



ARTICLE

The Inconvenience Doctrine

Saikrishna Bangalore Prakash*

Abstract. Many originalists and textualists disdain the consideration of consequences to determine a law’s meaning. Yet interpreters have long weighed consequences, particularly inconvenient ones, to decode the law. In the eighteenth century, the *argumentum ab inconvenienti*—the claim that a reading of the law was mistaken due to its adverse consequences—was a familiar technique, perhaps almost as common as an argument grounded on the letter of the law. This Article excavates the remarkably widespread invocation of consequences to defeat opposing readings and to decipher a law’s meaning. Commentators, including William Blackstone and Justice Joseph Story, discussed the practice, and legislators, executives, and judges regularly utilized it. The practice was scarcely controversial, as there seems to have been no one at the Founding who highlighted its drawbacks, much less rejected it. Instead, the likes of Chief Justice John Marshall, Alexander Hamilton, and James Madison invoked consequences to fix the meaning of federal and state law. What is an epithet today—result-oriented—was almost an apt description of the practices of the era. These rather unexpected findings have moved me to reconsider—and ultimately abandon—my prior conviction that interpreters have no business considering consequences.

* James Monroe Distinguished Professor of Law, Horace W. Goldsmith Research Professor of Law, and Miller Center Senior Fellow, University of Virginia. Thanks to Will Baude, Ashley Deeks, Connor Fitzpatrick, Michael Gilbert, John Harrison, Jordan Kei-Rahn, Evan Lisman, Nick Mauer, Caleb Nelson, Michael Paulsen, Michael Rappaport, Cass Sunstein, and Steve Walt for helpful conversations and comments. Thanks to Nate Bartholomew, David Bainbridge, Bradley Berklich, Anastasia Forbes, Steven Hayes, Trey Kieser, Suraj Renganathan, Lauren Rich, Kanishk Singh, and Andrew Taylor for excellent research and comments. Finally, thanks to the superb editors of the *Stanford Law Review*.

Table of Contents

Introduction 3

I. The Skeptics 10

II. British Commentary and Practice 16

III. American Commentary and Practice 21

 A. Commentary 22

 B. Cases 26

 C. Political Branches 35

IV. Lingering Questions About *Argumentum ab Inconvenienti* 46

 A. Why Consequences? 47

 B. Private Mischief, Public Convenience 47

 C. Inconvenience vs. Convenience 49

 D. What Must Be Unclear? Text or Meaning? 50

 E. Judging Uncertainty 52

 F. The Relationship Between Uncertainty and Inconvenience 54

 G. The Relevance of Consequences Today 58

Conclusion 61

Introduction

When it comes to meaning, the consequences do not matter.

—Saikrishna Prakash¹

If you [consider consequences], you're kind of putting yourself in the place of the legislator.

—Chief Justice John Roberts²

The argumentum ab inconvenienti . . . is one of the great foundations of the law.

—Thomas Jefferson³

The Roberts Court has reassured that “it is not our task to assess the consequences of each [party’s statutory reading] and adopt the one that produces the least mischief.”⁴ But in government, as in life, there is frequently a disconnect between professed principles and the practices on the ground. In fact, consequences play a sizable, if somewhat understated, role in the Supreme Court under the guise of the absurdity doctrine⁵ and other considerations.⁶ If Lord Voldemort is “He-Who-Must-Not-Be-Named,”⁷ consequences are the forceful

-
1. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2209 (2006) (book review).
 2. *Justice Roberts Fireside Chat*, REV (May 7, 2025) (capitalization altered), <https://perma.cc/3C94-GPN3> (generated by Rev).
 3. Letter from Thomas Jefferson to Albert Gallatin (Oct. 16, 1808) (capitalization altered), reprinted by NAT’L ARCHIVES: FOUNDERS ONLINE, <https://perma.cc/9AAZ-KDNA>.
 4. *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010).
 5. The absurdity doctrine authorizes a court “to ignore a statute’s plain words in order to avoid the [absurd] outcome those words would require in a particular situation.” Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 128 (1994); see also John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (“[T]he Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.”); Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1002 (2006) (noting that the absurdity doctrine “authorizes departures from the plain meaning of statutory text when its literal application would lead to an ‘absurd’ result in a particular case”); Jim Huang, Note, *Rationalizing Absurdity*, 133 YALE L.J. 2381, 2383 (2024) (asserting that the doctrine “loosely instructs that statutes ought not be interpreted as to lead to absurd results”).
 6. See Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971, 1030-31 (2023) (showing that the Court wields discretion to choose the outcome with the more easily avoidable negative consequences); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 773-75 (2021) (showing that second-order welfare consequences are used in constitutional law even as first-order welfare implications are forbidden); Anita S. Krishnakumar, *Practical Consequences in Statutory Interpretation*, 139 HARV. L. REV. (forthcoming 2026) (manuscript at 30-48), <https://perma.cc/9V7L-V6XW> (highlighting that justices cite policy consequences and administrability consequences).
 7. Voldemort, the archenemy of Harry Potter, is often referred to as “He-Who-Must-Not-Be-Named.” See, e.g., J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* 339 (1999).

(and apparently baleful) factor-that-must-not-be-named. The Court’s posture suggests that its members perceive consequences as an unbecoming, even illegitimate, factor—one whose influence must be kept hush-hush. What are observers to make of a judicial practice that the Court simultaneously disdains and deploys?

There was a time when consequences were openly invoked and utilized, and not a cause for dissembling or shame. Before there was much talk of an absurdity doctrine, there was what we can call an “Inconvenience Doctrine”—a guileless consideration of the consequences of various interpretations to decide a law’s meaning. In the eighteenth century, interpreters gave dispositive weight to all manner of consequences in the interpretation of constitutions, statutes, and treaties.⁸ There was a widespread agreement amongst treatise writers, jurists, and statesmen that when the meaning of a law was uncertain, the consequences could help settle the meaning. I call this the “Inconvenience Doctrine” because litigants and officials habitually underscored the drawbacks of an alternative reading. People argued that an opposing reading had to be mistaken because its consequences were harmful or dreadful, a tactic called an “*argumentum ab inconvenienti*”—an argument from adverse consequences. But the more general category was an argument from consequences. Because it was perhaps easier to claim uncertainty as to meaning than to assert that the law as written was absurd, the Inconvenience Doctrine might have been more potent than the absurdity doctrine, at least in the sense of being more often invoked.⁹

The arguments from consequences took on several incarnations. Early on, some insisted that arguments from inconvenience (i.e., adverse consequences) determined *the content* of the law. “[T]he law,” said Lord Edward Coke, “cannot suffer any thing that is inconvenient.”¹⁰ That is why, said Coke, “an argument *ab inconvenienti* is strong to prove [a particular reading] is against law.”¹¹ He likely meant that an interpretation of the law that generated harmful consequences was deeply troubled, if not outright mistaken. In the next century, Sir William Blackstone declared that “effects and consequence” were powerful “signs”—along with the text, context, subject matter, spirit, and reason—to “interpret the will of the legislator.”¹² In the United States, Chief Justice John Marshall noted: “That the consequences are to be considered in expounding laws, where the intent is doubtful [sic], is a principle not to be controverted.”¹³

8. See *infra* Part III.

9. I hedge here because, in some versions of the absurdity doctrine, one might circumvent absurd applications of a law even when the text was deemed clear.

10. 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON § 138 (London, John More 1629).

11. *Id.* § 722.

12. 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

13. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 389-90 (1805) (opinion of Marshall, C.J.).

He was saying that where the meaning—what he (and others) called “intent”—was uncertain, interpreters ought to assess the consequences of the various readings to decode meaning.

While the Inconvenience Doctrine assumed different shapes over time, by the end of the eighteenth century, it took on a fascinating form, with three steps.¹⁴

Step One: Interpreters, judges included, should use letter, spirit, context, and subject matter to make sense of the law. Within Step One, a text might be unambiguous, but interpreters nonetheless would occasionally depart from a text’s plain meaning due to the influences of spirit, context, and subject matter. Interpreters did this because they did not automatically equate the semantic meaning with the law’s actual meaning. The Founders used spirit,¹⁵ and other tools and techniques, to justify extensive and restrictive interpretation.¹⁶ They often discovered a meaning that went beyond what a text’s plain reading suggested (i.e., extensive interpretation).¹⁷ And other times, they found a meaning that was less than what the text’s plain reading signaled (i.e., restrictive interpretation).¹⁸

Step Two: When, after applying the above factors, the interpreter was confident about the meaning of a legal provision—when the meaning was thought clear—the interpreter should pay no heed to consequences. Again, clarity of the law was not merely a function of the text’s plain meaning, for the Founders used the other factors to discern clarity or its opposite, uncertainty.¹⁹

Step Three: When uncertain about the meaning of a legal provision, the interpreter utilized consequences to fix the meaning. Within Step Three, consequences did not merely serve as a tiebreaker, to do no more than decide who should prevail in a case. Instead, as James Madison put it, arguments from “convenience or inconvenience . . . were intended only to throw light upon what was meant by”²⁰ the lawmakers. That is, consequences could help an interpreter ascertain a law’s true meaning—what the lawmakers actually enacted.

In light of these three steps, return to Chief Justice Marshall’s observation. Recall that he tellingly attested to the undoubted influence of consequences—it

14. See *infra* Parts III.A-C.

15. Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 942-43 (2025) (defining arguments from “spirit” as the use of purpose, intent, reason, or speculation about what the lawmaker would have done in the face of unforeseen circumstances).

16. *Id.*

17. *Id.* at 954.

18. *Id.*

19. See *infra* notes 126-29 and accompanying text.

20. The Congressional Register (22 June 1789) (statement of Rep. James Madison), reprinted in 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 1028-29 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter 11 DOCUMENTARY HISTORY].

was *incontrovertible* that consequences were “to be considered in expounding laws.”²¹ The Inconvenience Doctrine had been a precept in Britain and had made its way to America, just as so many other legal principles did.²² It was part of a familiar scaffolding, and many, including Alexander Hamilton, James Madison, and Justice Joseph Story, endorsed the Doctrine.²³ They understood that when the meaning was uncertain, consequences decided the meaning of the law. To my knowledge, no one at the Founding voiced misgivings about, much less challenged, the principle that consequences could settle meaning. Thomas Jefferson spoke for many when he observed that arguments from consequences were one of the “great foundations of the law.”²⁴

Fascinating questions and issues arise from the use of consequences. At the outset, what did people mean by “consequences” and “inconvenient”? A dictionary of the era supplies recognizable definitions. Per Samuel Johnson’s Dictionary, “consequence” had seven definitions, with the first two being most relevant here: “[t]hat which follows from any cause or principle” and “[e]vent; effect of a cause.”²⁵ For “inconvenient,” the entry lists two definitions: “[i]ncommodious; disadvantageous” and “[u]nfit; inexpedient.”²⁶ From my readings of the materials of the era, I would say that “inconvenient” generally meant disadvantageous, at least in the context of legal interpretation.

When people of that era said a law was ambiguous, what did they mean by that assertion? In that era, ambiguity signaled something different than what many of us might take it to mean today. Textualists might imagine that when the text was clear, the meaning was plain and, in that case, consequences simply could not have mattered. After all, textual clarity in our era often cuts off recourse to other factors or doctrines.²⁷ Yet Founding-era interpreters sometimes weighed the consequences in this context because while the text might be unambiguous, *the meaning of the law might not be*.²⁸ Per Step One, the Founders often distinguished a law’s semantic meaning—the meaning that emerged from the letter of the law—from the law’s *true meaning*. In the eighteenth century, the search for meaning was a search for the legislature’s

21. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 389-90 (1805) (opinion of Marshall, C.J.).

22. *Infra* Parts II-III.

23. *See infra* Parts III.A-C.

24. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

25. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Dublin, W.G. Jones 1768).

26. *Id.*

27. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 17 (1994) (“The rule of lenity . . . applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.”); *cf.* Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1108 (2006) (discussing how courts read ambiguous contract terms against the drafter’s interests).

28. *See infra* Part III.A.

intent.²⁹ The letter of the law was the outer representation of that intent, but because of human imperfections, the text might not accurately reflect the author's intent. Indeed, people often invoked the metaphor of shell versus seed,³⁰ or outer bark versus what lies beneath,³¹ with the text of a law merely the shell or bark and the actual meaning resting behind the text. People distinguished between the letter of the law and the meaning of the law because they used other factors besides the text to discern meaning.³² In particular, they deployed context, subject matter, and spirit to determine the meaning, sometimes concluding that the ultimate meaning differed from the semantic meaning.³³

Given that interpreters could cite context, subject matter, and spirit to discover a meaning that *overrode* a plain reading of the text, these factors could exert a slightly less potent influence. They could cause an interpreter to assert that the meaning of the law was ambiguous or doubtful.³⁴ And whenever an interpreter discovered a latent uncertainty about meaning, the consequences settled the meaning.

What sorts of effects mattered? People of that era weighed all manner of consequences, including judicial administrability, the costs of litigating, the impact on the Treasury, the burdens placed on regulated industries, and the long-term viability of our federal system.³⁵ Interestingly, I came across nothing indicating that interpreters regarded particular sorts of consequences as out of bounds. This might reflect an implicit consensus that nothing was off limits. Or it might reflect a widely shared premise that interpreters ought never consider certain consequences, and hence there was no need to declare them off limits.

How often did interpreters conclude that the meaning of a provision of law was ambiguous or vague such that consequences should decide the matter? To answer this, we would have to know the universe of legal interpretations and how often people concluded that a law's meaning was uncertain. This would be an impossible inquiry. But as noted, the Inconvenience Doctrine was more than a tiebreaker to be used in extraordinary circumstances; the Doctrine did not

29. 3 BLACKSTONE, *supra* note 12, at *430 (observing that courts are “equally bound, and equally profess, to interpret statutes according to the true intent of the legislature”); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (arguing that “the intention of the law maker [sic] must govern in the construction of . . . statutes”).

30. *See* 2 EDMUND PLOWDEN, *THE COMMENTARIES, OR REPORTS OF EDMUND PLOWDEN* 465 (London, S. Brooke 1816).

31. *See, e.g.*, Letter from John Marshall to John Randolph (June 26, 1812), *in* 7 *THE PAPERS OF JOHN MARSHALL* 334, 335 (Charles F. Hobson et al. eds., 1993) (complaining that the Senate had honored the form of a rule at the expense of its deeper and true meaning).

32. Prakash, *supra* note 16, at 942-43.

33. *Id.* at 997.

34. *See id.* at 942-43.

35. *See infra* Part III.

apply merely when all else seemed in equipoise.³⁶ While not all laws were ambiguous or vague, the absence of clarity was hardly exceptional.³⁷ To say that the meaning of a provision was doubtful was often to say no more than one was uncertain about its meaning. That could occur quite frequently.

Finally, consider a far-reaching question: Notwithstanding the rule that consequences mattered only when the law's meaning was doubtful, did some people consider consequences before identifying any uncertainty or opacity? I believe so. To be clear, I found no one who claimed to be doing as much. Yet there are plenty of arguments from consequences where the speaker or writer never first asserted that the law's meaning was doubtful.³⁸ In my opinion, some of these people invoked consequences *without regard to any uncertainty of meaning*. This practice perhaps made sense because when interpreters recognized that one might avoid adverse consequences by settling upon another meaning, some of them would embrace that alternative. Further, even when someone asserted that a law's meaning was uncertain, one must wonder whether they were engaged in motivated reasoning. Some people might have first recognized the disadvantages of a particular reading and only later discovered or asserted a lack of clarity. Indeed, inconvenient consequences might be a potent reason to conclude that one's initial reading was shaky, if not mistaken.

