could adopt such 'protectionist' measures as it 'reflect[ed] the essential and patently unobjectionable purpose of state government – to serve the citizens of the State.'[1165]

The decision of the Supreme Court in this case seems surprising, as it returns to the approach where the powers of the states were extended based on the subject matter of the regulation. It will have to be seen whether this return to the previous interpretation will be utilised by the Supreme Court in the future, and how such will fit into the modern approach to the Dormant Commerce Clause.

3.3. Congressional authorisation

[1160] ibid.
[1161] ibid.
[1162] ibid 13.
[1163] ibid 13 -14.
[1164] ibid 13.
[1165] ibid 14.

Another way for the states to be able to regulate an area that may have an effect on interstate commerce is through specific authorisation from Congress. Such was the case in *Prudential Insurance v Benjamin*,[1166] where a tax imposed merely on out-of-state insurance companies operating within South Carolina was held valid under the Dormant Commerce Clause as it had been authorised specifically by an act of Congress.[1167]

Several other acts have been enacted by Congress that have authorised states to regulate areas that may affect interstate commerce, such as allowing the prohibition of the 'importation of alcoholic beverages manufactured in other states or nations' under the Wilson Act.[1168] These acts have also justified state actions that discriminate against out-of-state interests, such as banking regulations or discriminatory state taxes.[1169]

Therefore, a state is able to enact discriminatory laws in an area of commerce, provided that such action has been previously authorised by Congress, which seems to directly contradict the intention of the Framers.[1170] As it has been demonstrated above, the Framers appeared to have agreed on the need for the creation of a uniform system for the regulation of interstate commerce, which may be argued to have subsequently become a fundamental constitutional value. They further decided that this area would be regulated by Congress. On the other hand, by the delegation of its authority to the states, it may be argued that Congress is effectively acting contrary to its powers under the Commerce Clause.

3.4. Traditional state functions

A novel way that expanded the regulatory powers of the states in the area of interstate commerce was created in 2007 through the decision in *United Haulers Association v*

[1166] *Prudential Insurance Co v Benjamin* 328 US 408 (1946).
[1167] Williams, 'Why Congress May Not "Overrule" the Dormant Commerce Clause' (n 861) 157.
[1168] Wilson Act 27 USC § 121 (2000) and ibid 155.
[1169] ibid 155–156.
[1170] ibid 155.

Oneida-Herkimer Solid Waste Management Authority.[1171] This case concerned a state law enacted by the State of New York that 'forced haulers' 'to bring waste to facilities owned and operated by a state-created public benefit corporation.'[1172]

Whilst Chief Justice Roberts, in delivering the opinion of the Court, adopted the modern approach to assess whether the state law violated the Dormant Commerce Clause, he effectively created an exception to the first tier test.

This exception was created when he held that discrimination could only be present between 'similar entities' following the decision in *General Motors v Tracy*.[1173] Chief Justice Roberts interpreted this standpoint by claiming that discrimination could only be present between 'private entities' and not between states, who are responsible for the protection of 'the health, safety and welfare' of their citizens.[1174]

He subsequently argued that the state law in question regulated 'waste disposal,' which was "both typically and traditionally" a function that rested with the states, as also recognised by Congress.[1175] Thus, he failed to examine whether the state law discriminated between the state entity and the private entities that are operating in the same area. On the other hand, he held that the state law was non-discriminatory because it did not treat the in and out-of-state private entities differently.[1176]

Whilst it is indisputable that Chief Justice Roberts claimed that he investigated the state law in question under the anti-discrimination principle, it is argued that his interpretation of the test effectively created immunity for state monopolies from Dormant Commerce Clause challenges. Whether this was the intention of the Framers is highly arguable if the viewpoint is adopted that they intended to create a uniform national market.

[1171] *United Haulers Association, Inc, et al v Oneida-Herkimer Solid Waste Management Authority et al* (2007) 550 US ___.
[1172] ibid (Chief Justice Roberts) 1.
[1173] *General Motors Corp v Tracy* 519 US 278, 298 (1997).
[1174] *United Haulers Association, Inc, et al v Oneida-Herkimer Solid Waste Management Authority et al* (n 1171). (Chief Justice Roberts) 10.
[1175] ibid 12.
[1176] ibid 13.

As Chief Justice Roberts found that the state law in question satisfied the first tier test of the modern approach, he then set out to examine it under the second tier test. He, however, found it 'unnecessary' to determine whether the state law imposed an 'incidental burden on interstate commerce,' as he held the public benefits of the state law would outweigh any such burden in the balancing enquiry.[1177]

The Court also subsequently acknowledged that the state law in question effectively amounted to a policy adopted by New York, which ousted "competition with regulation or monopoly control."[1178] On the other hand, Chief Justice Roberts found no powers vested in the Supreme Court in the Constitution to decide whether this policy of creating monopolies is contrary to the Commerce Clause.[1179] It would thus seem that the Supreme Court had not been persuaded by the arguments that the Commerce Clause was to create a uniform national market. If such an approach had been adopted by the Supreme Court, it is argued that the decision would have been the reverse and the creation of a monopoly would have been found to clearly burden interstate commerce.

Consequently, if a state law has been enacted in an area that may pose a burden on interstate commerce, it will escape scrutiny under the Dormant Commerce Clause if the area is a traditional function of the states and where an entity operated by the state enjoys a monopoly in the area in question.

This decision, however, also attracted a wide range of criticism from commentators for two reasons. Firstly, the facts of the case were highly similar to those of *C & A Carbone, Inc v Town of Clarkstown*,[1180] but the Court distinguished this case from the latter on the basis that the latter enacted regulation favouring a 'private' entity, whilst in this case the operator in question was a 'public' entity.[1181] Secondly, the Court with the determination of traditional public functions of state government effectively resurrected a principle that had previously been held 'unworkable' in cases decided

[1177] ibid 14 -15.
[1178] ibid 12.
[1179] ibid 12 – 13.
[1180] *C & A Carbone, Inc v Town of Clarkstown* (n 1068).
[1181] Dan T Coenen, 'Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule' (2010) 95 Iowa Law Review 541, 544 and Denning (n 49) 649.

under the affirmative Commerce Clause following *Garcia v San Antonio Metropolitan,*[1182] which will be discussed in the subsequent chapter.

Despite the wide criticism of the above case, the approach of the Supreme Court has not changed in this area, as the same exception was applied in the subsequent case of *Department of Revenue v Davis*.[1183] This case effectively extended the above exemption to apply to state laws that regulate 'the issuance of bonds to raise revenue for public projects.'[1184] Justice Souter held that such activity fell under the 'traditional' function of state governments because it served to protect 'the health, safety and welfare of' the citizens of the state.[1185]

It is thus highly probable that this exemption will be extended in future cases to activities that were previously held to be discriminatory if the same activity is provided by the state. On the other hand, this approach has also resulted in the broadening of the regulatory powers of the states. It may, therefore, also provide an incentive for states to enter into areas where they have not been previously present when they are seeking to limit the entry and/or the activities out-of-state actors in that area.

V. Conclusion

The chapter demonstrated that despite having a clear definition of 'commerce' and 'interstate commerce', the interpretation of the Commerce Clause has mostly supported the ideology that a uniform national market should be created and protected within the United States as a fundamental constitutional value.

First, the chapter emphasised how the concept of commerce and interstate commerce has developed since the drafting of the Constitution with the passage of time. This constitutional uncertainty was demonstrated through commentators being unable to identify a clearly uniform definition of commerce at the time of the Constitutional

[1182] *Garcia v San Antonio Metropolitan Transit Authority* (1985) 469 US 528; Denning (n 893) 471. This decision will be discussed in the subsequent chapter.
[1183] *Department of Revenue v Davis* (2008) 553 US __.
[1184] Williams and Denning (n 1143) 260.
[1185] *Department of Revenue v Davis* (n 1183). (Justice Souter) 11 and Coenen (n 1181) 560.

Convention. It has subsequently been established that this uncertainty has had a fundamental effect on the development of the Commerce Clause. Whilst Chief Justice Marshall in the first Commerce Clause case adopted the definition of 'intercourse'[1186], and also attempted to define the 'among the states' provision, it is unlikely that the same definitions in the Commerce Clause would stand today.

Second, the chapter argued that one of the main reasons for the calling of the Constitutional Convention was the commercial warfare that the states engaged in against each other. It has been established that the Constitutional Convention aimed to solve this problem by creating a uniform regulation of interstate commerce and, thus, it was argued that this may be regarded as the constitutional value that this Clause aimed to protect under the living constitutional values approach. It has, however, also been underlined that the Framers also created a constant constitutional conflict between federal and state powers. The reason for this is that the Constitution failed to unequivocally assert whether the grant of power under the Commerce Clause amounted to an exclusive grant of power to Congress, and whether it was intended to limit the regulatory powers of the states in the area of interstate commerce. The importance of the creation of a uniform national market, however, has been also highlighted by demonstrating that the usual debate between the Federalist and Anti-Federalist was almost non-existent in this area.

Third, the chapter historically analysed the development of the application of the Commerce Clause: the decision in *Gibbons v Ogden*[1187] was analysed, particularly how Chief Justice Marshall devised the dual federalist interpretation of the Commerce Clause, to ensure that the federal and state governments could co-regulate the area of commerce in the dual, federal-state, system. Moreover, the section also emphasised that one of the characteristics of this interpretation was that state regulations could be held unconstitutional if they regulated areas where the regulatory power belonged to Congress exclusively.

The novel concurrent authority approach of Chief Justice Taney was subsequently examined. It was argued that even though Chief Justice Taney expressly rejected the

[1186] *Gibbons v Ogden* (n 100) 189 – 190 and 193 - 194.
[1187] *Gibbons v Ogden* (n 100).

previous dual federalist interpretation of the Dormant Commerce Clause, certain characteristics of the latter approach were still traceable in his unique approach. It was also highlighted that Chief Justice Taney recognised that certain subject matters were of 'truly national concern,'[1188] which may demonstrate that he supported the ideology of creating a uniform national market in certain areas of interstate commerce.

The national-local test originating from *Cooley v Board of Wardens of the Port of Philadelphia*[1189] was then argued to fall within the dual federalist interpretation of the Dormant Commerce Clause, but also to have adopted certain aspects of the concurrent authority approach. It was also claimed that a new area was created in this decision, which allowed Congress to transfer its exclusive authority to the states in the area of interstate commerce. Moreover, it was also argued that similar to Chief Justice Taney, Justice Curtis also recognised that certain subject matters were of national concern that needed to be addressed in a uniform manner nationally.

The reasons for the exclusion of 'manufacture' from the definition of commerce was subsequently analysed through *Kidd v Pearson.*[1190] This resulted in a brief period of regression to a decision based on the subject matter of the regulation, which consequently also led to the ideal of a national market being placed in the background.

On the other hand, the ideology returned with the direct-indirect test, where, if a state regulation placed a direct burden on the interstate commerce, it could not be upheld. This approach, however, proved ineffective in many cases related to the Dormant Commerce Clause. This resulted in the development of a modern two-tier test soon afterwards. Both tiers of the test have been analysed respectively and it was also demonstrated that a state regulation will be subject to a high level of judicial scrutiny under the modern test. Special emphasis has also been placed on the development of the first anti-discrimination tier, and how that may be closely related to the ideology of the creation of the national market as a constitutional value deemed worthy of protection under the living constitutional values approach.

[1188] McGinley (n 877) 413.
[1189] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).
[1190] *Kidd v Pearson* (n 1006).

It has, however, also been established that whereas it may seem that the powers of the states were consequently limited under the strict judicial scrutiny, a new trend may be identified where the regulatory powers of the states were, in fact, extended and not limited. After discussing the decisions of the Supreme Court under this new trend under four different groups, it seems that the ideal that the purpose of the Commerce Clause was that of creating a uniform national market has been pushed to the background.

In conclusion, it is argued that the constitutional uncertainty created by the lack of the definition of commerce has resulted in various interpretations of commerce and the Commerce Clause throughout the years. This development is argued to be in line with 'living Constitution' approach.[1191] Nevertheless, the variety of interpretations of what commerce means has resulted in legal uncertainties, which, consequently, materialised in debates around the constant conflict and the limits of the powers of the states and Congress.

Furthermore, it is argued that changes in the definition of commerce and the development of the Dormant Commerce Clause doctrine effectively resulted in the gradual return to the position, where states are restricted in their regulatory powers under the Commerce Clause, but are still allowed to enact certain discriminatory measures. This standpoint, however, seems remarkably similar to the one that ultimately called for the re-drafting of the Articles of Confederation, where the main problem was the lack of the authority of Congress to address the discriminatory state measures in a uniform manner. It, assuredly. seems that the four areas where the powers of the states have been increased may also result in the federal government being deprived of the opportunity to assert its authority over all areas of interstate commerce under the Dormant Commerce Clause. Consequently, under this position, it may be argued that both the fundamental questions posed after the adoption of the Commerce Clause have been answered: Congress was not granted exclusive authority to regulate all areas of interstate commerce, and states were not automatically limited from regulating in the area of interstate commerce.

[1191] Balkin (n 93).

As it is highly unlikely that a Constitutional Convention would be called nowadays, it is argued that the Justices of the Supreme Court have been interpreting the Commerce Clause from a standpoint that aimed to adapt to the developments and changes in each era of the decisions, often adopting a non-originalist method of interpretation. Whether our times require the return to discriminatory and protectionist measures by the states and limited regulatory powers possessed by Congress is questionable.

Chapter 5: Creating and subsequently protecting a uniform national market in the United States: Part II

The constitutional value set out in the Affirmative Commerce Clause

I. Introduction

Whereas the previous chapter concentrated on how the development of the dormant aspect of the Commerce Clause managed the constitutional uncertainties created by the Commerce Clause, this chapter sets out to examine how these uncertainties have been handled by the affirmative aspect of the Commerce Clause. Similar to Chapter 4, Chapter 5 will also examine whether the constitutional value of the creation and protection of the uniform national market has influenced the development of this aspect of the Commerce Clause.

As mentioned in the previous chapter, the positive or affirmative understanding of the Commerce Clause examines the power of Congress to regulate in the area of interstate commerce, and what the limits of this regulatory authority are.

The first part of this chapter will examine the initial textualist interpretation that the Supreme Court Justices adopted when making decisions about the affirmative Commerce Clause. It will also analyse how this formalistic interpretation relied on a division of interstate and intrastate commerce based on the subject matter of the challenged federal regulation. It will also demonstrate how the constitutional value of the creation of a uniform system of interstate commerce was already present in the first case based on the Commerce Clause following the adoption of the Constitution.

Subsequently, the chapter will analyse key decisions of the Supreme Court in this area until the Great Depression, and will categorise these based on the creation and development of interstate commerce as the purpose of the Commerce Clause and, thus, the constitutional value set out to provide protection for. The chapter will demonstrate that the previous textualist interpretation was adopted by the Justices in

one set of decisions, however, this method of interpretation also commenced to disappear with the passage of time.

The creation of the uniform national market and the constant conflict between the federal and state governments came to the limelight during the Great Depression once again. This chapter will demonstrate that the Great Depression resulted in the people of the United States recognising the importance of and the interconnectedness of their intrastate economies. The chapter will, subsequently, further study the reactions of the Supreme Court to the election of President Roosevelt, who wished for a stronger government policy about the national economy through the so-called New Deal. The Supreme Court Justices, whilst initially reluctant to accept the New Deal measures as constitutional exercises of the commerce power of Congress, in a somewhat surprising change, decided to uphold the subsequent measures and many federal legislation for decades. The fundamental cases of this era will, thus, be examined, placing special attention on whether the decisions were influenced by the purposes of the Commerce Clause and the resolution of the constant conflict between federal and state governments by the Court.

After a brief study of the subsequent cases that signalled a limitless extension of the national market and, thus, the power of Congress, the decisions in *United States v Lopez*[1192] and *United States v Morrison*[1193] will be analysed. This will demonstrate that the purpose of the Commerce Clause came to be interpreted differently at the time of these decisions, which consequently placed limits to the extension of the national market and the power of the federal government.

It will, however, subsequently be demonstrated that the restrictive interpretation of the Commerce Clause by the Supreme Court was rather short-lived, as it returned to extending the reach of the national market to areas, such as the home cultivation of marijuana in *Gonzales v Raich*,[1194] by adopting the newly devised classification of *United States v Lopez.*[1195]

[1192] *United States v Lopez* (1995) 514 US 549.
[1193] *United States v Morrison* (2000) 529 US 598.
[1194] *Gonzales v Raich* (2005) 545 US 1.
[1195] *United States v Lopez* (n 1192).