This Article excavates the overlooked Inconvenience Doctrine and makes five historical contributions. First, it explains why the influence of consequences was perhaps at its height when the common law was dominant. Second, perhaps because of a reconceptualization of the judicial role and the rise of legislation, the influence of consequences diminished a tad, leading to the Inconvenience Doctrine. Third, the Inconvenience Doctrine applied to constitutions and treaties and was not merely a feature of statutory interpretation. Fourth, all manner of legal elites made arguments from consequences—not only judges but litigants and politicians as well. In particular, the Executive, the most frequent and (therefore) consequential interpreter of federal law, regularly used consequences to decode the laws it was pledged to faithfully execute. Finally, this Article reveals that arguments from consequences have an ancient pedigree and are not the invention of willful, result-oriented judges from the twentieth century. At the Founding, all officials—judges included—often weighed the consequences and settled upon the reading that yielded the best outcomes.

While largely focused on the past, this Article should sway contemporary interpretive debates. First, this Article's findings have implications for non-

36. See *infra* Part III.

37. *Cf., e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 405 (Boston, Hilliard, Gray & Co. 1833) (describing an approach to constitutional interpretation when faced with ambiguity).

38. See *infra* Part III.C.

originalists. My research highlights a longstanding tradition, one that does not merely consider semantic meaning but also uses consequences as a factor in choosing among readings. A longstanding practice likely has a utility that non-originalists can endorse on Burkean grounds.³⁹ This Article also echoes the work of William Eskridge and others. Long ago, Eskridge argued that the Founders believed that consequences mattered in statutory interpretation.⁴⁰ This Article reinforces his claims, asserting that several institutions (legislatures, executives, and courts) deployed consequences across an array of legal instruments (statutes, treaties, and constitutions). Others, including Farah Peterson and Jonathan Gienapp, have also argued that at the Founding, legal instruments were not always understood by their text alone.⁴¹ But they perhaps paid less attention to the recurring use of consequences than did Eskridge.

Second, this project intervenes in an extended debate about the use of consequences.⁴² There are reasons why modern judges profess a disdain for consequences. Just as literalism is a flaw,⁴³ so too is a single-minded focus on outcomes. Whenever one considers consequences, one risks departing from the law that the lawmakers sought to enact.⁴⁴ Yet the risks associated with consequences were not so alarming that the Founders wholly eschewed their consideration. The Founders perhaps supposed that discarding the Inconvenience Doctrine would be exceedingly inconvenient.

39. For a discussion of Burkeanism in legal interpretation, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

40. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1003, 1037, 1066, 1076, 1083 (2001) (discussing the need to avoid bad consequences); see also *id.* at 1083 (describing when the “letter of the law . . . gave way to” other principles).

41. For Peterson and Gienapp’s perspectives, see Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 10, 29-31 (2020) (asserting a more textual interpretation of treaties and private law and a less textual interpretation of public law); and JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 90-91, 115-16 (2024) (arguing that the Founders believed that law was not merely reducible to its text).

42. See, e.g., Tang, *supra* note 6, at 972; Pozen & Samaha, *supra* note 6, at 748; Krishnakumar, *supra* note 6 (manuscript at 4-5). Compare Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957) (describing how the Supreme Court engages in policymaking by assessing “the consequences that will probably ensue from choosing a given alternative” and “the level of probability that these consequences will actually ensue”), with Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 59 (2005) (asserting that “concern with the consequences of its decisions does not figure largely in the Court’s decisions”).

43. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 24 (1997) (claiming that a good textualist is not a literalist).

44. See *infra* Part I.

Third, this Article bears on the move to reorient constitutional interpretation towards the “common good.”⁴⁵ This nascent crusade has stoked hostility from some originalists,⁴⁶ but a healthy concern for good outcomes was hardly foreign at the Founding. I will not say that the Founders had a particularly profound conception of good and bad outcomes because I lack the wisdom to evaluate their depth. But what is certain is that the founding generation was concerned with consequences, seemed to believe they knew which were disadvantageous, and strove to avoid harmful readings.⁴⁷ If my account is correct, originalism is consistent with some features of common-good constitutionalism.

Finally, and relatedly, this Article’s rediscovery of an interpretive method of the eighteenth and early nineteenth centuries will have implications for originalists. It should have its most significant impact on original methods originalists.⁴⁸ It certainly has caused me to reevaluate my overconfident claim that “[w]hen it comes to meaning, the consequences do not matter.”⁴⁹ Will this Article transform how originalists consider arguments from inconvenience? Hard to tell. I am ill-suited to prophesize about this potential consequence.

This Article proceeds in four Parts. Part I briefly describes the Supreme Court’s claims that the consequences do not matter and some cases that suggest otherwise. Part II considers British approaches to consequences, particularly those of Coke and Blackstone. Part III highlights early American stances—in commentary, the courts, and the political branches. Part IV addresses lingering questions related to the practice of considering consequences.

I. The Skeptics

If philosophers suffer from an is-ought problem (where existing practices are thought to be morally correct because they are current practices),⁵⁰ many lawyers, law professors, and judges have an ought-is problem. Lawyers of all sorts are motivated to say that the law is *what it ought to be*, either because they

45. See generally ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022) (drawing upon natural law to argue that constitutional interpretation should be focused on the common good).

46. See, e.g., William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861, 862-864 (2023) (book review) (arguing that *Common Good Constitutionalism* fails on a “theoretical level” because it reads more as a political manifesto (emphasis omitted)).

47. See *infra* Part III.A.

48. Cf. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751-52 (2009) (arguing that originalism should incorporate the common interpretive techniques of the Founding).

49. Prakash, *supra* note 1, at 2209.

50. David Hume discussed this problem long ago. See DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., Oxford, Clarendon Press 1960) (1888).

have a client or because they have predilections for what the law ought to be. They then labor mightily to read into, or discover, these preferences in the law. This is sometimes called “result-oriented,” and while it is necessary when it comes to client advocacy, many suppose that stewards of the law—judges and executives—should eschew that tendency.

Indeed, for a contemporary judge, there perhaps can be no worse epithet than “result-oriented.” A result-oriented judicial decision “gives the impression of being ad hoc justice, unprincipled, and dependent on the personal predilections of the judges.”⁵¹ There might be a confident handful who would not recoil from such a charge.⁵² But it seems clear that many jurists would shudder at the accusation, fearing that others would regard them as confusing or conflating what they wish the law to be with what the law *actually* is.

In the past, there was an aphorism about the appropriate role of a judge: “*jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.”⁵³ Today, a jurist steeped in this outlook might say “it’s my job to call balls and strikes”⁵⁴ and “[u]mpires don’t make the rules, they apply them.”⁵⁵ That judge is emphatically declaring, “I am not result-oriented.” For instance, Justice Antonin Scalia once wrote that “the avoidance of unhappy consequences is [not an] adequate basis for interpreting a text.”⁵⁶ In his book with Bryan Garner, Justice Scalia criticized the “half-truth that consequences of a decision provide the key to sound interpretation.”⁵⁷ As noted earlier, his colleagues seemed to agree with

51. John E. Simonett, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, 10 W.M. MITCHELL L. REV. 187, 196 (1984). Then-Justice John Simonett chronicled how the term came to be viewed as a pejorative. *Id.* at 188-89. Then-Judge Richard Posner discussed the concept and tried to narrow its scope to encompass the use of non-legal considerations, such as party identity. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 8 (1983).

52. A law clerk for Justice William Brennan once speculated that “the Justice would not necessarily have viewed that characterization [(i.e., result oriented)] as criticism.” Fred Woocher, Memorial Dedication, *Memorial Dedication to Justice William J. Brennan, Jr.*, 31 LOY. L.A. L. REV. 749, 749 (1998).

53. FRANCIS BACON, *ESSAYS, CIVIL AND MORAL: OF JUDICATURE* (1625), in 3 THE HARVARD CLASSICS 137, 137 (Charles W. Eliot ed., 1909).

54. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of then-Judge John G. Roberts, Jr.).

55. *Id.* at 55. For a discussion of balls and strikes and the judicial role, see generally Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012).

56. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in the judgment).

57. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 352 (2012). Justice Scalia and Garner admit that consequences should matter in several circumstances—to prevent reading text as ineffective, invalid, duplicative, inconsistent, eliminating sovereign immunity, preempting state law, having a retroactive effect, and so on. *Id.* But beyond this surprisingly long list, they strenuously
footnote continued on next page

his skepticism, for they joined his majority opinion saying as much.⁵⁸ In 2021, the Court swore that “raw consequentialist calculation plays no role in our decision.”⁵⁹ Two years earlier, the Court declared that “the consequences cannot change our understanding of the law.”⁶⁰ If consequences are immaterial, as the Court repeatedly insists, observers cannot accuse the Court of being result oriented. It is not crafting a strike zone. It is merely calling balls and strikes, faithfully enforcing the lawmaker’s strike zone.

Some scholars maintain that the Court’s assertion is implausible—they conclude that the justices are considering consequences.⁶¹ Others regard it as objectively mistaken—the justices are obviously considering consequences.⁶² Others say that while consequentialism is evidently an “anti-modal” means of argument, the Court nonetheless utilizes consequences in “diluted and disguised incarnations.”⁶³ Recent cases surely suggest that the Court does consider consequences as it makes decisions.⁶⁴ And despite his rejection of arguments from consequences, Justice Scalia made a lengthy consequentialist argument in *Morrison v. Olson*, observing that because of the perverse incentives they faced,

deny that consequences should otherwise matter and claim that consequentialists do not have an answer for whether one should “be a consequentialist on a wholesale or on a retail level.” *Id.* at 354.

58. See *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief.”).

59. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

60. *United States v. Davis*, 139 S. Ct. 2319, 2335 (2019) (quoting *id.* at 2355 (Kavanaugh, J., dissenting)).

61. See, e.g., Krishnakumar, *supra* note 6 (manuscript at 5); Tang, *supra* note 6, at 986.

62. See, e.g., Tang, *supra* note 6, at 986.

63. See, e.g., Pozen & Samaha, *supra* note 6, at 772.

64. For example, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Court considered the consequences of holding that the acquisition of cell site location information is not a search under the Fourth Amendment. *Id.* at 2217. Indeed, the Court recognized that such data could reveal “intimate” aspects of a person’s life—data the Government could obtain at the “click of a button” due to technological advancements and records of cellphone companies. *Id.* at 2217-18. In light of such consequences, the majority was not willing to let the government obtain “near perfect surveillance” of a suspect without a warrant. *Id.* at 2218. For other cases where the Court implicitly or explicitly considered consequences, see, for example, *Trump v. Anderson*, 144 S. Ct. 662, 670 (2024) (per curiam) (concluding that states cannot enforce Section 3 of the Fourteenth Amendment against candidates for federal office because such a power would sweep too broadly and that state-by-state determinations under Section 3 in presidential contests would create a patchwork of rules that would prevent the nationwide election of a President); and *Trump v. United States*, 144 S. Ct. 2312, 2346 (2024) (concluding that the absence of presidential immunity from prosecution would generate a vicious cycle of prosecutions against former Presidents).

independent counsels were disturbing.⁶⁵ Why discuss these incentives and their effects, if the consequences are irrelevant?⁶⁶

The Supreme Court's stance against the consideration of consequences recalls a famous directive: "Pay no attention to that man behind the curtain."⁶⁷ The Court insists to the world that there is nothing to see behind the curtain because it wants to obscure the fact that it is using consequences. Perhaps the Court fears that a candid consideration of consequences will diminish (or demolish) the perception of the Court as an objective and faithful interpreter of law made by others, not a law grounded on the predilections of unelected judges.

How long this professed disdain for consequences has reigned is hard to say. As noted, the Latin analog—*jus dicere, non jus dare*—is of ancient vintage. Perhaps the first use of "result-oriented" as an epithet in a Supreme Court case is Justice Harry Blackmun's dissent in a case involving the First Amendment's overbreadth doctrine.⁶⁸ Since then, justices have used the phrase to criticize the majority opinion or to describe criticism of earlier precedent.⁶⁹ One of the most

65. *Morrison v. Olson*, 487 U.S. 654, 727-34 (1988) (Scalia, J., dissenting).

66. Ironically, Justice Scalia accused the Court of crafting a test that allowed the Court to reach results it thought optimal. *Id.* at 734 ("[The Court's framework is] guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be."). He had a point, of course.

67. *THE WIZARD OF OZ*, at 1:28:26 (Victor Fleming dir., 1939).

68. *Lewis v. City of New Orleans*, 415 U.S. 130, 140 (1974) (Blackmun, J., dissenting) ("Overbreadth and vagueness in the field of speech . . . have become result-oriented rubberstamps attuned to the easy and imagined self-assurance that one man's vulgarity is another's lyric." (internal quotation marks omitted) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971))).

69. *See, e.g., Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) ("There are valid reasons for dissatisfaction with the 'two-tier' approach [to scrutiny under equal protection precedents] that has been . . . viewed by many as a result-oriented substitute for more critical analysis . . ."); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (arguing that phrases like "compelling state interest" and "least drastic [or restrictive] means" in the equal protection analysis are "really not very helpful for constitutional analysis," because they are "too convenient and result oriented"); *Engle v. Isaac*, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting) ("The Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts."); *Plyler v. Doe*, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting) ("If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example."); *Wilson v. Garcia*, 471 U.S. 261, 272 n.24 (1985) (noting that the reason for choosing one state law analogue over another for limitations on a § 1983 claim "will often be somewhat arbitrary," and therefore the "losing party may infer that the choice . . . in his case was result oriented, thereby undermining his belief that he has been dealt with fairly." (internal quotation marks omitted) (quoting *Garcia v. Wilson*, 731 F.2d 640, 650 (10th Cir. 1984))); *Hilton v. Braunkskill*, 481 U.S. 770, 783 (1987) (Marshall, J., dissenting) ("The Court's analysis in this area strikes me as result oriented, to say the least."); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 234 (1989) (Stevens, J., concurring) ("I feel, therefore, and have

footnote continued on next page

recent usages came from Justice Neil Gorsuch.⁷⁰ Although he criticized the *Lemon* Establishment Clause test⁷¹ as promoting an “unserious results-oriented approach to constitutional interpretation,” he went on to claim that for some, this was “more a virtue than a vice.”⁷² But, as noted earlier, if a “results-oriented approach” is a *virtue* to some, as the Justice claims, it is striking that no one seems confident enough to proclaim their esteem for a jurisprudence of results.

Even Justice Stephen Breyer, whom one might suppose would be more open to a candid consideration of consequences, has expressed scorn for a result-oriented law. In his *New York State Rifle & Pistol Ass’n v. Bruen* dissent, Justice Breyer highlighted the prospect that the majority’s test for the Second Amendment might empower judges “to reach the outcomes they prefer and then cloak those outcomes in the language of history.”⁷³ In his recent book, Breyer eschews results-oriented interpretation, favoring “purpose-oriented” readings.⁷⁴ The two are perhaps related, but the failure to embrace the former possibly reflects a desire to dodge the stain associated with a practice in wide disrepute.

Originalist scholars share the disdain of their fellow travelers on the Court. As Adrian Vermeule has observed, using consequences to make sense of the text is a “modality of argument that today’s originalists profess to reject altogether.”⁷⁵ For instance, my good friends Will Baude and Mike Paulsen recently took Chief Justice Salmon Chase to the woodshed.⁷⁶ His sin? In a case involving Section 3 of

always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented . . .” (quoting *Ill. State Bd. of Elections*, 440 U.S. at 188-89 (Blackmun, J., concurring)); *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (“[The Court] has thereby exposed *Casey’s* extraordinary deference to precedent for the result-oriented expedient that it is.”); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting) (pointing disapprovingly to a description of “law office history” as “a results oriented methodology . . . [that] produce[s] a preordained conclusion” (quoting Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1098 (2009))).

70. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1608 (2022) (Gorsuch, J., concurring in the judgment).

71. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (establishing a test where the government can only assist a religion if: (1) the primary purpose of the assistance is “secular”; (2) the assistance “neither advances nor inhibits religion”; and (3) there is no “excessive government entanglement with religion,” *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

72. *Shurtleff*, 142 S. Ct. at 1608.