It, thus, came as a surprise to many that the Supreme Court held that the individual mandate of the Patient Protection and Affordable Care Act of 2010 was an unconstitutional exercise of the commerce power of Congress in *National Federation of Independent Business v Sebelius.*[1196] The decision will be examined, focusing on whether the Justices departed from the previous interpretations of the purpose of the Commerce Clause, and whether this decision demonstrates a realistic view of the national market in the United States of America at the moment.

II. Interstate market after the adoption of the Constitution

The initial discussions on the purposes and scope of the Commerce Clause, examined in the previous chapter, were all put to the test soon after the adoption of the Constitution.

II.1. Gibbons v Ogden

While *Gibbons v Ogden*,[1197] the first fundamental case about the Commerce Clause, was decided based on the dormant angle of this clause, it also established key principles about the affirmative aspect of this Clause.

In the decision of Chief Justice Marshall, two approaches may be identified, as discussed in the previous chapter. Adopting a 'formalistic'[1198] interpretation of the Commerce Clause, relying on defining the provisions in this clause, he firstly defined interstate commerce as 'intercourse' that was to do 'with the states,' that 'intermingled with' the states and that 'concern[ed] more States than one.'[1199] By 'intercourse,' it may be argued that he insinuated that commerce included all economic and non-economic activity that comprised of an 'interaction and exchange between

[1196] *National Federation of Independent Business v Sebelius* (2012) 567 US ___.
[1197] *Gibbons v Ogden* (n 100).
[1198] Norman R Williams, 'The Dormant Commerce Clause: Why Gibbons v Ogden Should Be Restored to the Canon' (2005) 49 Saint Louis University Law Journal 830.
[1199] *Gibbons v Ogden* (n 6) 189 – 190 and 193 - 194.

persons.'[1200] Consequently, interstate commerce could include any of the above activities reaching across the physical borders of each state.

Chief Justice Marshall secondly held that the regulatory power over this interstate commerce had been granted exclusively to Congress under the Commerce Clause.[1201] On the other hand, he also held that the states still retained their regulatory power over areas that concerned 'their own purely internal affairs, whether of trading or police.'[1202] He thereby devised a 'dual federalist'[1203] interpretation of commerce in the United States: Congress was to regulate interstate commerce and states were to regulate intrastate commerce. To decide which area the challenged legislations belonged to, Chief Justice Marshall held, would be based on the subject matter of the regulation.[1204]

Chief Justice Marshall thus aimed to resolve the constitutional uncertainty created in the Commerce Clause by creating an interpretation that relied on the differentiation of activities. However, such a differentiation would not necessarily resolve the constant conflict between the federal government and the states set out in Chapter 1 over which of them had power to regulate these activities.

Chief Justice Marshall recognised that based on his interpretation, interstate commerce did not necessarily correspond to the crossing of physical boundaries of a state, and thus might 'be introduced into the interior' of these boundaries.[1205] He thus argued that certain limitations had to be and were, in fact, imposed on the exclusive power of Congress to maintain this dual federalist structure. The limitations on this Congressional power were expressed through 'the Constitution's affirmative prohibitions on the exercise of federal authority,'[1206] which he identified as 'the wisdom and the discretion of Congress, their identity with the people [and] the influence which their constituents possess at elections.'[1207] However, it is argued that such a limitation

[1200] Balkin (n 841) 5. and Amar, *America's Constitution: A Biography* (n 47) 107.
[1201] *Gibbons v Ogden* (n 100); Corwin (n 101) 484.
[1202] *Gibbons v Ogden* (n 6) 209 - 210.
[1203] Corwin (n 101) 481.
[1204] Frankfurter (n 948) 30–31.
[1205] *Gibbons v Ogden* (n 100) 194; Arthur B Mark, 'Currents in Commerce Clause Scholarship since Lopez: A Survey' (2003) 32 Capital University Law Review 671, 674.
[1206] Tribe (n 171) 808.
[1207] *Gibbons v Ogden* (n 100) 197; Tribe (n 171) 808.

would have not provided a limitation with clear certainty. Moreover, arguing that people have influence over the Congress through elections also seems to ignore the constant threat in a republican government as discussed in Chapter 2: that of improper elections. It is, therefore, argued that reliance on this 'wisdom' and 'discretion of Congress' allows for highly political decisions to be made and a somewhat blind trust to be placed with Congress, without any checks and balances over its decision.

It may be inferred from the decision of Chief Justice Marshall, that one of the evident purposes of the Commerce Clause was the creation of a uniform system of interstate commerce that would be regulated centrally and exclusively by Congress. This has also been argued to have become a fundamental constitutional value that would be deemed protection under the living constitutional values approach, advocated for by this work. However, the constitutional uncertainties and the constant conflict that this clause has created did not disappear with this decision.

III. Interstate commerce: the various early approaches of the Supreme Court

In the decisions of the Supreme Court following *Gibbons v Ogden*[1208] and prior to the New Deal, the formalistic and dual federalist approaches adopted by Chief Justice Marshall may be clearly identified. This, however, not only resulted in the extension of the power of Congress in some cases, but also led to holding certain acts of Congress unconstitutional under the Commerce Clause.

III.1. Extending interstate commerce

Firstly, in cases following *Gibbons v Ogden*[1209] an extension of the reach of the system of interstate commerce may be observed. This was achieved through the extension of the regulatory powers of Congress, adopting a dual federalist approach.

[1208] *Gibbons v Ogden* (n 100).
[1209] ibid.

In the first line of cases that may be identified, and similar to the original approach adopted to cases decided by the Supreme Court under the Dormant Commerce Clause, reliance was placed on the definition of interstate commerce. In *United States v Marigold,*[1210] the Supreme Court held that the 'power to regulate commerce' also included 'the power to exclude commerce.'[1211] Subsequently, in *The Daniel Ball*[1212] adopting this interpretation of interstate commerce, the Supreme Court held that interstate commerce included requiring the 'licensing of [all] ships' that were transporting articles of commerce that originated from or were 'destined for' another state.[1213]

On the other hand, a novel interpretation also seemed to emerge in this case to justify the extension of this area of commerce. The Supreme Court, intriguingly, held that Congress could regulate the previously exclusive intrastate licensing requirements based on an approach that - instead of placing an emphasis on the differentiation of interstate commerce - argued for the prevention of harm to interstate commerce. The Supreme Court, thus, held that the safety of the vessels participating in this kind of commerce not only had an effect, but could also 'harm' interstate commerce.[1214] Moreover, this approach strongly signals that the creation of a unified national market was one of the key reasons for the enforcement of the Commerce Clause of the era. This approach, thus, further supports the ideology that the creation of this market was also deemed to be a constitutional value.

This novel approach was consequently adopted when extending the activities that were to be included in the system of interstate commerce. *Champion v Ames*[1215] transformed the interpretation of interstate commerce once again, however, this time, in the area of lottery tickets. The Supreme Court in this decision ultimately allowed Congress to regulate this area, after examining the purpose of the challenged federal

[1210] *United States v Marigold* (1850) 50 US (9 How) 560.
[1211] ibid 566 - 567; Tribe (n 171) 808.
[1212] *The Daniel Ball* (1871) 77 US (1 Wall) 557.
[1213] Tribe (n 171) 808; Chemerinsky, *Constitutional Law* (n 77) 161.
[1214] Chemerinsky, *Constitutional Law* (n 77) 161.
[1215] *Champion v Ames* (1903) 188 US 321.

regulation on the sale of lottery tickets. The Court found the federal law was constitutional because the aim of the regulation was to protect the nation as a whole 'from the evils that inhere in the raising of money' through lottery.[1216] Whilst seemingly quite a policy-driven approach, this decision still appears to follow the dual federalist approach, as it declared that such activity could only be regulated by Congress through the 'prohibition of interstate shipments' of lottery tickets.[1217] On the other hand, this approach further demonstrates that the protection of the nation as a whole and the creation of a uniform national market was a fundamental constitutional value.

With the passing of time, the Supreme Court commenced to abandon the dual federalist approach for Commerce Clause cases. Instead, it decided to rely on the above two cases and their novel aspects: the effect that the federal regulation has on interstate commerce. In *Swift & Co v United States,*[1218] the Supreme Court held that if the effects of the activity were direct, i.e. the activity was placed in 'a current of commerce among the States,' it formed part of interstate commerce and could be regulated by Congress.[1219] Thus, it was held on this basis, that Congress was allowed to prohibit 'price-fixing in livestock markets' under the Sherman Antitrust Act.[1220]

Justice Hughes subsequently adopted this novel direct effect test in his decision in the subsequent *Shreveport Rate Cases*.[1221] He held that the Interstate Commerce Commission was allowed 'to set intrastate railroad rates' as those had a direct, 'close and substantial effect on interstate commerce.'[1222] Spreading the reach of interstate commerce into clearly intrastate areas, firstly, resulted in the regulatory powers of the state being reduced. Moreover, this position highlights the importance of interstate commerce: this would take priority over intrastate commerce at all occasions, since it

[1216] ibid 356; Chemerinsky, *Constitutional Law* (n 77) 168.
[1217] Lino A Graglia, 'United States v Lopez: Judicial Review under the Commerce Clause' (1995) 74 Texas Law Review 719, 734. An examination of decisions similar to that in this case may be found in the judgment of Justice Day in *Hammer v Dagenhart* (1918) 247 US 251, 270–271.
[1218] *Swift & Co v United States* (1905) 196 US 375.
[1219] ibid 399; Chemerinsky, *Constitutional Law* (n 77) 166.
[1220] Tribe (n 171) 810; *Swift & Co v United States* (n 1218) 394.
[1221] *Shreveport Rate Cases* (1914) 243 US 342.
[1222] ibid 351; Arthur B Mark, 'United States v Morrison, the Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power' (2000) 34 Creighton Law Review 675, 703; Williams, 'The Commerce Clause and the Myth of Dual Federalism' (n 1008) 1893.

may be argued that the protection of the state powers over that of the creation of a uniform national market as a constitutional value took priority. Physical state boundaries in this area were no longer relevant for these regulatory purposes.

On the other hand, recognising the implications of this extension of powers, Justice Hughes placed certain limitations on the regulatory powers of Congress, while also considering the protection of the uniform national market as a fundamental constitutional value. A federal regulation had to firstly demonstrate that the measures imposed were 'necessary or appropriate to' attain the end of 'foster[ing] and protect[ing] interstate commerce.'[1223] Such an end could be classified as 'the security of [interstate] traffic, […] the efficiency of the interstate service, and […] the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.'[1224] It appears that the limits of the power of Congress commenced to become identified in line with the purpose of the Commerce Clause that argued for the development of interstate commerce through the creation of the national market, including its protection, as set out initially in the Federalist Papers.[1225] It is, however, also argued that with the passage of time the Supreme Court commenced to recognise that such a market should not become limitless, since it may result in placing too much power in the hands of Congress. This would, thus, be completely contrary to republican values and defeat the aim of the constitutional values as a whole.

It may therefore be established that before the arrival of the Great Depression, the Supreme Court already commenced to recognise that the dual federalist interpretation of the Commerce Clause was no longer a viable approach in the evolving interstate market. It also emerges from the above decisions that it was no longer intrastate commerce that had to be protected from interstate commerce, but the Supreme Court would have to adopt its interpretative approach to the extended system of interstate commerce that was progressively developing. This system was regarded so essential in the United States, and was deemed by Congress and the Supreme Court to require

[1223] *Shreveport Rate Cases* (n 1221).
[1224] ibid 351.
[1225] Hamilton and Madison (n 920) No 14 67.

protection from the damaging effects of certain intrastate commercial activities. This clearly signals a shift in this approach, in line with the economic developments of the era.

On the other hand, in a second line of cases, it may be demonstrated that the Supreme Court was not always willing to extend the reach of this interstate system to areas that were previously regulated by the states.

III.2. Protecting the powers of the states over certain areas of intrastate commerce

It has been demonstrated in the above line of judgments, that following the decision in *Gibbons v Ogden*,[1226] the Supreme Court aimed to resolve the constant conflict between the federal and state governments in this area, and protect the creation of a uniform national market, by further extending the powers of the federal government, allowing for the expansion of a uniform system of interstate commerce. Such an approach, however, is not apparent in the decisions declaring federal regulations unconstitutional under the Commerce Clause. The interpretation that the Justices adopted to hold such acts unconstitutional may also be characterised into two groups, which were based on the formalistic and dual federalist interpretation of the Commerce Clause.

2.1. Traditional state police powers

The cases that may be firstly grouped together relied on the dual federalist interpretation to hold federal regulations unconstitutional by examining whether the subject matter of the challenged federal regulation constituted – as declared in *Gibbons v Ogden*[1227] - 'police power' of the states.[1228]

[1226] *Gibbons v Ogden* (n 100).
[1227] ibid.
[1228] *Gibbons v Ogden* (n 6) 209 – 210.

Of key importance is the decision in *United States v Dewitt,*[1229] where an Act of Congress was held unconstitutional under the Commerce Clause for the first time.[1230] The challenged Act criminalised 'the sale of grades of naphta or illuminating oils that burned at a temperature of less than 110 degrees Fahrenheit.'[1231] Chief Justice Chase held, based on the dual federalist approach, that the Commerce Clause was understood as 'a virtual denial of any power to interfere with the internal trade and business of the separate States.'[1232] He subsequently declared that this act was 'a police regulation, relating exclusively to the internal trade of the States,'[1233] the regulatory power over which belonged to the states and not to Congress.[1234] By re-establishing the importance of physical state boundaries, the defendant in the case, who was selling oils contrary to the above Act merely within his state, therefore, could not be charged with a criminal activity under that act.[1235]

It may, however, also be highlighted that similar to the limits placed on Congress by Justice Hughes in the *Shreveport Rate Cases,*[1236] Chief Justice Chase recognised that certain exceptions to the dual federalist interpretation of the Commerce Clause existed. Such exception, Chief Justice Chase held, existed when it could be demonstrated that federal regulation was 'a necessary and proper means for carrying into execution some other power expressly granted or vested' to Congress.[1237] It could be argued that the commercial activity could become part of interstate commerce through its regulation by the exercise of another enumerated power of Congress under the Constitution. In the current case, Chief Justice Chase held that this had not been proven as the enactment of the prohibition of the sale of these oils was 'merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.'[1238]

[1229] *United States v Dewitt* (1870) 76 US (9 Wall) 41, 41; Tribe (n 171) 809; Mark (n 1222) 696; Chemerinsky, *Constitutional Law* (n 77) 161.
[1230] Tribe (n 15) 809; Mark (n 31) 696; Chemerinsky (n 22) 161.
[1231] *United States v Dewitt* (n 38) 42.
[1232] *United States v Dewitt* (n 62) 44.
[1233] ibid 45.
[1234] Tribe (n 171) 809; Chemerinsky, *Constitutional Law* (n 77) 161–162.
[1235] *United States v Dewitt* (n 62) 45; Mark, 'United States v. Morrison, the Commerce Clause and the Substantial Effects Test' (n 56) 696.
[1236] *Shreveport Rate Cases* (n 1221).
[1237] *United States v Dewitt* (n 62) 44.
[1238] ibid.

'This consequence,' he held, was 'too remote and too uncertain' to include it under the exception highlighted.[1239]

The adoption of the dual federalist approach, however, continued in *The Trademark Cases*,[1240] where the Supreme Court held that the establishment of a uniform and federal trademark registration system was unconstitutional under the Commerce Clause.[1241] Justice Miller held that the regulation and enforcement of trademarks had belonged to the states traditionally, who had also been exclusively entrusted with 'the security and protection' of these.[1242] Consequently, the challenged Act that merely attempted to regulate previously existing trademark registration and enforcement, and did not make specific reference to the regulation of trademarks that were 'to be transported from one State to another,' was held unconstitutional under the Commerce Clause.[1243] Subsequently, it has now become an integral requirement under the current federal trademark registration system to use the registered federal trademark in interstate commerce.[1244]

Based on the above cases, another aspect of the Commerce Clause materialised. If Congress attempted to regulate activities the regulation over which was considered a traditional state power, and the market seemed to constitute an integral part of intrastate commerce, these could not become part of interstate commerce and had to be protected from such an invasion of sovereignty. However, returning to the dual federalist approach, if the activities involved the crossing of state borders, they could immediately become part of interstate commerce, thus rendering the distinction challenging to establish.