73. *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

74. STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOOSE PRAGMATISM, NOT TEXTUALISM* 109 (2024).

75. Adrian Vermeule, *The Non-Originalist Decision That May Save Trump*, NEW DIG. (Dec. 23, 2023), <https://perma.cc/U5XJ-EU7W>.

76. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 644-59 (2024).

the Fourteenth Amendment, Chief Justice Chase had said that in deciding certain issues, “great attention is properly paid to the argument from inconvenience.”⁷⁷ Baude and Paulsen were brutal: “Chase’s consequentialist approach to constitutional interpretation is simply wrong. Judges do not get to rewrite constitutional provisions they find objectionable on policy grounds.”⁷⁸ Of course, this is not what the Chief Justice purported to be doing. In any event, many originalists believe it “is simply wrong” to consider consequences. As noted, the Author was a member of this camp.⁷⁹

And yet, notwithstanding the disdain for consequences, the Court, and almost all textualists, endorse the absurdity doctrine.⁸⁰ Under that doctrine, courts will reject absurd readings of texts and either refuse to honor absurd applications or, more adventurously, fix the text by ignoring its semantic meaning.⁸¹ To say that interpreters should eschew absurd readings is to require them to assess the consequences of various interpretations and then use those consequences to reject a reading.⁸² After all, to say that one reading is absurd often means no more than that one reading’s consequences are incongruous or ridiculous.⁸³

Few wish to honor absurdities, and hence a doctrine meant to avoid absurd readings has had few critics. The most conspicuous exception is John Manning, who believes that first-order constitutional principles require the enforcement of some (perceived) absurdities.⁸⁴ Manning’s position has the virtue of consistency and coherence because he believes that the text that emerges from the legislative process is the law, not to be altered by judges seeking to “fix” that which *they* deem absurd.⁸⁵ If it is true that one man’s trash is another man’s treasure, one might equally say that what seems absurd to some may seem reasonable, even desirable, to others. Manning hews closest to the textualist ideal of a results-blind interpretation and is at the forefront of those seeking to curb, or end, the absurdity doctrine.

All in all, the Court and a cohort of like-minded scholars seem to be saying that one should not consider consequences. But in a subset of cases, consequences drive the decision.⁸⁶ A desire to avoid absurdities—terrible consequences—leads

77. Griffin’s Case, 11 F. Cas. 7, 24 (C.C.D. Va. 1869) (No. 5,815) (Chase, Circuit Justice).

78. Baude & Paulsen, *supra* note 76, at 650.

79. Prakash, *supra* note 1, at 2209.

80. *See supra* note 5 and accompanying text.

81. *See supra* note 5 and accompanying text.

82. *See* Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011).

83. *See id.*

84. *Cf.* Manning, *supra* note 5, at 2390 (discussing how the absurdity doctrine is in tension with textualism).

85. *See id.*

86. *See supra* notes 80-83 and accompanying text (discussing the absurdity doctrine).

courts to abandon what the text signals. Courts are textualist unless the results are so egregious that they warrant a departure.⁸⁷ And in other cases, the courts consider, or at least mention, consequences even when there are no lurking absurdities.⁸⁸ Judges not infrequently say something akin to: “My reading of the law is right and, happily, leads to good consequences.”⁸⁹ The question is whether the consequences played some role in their reading of the law. If they did not, why discuss consequences at all? If a dissenting judge discussed an extraneous factor in a case—say, what a religious leader thought of an executive power to remove officers—the majority would highlight the irrelevancy of that invocation rather than assert that the spiritual leader, properly understood, favored the majority’s reading. Yet when it comes to consequences, judges sometimes respond to arguments from consequences with a claim that their preferred reading generates better effects. When judges boast of their reading’s favorable consequences, or spotlight the ill effects of alternative readings, they give away the game. Consequences matter.

The rest of this Article illuminates, contextualizes, and defends Chief Justice Chase’s invocation of inconvenience. What seems extremely misguided to some was once an ordinary feature of legal interpretation. Considering consequences was an acknowledged part of our Anglo-American tradition. Consequences could be a key to making sense of the law.⁹⁰ They were not an embarrassment, much less something warranting disdain or censure.

II. British Commentary and Practice

Many of our legal practices hail from Britannia, a pattern typical of British colonies. For instance, Indian lawyers continue to wear black robes to court despite the heat and the Republic of India’s independence decades ago.⁹¹ Notwithstanding India’s status as a republic and its lack of a House of Lords, Indian lawyers refer to judges as “My Lords” and “Your Lordships.”⁹² Americans are not immune to this parroting. The U.S. Supreme Court begins its sessions with a crier chanting, “oyez, oyez, oyez,” a relic from Law French that started in the wake of the Norman Conquest.⁹³

87. See also *supra* note 31 and accompanying text.

88. See *infra* Part III.B.

89. See *infra* Part III.

90. *But see* SCALIA & GARNER, *supra* note 57, at 352.

91. Shan Li, *Pandemic Revives Old Courtroom Argument: To Robe, or Not to Robe?*, WALL ST. J. (Mar. 17, 2021, 1:08 PM ET), <https://perma.cc/DP97-SJNP>.

92. *Stop Calling Me ‘My Lord’ and I Will Give You Half of My Salary: SC Judge Tells Senior Advocate*, ECON. TIMES, <https://perma.cc/H975-GHY3> (last updated Nov. 2, 2023, 8:32 PM IST).

93. *How the Court Works—Oral Argument*, SUP. CT. HIST. SOC’Y, <https://perma.cc/7R5R-AJE8> (archived Oct. 13, 2025).

Of course, early Americans did not ape every British custom. For instance, none of our constitutions had a hereditary monarch. And even though many early state constitutions had an upper chamber, none were quite aristocratic,⁹⁴ for America lacked a hereditary political class. But there was a great deal of continuity when it came to modes of thinking about the law. American lawyers and jurists continued to cite Matthew Bacon, Blackstone, and other Brits post-independence.⁹⁵

When we turn to British materials, we see why early Americans paid heed to consequences. Consider Lord Edward Coke. As a jurist focused on the common law, Coke loathed inconvenience. Consequently, he was a stalwart proponent of the “*argumentum ab inconvenienti*”⁹⁶—the argument that one should reject an interpretation because of the difficulties it entails.⁹⁷ At the beginning of his *Institutes of the Laws of England*, Coke provided twenty “proofes [sic] and arguments” for understanding the common law.⁹⁸ In the middle of that list, he mentioned “*ab inconvenienti*, from that which is inconvenient.”⁹⁹ This was the jumping-off point for his tight embrace of the argument and its efficacy. Below are some of Coke’s references to *argumentum ab inconvenienti*, arrayed from strong to weak:

- “*Non solum quod licet sed quid est conveniens est considerandum., nihil quod est inconveniens, est licitum*” (“Not only what is permitted, but what is proper, is to be considered, because *nothing inconvenient is lawful*”).¹⁰⁰
- “An argument drawne [sic] from an inconvenience is forcible [powerful, influential, efficacious] in Law . . . the law, that is the perfection of reason, cannot suffer any thing that is inconvenient.”¹⁰¹

94. The upper chamber of British Parliament, the House of Lords, has historically been composed of members of the British aristocracy. See *History of the House of Lords*, U.K. PARLIAMENT, <https://perma.cc/J7NR-N36G> (archived Nov. 4, 2025).

95. See, e.g., *United States v. Burr*, 25 F. Cas. 55, 160 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit Justice) (“Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature.”).

96. See, e.g., 1 COKE, *supra* note 10, §§ 3, 87, 138.

97. *Argumentum ab Inconvenienti*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“An argument from inconvenience; an argument that emphasizes the harmful consequences of failing to follow the position advocated.”); *Argumentum ab Inconvenienti*, LAW DICTIONARY LEGAL TERMINOLOGY, <https://perma.cc/JJG7-N53N> (archived Oct. 12, 2025) (“An argument arising from the inconvenience which the construction of the law would create, is to have effect only in a case where the law is doubtful[;] where the law is certain, such an argument is of no force.”).

98. 1 COKE, *supra* note 10, § 3.

99. *Id.*

100. *Id.* § 87 (emphasis in parenthetical added).

101. *Id.* § 138.

- “First, that whatsoever is against the rule of Law is inconvenient. Secondly, that an argument *Ab inconvenienti* is strong to prove it is against Law, as often hath beene [sic] observed.”¹⁰²
- “[T]he law so abhorreth an inconvenience”¹⁰³
- “*Argumentum ab inconvenienti plurimum valet in lege . . .*” (“An argument from inconvenience avails much in law”).¹⁰⁴

Coke addressed *argumentum ab inconvenienti* primarily in the context of the common law, but he also applied the concept to statutes. In discussing a statute concerning “the Warrantie [sic] of the tenant by the courtesie [sic],” Coke remarked that “it should be inconvenient to intend [interpret] the Statute in such maner [sic]” as might yield a troubling result.¹⁰⁵ For Coke, thinking about the meaning of the law by reference to consequences was perhaps an ingrained habit, one that extended to statutory interpretation.

In *Commentaries*, William Blackstone never used the phrase “*argumentum ab inconvenienti*” or any analog. But he addressed the concept. In Book I, he laid out the objective of interpretation: “The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable.”¹⁰⁶ To grasp the summum bonum—“the will of the legislator”—an interpreter examines signals from “when the law was made.”¹⁰⁷ Those five signals were “the words, the context, the subject-matter, the effects and consequence, [and] the spirit and reason of [the law].”¹⁰⁸

The “effects and consequence” signal encompassed arguments from inconvenience:

As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted “that whoever drew blood in the streets should be punished with the utmost severity,” was held, after a long debate, not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.¹⁰⁹

Blackstone was discussing the rule against surplusage and the rule against absurd readings. Did he thereby signal that only two types of consequences mattered? If words imported no sense or an absurd meaning, only then may we deviate from the letter? Blackstone perhaps took this discussion from Samuel

102. *Id.* § 722.

103. *Id.* § 139.

104. *Id.* § 87.

105. *Id.* § 730.

106. 1 BLACKSTONE, *supra* note 12, at *59 (emphasis omitted) (footnote omitted).

107. *Id.*

108. *Id.*

109. *Id.* at *61 (emphasis omitted) (footnote omitted).

Von Puffendorf;¹¹⁰ I doubt that he intended to supply an exhaustive list of which consequences mattered.

Indeed, when later discussing the “rules to be observed with regard to the construction of statutes,”¹¹¹ Blackstone noted that when “some collateral matter arises out of the general words, and happens to be unreasonable, there the judges . . . conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.”¹¹² Here, Blackstone employed consequence more broadly and meant that judges should move beyond the letter when it comes to *unreasonable* applications. He gave an illuminating example:

Thus, if an act of Parliament gives a man power to try all causes that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.¹¹³

It would generate adverse consequences—would be “unreasonable”—for a judge to decide his own case. Yet Blackstone went on to say that if Parliament were to use “evident and express words as leave no doubt” about its intent¹¹⁴—if the law’s *meaning* was clear—then it could provide that a man would be a judge in his case despite the inconvenience of the outcome. In sum, when a statute’s meaning was clear, the consequences did not matter. But if there was doubt as to meaning, judges and other interpreters should eschew readings or applications that generated inconveniences.

Matthew Bacon’s *A New Abridgment of the Law* made the point about inconvenience more quickly and cleanly. In a section on statutory construction, Bacon laid down two rules: First, “[n]o statute shall be construed in such manner, as to be inconvenient or against reason.”¹¹⁵ Second, “[i]f the meaning of a statute be doubtful, the consequences are to be considered in the construction[.] But where the meaning is plain no consequences are to be regarded in the construction; for this would be assuming a legislative authority.”¹¹⁶ There seems to be tension between the two rules. But a synthesis makes sense of both. Inconvenience does not matter at all when the intent is clear—a meaning

110. See generally SAMUEL PUFFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* 198 (London, Benjamin Motte 2d ed. 1698) (“As to the *Effects and Consequences* this is the Rule: When Words, taken in the Literal and Simple Sense, admit either of none or else of some absurd Consequences, we must recede so far from the more receiv[e]ld Meaning, as is necessary for the avoiding of a Nullity or Absurdity.”).

111. 1 BLACKSTONE, *supra* note 12, at *87.

112. *Id.* at *91.

113. *Id.*

114. *Id.*

115. 4 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 652 (Dublin, Luke White 6th ed. 1793) (capitalization altered).

116. *Id.* (capitalization altered).

grounded on more than just the letter. But when a law's meaning is unclear, consequences are relevant.

According to Richard Preston, an English lawyer writing about property law in the eighteenth century,¹¹⁷ there "is no argument in law which hath greater weight, in the determination of any case whatsoever . . . than the argument which adverts to the polity of the law, and is termed *Argumentum ab inconvenienti*."¹¹⁸ Hyperbole perhaps, but telling nonetheless.

Legal commentary often reflects the case law. Not surprisingly, British cases around the time of the Constitution's creation evinced a willingness to consider consequences in deciding meaning. Specifically, courts would consider consequences when the meaning of the statute was unclear. As one judge put it, "if there were, in fact, such inconveniences as have been suggested, yet arguments *ab inconvenienti* will not hold against the express words and meaning of an Act of Parliament: and both the words and the meaning of this Act of Parliament are extremely plain and clear."¹¹⁹ The implication is that inconvenience would have been relevant had the "words and meaning" not been "plain and clear." Note the implication that though the words might be clear, the meaning might not.

In *The Queen v. Simpson*, a case concerning whether a court could try a criminal in absentia, the reporter included this claim from the Solicitor General: "It is true, that where an Act of Parliament is plain, consequences are not to be regarded; for that would be to assume a legislative authority. But where an Act of Parliament is doubtful, there the consequences are to be considered . . ."¹²⁰ The Solicitor General meant that where the *meaning* of a law is plain—presumably after using interpretive tools beyond the letter—then one should pay no regard to consequences. But where the meaning of an act is uncertain, one should attend to the consequences.

For a moment, return to Blackstone's intriguing hypothetical about the judge and his jurisdiction. Imagine that a statute expressly declared "a judge shall have jurisdiction over Dale, including in cases where the judge shall be a party." Given this wording, there seems no room for using other signs of meaning to

117. 3 A NEW BIOGRAPHICAL DICTIONARY, OF 3000 COTEMPORARY PUBLIC CHARACTERS, BRITISH AND FOREIGN, OF ALL RANK AND PROFESSIONS 183 (London, George B. Whittaker 2d ed. 1825).

118. RICHARD PRESTON, AN ELEMENTARY TREATISE BY WAY OF ESSAY, ON THE QUANTITY OF ESTATES, &C. 107 (Exeter, Trewhman & Son 1791). Of course, the common law tradition has long been thought to generate efficient outcomes. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 25-27 (5th ed. 1998). It might be that the common law system's focus on consequences, and the need to avoid disadvantageous effects in particular, helped generate that efficiency.

119. *Stephen v. Costor* (1763) 97 Eng. Rep. 899, 903; 3 Burr. 1408, 1416.

120. *The Queen v. Simpson* (1716) 88 Eng. Rep. 756, 757; 10 Mod. 341, 344.

evade what is obvious. The meaning “is plain,”¹²¹ and the consequences do not matter. Now, imagine a statute that merely declared that “a judge shall have jurisdiction over Dale” and did not mention cases in which the judge is a party, interpreters would exclude that portion of jurisdiction. Blackstone made that exact point.¹²² Despite the obvious plain reading of this text and the lack of an express exception, the statute’s meaning is *nonetheless doubtful* in the latter case because interpreters would not assume that the legislature meant to give the judge authority to decide cases contrary to the *nemo iudex in causa sua* maxim.¹²³ Given that it is ill-advised, even wrong, for a judge to decide cases involving himself, and given that the statute’s meaning is not crystal clear on this point, the meaning is in doubt, and interpreters would avoid the inconvenience by imputing an exception.