2.2. A restrictive interpretation of commerce

[1239] ibid.
[1240] *The Trademark Cases* (1878) 100 US (10 Otto) 82.
[1241] Chemerinsky, *Constitutional Law* (n 77) 162.
[1242] *The Trademark Cases* (n 71) 92-93.
[1243] *The Trademark Cases* (1878) 100 US (10 Otto) 82, 97 - 98.
[1244] 'Fact Sheets Selecting and Registering a Trademark' (*International Trademark Association*) <http://www.inta.org/TrademarkBasics/FactSheets/Pages/StateTrademarkRegistrationsUSFactSheet.aspx> accessed 10 April 2014.

The second group of cases also followed the dual federalist approach, however, they relied on adopting a more restrictive formalistic interpretation of commerce than the one adopted by Chief Justice Marshall, which included all 'intercourse,'[1245] to hold federal laws unconstitutional.

The case of *United States v EC Knight*[1246] involved questioning whether the Sherman Antitrust Act prohibiting the creation of monopolies applied to the nation-wide acquisition activities of American Sugar. Even though American Sugar acquired 'over 98% of the refined sugar manufacturing capacity in the US,' Chief Justice Fuller held that the regulation of commerce did not include manufacture. [1247] Thus, he held that the Sherman Antitrust Act did not apply to their acquisition activities.[1248] 'Manufacturing,' the Court argued, 'involved turning raw materials into finished products, while commerce […] involved transportation of finished goods between the states.'[1249] Manufacturing activities could, therefore, not become part of interstate commerce, regardless of their importance on the interstate market, and Congress could not regulate these uniformly.

The Supreme Court adopted the same approach in *Hammer v Dagenhart,*[1250] which included a challenge to the Owen-Keating Child Labor Act that was to regulate child labour in mines and factories.[1251] Arguably disregarding the purpose of the Act - protecting children while regulating child labour, - Justice Day held that since this Act was to regulate 'the production of articles' and not 'commerce,' it was to be regulated by states and was thus unconstitutional under the Commerce Clause.[1252] According to him, an activity became part of interstate commerce 'by [the] actual delivery [of the product] to a common carrier for transportation; or the actual commencement of its

[1245] *Gibbons v Ogden* (n 6) 189 – 190 and 193 - 194.
[1246] *United States v EC Knight* (1895) 156 US 1.
[1247] Mark (n 1205) 677; Mark (n 1222) 701.
[1248] Mark (n 1205) 677; Mark (n 1222) 701.
[1249] *United States v EC Knight* (n 1246) 14.
[1250] *Hammer v Dagenhart* (n 1217).
[1251] ibid 275; Vanue B Lacour, 'The Misunderstanding and Misuse of the Commerce Clause' (2003) 30 Southern University Law Review 187, 190.
[1252] Lacour (n 1251) 190; *Hammer v Dagenhart* (n 1217) 272.

transfer to another state.'[1253] The production, therefore, regardless of its purpose, could not be regulated by Congress under the Commerce Clause.

It would, therefore, seem that a wide interpretation of commerce was no longer an acceptable method for the Supreme Court to determine whether the regulated activity formed part of the interstate system. This view, however, is in stark contrast with the decisions where the Justices opted to extend the limits of this interstate system, recognising the interconnectedness of not only the regulated activities, but their markets as well.

Based on the above it may be established that the Justices of the Supreme Court before the Great Depression devised various distinct methods to determine whether an Act of Congress adopted under the Commerce Clause was constitutional. It, however, appears, that if they agreed that an activity formed an integral part of the constantly evolving interstate commerce, they were willing to adopt new interpretations of the Commerce Clause. At the same time, they were also ready to revert to the dual federalist approach or devise a more restrictive formalistic interpretation of the Commerce Clause to protect activities traditionally governed by states or when they considered the regulated activities to be merely intrastate with no physical state crossing involved.

However, as argued above, it may also be claimed that the protection of the rights of states to regulate certain areas could be regarded a constitutional value that was deemed more important based on the circumstances of each than that of the creation of a uniform national market.

IV. The Great Depression: signs of an even more interconnected economy?

Similar to the most recent financial crisis, which demonstrated the current interconnectedness of the global economy, one of the key aspects that the Great Depression demonstrated was how the 'entire American economy was

[1253] *Hammer v Dagenhart* (n 1217) 272.

interconnected,' and could be affected by harm caused to even one of its parts.[1254] To manage the harmful effects of the Great Depression, President Franklin Roosevelt was elected, who advocated for a more powerful federal government to ensure that the nation as a whole would be saved from 'economic ruin.'[1255] In order to succeed with his programme devised for this purpose called the 'New Deal,'[1256] however, he needed a degree of co-operation from all branches of the federal government with his programme. On the other hand, the co-operation he required from the judiciary was not present initially. A distinctive feature of these initial decisions is the stance that Supreme Court took towards the interpretation of the Commerce Clause.

One of the first federal acts enacted as part of the New Deal programme was the National Industrial Recovery Act, which in its preamble declared how the Great Depression 'burdened interstate commerce' and amongst other provisions, required the payment of 'minimum wages and maximum hours of labour.'[1257] The Live Poultry Code, enacted pursuant to this Act, laid down the same requirements for those working in slaughterhouses.[1258]

In *ALA Schechter Poultry Corp v United States,*[1259] it was argued that a slaughterhouse in Brooklyn violated the above Code,[1260] resulting in the challenge of the National Industrial Recovery Act under the Commerce Clause. The federal government, adopting the approach of the Supreme Court when it decided to extend the scope of interstate commerce based on the effect of the activities on interstate commerce, claimed that 'the wages and hours of slaughterhouse employees and the quality of birds sold' had an effect on interstate commerce as it 'influenc[ed] the price,

[1254] Eric R Claeys, 'The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison' (2002) 11 William & Mary Bill of Rights Journal 403, 426. 426.
[1255] Barry Cushman, *Rethinking the New Deal Court : The Structure of a Constitutional Revolution* (Oxford University Press 1998) 3; Donald G Morgan, *Congress and the Constitution : A Study of Responsibility* (Belknap Press of Harvard University Press 1966) 163.
[1256] Cushman (n 1255) 3.
[1257] ibid 156; Claeys (n 1254) 427.
[1258] Cushman (n 1255) 156.
[1259] *ALA Schechter Poultry Corp v United States* (1935) 295 US 495; Chemerinsky, *Constitutional Law* (n 77) 165; Tushnet (n 83) 165–166.
[1260] Cushman (n 1255) 156.

quantity, and quality of poultry shipped from one state to another.'[1261] It may further be claimed that their approach adopted the viewpoint that the creation and protection of a national market was, in fact, a constitutional value.

The Supreme Court, however, refused to accept these arguments. Justice Hughes, in delivering the opinion of the Court, held that the National Industrial Recovery Act was 'an unconstitutional delegation of authority,' and the Live Poultry Code was therefore invalid.[1262] He subsequently, however, devoted a separate part of his opinion to whether the activities of the defendants could constitute part of interstate commerce, if the Code had been upheld.[1263] In doing so, he first devised a novel approach to hold that the intrastate origin of the article of commerce was no longer relevant. It was its interstate destination, he held, that determined whether it formed part of the interstate system.[1264] Once the article 'had come to a permanent rest within the State' and was not being 'held, used, or sold' for interstate purposes,[1265] it left the 'stream of interstate commerce.'[1266] Once it had done so, it was no longer subject to uniform regulation by Congress, but was to be regulated by the states.

It is argued that this approach followed the first group of cases relying on the dual federalist approach analysed above, and traces of that approach may also be identified subsequently in the case. For instance, Justice Hughes, consequently returned to his decision in the *Shreveport Rate Cases*,[1267] and accepted the view that Congress could regulate certain intrastate commercial activities, but such a regulation – consistent with the purpose of the Commerce Clause – had to be enacted with the aim of preventing 'interstate commerce' from harm caused by the intrastate activities.[1268] It is, thus, claimed that he seemed to have recognised the creation and protection of a uniform national market as a constitutional value the Commerce Clause

[1261] David P Currie, 'The Constitution in the Supreme Court: The New Deal, 1931-1940' (1987) 54 The University of Chicago Law Review 504, 524; Cushman (n 1255) 158.
[1262] Cushman (n 1255) 157.
[1263] ibid.
[1264] ibid 158; Mark (n 1222) 710.
[1265] Cushman (n 1255) 158; Mark (n 1222) 710.
[1266] Cushman (n 1255) 158.
[1267] *Shreveport Rate Cases* (n 1221).
[1268] Currie (n 1261) 524.

was set out to protect. He subsequently argued that the aim of Congress through the National Industrial Recovery Act was 'merely the regulation of cost,' which amounted to 'a question of discretion and not of power,'[1269] and thus could not be upheld under the above exception. It is interesting to highlight this activity could not be regulated under the Commerce Clause in *Hammer v Dagenhart*,[1270] however, it was held otherwise in this case.

Justice Cardozo further claimed that 'to find immediacy or directness here is to find it almost everywhere.'[1271] His opinion supported the rejection of the extension of interstate commerce to include activities of interstate origin, but with no interstate destination.[1272] He claimed that such an extension would have resulted in an encroachment upon the unenumerated powers of the states that was to be protected under the Tenth Amendment.[1273] It seems, therefore, that Justice Cardozo placed more of an emphasis on the protection of state powers as a constitutional value rather than focusing on the protection of interstate commerce from the probable harmful effects of intrastate activities as a constitutional value.

It, however, should not be forgotten that one of the main aims of the New Deal programme was to ensure that the nation as a whole was set on the road to recovery from the Great Depression. If this aim was to be attained through a nation-wide programme, the evaluation by the Supreme Court of each challenge under the Commerce Clause individually meant that this aim of the New Deal programme was placed in grave jeopardy. However, if Congress was to regulate areas previously regulated by the state in the 'national interest,' the only method available to oversee and challenge such an expansion of powers was through the Supreme Court.

Another area of commerce where the federal government recognised nationwide problems was the bituminous coal industry, which was at 'a state of collapse' by the

[1269] ibid.
[1270] *Hammer v Dagenhart* (n 1217).
[1271] *ALA Schechter Poultry Corp v United States* (n 1259) 554.
[1272] As Justice Cardozo held: "To find immediacy or directness here is to find it almost everywhere." See Graglia (n 1217) 739.
[1273] See for instance, Currie (n 1261) 525.

time of the Great Depression following long-lasting troubles.[1274] An attempted answer to this problem was the adoption of the Bituminous Coal Act 1935, which set out 'wage and price standards'[1275] in the industry, and also imposed a 'heavy tax' on coal 'producers' who refused to join the Bituminous Coal Code.[1276]

This Act was challenged in *Carter v Carter*,[1277] where the majority of the Supreme Court Justices found that the Act was unconstitutional under the Commerce Clause from the formalistic interpretation approach and following the effects test. Justice Sutherland firstly held, seemingly reviving the decision in *United States v EC Knight*[1278] and adopting the restrictive interpretation of commerce, that Congress could not regulate the bituminous coal industry since the coal industry included activities of 'production, not […] commerce.'[1279] Despite the different approach adopted in *ALA Schechter Poultry Corp v United States,*[1280] Justice Sutherland seemed to prefer the approach adopted in the earlier case of *Hammer v Dagenhart*.[1281]

The intended interstate destination of the produced article of commerce, he held, was no longer relevant,[1282] since the aim of production was to bring 'into being' the article and 'commerce disposed of it.'[1283] Consequently, the article of commerce only became part of interstate commerce after 'negotiations, agreements and circumstances entirely apart from production' commenced about its 'disposal.'[1284] Thus, the line of where interstate commerce began was no longer set at the production of the article with the purpose of being sold on the interstate market, but was pushed to the end of the production process. However, it may be argued that negotiations and agreements could have commenced even before the production of the article was initiated, thus

[1274] Robert L Stern, 'The Commerce Clause and the National Economy, 1933-1946' (1946) 59 Harvard Law Review 645, 664.
[1275] Currie (n 1261) 529.
[1276] Stern (n 1274) 666.
[1277] *Carter v Carter Coal Co* (1936) 298 US 238.
[1278] *United States v EC Knight* (n 42).
[1279] *Carter v Carter Coal Co* (n 1277) 303; Currie (n 1261) 525.
[1280] *ALA Schechter Poultry Corp v United States* (n 1259); Chemerinsky, *Constitutional Law* (n 77) 165; Tushnet (n 83) 165–166.
[1281] *Hammer v Dagenhart* (n 1217).
[1282] *Carter v Carter Coal Co* (n 1277) 301.
[1283] ibid 303–304.
[1284] ibid 304.

making the decision when interstate commerce began quite blurred. Justice Sutherland, however, justified his differentiation by arguing that all articles in interstate commerce that were of local origin, such as 'mining, manufacturing, or crop growing' could, in effect, be argued to form part of interstate commerce otherwise.[1285]

Justice Sutherland also acknowledged that, despite not forming part of commerce, all production activities could be held to have an effect on interstate commerce. Nevertheless, Congress was only allowed to regulate those with 'direct' effects.[1286] For such a determination, he argued, the Court would look 'not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.'[1287] Therefore, if there was 'an intervening agency or condition' and the extent of the effect is not 'logical[ly]' related to 'its character,' such as in the current case, he held that the effect was an indirect one.[1288]

He further seemed to have, however, adopted the view that the protection of the national market should be recognised as a constitutional value. His opinion, thus, also focused on the protection of interstate commerce from 'evils' as a purpose of the Commerce Clause.[1289] However, he differentiated these 'evils' as being of 'local' and 'national' concern, and held that it was only the evils of national concern that could be regulated uniformly by Congress on national level.[1290] It is, therefore, argued that in his approach to the protection of this value he also adopted a somewhat dual federalist approach, focusing on the differentiation between what constituted federal and state concerns.

It consequently seemed that President Roosevelt would not achieve the required co-operation from the Supreme Court to achieve the aims of his New Deal programme, and the Justice would return to the approach that was aimed at protecting those areas

[1285] ibid.
[1286] ibid 307.
[1287] ibid 308. and Currie (n 1261) 525–526.
[1288] *Carter v Carter Coal Co* (n 103) 307-308.
[1289] ibid 308–309.
[1290] ibid.

that used to be regulated by the states from Congressional overreach. The famous 'switch' in the attitude of the Justices towards the New Deal was, however, near.[1291]

V. The switch in time that saved nine

Whilst the Justices of the Supreme Court were initially hesitant to uphold the Acts enacted under the New Deal programme under the Commerce Clause, their position, and mainly that of Justice Roberts, transformed radically in 1937.[1292] Whether this was an effect of the Court packing plan announced by President Roosevelt or the realisation by the Justices that the interconnected nature of the national economy required a nation-wide response and a powerful federal government, is still debated.[1293]

V.1. Close and substantial relation to interstate commerce

The first sign of this transformed approach became apparent in *NLRB v Jones & Laughlin Steel Corp,*[1294] in which the National Labor Relations Act was challenged under the Commerce Clause. The defendant in the case was a 'steelmaker' processing 'ores' of interstate origin and placing three quarters of 'its products in interstate commerce.'[1295]

The question, thus, became whether the Supreme Court would follow the restrictive interpretation and hold that the regulated activities merely concerned production following the decision in *Carter v Carter*,[1296] or whether it would adopt the approach that could argue that the activities of the steelmaker were situated in the 'current of commerce' following the decision in *Swift & Co v United States.*[1297]

[1291] G Edward White, *The Constitution and the New Deal* (Harvard University Press 2000) 202.
[1292] Chemerinsky, *Constitutional Law* (n 77) 169.
[1293] ibid.
[1294] *NLRB v Jones & Laughlin Steel Corp* (1937) 301 US 1.
[1295] Currie (n 1261) 543.
[1296] *Carter v Carter Coal Co* (n 1277).
[1297] *Swift & Co v United States* (n 1218).

Chief Justice Hughes surprisingly devised a somewhat novel interpretation of the concept of interstate commerce instead of following either approaches.

He, firstly, held that instead of focusing on the subject matter of the regulation and their nature, the emphasis should be placed on the relation of the activities in question to interstate commerce.[1298] If this relation of the activities was 'close and substantial,' making the 'control [of these activities] essential or appropriate to protect that commerce from burdens and obstructions,' he held that the regulatory power over these should belong to Congress.[1299] Even though Chief Justice Hughes placed the emphasis on the 'close and substantial […] relationship'[1300] in this case, it may be key to highlight that the same 'close and substantial' nature was already present in the earlier case of the *Shreveport Rate Cases*.[1301] The only distinguishing feature was the reference was now to a 'relationship' and not to an 'effect,' hence the reference to this interpretation as 'somewhat novel' above.

Furthermore, this approach also appears to correspond to the purpose of the Commerce Clause and the fundamental constitutional value it sets out to protect being the protection of interstate commerce in order to enhance its development. Subsequently, this becomes apparent in his claim that the commerce power of Congress included the plenary 'power to enact "all appropriate legislation"' as long as its aim was to protect or advance interstate commerce, "promote its growth and insure its safety" and "to foster, protect, control and restrain" it.[1302]

Chief Justice Hughes, however, recognised that this novel 'open-ended test'[1303] resulted in the inclusion of certain activities in interstate commerce, that if examined separately, would have been considered intrastate.[1304] On the other hand, he argued that such an examination required the Court to assess the activities in an 'intellectual

[1298] Williams, 'The Commerce Clause and the Myth of Dual Federalism' (n 1008) 1909.
[1299] *NLRB v Jones & Laughlin Steel Corp* (n 117) 37.
[1300] ibid.
[1301] *Shreveport Rate Cases* (n 1221).
[1302] *NLRB v Jones & Laughlin Steel Corp* (n 1294). 36 - 37. This decision also seems to adopt the language of his previous decision in *Shreveport Rate Cases* (n 55) and *ALA Schechter Poultry Corp v United States* (n 70). See also Chemerinsky, *Constitutional Law* (n 77) 165; Tushnet (n 83) 165–166.
[1303] Claeys (n 1254) 430.
[1304] Stern (n 1274) 680; Claeys (n 1254) 430.

vacuum,'[1305] which would have been unrealistic in the interconnected economy of the United States, which was in effect reflecting the experience of the people of the United States at the time.[1306]

Chief Justice Hughes, relying on this non-originalist method of interpretation that adapted to the circumstances of each era, thus upheld the National Labor Relations Act to be constitutional under the Commerce Clause. In reaching this decision, he argued that a conflict in the steel industry 'would have […] immediate and catastrophic effects […] upon interstate commerce.'[1307] Congress was allowed to exercise its regulatory powers uniformly over this national area. Consequently, this allowed Congress to regulate employment practices in the area to protect the employees from the 'unfair labor practices of their employer,' which was held to be in 'close and substantial' relation with interstate commerce.[1308]

The above test was soon adopted by the Supreme Court and utilised to extend the powers of Congress in *Santa Cruz Fruit Packing Co v NLRB.*[1309] In this case the characterisation was further defined as that between 'remote' and 'close and substantial' effects.[1310] The determinant for which category the activity belonged to was held to be 'one of degree' and not one that was to be expressed in "mathematical or rigid formulas."[1311] This position, thus, indicated that the non-originalist method of interpretation was held to be more suitable for this area of constitutional law.

In *NLRB v Fainblatt*[1312] this 'close and substantial' relation was further identified as one not requiring a considerable amount of ownership as even 'relatively small units' could amount to "in the aggregate a vast volume of interstate commerce."[1313] The activities of an employer not engaged in interstate commerce could, thus, become part

[1305] Stern (n 1274) 680.
[1306] Barry Friedman and Genevieve Lakier, '"To Regulate," Not "To Prohibit": Limiting the Commerce Power' (New York University School of Law 2013) Working Paper No 13-13 <http://papers.ssrn.com/abstract=2244496> accessed 14 February 2014.
[1307] Stern (n 1274) 680; Mark (n 1205) 678; Currie (n 1261) 543.
[1308] *NLRB v Jones & Laughlin Steel Corp* (n 117) 473.
[1309] *Santa Cruz Fruit Packing Co v NLRB* (1938) 303 US 453.
[1310] Stern (n 1274) 683.
[1311] ibid.
[1312] *NLRB v Fainblatt* (1939) 306 US 601.
[1313] Stern (n 1274) 683.

of interstate commerce if those had a substantial and close effect on it.[1314] This decision, therefore, extended the scope of interstate commerce into areas within the physical state boundaries, reducing the importance of these under this novel interpretation.

The Supreme Court further extended the powers of Congress under the part of the test that followed the purpose of the Commerce Clause and required the federal regulation 'to foster, protect, control and restrain' interstate commerce[1315] in *United States v Carolene Products*.[1316] Justice Stone held in this case that the regulatory powers of the states could in fact be encroached upon by the federal government. However, this was only possible if the aim of the federal regulation was 'to protect consumers in the state of destination with respect to health and fraud.'[1317] It may be argued that the initial approach developed in the *Shreveport Rate Cases*[1318] arguing for the protection of interstate commerce as a constitutional value was also extended to the actual protection of individuals as a result of uniform interstate regulations in this case.

In the subsequent decision in *Mulford v Smith*[1319] Justice Roberts further extended the reach of interstate commerce by holding that Congress was allowed to 'regulate the quantity of a commodity,' which effectively resulted in the 'control' of 'the amount produced in an interstate industry.'[1320] He also decided that the 'legislative motive' of Congress was no longer relevant even if that was to control an activity that was previously held to be clearly intrastate based on its subject matter.[1321]

V.2. Any reasonable mean allowed to attain the purpose of the Commerce Clause

[1314] *Consolidated Edison v NLRB* (1938) 305 US 197, 222; Stern (n 1274) 684.
[1315] *NLRB v Jones & Laughlin Steel Corp* (n 117) 36 - 37.
[1316] *United States v Carolene Products Co* (1938) 304 US 144.
[1317] Stern (n 1274) 685.
[1318] *Shreveport Rate Cases* (n 1221).
[1319] *Mulford v Smith* (1939) 307 US 38.
[1320] Stern (n 1274) 692.
[1321] ibid.

The second of the three fundamental cases that represent 'the switch in time that saved nine'[1322] was *United States v Darby*.[1323] The case concerned a challenge by 'a lumberyard in Georgia' to the requirement of a minimum wage to be paid to employees of 'industries engaged in "production for interstate commerce"' of the Fair Labor Standards Act of 1938 under the Commerce Clause.[1324]

Justice Stone, in delivering the unanimous decision of the Court, upheld the Fair Labor Standards Act of 1938 as constitutional, 'explicitly overrul[ing]'[1325] the decision in *Hammer v Dagenhart.*[1326] Firstly, he appears to have adopted the transformed viewpoint that one of the purposes of the Commerce Clause was the protection of individuals in the United States through uniform national regulation. He thus held that the Act was a 'means reasonably adapted to the attainment of the permitted end,'[1327] which end could include the 'preservation of public health, morals or prevention of crime.'[1328] The permitted end in the Act in question was found to be to 'protect against the adverse effects of low wages on interstate commerce' and to assist 'to effectuate the exclusion from interstate trade.'[1329] It is, however, highlighted that the protection of individuals from such evils was previously considered to be the responsibility of the states.

It emerges from the above decisions that following the Great Depression, such a responsibility was progressively placed in the hands of Congress. Justice Stone further held that since the challenged Act was used as a 'suppression of unfair methods' in interstate commerce,[1330] the activities regulated had become part of the national system to enhance their development. Consequently, through the Fair Labour

[1322] Chemerinsky, *Constitutional Law* (n 77) 169.
[1323] *United States v Darby* (1941) 312 US 100.
[1324] White (n 1291) 227.
[1325] Currie (n 1261) 545.
[1326] *Hammer v Dagenhart* (n 1217).
[1327] Robert L Stern, 'The Commerce Clause and the National Economy, 1933-1946. Part Two' (1946) 59 Harvard Law Review 883, 889.
[1328] ibid 888.
[1329] Currie (n 1261) 545; Mark (n 1222) 715.
[1330] Stern (n 1327) 889; Friedman and Lakier (n 1306) 285.

Standards Act, all employees in production activities would be guaranteed uniform minimum 'labour conditions' constitutionally.[1331]

With the passage of time and the adoption of the living constitutional values method of interpretation of the Constitution, it may, thus, be argued that Justice Stone in his decisions allowed the Constitution to adapt to the circumstances of each era.

Whereas previously the Supreme Court attempted to define the limits of this Congressional power, Justice Stone further appeared to have handed this responsibility back to 'Congress to determine public policy' and the limits of its own powers under the Commerce Clause.[1332] He also claimed that the Tenth Amendment 'states but a truism that all is retained, which has not been surrendered'[1333] and that the Court would no longer examine the motive for the enactment of the federal regulation.[1334] It thus seems that Justice Stone in fact attempted to abolish the judicial limits of the extent of interstate commerce,[1335] while maintaining, however, that Congressional limits could be established to this network based on public policy.

V.3. All activities are economically interdependent

The third fundamental case demonstrating the 'switch' was *Wickard v Filburn*.[1336] In this case, Filburn, the owner of 'a relatively small farm' brought a challenge of the Agricultural Adjustment Act of 1939 to the Supreme Court on constitutional grounds after he was asked to pay a penalty for using more than double of the size of the allotment granted to him under the above Act.[1337]

Filburn argued that he did not intend for all the harvest to be destined for neither the interstate, nor the intrastate market, but mostly utilised these for home consumption

[1331] Mark (n 1222) 715.
[1332] Stern (n 1327) 889.
[1333] *United States v Darby* (n 146) 124.
[1334] Graglia (n 1217) 740.
[1335] ibid.
[1336] *Wickard v Filburn* (1942) 317 US 111.
[1337] Stern (n 1327) 903–904.

and thus his activities did not fall under the interstate system.[1338] A unanimous Supreme Court, in a surprising opinion delivered by Justice Jackson, decided to break with previous case law completely and further extend the powers of Congress by upholding the challenged Act under the Commerce Clause.

Justice Jackson firstly held that it was no longer required for the activities of production to be shown that the articles produced were intended 'for interstate commerce.'[1339] He further held, recognising that all activities had become economically interdependent, that distinguishing activities based on their subject matter 'would have wreaked financial chaos to try' to argue at the time.[1340]

He subsequently adopted an economic interpretation of the Commerce Clause, and argued that the 'home-consumed wheat would have a substantial influence on price and market conditions' as it was in competition with 'the wheat in commerce.'[1341] This, he argued, occurred because of the aggregate or cumulative effects that the 'appellee's own contribution […] taken together with that of many other similarly situated' was 'far from trivial' on the commerce of wheat.[1342] This novel approach was subsequently named 'the substantial economic effect test.'[1343]

It would, thus, seem that he adopted the living constitutional values approach advocated for by this work, in which the creation and subsequent protection of a uniform national market would be deemed a constitutional value. It may also be argued that through this novel test Justice Jackson seemed to extend the scope of the activities that belonged to such system even further. Following his decision, it seemed to be sufficient to demonstrate that the 'class' of an insignificant 'individual act' could become part of this interstate system if the effects of this class of activity were substantial on interstate commerce.[1344]

[1338] Tribe (n 171) 813.
[1339] As held in *United States v Darby* (n 125). See also Stern (n 1327) 905 and 908.
[1340] *Wickard v Filburn* (n 1336); Claeys (n 1254) 431.
[1341] *Wickard v Filburn* (n 1336); Stern (n 1327) 904.
[1342] *Wickard v Filburn* (n 1336); Friedman and Lakier (n 1306) 284.
[1343] Stern (n 1327) 906.The origins of which are, however, identifiable in the decision of the Supreme Court in *NLRB v Jones & Laughlin Steel Corp* (n 1294).
[1344] Tribe (n 171) 813.

Based on the above, it emerges that towards the end of the New Deal programme, the scope of interstate commerce became so extensive that it resulted in the inclusion of activities that were previously regarded as traditionally belonging to the states. The aim of this extension of power, however, appeared to be the protection and development of the interstate system, which may be regarded as the purpose of the Commerce Clause and the constitutional value it set out to protect, rather than the protection of the traditional state powers. Moreover, with the protection provided to individuals through these traditional state activities, the transfer of these also resulted in such protection being assumed by Congress on certain occasions. Such transfer of protection of individuals could be justified by the devastating effects of the Great Depression and the support by citizens through the re-election of President Roosevelt. However, it also resulted in the loss of regulatory powers by the states, which consequently resulted in the transformation of the regulatory landscape of interstate commerce.

VI. A limitless interstate commerce?

Following the Great Depression, the Supreme Court for a period of almost sixty years refused to hold any federal law unconstitutional under the Commerce Clause. It, thus, further extended interstate commerce into such areas that it seemed that slowly all limits to the power of Congress would disappear. These cases may be categorised into three separate groups based on the interpretation of the clause by the Justices.

VI.1. Commerce that crosses state borders

In the first group of cases of this era, the re-introduction of the importance of physical state boundaries to determine whether the regulated activity formed part of interstate commerce may be witnessed.

For instance, in *United States v South-Eastern Underwriters Association*[1345] Justice Black held that due to the highly interstate nature of the insurance business, the insurance market was included in the interstate system and Congress was allowed to regulate these uniformly across the nation.[1346]

In *Scarborough v United States*[1347] the Supreme Court returned to its previous interpretation arguing that for the activity to be considered interstate, it was sufficient for the article of commerce regulated to have 'crossed a state line' at some point after it came into existence.[1348] Whilst not directly regulating commerce, however, the Omnibus Crime Control Act 1968 was therefore upheld under the Commerce Clause in this case, allowing the prohibition of the possession of 'a firearm' by 'a convicted felon.'[1349] In *Maryland v Wirtz*[1350] it was subsequently held that the Fair Labor Standards Act could also apply constitutionally to 'schools and hospitals' as they 'made [interstate] purchases.'[1351]

Whereas the re-introduction of the importance of crossing state boundaries could have resulted in a restriction of the powers of Congress, these cases demonstrate the opposite. The crossing was still important, however, the actors were placed further into the heart of an intrastate commercial system. For instance, the regulation of activities by schools and hospitals is a matter in which local interests would be high. However, the regulation of this traditionally intrastate area became possible through the affirmative Commerce Clause in this era.

VI.2. Federal protection of individuals

The extended purpose of the Commerce Clause that argued for the protection of individuals through uniform federal legislation may be clearly demonstrated when the

[1345] *United States v South-Eastern Underwriters Association* (1944) 322 US 533.
[1346] ibid 541. and Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (3).
[1347] *Scarborough v United States* (1977) 431 US 563.
[1348] Mark (n 1205) 682.
[1349] Graglia (n 1217) 744.
[1350] *Maryland v Wirtz* (1968) 392 US 183.
[1351] Graglia (n 1217) 745.

clause was utilised to uphold the provisions of the Civil Rights Act arguing that racial discrimination by public establishments 'affected interstate commerce.'[1352]

In *Hodel v Indiana,*[1353] for instance, this purpose also surfaced when it was held that the Congress could regulate activities under the Commerce Clause in order to 'protect "public health and safety" and the "environment," as well as agriculture' that could result in harm to the interstate system.[1354] In order to demonstrate this aim of the regulation, the Supreme Court held that it was merely sufficient for the act to form part of 'an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.'[1355]

VI.3. The resurgence of traditional state functions and the political safeguard theory

Whilst the Supreme Court made an attempt to hold a federal law invalid under the Commerce Clause during this period, this attempt proved quite short-lived. In *National League of Cities v Usery*[1356] the Supreme Court seemed to have returned to its previously adopted position under the dual federalist approach using the Tenth Amendment, and, thus, claiming that the protection of state rights was a more fundamental constitutional value than that of the creation and protection of the national market. It held in its majority decision that the Fair Labor Standards Act was aimed at regulating the 'traditional state functions.' These functions were guaranteed to be protected under the Tenth Amendment, and consequently, the Act was declared unconstitutional.[1357] Whilst this approach seems to have been a return to the dual federalist interpretation, what constituted such a 'traditional state function,'[1358] however, remained unclear.

[1352] ibid 743; Claeys (n 1254) 433. See also *Katzenbach v McClung* (1964) 379 US 294 and *Heart of Atlanta Motel, Inc v United States* (1964) 379 US 241.
[1353] *Hodel v Indiana* (1981) 452 US 314.
[1354] Graglia (n 1217) 747.
[1355] *Hodel v Indiana* (n 1353).
[1356] *National League of Cities v Usery* (1976) 426 US 833.
[1357] Chemerinsky, *Constitutional Law* (n 77) 184.
[1358] ibid.