In sum, even when the text seemed clear, its actual meaning might seem uncertain due to the influence of several factors besides the letter of the law. When Blackstone’s other signals of meaning—text, context, subject matter, and spirit¹²⁴—left the interpreter doubtful about the meaning, the interpreter would assess the consequences of each possible interpretation, and the courts would settle on the one with the best consequences. That is why British courts and commentators had come to regard arguments *ab inconvenienti* as often “forcible” (powerful, influential, efficacious) in deciding the meaning of the law.¹²⁵

III. American Commentary and Practice

Again, the American legal tradition was essentially a received one. The Americans had imbibed many a lesson from Blackstone, Coke, and others. As Chief Justice John Marshall put it, “[p]rinciples laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. . . . Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature.”¹²⁶ A tabula rasa would have been highly inconvenient, for Americans were not going to concoct an enormous array of novel legal phrases, principles, and institutions. As inheritors of British precepts, Americans knew Blackstone’s five signals and their role in

121. *Id.*

122. *See supra* note 113 and accompanying text.

123. For a discussion of the maxim and its limits, see generally Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 (2012).

124. *See* BLACKSTONE, *supra* note 12, at *59-60.

125. 1 COKE, *supra* note 10, § 138.

126. *United States v. Burr*, 25 F. Cas. 55, 160 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit Justice).

interpreting legal texts,¹²⁷ and they used those signs to engage in what I have termed elsewhere, extensive and restrictive interpretation.¹²⁸ More importantly, as discussed below, they used consequences to discern meaning. Specifically, Americans adopted the canon that when the meaning was clear, they should ignore the consequences. Yet when the meaning was uncertain, consequences decided the meaning.¹²⁹

A. Commentary

Justice Joseph Story's renowned multi-volume *Commentaries on the Constitution*¹³⁰ references inconvenience multiple times. His chapter on "Rules of Interpretation"¹³¹ is most on point. Per Justice Story, "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."¹³² That intention derives from "the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law."¹³³ This was just recapping Blackstone.

Justice Story then offers a window into Founding-era interpretive practices: "Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation."¹³⁴ In other words, if we are confident of the meaning—the "sense[of the words] distinct and perfect"—then we "generally" pay little thought to context, subject matter, and the like.¹³⁵ But where "there is some ambiguity or doubt arising from other sources" then interpretation is necessary.¹³⁶ The ambiguity might arise "from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived" from reading the law

127. Compare 1 BLACKSTONE, *supra* note 12, at *59 (stating that those five signals are "the words, the context, the subject-matter, the effects and consequence, [and] the spirit and reason of them all"), with 1 STORY, *supra* note 37, § 400 (stating that the intent, and thus construction, is derived from "the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law"), and 6 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 425 (Boston, Cummings, Hilliard & Co. 1823) (similar).

128. Prakash, *supra* note 16, at 997-1002.

129. See *infra* Parts III.A-C.

130. 1 STORY, *supra* note 37.

131. *Id.* §§ 397-456.

132. *Id.* § 400.

133. *Id.*

134. *Id.* § 401.

135. *Id.*

136. *Id.*

or from “its avowed object.”¹³⁷ In sum, sometimes we hew to the plain meaning, and other times we sense that it does not quite capture “the intention of the parties.”¹³⁸

Justice Story turned to the role of consequences:

Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds.¹³⁹

This should cause a double take (maybe a triple take), for it is an eye-catching discussion about the interpretation of texts. Justice Story is telling readers that interpreters of *unambiguous* texts sometimes depart from the text’s plain meaning. This is a startling observation that runs contrary to the plain-meaning precepts of textualism. In context, Justice Story does not seem to imagine that he is saying anything odd or shocking, much less revolutionary. His remarks lack a defensive cast. Instead, he is describing what he and others *were doing as they interpreted the law*.

When should we depart from the plain (unambiguous) meaning of text? According to Justice Story, judges must consider other factors to make that judgment. The “intention,” presumably of the lawmaker, might suggest a broader or narrower compass for the provision under consideration.¹⁴⁰ And imputed intention is, obviously, a matter of “conjecture.”¹⁴¹ Justice Story is declaring that interpreters care about what lawmakers are trying to accomplish, even when the latter’s “intention” is a matter of speculation. Furthermore, he says the words of a particular provision “may include . . . more or less” than what the *unambiguous* text suggests when we take the “other parts of the [law]” into account.¹⁴² In either situation, arguments from inconvenience will weigh in the minds of interpreters. Although the Justice mentioned intent, design, and the whole statute rule, he likely did not mean that these were the only factors that would lead someone to reject a plain meaning.

To some textualists, Justice Story’s discussion must seem puzzling. But that is because these textualists believe that meaning is almost entirely a function of the text. Justice Story and his contemporaries did not have that view. They always honored the meaning of the law. But they did not suppose that the semantic, or plain, reading of a law *simply was that law’s meaning*. They

137. *Id.*

138. *Id.* § 400.

139. *Id.* § 405.

140. *See id.*

141. *See id.*

142. *Id.*

distinguished textual or semantic meaning from true meaning. The meaning of a statute was a function of context, subject matter, spirit, consequences, and the letter. Given that multi-factor approach, sometimes the words could be *unambiguous*, yet the *law's true meaning* might vary from that semantic reading. The text says one thing, but the law's clear meaning runs counter to the text. If that was true (and it often was), something else would be true as well: Sometimes consideration of context, subject matter, spirit, and an unambiguous text might lead an interpreter to conclude that the law's meaning was merely *uncertain*. When that happened, consequences would come into play to help interpreters ascertain the meaning.

Later, Justice Story supplied two illuminating examples of inconvenience, both about militias. "No person would contend, that a state militia, while in the actual service . . . of the United States, might yet be, at the same time, governed . . . [by state law]. . . [T]he argument from inconvenience would be absolutely irresistible to establish an implied prohibition."¹⁴³ He likely was discussing an implied statutory prohibition against simultaneous state and federal regulation, what some today might call implied (statutory) field preemption of state rules.¹⁴⁴ Specifically, the Justice believed that interpreters ought to assume that Congress would not wish to subject militias to two sets of disciplinary rules at the same time. Why? Because the "argument from inconvenience" suggested that Congress would not have sought the disadvantages of concurrent regulation.¹⁴⁵

Yet if Congress made no laws for organizing, arming, and regulating the militia, "there seems no reason, why the states may not [do all three]. No necessary incompatibility would exist And, here, the argument from inconvenience would be very persuasive the other way."¹⁴⁶ In other words, to read the Constitution as if it implicitly preempted *all* state power over militias would be to generate a *great* inconvenience. If the Constitution preempted state regulation, and there were no federal statutes for ensuring a "well regulated Militia,"¹⁴⁷ the militias would be under no regulation whatsoever. To avoid this disadvantage, Justice Story argued that we ought to reject the claim that the Constitution wholly disempowers state regulation of the militia.

When discussing the concept of implied constitutional constraints on the states, the Justice argued that to establish an implied prohibition, "[t]here must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the" conclusion that the states are entirely

143. *Id.*

144. See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 230 n.22 (2000) (discussing implied field preemption).

145. See 1 STORY, *supra* note 37, § 445.

146. *Id.*

147. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

prohibited from regulating in a field.¹⁴⁸ He meant that because the Constitution does not clearly signal that states lack the power to tax, regulate commerce, or grant patents, one must consider the consequences—good and bad—of an exclusive federal legislative jurisdiction to determine whether states lack concurrent power. Put another way, whether there is an implied constitutional preemption on state exercise of some legislative power turns, in part, on the consequences of legislation emanating from two sovereigns. For example, one might conclude that there must be concurrent tax jurisdiction because it would be highly inconvenient to read the Constitution as if it preempted state taxing authorities. State governments need tax revenue to function. Contrariwise, one might conclude that the drawbacks of a concurrent power to grant patents might be so acute that the Constitution should be read to implicitly bar state patent grants. It seemed that Justice Story thought that inconvenience was a key factor in determining constitutional and statutory preemption of state power.

Before Justice Story's *Commentaries*, Nathan Dane had published his magisterial, multi-volume *A General Abridgement and Digest of American Law*.¹⁴⁹ "[N]o man," said Charles Warren, "was so well qualified as [Dane] to construct the first great digest of our statutes and decisions."¹⁵⁰ And according to Warren, "every American lawyer of distinction" in the nineteenth century had a copy.¹⁵¹

In Volume VI, Dane observed that "[i]n all courts there are the same rules of interpretation . . . by which to find the intentions of the legislature."¹⁵² He then recounted the Blackstonian signals, including "effects and consequences."¹⁵³ In his section on "Statutes," Dane utilized this striking subtitle: "[w]here words in a statute may be disregarded."¹⁵⁴ This again should cause a double take. Dane said that when "some unreasonable matter arises out of general words in a statute, the judges may suppose the consequences not foreseen" and "disregard" such an application of the statute.¹⁵⁵ But if the act "expressly say[s]" something that seems unreasonable, "there can be no power . . . to set [that application] aside."¹⁵⁶ Dane meant that when a clear statute evidently seeks to cause what the judge

148. 1 STORY, *supra* note 37, § 447; *see also id.* §§ 425-26 (explaining that a general power should not be minimized and read to extend only to "particular cases" on the grounds that some exercises might be inconvenient and claiming that a general power should not be expanded on grounds of inconvenience).

149. 1 DANE, *supra* note 127.

150. 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 414 (1908).

151. *Id.*

152. 6 DANE, *supra* note 127, at 425.

153. *Id.*

154. *Id.* at 589.

155. *Id.*

156. *Id.*

regards as an “unreasonable” state of the world, the judge could not set aside that application.

Dane later declared that when “the meaning is plain, no consequences are to be regarded . . . for this would be assuming legislative authority.”¹⁵⁷ But when meaning is uncertain, “then, and then only, can courts of law look to consequences in construing it.”¹⁵⁸ This was the rule that reigned in Britain. Indeed, Dane seemed to be repeating, almost verbatim, the stance taken by the Solicitor General in *The Queen v. Simpson*.¹⁵⁹ As we shall see, Justice Story and Dane were merely recounting what was an *American* practice. When the law’s meaning was clear, one should not consider consequences. When the meaning was uncertain, as it often was, one should consider the consequences. In deciding the clarity of the law, one would consider context, spirit, subject matter, and text.

B. Cases

Sharing a common interpretive space has its advantages, because one communicates and understands instruments against the backdrop of familiar conventions. State and federal courts operated in just such an environment, continuing to use the Inconvenience Doctrine. It was received wisdom and a habit of mind. The rules were familiar, even if people contested their application in any given situation.¹⁶⁰ Use the well-known tools of interpretation—text, spirit, context, and subject matter. If the resulting meaning was clear, then consequences did not matter. If the meaning was unclear, the consequences mattered quite a bit. Sometimes judges explicitly invoked inconvenience or consequences to make sense of the law.¹⁶¹ And other times, litigants made unsuccessful arguments regarding the consequences.¹⁶² But even in the latter cases, judges often acknowledged that consequences mattered.¹⁶³ A party raising consequences would not always prevail because, of course, sometimes courts deemed the meaning clear, without regard to the consequences.¹⁶⁴ Other times, both parties to a dispute made an *argumentum ab inconvenienti*, and when that happened, the court had to reject one argument from inconvenience.¹⁶⁵

157. *Id.* at 596 (emphasis omitted).

158. *Id.*

159. *Id.* (citing *The Queen v. Simpson* (1716) 88 Eng. Rep. 756, 757; 10 Mod. 341, 344).

160. See *infra* Part III.B.

161. See, e.g., *Taylor v. Delancy*, 2 Cai. Cas. 143, 149, 151 (N.Y. 1805) (per curiam).

162. See, e.g., *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 366 (1805) (statement of the case).

163. See, e.g., *id.* at 386 (opinion of Marshall, C.J.).

164. See, e.g., *id.*

165. See, e.g., *Taylor*, 2 Cai. Cas. at 146-47, 149.

Consider state cases from Pennsylvania. In *Mahoon v. The Lady Margaret*, the plaintiffs sought a portion of the proceeds of a condemned prize.¹⁶⁶ Before their suit, the marshal had sold the prize, advertised to supply notice to claimants, and distributed the funds from the prize sale.¹⁶⁷ The plaintiffs waited years after the alleged injury to bring a case.¹⁶⁸ In theory, this delay might have been acceptable: “[S]o long as property remains in the marshal’s hands, subject to the disposal of the court, no length of time should bar a legal claimant from recovering his right.”¹⁶⁹ After noting this principle, Judge (and founding father) Francis Hopkinson observed that “all things must be limited by right reason. A strong argument *ab inconvenienti* may supply the place and have the force of a statute.”¹⁷⁰ The court perhaps meant a statute of limitations. According to the court, if there were “no limits” on when one filed a claim, the marshal would have to delay distributing the proceeds from the prize sale, perhaps waiting indefinitely.¹⁷¹ Relatedly, if distribution did not terminate claims, people could bring suit against recipients, and the latter would “be for ever liable” for a refund to tardy claimants.¹⁷² Those inconveniences meant that there had to be a bar against bringing suit after distribution.¹⁷³ The sheer inconvenience of the plaintiff’s reading of the law led to their defeat.¹⁷⁴

Another case from the Keystone State was *Respublica v. Cobbet*.¹⁷⁵ William Cobbet, a Brit, argued that his Pennsylvania criminal case belonged in a federal circuit court per Section 12 of the 1789 Judiciary Act.¹⁷⁶ That section provided that an “alien” could remove from a state court to the federal circuit court any “suit” commenced against him.¹⁷⁷ Citing British law, Cobbet’s lawyers said that “[a]rguments from inconvenience can only be applied where the words of a statute [we]re doubtful or ambiguous.”¹⁷⁸ If Cobbet’s case was “brought within the words of the law, the natural meaning thereof must be conclusive on the

166. *Mahoon v. The Lady Margaret*, in FRANCIS HOPKINSON, JUDGMENTS IN ADMIRALTY 109 (Philadelphia, T. Dobson 1792).

167. *Id.*

168. *Id.* at 114.

169. *Id.* at 113.

170. *Id.* at 115 (comments of Francis Hopkinson).

171. *Id.* (opinion) (“For, if there are indeed no limits, how long shall the marshal wait for claimants to come in before he shall proceed to distribution?”).

172. *Id.*

173. *See id.* at 115-16.

174. *See id.*

175. 3 U.S. (3 Dall.) 467, 2 Yeates 352 (Pa. 1798).

176. *Id.* at 467-48, 2 Yeates at 352-53.

177. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (codified as amended at 28 U.S.C. § 1873).

178. *Cobbet*, 2 Yeates at 355.

court.”¹⁷⁹ Chief Justice Thomas McKean concluded that Section 12 concerned civil suits and not criminal suits.¹⁸⁰ In so doing, he invoked, among other things, the Inconvenience Doctrine: Congress did not “intend[.]” that all criminal prosecutions against an alien had to be tried in federal circuit court, held but twice a year, sometimes hundreds of miles away from an alleged crime.¹⁸¹ Such a rule would force the witnesses and prosecutors to travel vast distances.¹⁸² Further, there were “[m]any other inconveniences” that the Chief Justice declined to recount.¹⁸³ If another construction was reasonable, “it ought to prevail.”¹⁸⁴ Because there was, Cobbet lost.¹⁸⁵

New York’s *Taylor v. Delancy*¹⁸⁶ was similar. John Taylor appealed a surrogate (probate) court decision denying his request to join his sister Ann Delancy as co-administrator of their father’s estate.¹⁸⁷ Delancy and her other siblings argued in opposition that Taylor’s appointment would be inconvenient, as Taylor would not always be accessible to the family, and that the surrogate court had complete discretion in selecting administrators.¹⁸⁸ Writing in 1805, Justice Spencer said that if the case was to be decided by the statutory text alone, he believed that the surrogate had discretion.¹⁸⁹ The consequences of the opposite interpretation bolstered that reading: “Nothing could be more absurd than to *require* the surrogates to confer the right of administering on all who are next of kin, and who may desire it, when [extenuating factors] would . . . require their exclusion.”¹⁹⁰ The consequences were relevant because of a familiar

179. *Id.*

180. *Id.* at 361.

181. *Id.* at 362.

182. *Id.*

183. *Id.* at 363.

184. *Id.*

185. *Id.* This was an opinion of Pennsylvania’s Chief Justice, and it is unknown whether the other justices agreed with all the particulars. In an earlier case, however, the court wrote a per curiam opinion where it said the “argument *ab inconvenienti* operates forcibly for the plaintiffs” to overcome supposed irregularities. *Brealsford v. Meade*, 1 Yeates 487, 494 (Pa. 1795) (per curiam). For additional cases, see, for example, *Harvey v. Snow*, 1 Yeates 156, 158 (Pa. 1792) (per curiam) (observing that the “*argumentum ab inconvenienti* holds most strongly in the present instance” to support the validity of an ejectment judgment that lacked a finding of damages); and *Lee v. Biddis*, 1 U.S. (1 Dall.) 175, 175 (Pa. 1786) (per curiam) (noting that “the argument *ab inconvenienti* never applied in greater force” in a case concerning the definition of “[c]urrent lawful money”).

186. 2 Cai. Cas. 143 (N.Y. 1805).

187. *Id.* at 143.

188. *Id.*

189. *Id.* at 150-51.

190. *Id.* at 151 (emphasis added).

maxim: When the “words are doubtful, arguments from inconvenience would have a decisive and conclusive influence.”¹⁹¹

Arguments from inconvenience did not always prevail in state courts because sometimes the law’s meaning was deemed clear. Recall that sometimes the use of text, context, subject matter, and spirit would lead the interpreter to suppose that a law had an obvious meaning. That possibility is Step Two in the Inconvenience Doctrine, where an interpreter eschews consequences because she believes that the meaning of the law is clear. In *Gore v. Brazier*, Chief Justice Parsons of the Massachusetts Supreme Court brushed aside the consequences.¹⁹² He was interpreting a 1783 Massachusetts statute concerning whether a creditor had possession or mere right of entry over land seized on his behalf by the sheriff.¹⁹³ “As to the inconvenience suggested,” the court noted that “it can have weight in the construction of a statute [only] in doubtful cases.”¹⁹⁴ Because the statute’s meaning was evident, said Chief Justice Parsons, the consequences were immaterial.¹⁹⁵ Similarly, in another case, the Virginia Supreme Court acknowledged “a rule of construction, that where a statute is ambiguously worded, Courts will be governed by arguments drawn from inconvenience.”¹⁹⁶ But in the case *sub judice*, where the parties contested whether creditors could sue the debtor’s executor for mishandling funds, the statute’s meaning was clear, so the consequences did not move the court.¹⁹⁷

One of the first cases in the United States Reports to discuss the doctrine expressly was the 1788 case of *Kunckle v. Wynick*.¹⁹⁸ There, the Pennsylvania Court of Common Pleas held, in an action of covenant, that a lessee was responsible for rent even after assigning the rental contract to a third party.¹⁹⁹ The judge noted that “[a]s to the argument *ab inconvenienti*, I cannot see how it operates more in this country than in England. . . . If [lessees] will, in express

191. *Id.*

192. *See* 3 Mass. 523, 536-39 (1807).

193. *See id.* at 536.

194. *Id.* at 539.

195. *Id.*; *see also* Langdon v. Potter, 3 Mass. 215, 221 (1807) (“When the construction of a statute is doubtful, an argument from inconvenience will have weight.”); Putnam v. Longley, 28 Mass. 487, 490 (1831) (“The argument from inconvenience may have considerable weight upon a question of construction, where the language is doubtful. . .”).

196. Braxton v. Winslow, 1 Va. (1 Wash.) 31, 32 (1791).

197. *See id.*

198. 1 U.S. (1 Dall.) 305, 308 (Pa. Ct. Com. Pl. 1788). The earliest case might be *Lee v. Biddis*, 1 U.S. (1 Dall.) 175 (Pa. 1786) (per curiam). The first four volumes of the U.S. Reports were compiled by a Pennsylvanian, Alexander Dallas. As a result, these reports include lower federal court and state court cases. *United States Reports (Official Opinions of the U.S. Supreme Court)—About this Collection*, LIBR. CONG., <https://perma.cc/3JLW-G6WJ> (archived Oct. 15, 2025).

199. *Kunckle*, 1 U.S. (1 Dall.) at 308.

words, covenant for the payment of the rent, they must be bound by it.”²⁰⁰ The court understood the British rule and made the point that consequences only went so far. When the meaning of an instrument was clear, the consequences did not matter.

In the Supreme Court, the Inconvenience Doctrine also had its place. To begin with, litigants discussed how consequences should cause judges to adopt a reading not derived from the text.²⁰¹ Supreme Court justices adverted to consequences as well. In *Hylton v. United States*, a case involving whether an early carriage tax had to be apportioned as a direct tax, Justice James Iredell cited the “dangerous consequences” of taxing “different states differently.”²⁰² It would require “powerful arguments” on its behalf for such a reading of the taxing power to prevail.²⁰³ In *Wiscart v. Dauchy*, Chief Justice Oliver Ellsworth wrote that if a “construction . . . would amount to a denial of justice, would be oppressively injurious[,] . . . or would be productive of any general mischief, . . . [he would adopt] any other rational exposition of the law . . . [not] attended with these deprecated consequences.”²⁰⁴

Interestingly, in *United States v. Fisher*, a case involving a liquidation preference in bankruptcy, Chief Justice Marshall supplied an extended discussion.²⁰⁵ The question was whether the United States was entitled to a creditor preference per a statute that provided “where any revenue officer, or other person” became “insolvent,” the debt to “the United States shall be first satisfied.”²⁰⁶ The text suggested that the United States was entitled to a preference whenever there was a personal insolvency because the phrase “revenue officer, or other person” seemed to cover *all persons*.²⁰⁷ But, said Chief Justice Marshall, “other parts of the act involve this question in much embarrassment.”²⁰⁸ In other words, a perusal of the entire statute suggested that the semantic meaning of the provision was troubled.²⁰⁹

200. *Id.*

201. *See, e.g.,* *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 12 (1794) (discussing the argument that a French-American treaty should not be read as to permit French privateers to seize American or neutral ships without U.S. objection, given the “absurdity and injustice of th[ose] consequences”).

202. 3 U.S. (3 Dall.) 171, 183 (1796).

203. *Id.*

204. 3 U.S. 321, 328-29 (1796). Eskridge points out that Chief Justice Ellsworth elsewhere said that “[s]uggestions of policy and conveniency cannot be considered in . . . a question of right.” Eskridge, *supra* note 40, at 1066 n.382 (quoting *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319, 319 (1796)).

205. *See* 6 U.S. (2 Cranch) 358, 385-90 (1805) (opinion of Marshall, C.J.).

206. *Id.* at 362 (emphasis omitted) (statement of the case).

207. *See id.* at 385 (opinion of Marshall, C.J.).

208. *Id.* at 386.

209. *See id.* at 386-89.

The Court then gestured to several principles “in construing legislati[on].”²¹⁰ Of these rules, the Court remarked that “no difference of opinion can exist,” suggesting that the rules were universally acknowledged.²¹¹ The first was that in understanding statutes, “every part is to be considered” and the “intention of the legislature to be extracted from the whole.”²¹² The second was that “where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.”²¹³ Because this law’s words were clear, said the Court, the party seeking to overcome that plain meaning must “shew an intent varying from that which the words import.”²¹⁴ The Court essentially declared that if a party could show an intent in tension with the plain meaning, the justices would depart from that meaning.

After discussing the title, the text, and the other sections, the Court turned to consequences. Chief Justice Marshall’s discussion, briefly cited earlier, is worth quoting at length:

That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.—But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.²¹⁵

In the case before the Court, rights were not infringed. Nor were fundamental principles overthrown. Instead, the case involved garden-variety inconveniences—what Chief Justice Marshall styled as inconveniences arising from mere “political regulation[s]” or, more simply, “[political] inconveniences.”²¹⁶ The legislature had passed the legislation, presumably with these inconveniences in mind, he said. The entire discussion was perhaps merely

210. *Id.* at 386.

211. *See id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 389-90.

216. *Id.*

restating British precepts. If the meaning was clear, everyday consequences should not matter. If the meaning was unclear, ordinary consequences decide the meaning.

Justice Bushrod Washington did not vote in *Fisher*, for he had presided over the lower court trial, the one that the Court was overturning.²¹⁷ Curiously, he opined anyway.²¹⁸ Among other things, Justice Washington said the following: “[I]f the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if . . . it may fairly be done.”²¹⁹ These rules “are as clearly founded in plain sense, as they are certainly warranted by the principles of common law.”²²⁰ The Justice went on to argue that there was another reasonable reading of the statute, one that avoided the unjust and inconvenient consequences. Specifically, he argued that “other persons” merely encompassed “all accountable agents,” meaning federal agents disbursing federal revenue.²²¹ Despite the seemingly plain language, “other persons” did not actually encompass all persons.

The disagreement underscored Chief Justice Marshall’s observation that everyone agreed on the rules and merely differed as to their application. As the Chief Justice put it, without contradiction by Justice Washington, “no difference of opinion can exist” about the rules of interpretation.²²² Both declared that except where the meaning of the law was plain, interpreters ought to pay close attention to the consequences to discern the meaning.²²³ Further, both understood that the text might suggest a plain meaning, but the law’s actual meaning might not be in sync with that plain meaning due to consideration of spirit, context, and subject matter.

Other cases likewise assumed that consequences mattered. In *Sturges v. Crowninshield*, Chief Justice Marshall discussed whether the Constitution’s Bankruptcy Clause implicitly barred state insolvency laws.²²⁴ The plaintiffs

217. See generally *United States v. Fisher*, 25 F. Cas. 1087 (C.C.D Pa. 1803) (No. 15,103) (discussing the proceedings below).

218. *Fisher*, 6 U.S. (2 Cranch) at 397-98 (opinion of Washington, J.).

219. *Id.* at 400. Before he joined the Supreme Court, Justice Washington had said the following: “If the meaning be doubtful, consequences are to be attended to in the Construction[,] otherwise if not doubtful.” *Harrison v. Allen*, Argument in the High Court of Chancery, in 2 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 284 (Charles T. Cullen & Herbert A. Johnson eds., 1977). Perhaps that is what Justice Washington meant by “if . . . it may fairly be done.”

220. *Fisher*, 6 U.S. (2 Cranch) at 400 (opinion of Washington, J.).

221. See *id.* at 403 (emphasis omitted).

222. *Id.* at 386 (opinion of Marshall, C.J.).

223. Compare *id.* at 389-90, with *id.* at 399-400 (opinion of Washington, J.).

224. 17 U.S. (4 Wheat.) 122, 192, 197-99 (1819).

argued as much, but the Court disagreed.²²⁵ In the course of his discussion, Chief Justice Marshall said that “it is obvious that much inconvenience would result from that construction of the [C]onstitution, which should deny” concurrent state power.²²⁶ “It may be thought more convenient, that much of it should be regulated by State legislation”²²⁷ Nor does it “appear to be a violent construction of the [C]onstitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach.”²²⁸ In other words, on a doubtful question—whether the Bankruptcy Clause implicitly prohibited state bankruptcy legislation—Chief Justice Marshall assayed the consequences and concluded that superior consequences flowed from concurrent state power.²²⁹

Inconvenience played a role in other federalism questions. *Cohens v. Virginia* concerned whether the Supreme Court had appellate jurisdiction over state criminal proceedings involving a constitutional question.²³⁰ For the Court, Chief Justice Marshall observed that “[t]he mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union.”²³¹ In other words, Virginia’s argument that the Supreme Court could not review state court judgments was mistaken because it would incapacitate the federal government.

In the lower courts, the influence of the Inconvenience Doctrine was likewise evident, in part because the Justices of the Supreme Court also served as circuit justices. Four cases are noteworthy. In *Van Reimsdyk v. Kane*, the question was whether an insolvent act of Rhode Island discharged debt originating from foreign private contracts.²³² Justice Story held that there was no unilateral discharge of out-of-state debt and declared the following: “I have not dwelt upon the inconveniences of a contrary construction, though I hardly know a case[] in which the argument ab inconvenienti could more pointedly

225. *Id.* at 208.

226. *Id.* at 195.

227. *Id.*

228. *Id.* This likely means cases states do not presently reach.

229. There are other early cases where both or either the parties and the Court considered the argument from consequences. *See, e.g.,* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 122, 126, 127-29, 140, 144 (1812) (demonstrating that both the parties and the Court argue from consequences); *Randolph v. Donaldson*, 13 U.S. (9 Cranch) 76, 81, 85-86 (1815) (discussing one party’s argument from convenience and ruling that the argument did not prevail in the circumstance at hand); *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 110 (1833) (applying the “argument ab inconvenienti” to reject a party’s proposal); *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 164 (1841) (denying the force of argument from inconvenience).

230. 19 U.S. (6 Wheat.) 264, 391-92 (1821).

231. *Id.* at 385.

232. 28 F. Cas. 1062, 1063 (C.C.D. R.I. 1812) (No. 16,871) (Story, Circuit Justice).

apply.”²³³ He then listed a parade of horrors associated with allowing the discharge: drying up federal jurisdiction, annihilating public credit, pitting citizens against each other, and the like.²³⁴

Justice Story relied more heavily on the Inconvenience Doctrine in *United States v. Shackford*. The case concerned whether a ship owed a penalty for stopping in her home port on the way to another destination.²³⁵ The statute imposed the penalty on a ship’s “arrival.”²³⁶ The Justice said “if one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations.”²³⁷ Later he said if we adopt a “rigid construction[,]... great embarrassments, if not material injuries, may arise to merchants and owners.”²³⁸ He then said:

Ought not maritime laws . . . be liberally construed in doubtful cases, so as to ward off . . . the pressure of uncontrollable misfortunes? My opinion is that . . . it would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties.²³⁹

He concluded that “arrival” did not encompass coming into the home port for mere “accidental and transitory purposes.”²⁴⁰ It only encompassed coming to the home port as the terminus of a voyage.²⁴¹ Justice Story’s opinion evinces a deep concern for adopting an advantageous construction.

Inconvenience sometimes played a marginal role, bolstering the circuit justices’ conclusions. In *Coates v. Muse*, a federal circuit court considered whether a statute, which bound obligors of joint contracts severally as well as jointly, extended to binding those obligors severally in *judgments* founded on those contracts.²⁴² Riding circuit, Chief Justice Marshall said that the statute

233. *Id.* at 1065.

234. *Id.*

235. *United States v. Shackford*, 27 F. Cas. 1038, 1038 (C.C.D. Me. 1830) (No. 16,262) (Story, Circuit Justice).

236. *Id.*

237. *Id.* at 1039.

238. *Id.*

239. *Id.*

240. *Id.* at 1040.

241. *See id.* Other federal courts considered arguments from inconvenience. *See Lanning v. Dolph*, 14 F. Cas. 1120, 1122 (C.C.E.D. Pa. 1826) (No. 8,073) (Washington, Circuit Justice) (finding the argument from inconvenience was “not sufficient to justify” an argument contrary to the text, uniform decisions of the Supreme Court, and “the soundest principles of law”); *Harvey v. Richards*, 11 F. Cas. 740, 746 (C.C.D. Mass. 1814) (No. 6,182) (Story, Circuit Justice) (noting the Court will “listen” to “arguments” from inconvenience “in proper cases,” meaning that though the Court will endorse the argument in proper cases, this was an improper case for its application).