On the other hand, this approach was rejected indirectly by the Supreme Court until 1985,[1359] when in *Garcia v San Antonio Metropolitan Transit Authority,*[1360] the Supreme Court finally overruled the above case. While doing so, Justice Blackmun held that the "traditional government functions" distinction was 'unworkable' and 'inconsistent with established principles of federalism.'[1361] He argued, recognising the special place, that states occupied in the federal system, that the 'political safeguards of federalism' were what guaranteed that Congress would not abuse its powers under the affirmative Commerce Clause.[1362] Under this theory, he claimed that because states participate in the enactment of federal legislation, no federal act could be enacted that 'unduly burden the States.'[1363] Such a theory, however, raises further issues. It could, ultimately, lead to the regulatory powers of Congress becoming limitless. This may result in Congress acting unconstitutionally, which would, consequently, remain unchallenged by the Supreme Court. Such actions would, however, contravene one of the key republican principle of separation of powers underlying the Constitution.

It, thus, appears that following the 'switch in time that saved nine,'[1364] the Supreme Court had not only recognised the interconnectedness of the state and federal economies, but had also enabled the development and the actual extension of a uniform and centralised system of interstate commerce, which may be claimed to constitute the original purpose of the Commerce Clause and the constitutional value it was set out to protect. This system, however, was faced with the challenge that it was, in fact, on the route to becoming limitless, where the state boundaries or traditional state functions were no longer protected if these were related to activities harmful to the interstate network.

[1359] ibid 185. It had also undergone various alterations and had various limits set to its scope These included, for instance, the requirement that Tenth Amendment violations by Congress were only present when Congress regulated 'state governments' or 'states as states' and not 'private conduct.' *Hodel v Virginia Surface Mining & Reclamation Association* (1981) 452 US 264. and Chemerinsky, *Constitutional Law* (n 77) 185.

[1360] *Garcia v San Antonio Metropolitan Transit Authority* (n 1182).

[1361] ibid 531.

[1362] Schütze (n 994) 86.

[1363] *Garcia v San Antonio Metropolitan Transit Authority* (n 1182); James Hinshaw, 'The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space' (1992) 67 Indiana Law Journal 511, 513.

[1364] Chemerinsky, *Constitutional Law* (n 77) 169.

VII. The limits of interstate commerce: protecting the traditional state powers

Until 1995, the Justices were willing to extend the scope of interstate commerce to enhance its development and protect the citizens of the United States in a uniform manner. However, the opinion of the Justices transformed once again.

The Supreme Court, in a surprising decision in *United States v Lopez*,[1365] held the Gun-Free School Zones Act of 1990, which criminalised the possession of a firearm in a school zone, unconstitutional under the Commerce Clause.[1366] An issue that was apparent in the Act itself was that it did not make a specific reference to how the regulated activity was related to interstate commerce.[1367]

The government consequently argued that the possession of guns in a school zone could affect interstate commerce in three ways. First, possessing a firearm could 'lead to violent crime,' the 'costs' of which the government 'spreads throughout the population' through 'insurance.'[1368] Secondly, the insurgence of violent crimes would lead to the reduction of 'travel to areas within the country that [we]re perceived to be unsafe.'[1369] Thirdly, the 'learning environment' would be 'threaten[ed],' which would lead to 'a less productive citizenry,' having 'an adverse effect on the Nation's economic well-being.'[1370]

Whereas it could have clearly been established following *Scarborough v United States*[1371] that Congress could regulate the possession of firearms if those passed a state line,[1372] the Supreme Court focused its attention on the regulation being related to educational establishments.

[1365] *United States v Lopez* (n 1192).
[1366] Tribe (n 171) 817.
[1367] Graglia (n 1217) 750.
[1368] *United States v Lopez* (n 1192).564; Graglia (n 51) 753.
[1369] *United States v Lopez* (n 1192). 564.
[1370] ibid 564.
[1371] *Scarborough v United States* (n 1347).
[1372] Mark (n 1205) 682.

The majority of the Justices first rejected the findings of the government, and argued that 'Congress had not done what was necessary to locate the Act within the Commerce Clause.'[1373] Chief Justice Rehnquist subsequently identified three types of activities that Congress, according to previous cases, was allowed to regulate.[1374] Firstly, Congress could regulate 'the use of the channels of interstate commerce,'[1375] for instance, to ensure that those are kept 'free from immoral and injurious uses.'[1376] Secondly, Congress could regulate and protect 'the instrumentalities of interstate commerce, or persons or things in interstate commerce' regardless of their intrastate origin.[1377] Thirdly, Congress was allowed to regulate those activities that had a 'substantial relation to interstate commerce,' as devised by Chief Justice Hughes in *NLRB v Jones & Laughlin Steel Corp*,[1378] which included the test of 'whether the regulated activity "substantially affect[ed]" interstate commerce.[1379]

Applying these categories to the case in question, Chief Justice Rehnquist established that it was clear that the challenged Act did not belong to the first two categories and, thus, it had to be demonstrated that the regulated activity had a substantial effect on interstate commerce.[1380] While holding that the possession of the firearm did not affect interstate commerce substantially, he identified a novel distinction of previous case law based on the 'economic' nature of the regulated activity.[1381] He held that the challenged Act included the 'non-economic' activity of possession of firearms, and notably, even the cultivation of wheat was an 'economic activity.'[1382]

Moreover, Chief Justice Rehnquist rejected the argument[1383] that the Gun-Free School Zones Act of 1990 could be held to form an 'essential part of a larger regulation of

[1373] Graglia (n 1217) 751.
[1374] *United States v Lopez* (n 421) 558.
[1375] ibid 558. Following the decisions in *United States v Darby* (n 146) and *Heart of Atlanta Motel, Inc v United States* (n 1352).
[1376] *United States v Lopez* (n 421) 558.
[1377] ibid 558. Such as they did in the *Shreveport Rate Cases* (n 1221).
[1378] *NLRB v Jones & Laughlin Steel Corp* (n 1294).
[1379] *United States v Lopez* (n 421) 558 – 559.
[1380] ibid 558–559; Graglia (n 1217) 752.
[1381] Tribe (n 171) 819.
[1382] *United States v Lopez* (n 421) 560.
[1383] Similar to the decision in *Hodel v Indiana* (n 1353).

economic activity.' [1384] It could consequently not be demonstrated that the Act had a 'substantial' effect on interstate commerce, when 'viewed in the aggregate.'[1385]

However, according to this decision, it may be argued that since *Scarborough v United States*[1386] formed part of previous case law, which also regulated economic activity, it was, in fact, the same activity that was regulated as in this case: the possession of firearms. Justice Stevens in his dissent also argued that possession of firearms should have been held to affect interstate commerce as firearms 'are both articles of commerce and articles that can be used to restrain commerce,' the possession of which is a result 'of commercial activity.'[1387] This recognition would have effectively made the Act to be upheld even utilising the newly adopted interpretation of the Commerce Clause.

On the other hand, it would seem, that while the Supreme Court considered the protection of citizens from convicted felons possessing firearms a matter of interstate concern, the protection of children from individuals possessing firearms near their schools, adopting the non-originalist method of interpretation, was an unwelcome extension of the interstate system of commerce. Chief Justice Rehnquist argued that such an extension could not be upheld as it could lead to the inclusion of 'the educational process' in the interstate system, which could clearly not be conceived as such.[1388] This decision, however, seems to overrule the decision in *Maryland v Wirtz*,[1389] where the Supreme Court upheld a federal regulation to apply for educational establishments.

Even though the Chief Justice agreed with the government that it was not generally necessary 'to make formal findings as to the substantial burdens that an activity ha[d] on interstate commerce,'[1390] he created a novel procedural requirement in this area. He effectively asked for such findings to be provided for the Supreme Court 'to

[1384] *United States v Lopez* (n 421) 561.
[1385] ibid 561.
[1386] *Scarborough v United States* (n 1347).
[1387] Graglia (n 1217) 762.
[1388] *United States v Lopez* (n 421) 564.
[1389] *Maryland v Wirtz* (n 1350).
[1390] *United States v Lopez* (n 1192).

evaluate the legislative judgment that the activity in question substantially affected interstate commerce' if that was not 'visible to the naked eye.'[1391]

The Chief Justice further emphasised Congress was only to exercise its 'enumerated powers' under the Constitution, the 'outer limits' of which powers were 'judicially enforceable.'[1392] He did accept that this would lead to legal uncertainty, since it would be decided by the Supreme Court at the time what limits were acceptable at the era on a case-by-case basis. However, he held that this was set out to be an 'inherent' characteristic of the federal system of the United States, which the Supreme Court was unwilling to disturb by setting out the clear limits of 'what is truly national and what is truly local.'[1393] This approach, however, appears to revive the previously overruled traditional state function argument and the dual federalist approach. It further suggests that education would remain a 'truly local'[1394] concern that could not become part of interstate commerce.

The novel approach of Chief Justice Rehnquist in *United States v Lopez*[1395] was adopted in the subsequent of *United States v Morrison*,[1396] when the Supreme Court held that 'gender-motivated violence' was not "economic" activity' and thus 'the tort provisions of the Violence Against Women Act' were unconstitutional under the Commerce Clause.[1397]

Chief Justice Rehnquist, adopting his previous approach, held that the Act did not belong to the first two categories, it therefore had to be demonstrated that the regulated activity had a substantial effect on interstate commerce.

Even though Congress provided the Supreme Court with substantial findings that 'violence against women was a national problem,'[1398] and could thus be argued to fall within the constitutional value of ensuring the protection of citizens through a national

[1391] ibid 563.
[1392] ibid. Thus seemingly rejecting the political safeguard theory.
[1393] ibid 566–568.
[1394] ibid.
[1395] ibid.
[1396] *United States v Morrison* (n 1193).
[1397] Claeys (n 1254) 435.
[1398] Mark (n 1222) 687.

market, the majority of the Supreme Court remained unconvinced.[1399] Similar to their decision in *United States v Lopez,*[1400] Chief Justice Rehnquist held that if they were to find that the criminal activities had a substantial effect on interstate commerce, they would effectively "allow Congress to regulate any crime as long as the nationwide aggregated impact of that crime had substantial effects on employment, production, transit, production or consumption."[1401] He then took a step further and actually acknowledged the revival of the 'traditional state regulation' or dual federalist approach. He argued that the above activities belonged to this category and thus could not be regulated uniformly by Congress as this would 'obliterate the Constitution's distinction between national and local authority.'[1402]

In his dissent, Justice Breyer, however, highlighted that Congress actually provided reasons for the substantial effect of the regulated activities on interstate commerce and if these were 'rational,' they should not be overruled.[1403] He further supported the viewpoint that it should be Congress, who determines what constitutes 'economic activity' and not the Court. [1404] This approach, however, would have resulted in the same consequences as *Garcia v San Antonio Metropolitan Transit Authority*,[1405] where it was argued that there would have been no limits and checks created for the exercise of the regulatory powers of Congress.

The above two decisions, with a transformation in the approach of the majority of the Justices, suggest that a desire arose for limits to be placed on the further extension of interstate commerce towards the very end of the twentieth century. Both decisions appear to be highly concerned with Congress being able to extend its regulatory powers to areas that states have a strong interest in and regard to belong to them traditionally. It is, thus, argued that if the Supreme Court was to adopt the living constitutional values approach, it could argue that the protection of state powers has

[1399] Mark (n 1205) 685.
[1400] *United States v Lopez* (n 1192).
[1401] Mark (n 1222) 687.
[1402] *United States v Lopez* (n 421) 556-557; *United States v Morrison* (n 422) 605 and 618.
[1403] Mark (n 1222) 688.
[1404] ibid.
[1405] *Garcia v San Antonio Metropolitan Transit Authority* (n 1182).

become a more significant constitutional value than that of the creation and protection of a uniform national market.

Whilst the Justices did accept that novel interpretations developed since *Gibbons v Ogden*[1406] about the Commerce Clause, their approach in these two cases, seem to have reverted to the 'police power' distinction of Chief Justice Marshall in that same case.[1407] This surprising move, however, appears to reject the approaches that previously recognised the interconnected nature of local and national commerce. The forefront of their interpretation of the purpose of the Commerce Clause thus became the protection of 'traditional state' powers as opposed to the previously held purposes of protecting individuals from harm. The latter interpretation, however, no longer fit the restrictive definition of commerce or the newly devised tests.

VIII. The return of the interconnected commerce

The subsequent decisions of the Supreme Court until 2012 demonstrated a return to the approach that recognised the interconnected nature of local and national activities in commerce. Surprisingly, for this purpose, the Justices did not initially devise a novel approach, but adopted that of the decision in *United States v Lopez*.[1408]

In *Pierce County, Washington v Guillen,*[1409] for instance, the Justices 'unanimously' held that federal regulation about 'road safety' belonged to the first category of 'the use of the channels of interstate commerce,'[1410] and the Act in question was thus constitutional.[1411] Therefore, if the federal regulation belonged to the first two categories of cases identified in *United States v Lopez*,[1412] it appeared to be redundant to prove that the activities regulated had 'substantial effect' on interstate commerce.

[1406] *Gibbons v Ogden* (n 100).
[1407] *Gibbons v Ogden* (n 6) 209 – 210.
[1408] *United States v Lopez* (n 1192).
[1409] *Pierce County, Washington v Guillen* (2003) 537 US 129.
[1410] *United States v Lopez* (n 421) 558.
[1411] Chemerinsky, *Constitutional Law* (n 77) 209.
[1412] *United States v Lopez* (n 1192).

Their inclusion in the first two categories was sufficient for the activity to be characterised as interstate commerce.

A transformation in the approach of the Supreme Court towards determining what activities amounted to interstate commerce under the third category of *United States v Lopez,*[1413] however, did take place in *Gonzales v Raich*.[1414] The challenged federal law in this case was the Controlled Substances Act, since the home-grown marijuana plants of the defendants were appropriated from them under this Act.[1415]

Justice Stevens, in delivering the opinion of the Court, and adopting the characterisation in *United States v Lopez,*[1416] held that it had to be examined whether the activities regulated had substantial effect on interstate commerce under the third category as those did not belong to the first two.[1417] Firstly, he held that the facts of the case were highly similar to those of *Wickard v Filburn*.[1418] He argued that the respondents in both cases were 'cultivating, for home consumption, a fungible commodity for which there is an established […] interstate market,' the only difference being that in the case in question this market was an 'illegal' one.[1419] He further held that both federal Acts in question were aimed at 'control[ling] the supply and demand' of the commodity in question.[1420] He, therefore, held that if it had been found in *Wickard v Filburn*[1421] that Congress had 'a rational basis for believing' that the aggregate effect of home-consumption of a commodity would be substantial 'on price and market conditions,' the same 'rational basis' could be demonstrated in the Controlled Substances Act.[1422]

[1413] ibid.
[1414] *Gonzales v Raich* (n 1194).
[1415] ibid 1.
[1416] *United States v Lopez* (n 1192).
[1417] *Gonzales v Raich* (n 423) 18.
[1418] *Wickard v Filburn* (n 1336).
[1419] *Gonzales v Raich* (n 423) 18.
[1420] *Gonzales v Raich* (n 1194).
[1421] *Wickard v Filburn* (n 1336).
[1422] *Gonzales v Raich* (n 423) 19; 22 and 31. This also seems to echo the dissent of Justice Breyer in *United States v Morrison* (n 1193).

To distinguish the case in question from that of *United States v Lopez*[1423] and *United States v Morrison*,[1424] he further held that the activity in question was, in fact, an 'economic' activity according to the definition provided by Webster of "economics" that includes "the production, distribution and consumption of commodities."[1425]

He also rejected the novel procedural requirement of requiring a finding of the substantial effects of the activities in the federal Act.[1426] He declared that the mere 'absence' of the above 'does not call into question Congress's authority to legislate.'[1427] Contrary to the rejection by Chief Justice Rehnquist of the determination of whether an activity had substantial effect on interstate commerce as part of a 'larger' regulatory scheme, [1428] Justice Stevens seemingly reverted to this approach. He consequently refused to invalidate the Controlled Substances Act, since he held that it was an 'individual component of [a] larger scheme.'[1429]

Following the above decision, it, therefore, appeared that Congress had regulatory power over the areas of 'economic' activities, as defined by Justice Stevens, that 'had an "established … interstate market"' over which Congress had a 'rational basis' to believe that the activity in question had a substantial aggregate effect. [1430] This viewpoint also seems to follow the interpretation that the purpose of the Commerce Clause and the constitutional vale it encompassed was the development and protection of interstate commerce. It may therefore be contended that the national interest in this area of commerce took precedence over the ones of the states.