242. *See* 5 F. Cas. 1116, 1117-18 (C.C.D. Va. 1822) (No. 2,917) (Marshall, Circuit Justice).

contained “words of some ambiguity” and that his “general rule” was to “adhere to the letter.”²⁴³ But “[i]t is . . . no weak argument in favour [of one construction], that no mischief can come from its adoption.”²⁴⁴ The alternative reading would lead to the “multiplication of suits.”²⁴⁵ To say that his *general* rule was to adhere to the letter suggested that this was not his universal practice.²⁴⁶ Marshall was declaring that he did not always follow the letter of the law. His further discussion makes clear that consequences mattered, likely because of underlying statutory ambiguity.

And, of course, some inconveniences seemed insignificant, meaning they failed to move the judge. During the War of 1812, President James Madison had summoned the state militia, and William Meade failed to answer the call.²⁴⁷ Federal law provided that a summoned militiaman would be triable by a “court martial.”²⁴⁸ Meade had been tried and fined by a *state* court martial, and then detained due to his failure to pay the fine.²⁴⁹ In *Meade v. Deputy Marshal*, Meade sought his release because he supposed that the state trial was illegal.²⁵⁰ The circuit court agreed with Meade. Chief Justice Marshall opined that the “inconvenience” from utilizing “officers in actual service” to try Meade “may be great, . . . but I doubt whether it is sufficient to justify” a court sitting under state authority to try the case.²⁵¹ This dovetailed with Justice Story’s later discussion in *Commentaries*. Inconvenience often would “have different influences upon different minds.”²⁵² Marshall was unmoved by the inconveniences here—they were not “sufficient.”²⁵³

C. Political Branches

American statesmen were familiar with the claim that consequences could shed light on the meaning of legal texts.²⁵⁴ The underlying practice predated the Constitution’s ratification, as a few examples attest. In 1787, Congress declared that under the Articles of Confederation, state legislatures could not, via

243. *Id.* at 1118.

244. *Id.*

245. *Id.*

246. *Id.* (mentioning that Chief Justice Marshall would “not readily depart” from that practice).

247. *See Meade v. Deputy Marshal*, 16 F. Cas. 1291, 1292 (C.C.D. Va. 1815) (No. 9,372) (Marshall, Circuit Justice).

248. *See id.*

249. *Id.*

250. *See id.*

251. *Id.* at 1293.

252. *See* 1 STORY, *supra* note 37, § 405.

253. *Meade*, 16 F. Cas. at 1293.

254. *See infra* notes 259, 270, 299, 307, 317, 324, 332 and accompanying text.

declaratory statutes, “decide and point out” what a national treaty meant.²⁵⁵ To suppose that states could pass such laws “would prove no less inconvenient in practice [than] irrational in theory.”²⁵⁶ A treaty might “mean one thing in New Hampshire, another thing in New York, and neither the one nor the other of them in Georgia.”²⁵⁷ To delegates in Congress, damaging consequences fatally undermined the claim that states could pass such authoritative laws.

That same year, James Madison wrote that the Treaty of Amity and Commerce,²⁵⁸ made with the Netherlands, should be understood by reference to its consequences.²⁵⁹ The Dutch minister to the United States invoked the Treaty’s most-favored-nation provision.²⁶⁰ By statute, Virginia had given some tariff reductions to French products, and the Dutch had insisted on equal treatment.²⁶¹ American officials responded that the Dutch would have to supply some compensating adjustments, presumably lower tariffs.²⁶² A Dutch representative answered “that nothing is said about compensation in the Treaty: that it is expressly stated that the Dutch shall pay no higher duties than the most favored Nation.”²⁶³ In other words, the Dutch must receive most-favored-nation treatment, and the Americans would get nothing in return. For Madison and others, this argument for a unilateral, uncompensated benefit was untenable: “We tell him the compensation is necessarily implied; and that a contrary interpretation would render the Treaty too inconvenient to both the parties to be supposed the true one.”²⁶⁴ What Madison was saying is that the Dutch interpretation could not be correct because it yielded suboptimal consequences. The Dutch reading was suboptimal because when America subsequently made treaties that imposed lower tariffs, America also would have to lower its tariffs on Dutch goods with no compensating adjustments.²⁶⁵ Whether Madison (and the others) were right is not the point. Instead, what is clear is that the American officials believed that attending to the consequences of various interpretations shed light on the best interpretation—the “true one.”²⁶⁶ Note this was yet another case where Americans supposed that a law’s

255. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 179 (Roscoe R. Hill ed., 1936).

256. *Id.*

257. *Id.*

258. Treaty of Amity and Commerce, Neth.-U.S., Oct. 8, 1782, 8 Stat. 32.

259. See Letter from James Madison to Edmund Randolph (Feb. 18, 1787), in 9 THE PAPERS OF JAMES MADISON 9 APRIL 1786-24 MAY 1787, at 271, 272 (Robert A. Rutland et al. eds., 1975).

260. *Id.* at 271.

261. See *id.* at 272.

262. *Id.*

263. *Id.*

264. *Id.*

265. See *id.*

266. See *id.*

express provisions were trumped by something implicit, a reading grounded on claims of common sense.

In *Federalist No. 81*, Alexander Hamilton used consequences to refute the claim that the Constitution abrogated state sovereign immunity. There would be no point in authorizing “suits against States for the debts they owe.”²⁶⁷ Recoveries on judgments would require “war against the . . . State.”²⁶⁸ In that context, to “ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.”²⁶⁹ Because reading the Constitution as abrogating sovereign immunity generated awful consequences, that reading was mistaken.

Arguments grounded on consequences continued after ratification. Consider interpretation by legislators in the context of one of the greatest, and earliest, constitutional debates within Congress. In 1789, there were extensive House debates over whether the President had a constitutional power to remove executive officers. In a letter to Tench Coxe, Madison recounted the debate. There were four theories about removal. “Each of these doctrines was defended by a very free use of the argumentum ab inconvenienti agst. [sic] the others.”²⁷⁰ The records of the debates confirm the recurring use of inconvenience.²⁷¹

Representative Thomas Hartley rejected the construction that officers were removable only by impeachment. “[I]t cannot be the intention of the [C]onstitution to prevent . . . a removal in every other way: Such a principle if once admitted, would be attended with very inconvenient and mischievous consequences.”²⁷² Similarly, Representative Fisher Ames said that it would be “very inconvenient” for misbehaving officers to remain in office after House impeachment and before Senate trial.²⁷³ If the President could unilaterally remove, however, corrupt or wayward officers could be ousted right away.

Representative William Smith disagreed. He likened any inconvenience to the one imposed by Senate approval for treaties. “If this is an inconvenience, it is

267. THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

268. *Id.*

269. *Id.*

270. Letter from James Madison to Tench Coxe (June 24, 1789), in 12 THE PAPERS OF JAMES MADISON, 257, 257 (Charles F. Hobson et al. eds., 1979).

271. *See* Letter from James Madison to Tench Coxe (Jan. 17, 1821), in 2 THE PAPERS OF JAMES MADISON RETIREMENT SERIES, 221, 222 (David B. Mattern et al. eds., 2013) (describing that Madison thought consequentialist arguments favored a presidential power of removal). Madison said as much decades later: “If ever there was a case where the argumentum ab inconvenienti, ought to turn the scale, this was surely one.” *Id.*

272. The Congressional Register (17 June 1789) (statement of Rep. Hartley), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 20, at 905.

273. The Congressional Register (16 June 1789) (statement of Rep. Ames), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 20, at 881.

imposed upon us by the [C]onstitution, and must be submitted to.”²⁷⁴ Smith thought the Constitution clear, so the consequences were irrelevant. The trouble with Smith’s claim is that the Constitution never declared that impeachment was the only means of removing officers or that there was no executive power to remove them.²⁷⁵ Given the absence of a “plain” meaning,²⁷⁶ inconvenience was a permissible argument against Smith’s reading.

Representative Peter Silvester made this exact point. If the Constitution required a Senate check on removals, “we should [(must)] put up with it.”²⁷⁷ But the Constitution required no such thing.²⁷⁸ Silvester then summoned inconvenience: “If the necessity for dismissal is pressing, clearly the mode by impeachment is not likely to answer the purpose. It can never be thought expedient to establish a doctrine so big with mischief, and likely to drive the whole government into confusion.”²⁷⁹ Similarly, Representative Egbert Benson highlighted “the difficulties and embarrassments which would result” from Senate participation in removals.²⁸⁰ Suppose the President sought to remove an overseas diplomat.²⁸¹ If the wrongdoing involved national security secrets, the President might be unable to disclose to the Senate his genuine reasons for dismissing the officer.²⁸² And yet, “the Senate would sit in judgment between the Chief Magistrate of the United States[] and one of his officers.”²⁸³ Benson cautioned that this “absurd scene” would embarrass the government.²⁸⁴

Again, Madison was right about the “free use” of “argumentum ab inconvenienti.”²⁸⁵ Perhaps the multiple perspectives on the issue suggested some ambiguity. In that context, consequences could settle the meaning. As Madison

274. The Congressional Register (17 June 1789) (statement of Rep. Smith of S.C.), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 20, at 935.

275. *See* U.S. CONST. art. I, § 3; *id.* art. II, § 4. For a more in-depth discussion of Smith’s impeachment argument (and the debates on removal generally), see Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORN. L. REV. 1021, 1023, 1035-36 (2006).

276. *The Queen v. Simpson* (1716) 88 Eng. Rep. 756, 757; 10 Mod. 341, 343.

277. The Congressional Register (19 June 1789) (statement of Rep. Silvester), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 20, at 1010.

278. *See id.* at 1009.

279. *Id.* at 1010.

280. The Daily Advertiser (22 June 1789) (statement of Rep. Benson), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 20, at 903.

281. *See id.* (“He would put the case of the officer to which the bill related. To him were to be committed the negotiations [sic] with foreign ministers; a very delicate trust.”).

282. *See id.* (“The supreme executive, in controuling [sic] this department, would frequently be obliged to act on suspicion, and that of the most delicate kind, and the circumstances on which it was founded, not proper to be explained. He would be in a situation which would render it improper to make use of the evidences of his suspicion . . .”).

283. *Id.*

284. *See id.*

285. *See* Letter from James Madison to Tench Coxe, *supra* note 270, at 257.

put it, “arguments... brought forward respecting the convenience or inconvenience of such a disposition of the [removal] power, were intended only to throw light upon what was meant by the compilers of the [C]onstitution.”²⁸⁶ In other words, Madison thought the consequences mattered in settling what the Constitution’s makers meant.

In 1791, Congress debated the Bank of the United States.²⁸⁷ Representative Elbridge Gerry cited the Necessary and Proper Clause²⁸⁸ and Blackstone’s “rules of interpretation”²⁸⁹ to defend the Bank. He claimed that Blackstone’s five signs aligned with his reading of the Clause.²⁹⁰ The “gentlemen in the opposition generally... give the whole clause... no meaning whatever, for they say the former Congress had the same power under the confederation without this clause as the present Congress have with it.”²⁹¹ Yet Blackstone’s rule “says, that where the words bear no signification we must deviate a little” and give the words “a more liberal construction than is given by gentlemen in the opposition.”²⁹² In other words, the argument that the Necessary and Proper Clause ceded no power to Congress was mistaken because, on Gerry’s account, it gave “no signification”—no meaning—to the Clause. To ascribe no meaning to the Clause violated the rule that effects and consequences mattered.

Madison opposed the Bank.²⁹³ While reciting several interpretive precepts, he described a familiar Doctrine: “Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.”²⁹⁴ He went on to say that if it could establish a bank, Congress might likewise “incorporate companies of manufacturers, or companies for cutting canals, or even religious societies.”²⁹⁵ For Madison, “[t]hese inadmissible

286. The Congressional Register (22 June 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 20, at 1029.

287. See The General Advertiser (8 Feb. 1791) (“The [H]ouse [of Representatives] then took up the further consideration of the bill to incorporate the subscribers [sic] of a bank.”), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 20, at 445 (William Charles diGiacomantonio et al. eds., 1995) [hereinafter 14 DOCUMENTARY HISTORY].

288. The General Advertiser (3 Mar. 1791), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 287, at 452, 452-54.

289. See *id.* at 453 (discussing Blackstone’s rules “laid down”).

290. See *id.*; The General Advertiser (4 Mar. 1791), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 287, at 454, 454-56; The General Advertiser (5 Mar. 1791), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 287, at 456, 456-58.

291. The General Advertiser (5 Mar. 1791), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 287, at 456, 457.

292. *Id.* at 457.

293. See Gazette of the United States (23 Feb. 1791) (discussing Madison’s arguments regarding the National Bank), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 287, at 367, 367-75.

294. *Id.* at 369.

295. *Id.* at 370.

consequences condemned” the claim that the Constitution authorized the Bank.²⁹⁶ Even worse, if one read the Constitution to authorize a bank, that reading would “destroy[.]” the “essential characteristic of the government”—the limited scope of federal powers.²⁹⁷ To Madison, the consequences made it clear that the broad reading of congressional power was mistaken.

As compared to legislators, executive officials more frequently engaged in interpretation, particularly statutory construction.²⁹⁸ In so doing, these officials invoked the Inconvenience Doctrine. In 1792, Congress presented an apportionment bill to the President.²⁹⁹ The Apportionment Clause of the U.S. Constitution declared “[t]he Number of Representatives shall not exceed one for every thirty Thousand.”³⁰⁰ The bill reflected the view that the total number of representatives ought to be determined by taking the entire population of the United States and dividing it by 30,000.³⁰¹ The resulting number was then to be apportioned among the states by population, with certain states receiving extra House seats because they were the closest to the next 30,000 increment.³⁰² So if Massachusetts had 80,000 inhabitants, it might receive three representatives. Opponents of the bill argued that the “one for every 30,000” was to be determined on a state-by-state basis, meaning that even if a state had a population of 89,999, it could have but two representatives.³⁰³

296. *See id.*

297. *See id.* at 371.

298. Prakash, *supra* note 16, at 980.

299. *See* Thomas Jefferson, *Opinion on Apportionment Bill (Apr. 4, 1792)*, in 23 THE PAPERS OF THOMAS JEFFERSON 1 JANUARY TO 31 MAY 1792, at 370, 376-77 (Charles T. Cullen et al. eds., 1990) [hereinafter THOMAS JEFFERSON PAPERS] (detailing the history of the apportionment bill in an editorial note); *see also* Letter from James Madison to James Madison, Sr. (Mar. 15, 1792), in 14 THE PAPERS OF JAMES MADISON, *supra* note 270, at 252-53 (Robert A. Rutland et al. eds., 1983) (discussing the bill as amended by the Senate).

300. *See* U.S. CONST. art. I, § 2, cl. 3.

301. *See* Letter from James Madison to James Madison, Sr., *supra* note 299, at 253.

302. *See id.* (describing that the bill set the number of representatives at 120 “by applying 1 for 30,000 to the aggregate population of the U.S. and allowing to *fractions* of certain amount an additional member”); *see also* Letter from James Madison to Henry Lee (Mar. 28, 1792), in THE PAPERS OF JAMES MADISON, *supra* note 299, at 269, 269 (“By applying the ratio to the aggregate population instead of the respective nos. in the states and giving an additional member to the larger fractions, it makes out 120 for the no. of Reps. so distributed, that the southern states & particularly Virginia, are deprived of the little fractional advantage arising from the contingent operation of the constitutional rule.”).