This position, however, was highly dependent on the less extensive scope chosen for the examination of the regulated activity. Justice Stevens, similarly to Chief Justice Rehnquist, could have argued that the regulation of the cultivation of marijuana could lead to Congress regulating criminal activities uniformly in states, which is a traditional

[1423] *United States v Lopez* (n 1192).
[1424] *United States v Morrison* (n 1193).
[1425] *Gonzales v Raich* (n 423) 25.
[1426] *United States v Lopez* (n 421) 563.
[1427] *Gonzales v Raich* (n 423) 21.
[1428] *United States v Lopez* (n 421) 561.
[1429] *Gonzales v Raich* (n 423) 22.
[1430]

area of state concern. On the other hand, he opted to focus on the more restrictive market the activities belonged to (the market of illegal drugs) and not the widest possible categorisation (criminal law).

IX. A novel limit: Congress to regulate and not create interstate commerce

Undoubtedly, when learning that almost 14.6% of the population of a country is uninsured,[1431] most of them being young adults,[1432] it looks like a worrying scenario not only for those who are used to receiving free health care from their states. Whereas health care is often provided for free in industrialised nations, the uninsured individuals often mention the high costs of obtaining health insurance for their lack of such and data shows that two-thirds of this class of citizens live on income 'twice [below] the poverty line.'[1433] They are, therefore, restricted to accessing health care from, for example, emergency departments,[1434] however, if they stay in hospital as a young adult, they may leave with an average bill of $17,195.[1435] As many uninsured individuals live under the poverty line, they are, however, highly unlikely to be able to pay these, which in effect results in unpaid medical bills causing half of the personal bankruptcies in the country.[1436]

This situation has economic consequences for both the state and federal governments. In 2008, for instance, they had to pay $43 billion to cover for the

[1431] Relevant data from 2008 about uninsured people in the United States, which amounted to 44 million people out of the 304.5 million individuals living in the United States that year. Population Reference Bureau, '2008 World Population Data Sheet' (2008) <http://www.prb.org/pdf08/08WPDS_Eng.pdf> accessed 10 April 2014; Robin A Cohen and others, 'Health Insurance Coverage Trends, 1959–2007: Estimates from the National Health Interview Survey' (2009) 17 <http://www.cdc.gov/nchs/data/nhsr/nhsr017.pdf> accessed 10 April 2014; Jenna Levy, 'In U.S., Uninsured Rate Lowest Since 2008' (*GALLUP*, 7 April 2014) <http://www.gallup.com/poll/168248/uninsured-rate-lowest-2008.aspx> accessed 10 April 2014.

[1432] Levy (n 1431).

[1433] Jonathan Gruber, 'Covering the Uninsured in the US' (National Bureau of Economic Research 2008) 11 <http://www.nber.org/papers/w13758> accessed 14 April 2014.

[1434] Somin mentions in a recent article that the emergency departments of hospitals are required to stabilise all individuals free of charge. Ilya Somin, 'A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope' (2012) 75 Law and Contemporary Problems 75, 86.

[1435] Pfizer, 'A Profile of Uninsured Persons in the United States' (Pfizer 2008) 23 <http://www.pfizer.com/files/products/Profile_of_uninsured_persons_in_the_United_States.pdf> accessed 10 April 2014. They can also rely on free clinics, but around half of them are unlikely to see a doctor at all. ibid 46.

[1436] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (E).

emergency care of the uninsured.[1437] Furthermore, nearly twice of the share of the economic output of the United States is spent on health care compared to other industrial nations.[1438] In the meantime, the revenues of the health insurance industry, who impose the high costs, surpassed $500 billion per year.[1439]

The Patient Protection and Affordable Care Act of 2010, or as it is more widely known 'Obamacare,' was aimed at providing a reform to this health care system.[1440] The 'individual mandate,' one of the most controversial parts of the above Act, 'compelled people who earned a certain income to purchase health insurance.'[1441] Failure to do so required the individual to 'pay a penalty.'[1442] One of the constitutional bases on which this mandate was adopted was the Commerce Clause.

Whilst it seemed that Justice Stevens indicated in *Gonzales v Raich*[1443] that constitutional findings were not essential to decide whether the regulated activities had substantial effect on interstate commerce, the Patient Protection and Affordable Care Act did provide such findings. It firstly held that the individual mandate was 'commercial and economic in nature' and 'substantially affect[ed] interstate commerce.'[1444] These effects were claimed to be many.

Firstly, it was claimed that mandate regulated commercial and economic activities as it regulated 'economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.'[1445] It was subsequently established that a significant interstate market of health insurance had already been established, where the sellers of insurance are mostly 'national or regional' companies.[1446] Therefore, following the purpose of and constitutional value encompassed in the Commerce

[1437] Barry Friedman, 'Obamacare and the Court: Handing Health Policy Back to the People' (2012) 91 Foreign Affairs 87, 88.
[1438] Michael J Graetz and Jerry L Mashaw, 'Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case' (2013) 7 Harvard Law & Policy Review 343, 356.
[1439] Gruber (n 1433) 28.
[1440] Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* (Public Affairs 2013) 29.
[1441] ibid.
[1442] ibid. This was similar to the provisions of the Bituminous Coal Act 1935, which was challenged in *Carter v Carter Coal Co* (n 1277).
[1443] *Gonzales v Raich* (n 1194).
[1444] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (1).
[1445] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (A).
[1446] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (B).

Clause, it could have been argued that the aim of the Act was the protection of this already established strong interstate market.

The findings also claimed that the mandate would contribute to the increase in 'the supply of, and demand for, health care services.'[1447] On the other hand, to demonstrate the above, Congress had to prove that it had 'a rational basis for believing' that the aggregate effect of the economic activity in question would be substantial 'on price and market conditions.'[1448] This was further demonstrated in two separate sections. Firstly, the findings argued that by requiring 'healthy individuals' to purchase health insurance, the 'health insurance premiums' could be reduced, which was crucial in 'creating effective health insurance markets' and, secondly, in increasing the 'financial security' of families whose bankruptcy was a result of unpaid health care bills.[1449] These did not only seem to follow the purpose and constitutional value of the Commerce Clause that argued to provide for the protection of interstate commerce, but also appear to follow the more extended purpose of providing uniform protection for individuals under such a system.

Lastly, the findings also claimed that the regulation of insurance had already been held to be an activity that Congress was allowed to regulate in *United States v South-Eastern Underwriters Association*.[1450]

Soon after the adoption of the Patient Protection and Affordable Care Act constitutional challenges to the Act had been filed by 'twenty-eight states.'[1451] During the challenges at the district courts the arguments of the Department of Justice focused on identifying the limitations on the powers of Congress under the Commerce Clause.

Firstly, it argued that Congress "can[not] act in attenuated ways, [as in] *Morrison,*" for which it must demonstrate that there was a 'close link' between its regulatory powers and the 'regulated market.'[1452] The second limitation was claimed to be based on the

[1447] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (C).
[1448] *Gonzales v Raich* (n 423) 19; 22 and 31.
[1449] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (E) and (G).
[1450] *United States v South-Eastern Underwriters Association* (n 1345). and Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (3).
[1451] Blackman (n 1440) 79.
[1452] ibid 136.

national-local distinction, according to which Congress could not impinge upon 'areas of traditional state responsibility.'[1453] The Department of Justice argued that the challenged Act did not fall into either of these categories: firstly, the end of the Act was to control 'rising health care costs,' which constituted interstate commerce, and secondly 'health insurance ha[d long] been subject to federal regulations.'[1454]

The constitutional challenge of Obamacare arrived at the Supreme Court in 2011, with a change in the approach of the Department of Justice.[1455] During the oral arguments, the novel approach was set out: 'there was no individual mandate,' the issue in question was merely 'the "method of financing health [care]."'[1456]

The 'health care market' was also subsequently argued to be "unique" as "virtually everybody in society is in this market."[1457] This market was also distinguishable from the one where people could 'buy broccoli'[1458] as "everyone knows when they will need food, but they do [not] know when they will need medical treatment."[1459] This was a favourite comparison of those opposed to this Act. Interestingly, however, comparing the mandate of compelling people to buy health insurance to that of buying broccoli is an even widest categorisation of the regulation than those previously identified by Chief Justice Rehnquist in *United States v Lopez*[1460] or *United States v Morrison*.[1461] This categorisation now places the focus on the method of the regulation, not the activity regulated. The comparison, thus, did not take place with the mandate in existence in 47 states that requires the purchase of car insurance by individuals to be able to keep a driving licence.[1462]

The Department of Justice no longer focused on whether there were any limits to the power of Congress under the Commerce Clause[1463] and that there was an already established and strong federal health insurance market. Subsequently, the petitioners

[1453] ibid.
[1454] ibid.
[1455] ibid 167 and 175.
[1456] ibid 191.
[1457] Blackman (n 1440). 190.
[1458] *United States v Lopez* (n 421) or *United States v Morrison* (n 1193).
[1459] Blackman (n 1440) 191.
[1460] *United States v Lopez* (n 421).
[1461] *United States v Morrison* (n 1193).
[1462] Friedman (n 1437) 95.
[1463] Blackman (n 1440) 193–194.

could masterfully argue that what the individual mandate effectively did was 'to compel people to enter [into] commerce,' thus, effectively 'creat[ing] commerce' and extending the powers of Congress to previously inconceivable areas.[1464]

In delivering the opinion of the majority, Chief Justice Roberts, firstly devised a novel definition of the part 'regulate Commerce' of the Commerce Clause, and claimed that this power 'presupposes the existence of commercial activity to be regulated,' which he held could be demonstrated in all the preceding cases involving a challenge under the Commerce Clause.[1465]

It is, however, interesting to highlight that what constituted 'commercial activity' based on the characterisation of the previous cases by Chief Justice Roberts, could be argued to include a non-commercial activity, such as the one included in *Wickard v Filburn*,[1466] that had 'a substantial economic effect on interstate commerce.'[1467] This characterisation further seems to fail to adopt the distinction of the activities that was previously decided based on the 'economic' nature of the activity, which Justice Stevens in *Gonzales v Raich*[1468] held included "the production, distribution and consumption of commodities."[1469]

Thus, how it will be decided under this novel commercial – non-commercial activity test what constitutes commercial activity becomes questionable. Chief Justice Roberts, however, provided some examples, such as the purchase of 'health insurance, […] cars and broccoli,'[1470] but did not provide further explanation as to how the activities in the above two cases fit into this novel pre-requisite.

Chief Justice Roberts subsequently held - adopting the argument of the petitioners - that the 'individual mandate […] does not regulate existing commercial activity'[1471] and holding so would 'override' the limits placed on the power of Congress in *Wickard v*

[1464] ibid 195; Somin (n 1434) 84.
[1465] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 18 - 20.
[1466] *Wickard v Filburn* (n 1336).
[1467] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 20.
[1468] *Gonzales v Raich* (n 1194).
[1469] ibid 25.
[1470] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 27.
[1471] ibid. (Chief Justice Roberts) 20.

Filburn.[1472] In that case, he argued, the activity of Filburn fell under the regulatory powers of Congress because he was engaged in a commercial activity, 'the production of wheat.'[1473] He, thus, contended that holding the individual mandate constitutional under the Commerce Clause would result in the extension of these powers to requiring 'individuals' to engage in an activity that they 'are not [currently] doing.'[1474] Interstate commerce, therefore, may only include activities already initiated.

It is apparent that the 'production of wheat' constitutes an economic activity based on the decision in both *Wickard v Filburn*[1475] and *Gonzales v Raich.*[1476] On the other hand, classifying it as a commercial activity would need further explanation as the only connecting factor of the activity seems to be its substantial effects on commerce. If this was adopted as the definition of a commercial activity, since the decision of the individual not to purchase health insurance has a substantial effect on interstate commerce, the inactivity of the individual could effectively be classified as 'commercial activity.' Thus, it is of crucial importance that a more detailed guidance is provided in future cases about how to determine what may constitute commercial activity.

Surprisingly, Chief Justice Roberts recognised that economists may argue that 'there is no difference between activity and inactivity [as] both have measurable economic effects on commerce.'[1477] Whereas previously the Justices of the Supreme Court did not shy away from the interpretation of this clause from the angle of an economist,[1478] Chief Justice Roberts, adopting the textualist method of the originalist interpretation approach of the Constitution, argued that since the Framers of the Constitution must have understood this distinction, but still decided to use the word 'regulate' and not 'compel' in the Constitution, the Supreme Court had always interpreted the clause accordingly since the adoption of the Constitution.[1479] This, however, raises the

[1472] *Wickard v Filburn* (n 159) and *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 22.
[1473] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 22.
[1474] ibid. (Chief Justice Roberts) 22.
[1475] *Wickard v Filburn* (n 1336).
[1476] *Gonzales v Raich* (n 1194).
[1477] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 24.
[1478] which, it may be argued, resulted in the Supreme Court devising the substantial effects test in *Wickard v Filburn* (n 1336).
[1479] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 24.

question whether the adoption of a viewpoint in 1787 is a workable and realistic interpretation of the Constitution nowadays. The Framers could not have foreseen the development of the concept of commerce to where it stands nowadays. If the Supreme Court is to adopt an interpretation from 1787, it may effectively transform the Constitution to a document that is unable to reflect the realities of our days and may therefore become ineffective.

Chief Justice Roberts subsequently returned to the findings of the Act. He highlighted that the claim that by requiring 'healthy individuals' to purchase health insurance, 'health insurance premiums' would be reduced and 'effective health insurance markets' would be created.[1480] He held that this was not a constitutional exercise of the regulation of a "class of activities," since it was aimed at regulating 'classes of individuals.'[1481] Whereas it was argued that the uninsured individuals were inactive participants in the health insurance market, it would have been interesting to examine what their position was in the health care market through the individual mandate, since they could have easily been identified as active participants in such a market. For instance, an argument could have been that a mere $43 billion was being spent on their emergency care.[1482]

Whereas the findings emphasised that the mandate would assist the families who had to declare bankruptcy due to unpaid medical bills, Chief Justice Roberts argued that the mandate would have an adverse affect on the 'healthy, often young adults' who cannot afford to increase their medical expenses, and thus were 'targeted at a class' characterised by its 'commercial inactivity.'[1483] On the other hand, it may be significant to highlight that the 'commercial inactivity'[1484] of these individuals had a clear substantial effect on interstate commerce and could thus be argued to effectively be characterised as a commercial activity. Furthermore, if one could characterise a class based on its 'commercial inactivity,'[1485] the respondents in both *Wickard v Filburn*[1486]

[1480] Patient Protection and Affordable Care Act, Subtitle F, Part I, s 1501 (a) (2) (G).
[1481] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 25.
[1482] Friedman (n 1437) 88.
[1483] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 25.
[1484] ibid. (Chief Justice Roberts) 25.
[1485] ibid. (Chief Justice Roberts) 25.
[1486] *Wickard v Filburn* (n 1336).

and *Gonzales v Raich*[1487] were commercially inactive: they did not participate in interstate commerce, since their activities were not destined for commercial purposes.

Chief Justice Roberts consequently held that the individual mandate was an unconstitutional exercise of the powers of Congress under the Commerce Clause regardless of the "inherently integrated" nature of 'health insurance and health care.'[1488] It would thus seem that the decision of Justice Stevens in *Gonzales v Raich*[1489] became impliedly overruled. Following the decision of Justice Stevens would have likely resulted in finding the mandate constitutional, since it could have been demonstrated that the mandate regulated 'economic' activities that 'had an "established … interstate market"' over which Congress had a 'rational basis' to believe that the activity in question had a substantial aggregate effect. [1490]

Whereas the findings of the Act seemed to have satisfied most of the above requirements, the majority of the Supreme Court, through adopting a novel approach towards the interpretation of the Commerce Clause, ensured that the powers of Congress could not be extended further. On the other hand, even though the mandate was held unconstitutional under the Commerce Clause, it was subsequently upheld as a valid exercise of the tax powers of Congress.[1491]

Justice Ginsburg, in her dissenting opinion, and adopting a method of interpretation that would fall in line with the living constitutional values approach, also adopted the approach of the Department of Justice, and argued that the unique characteristics of the health care market deemed that individuals without a health insurance should have still been held to be active participants of the health care market as '[v]irtually everyone […] consumes health care at some point in his or her life.'[1492] She further argued that

[1487] *Gonzales v Raich* (n 1194).
[1488] *National Federation of Independent Business v Sebelius* (n 5) (Chief Justice Roberts) 27.
[1489] *Gonzales v Raich* (n 1194).
[1490] ibid. 19; 22; 25 and 31 and Pushaw (n 1430) 898.
[1491] Friedman (n 1437) 91.
[1492] *National Federation of Independent Business v Sebelius* (n 5) (Justices Scalia, Kennedy, Thomas and Alito) 11.

she had failed to identify in the previous cases the activity-inactivity distinction devised by Chief Justice Roberts.[1493]

Justices Scalia, Kennedy, Thomas and Alito, on the other hand, rejected this approach and adopted that of Chief Justice Roberts. They claimed that because the individual mandate targeted young individuals, who would only consider purchasing health insurance 'later in their lifetime,' Congress acted outside its powers under the affirmative Commerce Clause, when it enacted the Act in question.[1494] It may, however, be crucial to highlight that such a decision of these young individuals seems to be delayed not by choice,[1495] but by necessity due to the costs of health insurance.[1496]

The Supreme Court once again seems to have returned to its usual method of devising a novel approach to the Commerce Clause to justify its decision based on a view contrary to the economic realities of their era. The majority of the current Justices appear unwilling to accept the purposes of the Commerce Clause as the development and protection of an already established and significant interstate market, and the protection of individuals from the harmful effects of the lack of a uniform national regulation. It will, thus, be fascinating to follow how they will decide about other commercial activities in the future. After all, the financial crisis that struck the world in 2008 only demonstrated how an activity in the United States may have a harmful effect not just in all areas of life in the nation, but all over the world.