303. *See* Jefferson, *supra* note 299, at 372-73; *see also* Letter from George Washington to the United States House of Representatives (Apr. 5, 1792), in 10 THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION, PRESIDENTIAL SERIES 213, 213-14 (2008), <https://perma.cc/V9VJ-HU7F> (archived Oct. 16, 2025) [hereinafter THE PAPERS OF GEORGE WASHINGTON] (noting that President Washington vetoed the bill because: (1) “[t]he Constitution has prescribed that representatives shall be apportioned among the several States according to their respective numbers” and (2) “the Bill has allotted to
footnote continued on next page

Discussing the bill, Thomas Jefferson's 1792 opinion for George Washington cited the Inconvenience Doctrine: "Where a phrase is susceptible of two meanings, we ought certainly to adopt that which will bring upon us the fewest inconveniencies."³⁰⁴ Jefferson argued that the interpretation of the Apportionment Clause reflected in the bill had far more inconveniences than one that limited each state to no more than one representative for every thirty thousand residents.³⁰⁵

After he left the Treasury, Alexander Hamilton, his successor Oliver Wolcott, and George Washington faced criticisms for the payment practices of the Treasury Department, including payments to Washington.³⁰⁶ In late 1795, Hamilton wrote *Explanation* to defend his conduct, citing consequences.³⁰⁷ He observed that after Congress made an appropriation, the Treasury would sometimes make advance payments to contractors before they had completed their duties or services.³⁰⁸ As Secretary, he had made payments before the year for which they were earmarked.³⁰⁹ This was, said Hamilton, "essential to the due course of the public service."³¹⁰ If contractors had to make big purchases for the government, they often would require the money in advance, and hence the need for "advances or anticipations."³¹¹ This practice was consistent with the Constitution because in every case there was an appropriation "made by law."³¹² Hamilton went on to stump for his reading: "Even in cases which affect only individual interests, if the terms of a law will bear several meanings that *is to be*

eight of the States, more than one for thirty thousand," which exceeds the constitutional requirement that "the number of Representatives shall not exceed one for every thirty thousand").

304. Jefferson, *supra* note 299, at 374.

305. *Id.* at 375 ("Viewing this bill either as a *violation of the constitution*, or as giving an *inconvenient exposition to it's* [sic] words, is it a case wherein the President ought to interpose his negative? I think it is.").

306. See Letter from Alexander Hamilton to George Washington (Oct. 26, 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON 350, 350 n.1 (Harold C. Syrett et al. eds., 1973).

307. See Alexander Hamilton, *Explanation* (Nov. 11, 1795), in THE PAPERS OF ALEXANDER HAMILTON, *supra* note 306 at 400, 400-01.

308. *Id.* at 402 ("Thus, if a sum was appropriated for provisions for the army for a particular year it was common to make *advances* on account to the contractors long before the supplies were furnished.").

309. See *id.* ("If the law was passed in one year for the next, there would be no hesitation to make the advance immediately after the passing of the law and before the year to which the appropriation was applicable had commenced.").

310. See *id.* at 403.

311. *Id.* ("The officers who are for a long time distant from their corps require the accommodation of an advance of pay to be able to discharge their duty.").

312. See *id.* at 404, 406 (interpreting the Appropriations Clause and "conclud[ing] that if there exist a law *appropriating* a certain sum for the salary of the President, an advance upon that sum in *anticipation* of the service, is as constitutional as a *payment* after the service has been performed").

preferred which will best accord with convenience. In cases that concern the public this rule is applicable with still greater latitude.”³¹³ In the public sector, advances were necessary because “[t]he business of administration requires accommodation to so great a variety of circumstances, that a rigid construction would . . . arrest the wheels of Government.”³¹⁴ The Treasury’s construction of the law was “essential in practice,” and this fact “inclines the scale in favour of it.”³¹⁵

In the same defense, Hamilton discussed salary payments to the President. Hamilton argued that a “literal[.]” reading of the Presidential Emolument Clause was impossible.³¹⁶ To make his point, he posed the following hypothetical: Suppose the Treasury failed to make a payment to the President per the rules laid down in a statute.³¹⁷ And suppose further that someone proposed that the President should receive the missed payment the following year.³¹⁸ Does the Constitution forbid handing over the missed payment to the President because the Treasury failed to disburse it at the “stated times” as the Constitution directs?³¹⁹ Of course not, said Hamilton.³²⁰ As long as the President receives what Congress has appropriated, there is no violation, even if, in a given year, he secures compensation that is larger than the yearly salary set by Congress.³²¹ In other words, having failed to pay the President at the “stated time[.]” the Treasury should make the delayed payment even if it meant that the sums paid for a year were higher than the salary established by law. Hamilton claimed his argument applied to advances and catch-up payments.³²²

The practical needs of administration arose again in 1808, this time regarding commissions for office. The Constitution requires that the President commission officers,³²³ presumably to supply them evidence of their appointment. President Thomas Jefferson wrote to Secretary of the Treasury

313. *Id.* at 405 (emphasis added).

314. *Id.*

315. *Id.*

316. *Id.* at 410-11 (quoting U.S. CONST. art. II, § 1, cl. 7); *see* U.S. CONST. art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased [sic] nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”).

317. *See* Alexander Hamilton, *supra* note 307, at 411.

318. *See id.*

319. *See id.* (emphasis omitted) (quoting U.S. CONST. art. II, § 1, cl. 7).

320. *Id.* (“It follows that actual receipt or payment are not the criterion but the absolute definitive allowance by law. An advance beforehand or a payment afterwards are equally consistent with the true spirit & meaning of this part of the [C]onstitution.”).

321. *See id.*

322. *See id.*

323. *See* U.S. CONST. art. II, § 3.

Albert Gallatin, responding to a concern about the propriety of “Massey’s commission.”³²⁴ Jefferson had signed a blank commission, and someone else had filled in Hart Massey’s name later.³²⁵ Per Jefferson, a “half sighted lawyer” (meaning a short-sighted attorney) might say that the commission was a “nullity; because in legal instruments, any change in a material part of a bond, deed &c. after sealing & delivery, nullifies it.”³²⁶ Adding a name after the signature and seal would void the commission, at least under that rule. Jefferson disparaged this concern:

In matters of government there can be no question but that the commission sealed & signed with a blank for the name, date, place &c. is good: Because government can in no country be carried on without it. The most vital proceedings of our own government would become null were such a construction to prevail, and the argumentum ab inconvenienti, which is one of the great foundations of the law, will undoubtedly sustain the practice.... I could not therefore give the countenance of the government to so impracticable a construction, by issuing a new commission.³²⁷

By way of background, the Executive had been utilizing blank commissions in this way since the Washington administration, when Jefferson was the Secretary of State.³²⁸ Why? A more fastidious approach required the following: The President, by letter, requests names from existing officers in the field. The officers, by post, reply with candidates for inferior offices. The President then commissions the officers, with letters and commissions again going by post. Yet, the commissioned officer might decline the job, thus requiring the process to return to square one. This process might take weeks or months, particularly with officers in distant states or territories. Rather than traverse that long path, sometimes the Secretary of State would affix a seal to a blank commission, the President would sign it, the President would instruct a field officer to appoint someone worthy, and the appointment would vest with the addition of a name

324. See Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

325. See *id.*; see also Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199, 249 n.262 (2013) (discussing the practice of utilizing blank commissions).

326. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

327. *Id.* (capitalization altered).

328. See, e.g., Letter from Tobias Lear to George Washington (Apr. 8, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON, *supra* note 303, at 434, 437 n.8, <https://perma.cc/W63M-3PDT> (archived Oct. 17, 2025) (observing that blank commissions were sent to Alexander Hamilton to fill out); Letter from Tobias Lear to George Washington (May 29, 1791), in 8 THE PAPERS OF GEORGE WASHINGTON, *supra* note 303, at 217, 217, <https://perma.cc/EW4Q-UAEY> (archived Oct. 17, 2025) (observing that Lear had filled in blank commissions at the Treasury Secretary’s request); Letter from George Washington to Thomas Jefferson (Oct. 11, 1793), in 14 THE PAPERS OF GEORGE WASHINGTON, *supra* note 303, at 197, 199 n.8, <https://perma.cc/7TTT-9CLZ> (archived Oct. 17, 2025) (noting that a post had been offered to one person but that the post should be offered to another if he declined, at which point the name could be added to a commission).

and date.³²⁹ Because Jefferson knew firsthand that rules governing sealed instruments were too disadvantageous, he supposed that those rules must yield to the realities of sound administration.³³⁰ The arguments for filling out all the particulars in advance paled in comparison to the delays and embarrassments, making this a textbook case where one of the “great foundations of the law”—*argumentum ab inconvenienti*—would prevail.³³¹

An adjacent question arose in 1822. During the Presidency of James Monroe, James Madison penned an unpublished memo on the “power of the President to appoint publick [sic] ministers & consuls during a recess of the Senate.”³³² He noted that “[i]f the text of the Constitution be taken literally no municipal officer could be appointed by the President alone, to a vacancy not *originating* in the recess of the Senate.”³³³ Madison rejected this literal interpretation:

[U]nder the sanction of the maxim, qui hæret in litera, hæret in cortice [who clings to the letter clings to the bark] and of the *argumentum ab inconvenienti*, the power has been understood to extend, in cases of necessity or urgency, to vacancies, happening to exist, in the recess of the Senate, though not coming into existence in the recess.³³⁴

Further, he claimed that actual practice differed from the semantic meaning due to the inconveniences arising from that reading.

Madison supplied an example of “an appointment to a vacancy by the President & Senate, of a person dead at the time, but not known to be so till after the adjournment and dispersion of the Senate.”³³⁵ In such a case, “it has been deemed within the reason of the constitutional provision, that the vacancy should be filled by the President alone” during the recess even though the vacancy did not arise during the recess.³³⁶ Madison summarized this exception from the “literal” reading: The recess-appointment power extends “to vacancies happening unavoidably to exist, tho’ not to originate, in the recess of the Senate, and which the publick [sic] good requires to be filled in the recess.”³³⁷ By condoning the subset of “unavoidabl[e]” vacancies, where “publick [sic] good requires” the office to be filled, Madison was invoking the *argumentum ab*

329. See Prakash, *supra* note 325, at 249 n.262.

330. Cf. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3 (discussing consequences). Hopefully, the field officer would previously approach the putative appointee to ensure that he would agree to serve.

331. See *id.*

332. James Madison, Power of the President to Appoint Ministers and Consuls During a Recess of the Senate (May 6, 1822), in 2 THE PAPERS OF JAMES MADISON, RETIREMENT SERIES, *supra* note 271, at 516, 516 (capitalization altered).

333. *Id.*

334. *Id.*

335. *Id.*

336. See *id.*

337. *Id.* at 517.

inconvenienti to eschew the hardships of the semantic reading.³³⁸ As he put it, it would be “a hard rule of construction, that would give to the text . . . an operation so injurious, in preference to a construction that would avoid it.”³³⁹

One can reject Madison’s reading of the Recess Appointments Clause but nonetheless recognize the considerable work inconvenience did in his argument. Indeed, one need not agree with *any* of the interpretive claims discussed in this Part to see the pattern: Members of Congress and the Executive believed that *argumentum ab inconvenienti* was “forcible”³⁴⁰ (powerful, influential, efficacious) in decoding the law. In my assessment, everyone who discussed the issue knew that arguments from inconvenience mattered when the law’s meaning was uncertain. Indeed, I know of no one who questioned, much less denied, the point. Further, even when the law’s semantic meaning was clear, one might cite hardship, inconvenience, and other arguments—like spirit—to depart from that meaning, as Madison did with respect to the Recess Appointments Clause.³⁴¹

* * *

Building upon the insights of Blackstone and others, the Founders believed that meaning was a function of multiple factors, including text, spirit, context, subject matter, and consequences. Even when the text was unambiguous, the law’s actual meaning might be different, as when spirit trumped text.³⁴² Such moves may seem unfaithful to the text. But the Founders were not ardent textualists. Again, because they supposed meaning arose from a host of factors, only one of which was text, there would be some occasions when the *letter of the law seemed clear*, but the law’s meaning was not.

When text, spirit, context, and subject matter, taken together, yielded an unambiguous meaning, consequences had no role to play. What the lawmaker evidently sought to enact would prevail. But where the law’s meaning was unclear, consequences helped determine the meaning.³⁴³ As Chief Justice Marshall noted, “no difference of opinion can exist” regarding the rules of interpretation, one of which was that the consequences mattered when the meaning was uncertain.³⁴⁴

338. *Cf. id.* (discussing the consequences of a literal interpretation).

339. *Id.*

340. *See* 1 COKE, *supra* note 10, § 138.

341. *See* MADISON, *supra* note 332, at 516–17.

342. *See generally* 1 STORY, *supra* note 37, § 400 (discussing the “incongruity or repugnancy between the words” and the context or spirit of a law).

343. *Compare* 1 BLACKSTONE, *supra* note 12, at 59 (explaining that intention should be gathered from signs including context and consequences), *with* 1 STORY, *supra* note 37, § 400 (same), *and* 6 DANE, *supra* note 127, at 589 (explaining that consequences may sometimes justify departures from the language of a statute).

344. *See* Fisher v. United States, 6 U.S. (2 Cranch) 358, 386 (1805) (opinion of Marshall, C.J.).

Consistent with his observation, there were ample discussions of the Inconvenience Doctrine.³⁴⁵ Sometimes, the participants merely mentioned the Doctrine.³⁴⁶ Occasionally, people invoked consequences even when some supposed that the semantic meaning was clear.³⁴⁷ And other times the Doctrine proved decisive.³⁴⁸ The general point is that people would not presume that a legislature would want to foster inconveniences,³⁴⁹ meaning that arguments from consequences could be persuasive. Was *argumentum ab inconvenienti* the *only* underpinning of the law? Of course not. The other signs mattered, most especially the letter. Yet Thomas Jefferson had ample grounds for declaring that an argument from inconvenience was one of the “great foundations of the law.”³⁵⁰

IV. Lingering Questions About *Argumentum ab Inconvenienti*

As we have seen, arguments from inconvenience (from consequences) were a steady feature of legal discourse in the eighteenth and nineteenth centuries. There was no dispute about their potential relevance and no discredit in making such arguments. While no one would have declared that we should gaze at the stars (astrology) or at animal entrails (haruspicy) to decide the meaning of a law, I am aware of no one who denied that consequences mattered.

The cardinal rules were easy to state. Recall that the Inconvenience Doctrine had three steps. Step One: Use text, spirit, context, and subject matter to discern a law’s meaning, recognizing that on occasion, spirit, context, and subject matter would trump a statute’s semantic meaning. That is, the law’s meaning, derived from those sources, might be different than the text’s plain meaning. Step Two: Where a law’s meaning was clear, consequences did not matter. Step Three: When a law’s meaning was uncertain, interpreters used consequences to decide the meaning. Yet a rule that is easy to recite can be difficult to apply. Ironically, a test that turns on the lack of clarity suffers from its own uncertainties, which the above summary glosses over.

We turn to some of the uncertainties. Why did people suppose consequences mattered and what did they think of private consequences versus public consequences? Why was there such a focus on inconveniences? Why did they differentiate meaning and text in a way that seems odd to moderns? How

345. See generally *supra* Part III.A-C.

346. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 385 (1821).

347. See, e.g., Letter from James Madison to Edmund Randolph, *supra* note 259, at 272 (protesting the Netherlands’s insistence on its most favored nation status).

348. See, e.g., *Respublica v. Cobbet*, 3 U.S. (3 Dall.) 467, 475-76, 2 Yeates 352, 362-63 (Pa. 1798).

349. See, e.g., *United States v. Shackford*, 27 F. Cas. 1038, 1039 (C.C.D. Me. 1830) (No. 16,262) (Story, Circuit Justice).

350. See Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

did the Founders decide that a law's meaning was uncertain? Was there a relationship between inconvenience and perceived uncertainty of meaning, with greater inconvenience generating a greater perceived uncertainty? And finally, what are originalists and textualists to make of the Inconvenience Doctrine?