X. Conclusion

[1493] Robert J Pushaw and Grant S Nelson, 'The Likely Impact of National Federation on Commerce Clause Jurisprudence' (2012) 40 Pepperdine Law Review 975, 988.
[1494] *National Federation of Independent Business v Sebelius* (n 5) (Justices Scalia, Kennedy, Thomas and Alito) 13.
[1495] 1.5% of the young uninsured adults chose not to purchase health insurance in 2012, according to a recent survey. 'Key Facts about the Uninsured Population' (*The Henry J. Kaiser Family Foundation*, 26 September 2013) <http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/?__hstc=43953530.0446700af0d7452db714a0c580c0249e.1397425237746.1397425237746.1397466342083.2&__hssc=43953530.1.1397466342083&__hsfp=1786422178> accessed 10 April 2014.
[1496] The same survey showed that 61% of the uninsured young adults does not possess health insurance due to its high costs (31.6%) or because they have recently lost their job (29.4%). ibid.

It has become apparent from the above analysis that the interpretation of the Commerce Clause has been constantly transforming since 1787. These transformations, under the 'living Constitution'[1497] theory could be argued to have occurred as a result of the transformation of the understanding of the various concepts included in the Constitution through the eras. After all, at the time of the Constitutional Convention in Philadelphia, it is quite certain that the delegates could not imagine how the innovations and the developments in our societies and economies could change our world. If the Constitution was still interpreted based on the original interpretation of the Constitution at all times, the constitutional system of the United States would be far behind the developments of each era and could become highly ineffective.

It is further argued that this interpretation of the Commerce Clause was made possible due to the constitutional uncertainty that was created at the time of its drafting by the lack of definition of what commerce and interstate commerce entailed and what the limits on the power of Congress were.

In conclusion, this chapter has demonstrated that despite the lack of an express provision in the Constitution of the United States, the Supreme Court has been willing to interpret the Commerce Clause in line with its purposes of the creation, development and protection of the interstate or national market as a constitutional value. In order to do this, the chapter has focused on identifying whether the Justices of the Supreme Court recognised these purposes and consequently supported the ideal of a national market.

This chapter has also adopted the approach of Chapter 4, which argued that one of the purposes of the adoption of the Commerce Clause was to ensure that the regulation of the national or interstate market would be uniform by placing the powers over this area in the hands of Congress. This effectively became the affirmative aspect of the clause.

The analysis of the decision of Chief Justice Marshall in *Gibbons v Ogden*[1498] established that the Chief Justice seemed to have adopted the view that the purpose

[1497] Claeys (n 1254); Balkin (n 93).
[1498] *Gibbons v Ogden* (n 100).

of the Commerce Clause was the creation of a uniform and centrally regulated system, and based his decision on the above. His formalistic and dual federalist approaches to the Commerce Clause have also been examined and it was found that he adopted a very wide definition of commerce, which had created an extensive interstate system of commerce, which was, however, still limited on most occasions by physical state boundaries.

It was subsequently demonstrated that whilst the adoption of the above approach resulted in the extension of the interstate market, it also led to certain federal Acts being held unconstitutional. It was argued that as the Supreme Court commenced to recognise the interconnected nature of local and national commercial activities, it resulted in not only the further extension of the national market, but also the disregard of the dual federalist interpretation.

A conservative Supreme Court, however, arguably, refused to acknowledge that to effectively manage the harmful effects of the Great Depression a strong, uniform and national answer was required. The Court, therefore, did not recoil from holding two initial Acts of the New Deal programme unconstitutional in *ALA Schechter Poultry Corp v United States*[1499] and *Carter v Carter*.[1500] It has also been demonstrated that both decisions had deviated from the interpretation of this work of the original purpose of the Commerce Clause and focused on the protection of local activities from national intervention.

Surprisingly, another 'switch' of the approach of the Supreme Court resulted in the extension of the powers of Congress, mostly through the three fundamental cases of the New Deal era: *NLRB v Jones & Laughlin Steel Corp,*[1501] *United States v Darby*[1502] and *Wickard v Filburn*.[1503] The examination of these cases demonstrated that towards the end of the New Deal programme, the scope of interstate commerce became so extensive that activities that were previously regarded as traditionally belonging to the

[1499] *ALA Schechter Poultry Corp v United States* (n 1259); Chemerinsky, *Constitutional Law* (n 77) 165; Tushnet (n 83) 165–166.
[1500] *Carter v Carter Coal Co* (n 1277).
[1501] *NLRB v Jones & Laughlin Steel Corp* (n 1294).
[1502] *United States v Darby* (n 1323).
[1503] *Wickard v Filburn* (n 1336).

states could be considered part of the interstate system. It has, however, been argued that the aim of this extension followed the original purpose of the Commerce Clause: the protection of the development of the national market. It has also been claimed that the purpose of the clause itself commenced to extend as it took over the role of the states in the areas of commerce that became part of the national market, by affording protection to the individuals, but such protection was now provided in a uniform manner nation-wide.

The brief study of the subsequent cases until 1995 signalled a limitless extension of the national market, even though the cases developed in line with the original purpose of the Commerce Clause. Such an extension logically resulted in the state boundaries and traditional state functions enjoying less protection if these were related to activities harmful to the national market. Unsurprisingly, in a federal union of states, this extension of the national power resulted in the states becoming more protective over activities that they had a strong local interest in.

The decisions in *United States v Lopez*[1504] and *United States v Morrison*[1505] seem to have provided a welcome limitation on the extension of the national market to the states. On the other hand, the newly devised approach of the Supreme Court seems to have reverted to the 'police power' distinction, rejecting to acknowledge the interconnected nature of the local and national market. This, however, also appears to have resulted in a return to the approach of the states before the adoption of the Articles of Confederation: it was, once more, the local market that had to be protected from the evils of the national market and not vice versa. The uniform and national protection of individuals could not even be considered.

This restrictive interpretation of the Commerce Clause was rather short-lived because the Supreme Court returned to extending the scope of the national market to areas such as the home cultivation of marijuana in *Gonzales v Raich*.[1506] Surprisingly, the Justices did not devise a new test to extend the national market, but adopted the one in *United States v Lopez.*[1507] On the other hand, these cases clearly demonstrate the

[1504] *United States v Lopez* (n 1192).
[1505] *United States v Morrison* (n 1193).
[1506] *Gonzales v Raich* (n 1194).
[1507] *United States v Lopez* (n 1192).

adoption of the development and protection of the national market as a purpose of the Commerce Clause and the constitutional value it set out to protect.

The unexpected decision of *National Federation of Independent Business v Sebelius*[1508] was subsequently examined, where it was argued that in order to justify a decision reflecting on the current situation of the health insurance and health care markets, the Supreme Court devised a novel interpretation of the Commerce Clause, once again. The decision of Chief Justice Roberts also seems to reject the purpose of the Commerce Clause as the protection of not only the national market, but the participants of it through uniform national regulation.

Whether the approach of Chief Justice Roberts will be adopted in future cases will depend on how long this transformation in the approach of the Supreme Court lasts. Furthermore, whether a novel situation may arise where the interpretation of the Commerce Clause would need to be transformed is, however, not predictable.

[1508] *National Federation of Independent Business v Sebelius* (n 1196).

Chapter 6: Conclusion

The drafting of the Constitution of the United States of America could have taken two different routes during the Constitutional Convention in Philadelphia in 1787. Firstly, the Framers could have provided clear definitions for all provisions of the Constitution as these were understood at the time. This would have guaranteed that the interpretation of these provisions would have been more consistent throughout the ages and would have provided more legal certainty. The Framers, however, decided to take the second approach in the areas of interstate commerce, the protection of fundamental rights and the guarantee of a republican form of government: they opted not to preserve their understanding of these areas in the Constitution, with the purpose of allowing the Constitution to be able to adapt to the advancements of society.

However, adopting this technique to drafting the Constitution has raised two fundamental ambiguities in the constitutional system of the United States of America: first, the constitutional uncertainty surrounding the wording of the provisions, and second, the constant conflict that this creates as a result between the federal and state governments. This thesis has aimed to assess how the United States of America has been managing these two uncertainties since its Founding era.

We can identify two hermeneutic techniques that have been used to manage these uncertainties. The originalist method adopts the viewpoint that the interpretation of the Constitution should follow the original meaning of the provision examined, as viewed in 1787.[1509] The second, non-originalist method argues for an interpretation of the Constitution that looks behind the text of the provision. One such method is that of the 'living Constitution' that argues that the provisions of the Constitution should be interpreted in light of the changes to society, politics and/or the economy throughout the ages. [1510]

This thesis argued in Chapter 1 that this approach may be taken a step further and through the living constitutional values approach, it may provide for the most effective

[1509] Stone and others (n 34) 722.
[1510] Balkin (n 93) 551.

protection of the fundamental constitutional values each of the examined provisions were set out to provide protection for.

I. Managing the constitutional uncertainties of the provisions of the Constitution

When interpreting a provision of the Constitution, one could commence with the textualist method of determining what the terms included in the relevant provisions should be defined as. For instance, in order to determine whether Congress has the power to regulate interstate commerce under Article I section 8 of the Constitution,[1511] what constitutes interstate commerce could be assessed first. The interpretation of this provision, according to the originalist approach, would start with looking at interstate commerce at the time of the adoption of the Constitution. This would ensure legal certainty regarding the interpretation of this provision.

However, given that these terms are not clearly defined in the Constitution, one could also adopt the approach that regards the Constitution a 'living' instrument and determine what would now qualify as 'interstate commerce'.[1512] While the second approach does not provide the same legal certainty as the originalist interpretation, it allows the Constitution to adapt to the advancements of society, politics and/or the economy. The living constitutional values approach stretches the limits of this approach and argues that it should be the constitutional values set out in this provision, i.e. the creation and subsequent protection of a uniform national market to which the interpretation of the Constitution should adapt.

This method of interpretation is also present in other areas of the Constitution, and acts as the link between the management of these constitutional uncertainties in the three fundamental areas studied in the thesis. Moreover, it has been demonstrated that these constitutional uncertainties have been managed by one particular branch of the federal government, the Supreme Court, in most situations. However, it has also

[1511] Constitution of the United States of America 1787, Article I section 8 clause 3.
[1512] Balkin (n 93) 551.

been highlighted, that the Supreme Court gained its powers of judicial review, which it has used in the areas investigated not through a provision of the Constitution, but through the decision in *Marbury v Madison*.[1513] This case gained prominence after holding that the Supreme Court could invalidate any legislation contrary to the Constitution, [1514] and has been used as the basis for such actions ever since. However, it is notable that this case itself arose out of a constitutional uncertainty: the silence of Article III section 1 of the Constitution over the power of the Supreme Court to review acts of other branches of the federal government.[1515]

It has also been argued in this work that the constitutional uncertainties in the area of interstate commerce created through the Commerce Clause originated from a diverging understanding of commerce at the time of the adoption of the Constitution. Three definitions of commerce can be identified at that time: commerce as intercourse; commerce as manufacturing, agriculture and commerce; and commerce as trade. In the first case about the Commerce Clause, in *Gibbons v Ogden,*[1516] the Supreme Court focused on resolving the uncertainty created by this provision by determining what commerce entailed. Chief Justice Marshall firstly adopted the widest interpretation of commerce and identified interstate commerce as 'intercourse [..] concerning more States than one.'[1517] While most of the ensuing interpretations focused on the constant conflict between the federal and state governments, in *Kidd v Pearson*[1518] the Court returned to this constitutional uncertainty and held that manufacturing was not included in commerce. This method of managing the uncertainties created by the Dormant Commerce Clause has been abandoned since.

Constitutional uncertainties may also be identified in the Fourteenth Amendment in the definition of the 'due process of law.' This has resulted in diverging interpretations as to how rights included in the first eight Amendments of the Constitution could be enforced against the states. For instance, in *Hurtado v California*, it was argued that 'settled usages and modes of proceedings' that existed in 'England before the

[1513] *William Marbury v James Madison, Secretary of State of the United States* (n 63).
[1514] ibid 177.
[1515] ibid 178.
[1516] *Gibbons v Ogden* (n 100).
[1517] ibid 189 – 190 and 193-194.
[1518] *Kidd v Pearson* (n 1006).

emigration of our ancestors' and which had been used since then in the United States would constitute 'due process of law.'[1519] In *Twining v New Jersey*, however, the Supreme Court held that if the right was such an 'immutable principle of justice' that it had to be protected against 'arbitrary' government action in a free government, it should be considered to amount to 'due process of law.'[1520]

The lack of definition of a 'republican form of government' under the Guarantee Clause has, similar to the Commerce Clause, resulted in key uncertainties since the Founding era. Further, in parallel with the Commerce Clause, a republican form of government in 1787 could be characterised differently, resulting in increased uncertainties over the interpretation of this provision. This has been illustrated, for instance, through the analysis of the debates before and during the Civil War, and the Reconstruction Era at Congress about whether the Southern states, where slavery was not abolished, could still be regarded republican states.[1521] Subsequently, the uncertainties created by the Guarantee Clause have further tested the limits of what a state that is 'substantially republican' means, such as in the case of its non-application against Huey P Long's Louisiana.[1522]

II. Managing the constant conflict between the federal and state governments

A second connection between the three fundamental areas examined in the thesis has been identified as the management of the constant conflict between the federal and state governments. It has been argued that whilst the Constitution created a federalist system in the United States of America with two levels of government – federal and state – it also created a constant conflict between these levels. This constant conflict in the provisions of the Constitution investigated in the thesis arose by the Framers not having clearly defined which level of government – or in the case of the Guarantee Clause, which branch of the federal government – was clearly granted with the powers

[1519] *Hurtado v California* (n 720).
[1520] *Twining v New Jersey* (n 731) 101 - 102.
[1521] *Congressional Globe* 37th Cong, 2nd Session 47 (1861).
[1522] Magliocca (n 317) 4; Ackerman, *We the People: Transformations* (n 200) 108.

to regulate a given area. Moreover, granting the federal government with powers that it had not previously possessed under the Articles of Confederation meant that those same powers would be withdrawn from the states.

A clear illustration of this issue is reflected in the area of protection of fundamental rights of individuals. As it was examined further in Chapter 3, only certain states, such as New Hampshire, Vermont or Virginia, had enacted a bill of rights before the adoption of the Constitution. These bills of rights clearly granted the states with the power to protect the rights of the individuals living in these states. However, as demonstrated in Chapter 3, with the adoption of the federal Bill of Rights, the federal government was also entrusted with the task of protecting the rights of individuals contained in the first ten Amendments of the Constitution. To resolve this conflict of regulating the same area, the Supreme Court, in *Slaughter House Cases*, resorted to the 'dual federalist' method of interpretation of the Constitution.[1523] This meant that the states were responsible for providing protection to the individuals of their rights guaranteed under state laws and the federal government was responsible for providing protection to the individuals of their rights guaranteed under the Constitution. Moreover, the rights contained in state laws could only be enforced against the states, and the rights contained in the Constitution could only be enforced against the federal government.

However, the thesis has demonstrated that this approach was not followed consistently for all rights contained in the ten Amendments, and the Supreme Court has subsequently adopted the selective incorporation doctrine. According to this approach, through the due process clause of the Fourteenth Amendment, certain provisions of the Bill of Rights may be enforceable against the states as well, and not only the federal government. This would, however, only apply following the analysis of each case 'clause by clause and right by right' and if the provision is considered fundamentally fair in light of a non-originalist method of interpretation in most cases.[1524]

[1523] *The Slaughter House Cases* (n 688).
[1524] Amar, *The Bill of Rights: Creation and Reconstruction* (n 543) 139 and 219; Brennan Jr (n 553) 545.

The thesis has also argued that the debates surrounding the constitutional uncertainties in the protection of fundamental rights and the Guarantee Clause contributed to conflicts that sparked the Civil War. They highlighted crucial differences between various aspects of the states that constituted the United States of America, for instance, in relation to slavery, and thus contributed to the North-South divide.

The constant conflict between the federal and states governments also characterises the Commerce Clause, which was examined in Chapters 4 and 5, and has even resulted in its dual characteristics: its affirmative, and negative or dormant aspect. These aspects, it was argued, also demonstrate the conflict itself: while the affirmative aspect focuses on the limits of the regulatory authority of Congress over interstate commerce, the dormant aspect focuses on the limits this poses on the regulatory authority of the states. Similar to the initial position of the Supreme Court on the Bill of Rights, the Justices adopted the dual federalist approach in this area as well in *Gibbons v Ogden.*[1525] Thus, Congress was to regulate interstate commerce and the states were to regulate in the area where they possessed 'police powers.'[1526] However, it has also been established that parallel with the incorporation doctrine, this dual federalist interpretation of the Commerce Clause has been set aside, and a novel method of resolving the constant conflict between the states and the federal government is identifiable in most fundamental cases in this area.

III. The Living Constitution and the living constitutional values approach

A third uniting characteristic of the approaches adopted by the federal government to manage the constitutional uncertainties and the constant conflict between the federal and state governments in the areas examined in the thesis is identifiable. In all areas, the federal government seems to have adopted an approach at certain times that accepts the Constitution as a 'living' instrument,'[1527] and a constitutional value in each

[1525] *Gibbons v Ogden* (n 100).
[1526] Corwin (n 101) 480.
[1527] Balkin (n 93) 551.

of the provisions examined in this work that the Constitution was set out to protect under the living constitutional values approach may also be identifiable. This means that the Constitution has been able to accommodate the advancements in society, politics and/or the economy, which has, in hand, assisted in the creation of these developments. However, in order for the Constitution to become such an instrument, constitutional uncertainties must have existed in the area, allowing room for different interpretations of the provisions in question to emerge.

The adoption of this approach was evidenced through the Commerce Clause case-law. For instance, *Gibbons v Ogden*,[1528] the first Commerce Clause case, focused on the subject matter of the regulation. However, the current approach to determine whether a state law is contrary to the Dormant Commerce Clause is a novel, 'two-tiered standard.'[1529] This requires (i) the assessment of the discriminatory aspect of the state law in question first, and (ii) the balancing test devised in *Pike v Bruce Church Inc.*[1530] to determine whether 'the statute regulates evenhandedly to effectuate a legitimate local public interest.'[1531] Therefore, it is argued that a clear transformation in the approach of the Supreme Court to these cases is identified, which reflects the current standards of society. It was further argued, however, that the constitutional value originally set out in the Commerce Clause – that of the creation of a uniform national market – always remained constant, it was merely adapting to the circumstances of each era and the understanding of interstate commerce by the societies at each point in time.

A similar transformation has also been uncovered in cases where the affirmative Commerce Clause formed the basis of action. It has been demonstrated that following the Great Depression, the Supreme Court initially rejected the New Deal Programme in *ALA Schechter Poultry Corp v United States.*[1532]

[1528] *Gibbons v Ogden* (n 100).
[1529] Day (n 1038) 46–47; Friedman and Deacon (n 860) 1926; Felmly (n 963) 475; Larsen (n 892) 850.
[1530] *Pike v Bruce Church Inc* (n 1122).
[1531] *Pike v Bruce Church Inc* (n 1124) 142; O'Fallon (n 1126) 407.
[1532] *ALA Schechter Poultry Corp v United States* (n 1259); Chemerinsky, *Constitutional Law* (n 77) 165; Tushnet (n 83) 165–166.

However, the Supreme Court in the 'switch in time that saved nine,'[1533] changed their approach and accepted the New Deal Programme as a constitutional exercise of the regulatory authority of Congress under the Commerce Clause. The powers of Congress to regulate commerce, as a result, seemed to become limitless in the subsequent cases, until the decision in in *United States v Lopez*[1534] and *United States v Morrison.*[1535] In these cases, the Supreme Court held that Congress was not allowed to criminalise the possession of firearms in a school zone[1536] or enact 'tort provisions of the Violence Against Women Act' to regulate 'gender-motivated violence' as "economic" activity.'[1537] These cases, therefore, reflected a transformation in the approach of the Justices, and, importantly, the society in the United States of America towards the regulation of the interstate market, and, thus, the constitutional value of the creation and subsequent protection of a uniform national market as well.

Nevertheless, the approach of the Supreme Court transformed once again, and, in effect, facilitated the expansion of the power of Congress in *Gonzales v Raich*,[1538] where the Court held that Congress could regulate the cultivation of marijuana for home consumption under the Commerce Clause as an 'economic activity.' [1539]

This approach of the Supreme Court, however, was not sustained for long. In *National Federation of Independent Business v Sebelius*, the Court held that the powers of Congress under the Commerce Clause cannot be used to create commerce, but only to regulate commerce.[1540]

This development of the case law, which is characterised by regular transformations of the approach of the Supreme Court to the Commerce Clause, would not have been possible had the Supreme Court adopted the originalist interpretation of this clause. It has, thus, been argued that by allowing the changes through different time periods to influence its decisions, by adopting a non-originalist method of interpretation, the

[1533] Chemerinsky, *Constitutional Law* (n 77) 169.
[1534] *United States v Lopez* (n 1192).
[1535] *United States v Morrison* (n 1193).
[1536] Tribe (n 171) 817.
[1537] Claeys (n 1254) 435.
[1538] *Gonzales v Raich* (n 1194).
[1539] *Gonzales v Raich* (n 423) 25.
[1540] *National Federation of Independent Business v Sebelius* (n 1196).

Supreme Court has accommodated and facilitated the advancements of commerce. The thesis has, therefore, argued that the Supreme Court adopted the approach in these cases that the Constitution is a living instrument and regarded the creation and subsequent protection of a uniform national market as the living constitutional value that was set out to guide the development of this area in the Constitution.

The study of the protection of the fundamental rights in the United States of America and the Guarantee Clause further provided a clear illustration of the acceptance of the approach that the Constitution is, in effect, a living document. An illustration of this approach was identified through the discussions on the existence and the abolition of slavery at both the federal and state levels of government.

Slavery emerged in the debates surrounding the protection of the fundamental rights of individuals as a system that was incompatible with a government, where such protections were afforded to individuals. Since these rights could not be guaranteed to slaves and manumitted ex-slaves, the creation of a federal system protecting these rights had to be devised. Moreover, the existence of slavery was also considered to be contrary to the ideals of a republican form of government during the debates about the Guarantee Clause. One key standpoint claimed that slavery stood strongly opposed to the idea that 'all men are created equal,' which is a key provision of the Declaration of Independence that is claimed that all republican governments should follow.[1541]

It has also been argued that these debates played a role in the start of the Civil War, and that the uncertainties around the status of slavery and the dynamic interpretation of these provisions allowed for the commencement of the re-building of the federal system.

It has been further demonstrated that states where slavery was not outlawed before the Civil War were considered to be republican governments under the Constitution. If an originalist interpretation of the Constitution had been adopted, slavery would have, thus, remained an acceptable practice in a republican form of government. However, with the adoption of the non-originalist living constitutional values approach,

[1541] Annals of Congress, House of Representatives, 15th Congress, 2nd Session 1180.

the Acts of the federal government and the Constitution itself were able to adapt to the changes in the standpoint of society on the issue of slavery.

However, it has also been established that whereas the incorporation doctrine provides an opportunity to assess whether changes in society have taken place that will consequently allow for a certain right from the Bill of Rights to be incorporated against the state, this trend is not clearly visible for the Guarantee Clause. The current silence of this clause has, therefore, increased the uncertainties around this area and whether it will gain a *Marbury v Madison*[1542] moment in the foreseeable future is questionable.

Therefore, the development of constitutional law in these areas clearly shows that the federal government has adopted the approach when it deemed it appropriate that the Constitution is a living instrument, and in each of its provisions a constitutional value may be discovered that the Constitution set out to protect. This has further allowed for the law to react to situations as they arise. However, adopting this approach has also demonstrated its disadvantages, for instance, with the issue of slavery where the unresolved state of the constitutional uncertainties and the resulting conflict between the federal and state governments led to dire consequences.

IV. A uniform system

A fourth characteristic that unites the areas examined in the thesis is the purpose of the creation of a uniform system. This may be self-explanatory at first sight, since the creation of a novel federal system required the adoption of a uniform system. However, it has been argued that the creation of a uniform system may also be identified as a purpose, and, thus, the protection of citizens from the undesired consequences of diverging legal systems at federal level a constitutional value, where this has not been clearly laid down in the Constitution.

[1542] *William Marbury v James Madison, Secretary of State of the United States* (n 63).

Thus, for instance, it has been established that the decisions of the Supreme Court based on the Commerce Clause, demonstrate the aim to create and subsequently protect a national and uniform federal market as a constitutional value. Regardless of the definition of commerce adopted at the time, the nature of commerce in the United States commenced to transform in the last stages of the Confederacy and prior to the Constitutional Convention. While economic, political and social interactions became more regular between the states, this era was characterised by discriminatory measures and trade wars between the states.[1543] It was, therefore, demonstrated that a change in the approach of the regulation of interstate commerce was also required. The debates at the Constitutional Convention illustrated the clear demand and desire for a federal Congress with stronger authority to regulate interstate commerce.[1544] It has, therefore, been established that the creation of a national market in the United States of America was one of the purposes for the adoption of the Commerce Clause, which may, thus, also be identified as a constitutional value set out in this provision. However, in order to be able to create such a federal market, the actions of the states would have to be limited. As a result, the constant conflict will always remain in place as long as the national market remains incomplete, and with limits that may never be abolished.

It has also been argued that following the opinion of Chief Justice Marshall in *Gibbons v Ogden,*[1545] the subsequent concurrent authority approach of Chief Justice Taney recognised the creation of a national market as the main purpose and the constitutional value of the Commerce Clause.[1546] The continued acceptance of this was also highlighted in a transformed approach to the Dormant Commerce Clause, through the national-local test originating from *Cooley v Board of Wardens of the Port of Philadelphia.*[1547] The acceptance of the same purpose can also be identified in the

[1543] Eule (n 861) 430; Friedman and Deacon (n 860) 1889; Tribe (n 171) 1044; *H P Hood & (and) Sons, Inc v Du Mond, Commissioner of Agriculture and Markets* (n 873).
[1544] See Chapter 2, section II.3 for a further discussion about this.
[1545] *Gibbons v Ogden* (n 100).
[1546] McGinley (n 877) 413.
[1547] *Aaron B. Cooley, Plaintiff in Error, v. The Board of Wardens of the Port of Philadelphia, to the use of the Society for the Relief of distressed Pilots, their Widows and Children, Defendants* (n 986).

modern approach to the Dormant Commerce Clause, which allows the Supreme Court to invalidate any discriminatory state regulation in this area.[1548]

It has, however, also been recognised that through the novel trend of extending the powers of the states to regulate interstate commerce, a renewed view has, once again, emerged about the Dormant Commerce Clause. This trend, alarmingly, seems to return to accepting discriminatory state regulations in this area, thus contravening the purpose of the Commerce Clause as the creation of a uniform national market.

Despite the various transformations of the interpretation of the Affirmative Commerce Clause throughout the years, the Supreme Court has been willing to interpret this aspect of the Commerce Clause in line with its purposes of the creation, development, and protection of the interstate or national market as a constitutional value. A key moment in the development of a uniform national market in the United States of America can be identified as the Great Depression, which reflected the interconnectedness of the various economies of the states within the United States of America.[1549] Despite the initial rejection of the New Deal Programme by the Supreme Court, the Justices were willing to accept a wide extension of regulatory powers of Congress until 1995. It has, therefore, been argued that this demonstrates the adoption of the viewpoint by the Supreme Court that the creation of a national market could be identified as the purpose of the Commerce Clause, and in parallel the constitutional value it was set out to protect. Notwithstanding the limitations placed on this extension of powers in *United States v Lopez*[1550] and *United States v Morrison,*[1551] the Justices returned to the expansion of the national market in *Gonzales v Raich*.[1552] The return of this approach illustrated that the creation and protection of a national market as a constitutional value came to the foreground once again.

However, similar to the approach of the new trend of Dormant Commerce Clause cases, *National Federation of Independent Business v Sebelius*[1553] also illustrates that

[1548] Petragnani (n 1052) 1218.
[1549] Claeys (n 1254) 426. 426.
[1550] *United States v Lopez* (n 1192).
[1551] *United States v Morrison* (n 1193).
[1552] *Gonzales v Raich* (n 1194).
[1553] *National Federation of Independent Business v Sebelius* (n 1196).

this purpose of the Commerce Clause has been set aside in order to place limits on the powers of Congress.

The federal Bill of Rights and the incorporation doctrine is an additional illustration of how the creation of a uniform system for the protection of fundamental rights could be identified as the purpose of the creation of these Amendments and this doctrine. The federal Bill of Rights provides a nation-wide protection for individuals in the United States of America against the federal government. Through the incorporation doctrine, and the selective incorporation of most rights contained in the federal Bill of Rights, individuals are now afforded protection against their states. Therefore, in effect, in this area, and as argued in Chapter 3, the United States has already achieved a uniform system on federal level and has been heading towards an almost uniform system on both federal and state level.

The Guarantee Clause is a further example of how the purpose of creating a uniform system on both federal and state level contributed to the adoption of the clause. Guaranteeing the same form of government to each state would have guaranteed that certain principles of a republican government are observed not only on federal level, but in all states. Whilst the Guarantee Clause itself does not set out what these principles are, it is indisputable that there are common characteristics of the states that unite them. For instance, none of the states have a monarch or grant titles of nobility to their citizens. Moreover, the protection of certain fundamental rights of individuals is guaranteed in all states through the incorporation doctrine. Chapter 2 further observed how the Guarantee Clause may also be claimed to have laid down the protection against the formation of a tyranny in the United States of America, and how adopting like forms of republican governments in the states would achieve this result.

V. Conclusion

In conclusion, the thesis has studied how the federal government of the United States of America has managed the constitutional uncertainties, and the constant conflict that

has arisen as a result between the federal and state governments. In order to assess this, the thesis has focused on the development of three key areas of constitutional law in the United States of America: the regulation of interstate commerce, the protection of fundamental rights, and the guarantee of a republican form of government.

The thesis has established that the management of the uncertainties in these areas by the federal government has differed greatly at different times, based on different methods of constitutional interpretation at different times. Therefore, the method of managing these uncertainties and conflicts has become uncertain itself. Whilst this creates a state of legal uncertainty, it is not in contradiction to the standpoint that the Constitution itself is a living instrument, which should adapt to the changes of circumstances in each era.

This work has further devised a new method of non-originalist constitutional interpretation that may be applied to the areas examined in this thesis: the living constitutional values approach. This method claims that each provision of the Constitution lays down certain fundamental constitutional values that the Framers intended to protect. However, to effectively provide protection for these, and recognising that the state of play in 1787 would not remain constant, the approach of non-originalists and those adopting a living constitutional approach should be followed: whilst the intent of the Framers as a constitutional value may remain constant, the interpretation and understanding of these values may change over time and the Constitution should be able to adapt to these.

The ambiguity of what a republican government entails, however, also poses a substantial threat that an illiberal democracy, such as those in the European Union, may emerge in the United States, which may not necessarily comply with the values of the current republican ideal. Whether the federal government is equipped to predict such threats and if the United States of America is prepared for addressing such possible threat, based on this work, is quite doubtful.

While it was argued that the constitutional value set out in the Fourteenth Amendment was to create a uniform method of the protection of fundamental rights of citizens, this

has not fully materialised up to date. Whilst it would create a complete uniform system for the protection of fundamental rights in the United States, it is unpredictable whether the views of society will ever change to argue for the total incorporation of all rights contained in the Bill of Rights.

It is, moreover, lamentable that the current views of society support the restriction of the protection of the national market in support of local protectionist measures at times when, for instance, with the click of a button, a citizen of one state in the United States may be able to purchase goods or services from another state.

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