A. Why Consequences?

Those who invoked the Doctrine never sought to justify it. Like a comfy recliner in a family room, it needed no defense. Yet it is easy enough to speculate about why people thought it evident that consequences should be a factor in determining meaning. First, under common-law thinking, much of it focused on good outcomes, perhaps the advantages of considering consequences would have been evident to all. This approach to the law survived the transition to a world increasingly centered on written law.³⁵¹ The consideration of consequences did not entirely disappear, even as its influence was tempered to better cohere with the primacy of written law. Where under the common law, one always could reference the inconvenience of a particular reading, now one had to first argue that the meaning of a law was uncertain.

Second, interpreters operated against the backdrop of a strong presumption that lawmakers would never impose disadvantageous rules. As Justice Story put it in the context of interpreting a federal statute, "it can never be presumed that the government means to impose irksome [statutory] regulations."³⁵² Madison made much the same point to the Dutch. Recall that he claimed that the Dutch interpretation of a treaty was "too inconvenient to both the parties to be supposed the true one."³⁵³ It would take striking clarity to overcome the presumption and conclude that a law meant to impose harmful consequences.

Perhaps Justice Washington summed it up best. He said the use of consequences, and other factors, in legal interpretation "are as clearly founded in plain sense, as they are certainly warranted by the principles of common law."³⁵⁴ From the perspective of lawyers in that era, common sense and common law traditions easily justified the Inconvenience Doctrine.

B. Private Mischief, Public Convenience

The Brits and the Americans sometimes distinguished "mischief" from "inconvenience." In *Institutes*, Coke had said that the law would "sooner suffer a mischiefe [sic] than an inconvenience."³⁵⁵ Whether Coke originated the

351. See *supra* text accompanying notes 115-16, 119-20.

352. *Shackford*, 27 F. Cas. at 1039.

353. Letter from James Madison to Edmund Randolph, *supra* note 259, at 272.

354. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 400 (1805) (opinion of Washington, J.).

355. 1 COKE, *supra* note 10, § 231.

distinction is uncertain. But what he meant was that the good of the many mattered more than the hardship visited upon a few. As one writer put it, “[t]he general grounds of the law of England heed more what is good for many, than what is good for one single person only It is better . . . to suffer a mischief that is particular to one, than an inconvenience that may prejudice many.”³⁵⁶ Americans continued to recite this maxim.³⁵⁷ They too believed that when disadvantages imposed on a handful paled compared to the benefits conferred on the public, the few would have to bear those costs to avoid imposing inconveniences on the many. The needs of the many outweighed the needs of the few, or even the one.

This particular aspect of originalist interpretive methodology coheres with at least some features of Common Good Constitutionalism.³⁵⁸ Vermeule rejects any “hard constitutional limit on the acts of the highest authority” so long as the government’s decision reflects a “reasonable determination [about] the common good.”³⁵⁹ Further, the Constitution should be read to secure “well-ordered peace, justice, and abundance in political community.”³⁶⁰ This is an “expansive reading” not especially constrained by the text.³⁶¹ Relatedly, Vermeule would not interpret legal texts without also considering the consequences. Without the common good, it is impossible “even to understand what texts mean.”³⁶² Sometimes all that matters is the “flourishing of the political community.”³⁶³

Flourishing is important. And the Founders labored to avoid unreasonable interpretations.³⁶⁴ Yet at least some of them had the British view that if the statute was sufficiently clear, statutes would be read to generate inconveniences, perhaps even at the expense of flourishing.³⁶⁵ It might take a lot of clarity—pellucid clarity—to lead an interpreter to decide that, because a statute was clear, any horrible consequences were irrelevant. But it seems to me that was always a theoretical possibility.

356. GENTLEMAN OF THE MIDDLE TEMPLE, *THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY* 187 (London, T. Osborne 2d ed. 1751) (emphasis omitted).

357. *Cf., e.g.,* Kamper v. Hawkins, 1 Va. Cas. 20, 55 (1793) (finding that it is better to suffer a “particular mischief” than a “public inconvenience”).

358. *See generally* VERMEULE, *supra* note 45, at 36-38 (describing Common Good Constitutionalism).

359. *Id.* at 158 (speaking specifically about federal power over “state sovereignty” but generalizing to “other constitutional principles”).

360. *Id.* at 14.

361. *See id.* at 40.

362. *Id.* at 94 (emphasis omitted).

363. *See id.* at 14.

364. *See supra* text accompanying notes 313-14, 326-27, 332-34.

365. *See supra* text accompanying notes 156-57, 213-14.

C. Inconvenience vs. Convenience

Recall that Blackstone had said that “effects and consequence” were signs of meaning.³⁶⁶ As noted earlier, Blackstone had taken that phrase, perhaps a hendiadys,³⁶⁷ from Samuel Von Pufendorf.³⁶⁸ While Americans used this phrase on some occasions, I believe that the use of “consequences” was more frequent. It certainly was more succinct. Furthermore, I believe that in this context, perhaps the most common word was “inconvenience” or the related “inconvenient.”

The prevalence of “inconvenient” was a function of two factors. First, there was the continuing influence of Coke’s discussion of inconvenience. Coke cast a long shadow,³⁶⁹ with people often referencing “argumentum ab inconvenienti” or “ab inconvenienti.”³⁷⁰ Second, due to negativity bias,³⁷¹ a focus on *negative* consequences—inconveniences—was especially persuasive. Highlighting the downsides of some reading might convince official decisionmakers, including judges. The common desire to avoid downside risk would lead officials to pay special heed to whichever parade of horrors was longer and more dreadful. Above all, *that* parade had to be canceled.

While it might be possible for two contending readings to both enjoy positive net benefits, people in the real world will frame their argument as if the alternative reading generates serious disadvantages. In other words, rather than saying, “both readings generate net benefits, but my reading generates more net benefits,” an advocate for one reading would insist that their reading was

366. 1 BLACKSTONE, *supra* note 12, at *59.

367. See generally Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688-89 (2016) (defining hendiadys as “two terms separated by a conjunction work[ing] together as a single complex expression” where the “[t]he two terms . . . are not synonymous, and when put together their meanings are melded”).

368. Compare 1 BLACKSTONE, *supra* note 12, at 60, with PUFENDORF, *supra* note 110, at 198.

369. *Cf.*, e.g., *United States v. Burr*, 25 F. Cas. 55, 160 (C.C.D. Va. 1807) (No. 14,693) (Marshall, Circuit Justice) (“Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature.”).

370. See, e.g., Letter from James Madison to Tench Coxe (June 24, 1789), *supra* note 270, at 257 (using the phrase); Letter from James Madison to Tench Coxe (Jan. 17, 1821), *supra* note 271, at 222 (same); Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3 (same); MADISON, *supra* note 332, at 516 (same); *Mahoon v. Lady Margaret*, *supra* note 166, at 115 (same); *Kunckle v. Wynick*, 1 U.S. (1 Dall.) 305, 308 (Pa. Ct. Com. Pl. 1788) (same); *Van Reimsdyk v. Kane*, 28 F. Cas. 1062, 1065 (C.C.D. R.I. 1812) (No. 16,871) (Story, Circuit Justice) (same).

371. See generally Amrisha Vaish, Tobias Grossmann & Amanda Woodward, *Not All Emotions Are Created Equal: The Negativity Bias in Social-Emotional Development*, 134 PSYCH. BULL. 383, 383, 397 (2008) (discussing that “negative stimuli are hypothesized to carry greater informational value than positive stimuli” and that “[h]uman adult psychology has been shown, time and time again, to display a strong negativity bias”).

advantageous and the alternative reading generated deleterious consequences. The only time I found people discussing *convenience* was when judges declared that one reading convenient and another not. Chief Justice Marshall said as much in *Sturges v. Crowninshield*, arguing that while exclusive federal authority over bankruptcy was “inconvenient[er],” concurrent authority was “convenient.”³⁷² Justice Story made this move in *United States v. Shackford*: “[I]f one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention”³⁷³ But these were exceptions, for claims of inconvenience usually took center stage. This pattern makes sense, for while a judge might suggest that one reading of the law was convenient, a lawyer would seldom characterize the other side’s argument in this manner.

The most common label for these sorts of arguments perhaps underscores these points. Citations of “argumentum ab inconvenienti” were common.³⁷⁴ Yet there seems to have been no reference to an “argumentum ab *convenienti*.”

D. What Must Be Unclear? Text or Meaning?

Must the letter be clear or must the meaning be clear? I touched upon this in the Introduction, and in Parts of this Article, but it bears emphasizing again, for these discussions contradict textualist precepts. Textualists may suppose that anyone asking this question has committed a conceptual error. A textualist might insist that meaning is mostly (or entirely) a function of the letter. In fact, people in the eighteenth century rejected this fixation on the text.³⁷⁵ At the Founding, people thought meaning was not deducible from the letter alone, but that spirit, among other things, also mattered.³⁷⁶ Writers of the era confirm as much.

Start with Matthew Bacon’s *Abridgment*, which perhaps best articulated the Doctrine in the late eighteenth century: “If the meaning of a statute be doubtful, the consequences are to be considered in the construction: But, where the meaning is plain, no consequences are to be regarded in the construction; for this would be assuming a legislative authority.”³⁷⁷ Plain *meaning* is different from plain *text*, for Bacon elsewhere expressly distinguished letter and meaning. For instance, the *Abridgment* declared that while a “donative” was not within “the words of [a certain] statute,” it was within the “mischief” and therefore was

372. See 17 U.S. (4 Wheat.) 122, 195 (1819).

373. 27 F. Cas. 1038, 1039 (C.C.D. Me. 1830) (No. 16,262) (Story, Circuit Justice).

374. See *supra* note 370 (collecting cites).

375. Prakash, *supra* note 16, at 942-43, 972-95.

376. See *id.*

377. 4 BACON, *supra* note 115, at 652 (capitalization altered).

“within the meaning” of the statute.³⁷⁸ For Bacon and others, *meaning* was paramount. While meaning was partly a function of the letter, there were other inputs—including spirit and context—such that a plain text did not necessarily establish a plain meaning.

If there is doubt about Bacon’s distinction between letter and meaning, there should be less uncertainty about Justice Story’s stance. Recall that his *Commentaries* said this:

Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy[.]³⁷⁹

The words may be unambiguous, meaning the words point to a certain meaning. Nonetheless, the provision may *mean* more, or less, based on the intention, and hence there is a “room for controversy” about the ultimate meaning. When this is true, there in fact is no plain meaning, and one looks to consequences. This whole discussion assumes a distinction between the words and the meaning, where the former is clear (“unambiguous”), but the law’s *meaning* is not.

Chief Justice Marshall’s discussion is of a piece. He said that the “consequences are to be considered in expounding laws, where the intent is doubtful.”³⁸⁰ Intent, in the eighteenth century, was not merely a function of the text. After all, people said that spirit, or reason, could control the letter, permitting the creation of extensions and exceptions to the meaning suggested by the text.³⁸¹ That explains why Chief Justice Marshall said he *generally* followed the letter,³⁸² a statement that signals that he did not always do so. In a letter to Justice Story, the Chief Justice made this plain, admitting the “necessity in some instances of controuling [sic] the letter by the plain spirit of the law.”³⁸³

Bacon, Justice Story, and Chief Justice Marshall were not outliers. They reflected a dominant approach to legal interpretation in the eighteenth century.³⁸⁴ Discovering the meaning of a legal provision was far more complicated than just reading and applying the text. The import of a provision of law lay behind the text and was not merely a reflection of the meaning

378. *Id.* at 468 (capitalization altered).

379. 1 STORY, *supra* note 37, § 405.

380. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 389-90 (1805) (opinion of Marshall, C.J.).

381. *See generally* Prakash, *supra* note 16 (examining how British and American jurists of the eighteenth and early nineteenth centuries invoked spirit in legal interpretation).

382. *See* *Coates v. Muse*, 5 F. Cas. 1116, 1118 (C.C.D. Va. 1822) (No. 2,917) (Marshall, Circuit Justice).

383. Letter from John Marshall to Joseph Story (July 25, 1827), in 11 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 35, 47 (Charles F. Hobson ed., 2002).

384. *See generally, e.g.*, Prakash, *supra* note 16 (explaining how the Founders consulted the spirit of the text as a tool of legal interpretation).

derived from the words. Indeed, I know of no one from that era who said that meaning was simply a function of the letter of the law. More common was what Virginia Chancellor George Wythe noted in a case. First, a law “is a declaration of the Legislative will.”³⁸⁵ Second, Wythe said that “[i]t too often happens that the paper of parchment on which this Will is written is considered as the Will itself whereas it is only the simbol [sic] of it.”³⁸⁶ Wythe meant that while the letter was a prominent signifier of legislative will or intent, it was not the will itself. Further, he observed that too often people were fixated on the text as if it invariably and unerringly reflected the will.³⁸⁷ Wythe and many others at the time knew there were other signifiers of will, including spirit.³⁸⁸

All in all, the rule was that if the *meaning* was unclear, the consequences would help settle the meaning. Sometimes a plain text would lead an interpreter to conclude that there was a plain meaning. But other times a court would reject the meaning arising from an *unambiguous* text in favor of a reading derived from the spirit. That is, the plain, textual meaning was not the law’s meaning. And other times, interpreters would use context, spirit, and subject matter to sensibly conclude that a plain text did not yield a clear meaning because context, spirit, and subject matter caused the reader to conclude that the law was ambiguous. In the latter case, consequences were relevant.

E. Judging Uncertainty

My sense is that each of the Blackstonian factors besides “effects and consequence” were to be used to decide the meaning, namely letter, spirit, context, and subject matter. There are hints that these other factors were used to determine meaning. For instance, in reading the Recess Appointments Clause to extend beyond its letter to cover some vacancies that arise during a Senate session, Madison cited “qui hæret in litera, hæret in cortice”³⁸⁹ (in deciding the meaning of the law, one must go beyond the surface to what lies beneath)—a spirit-based argument. More generally, as I have shown elsewhere, Americans frequently invoked a law’s spirit to decide meaning, including to depart from a law’s semantic meaning.³⁹⁰ I have not researched the other two factors, context, and subject matter. But I believe that both would have been used to decide whether (or not) a law had a clear meaning.

385. *Harrison v. Allen*, Argument in the High Court of Chancery (Sept. 1794), in 2 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 282, 288 (Charles T. Cullen & Herbert A. Johnson, eds., 1977).

386. *Id.*

387. *Cf. id.* (differentiating between the text and legislative intent).

388. See Prakash, *supra* note 16, at 951 and 977.

389. Madison, *supra* note 332, at 516.

390. See generally Prakash, *supra* note 16, at 942-43 (arguing that spirit could control text).

Another way to think about my claim is to regard four of Blackstone's five factors—letter, spirit, context, and subject matter—as *primary* factors, perhaps always in play. In contrast, inconvenience (consequences) was a secondary factor. In other words, the canonical versions of the Inconvenience Doctrine treated consequences as something of a secondary sign of meaning.

Furthermore, I speculate that people understood that statutory clarity, and its absence, were in the eyes of the beholder. I suppose that interpreters perhaps believed that there was no objective means of determining the existence of uncertainty in a law. One reasonable interpreter might believe that a law's meaning was unclear; other reasonable persons might insist that it was clear beyond peradventure. The former would use consequences; the latter would rule them out.

For an example of such a dispute, return to the dispute between Justice Washington and Chief Justice Marshall in *United States v. Fisher*.³⁹¹ The question was how to read “any revenue officer, or other person” in a statute granting a liquidation preference to the United States.³⁹² Chief Justice Marshall claimed that the phrase “other person” was unambiguous.³⁹³ For the Chief Justice, this text was “sufficiently intelligible to leave no doubt” that the phrase should be understood in its ordinary (broad) sense.³⁹⁴ As he put it, the letter was “too explicit” to warrant going beyond the text.³⁹⁵ Justice Washington demurred.³⁹⁶ He thought the context suggested a reading where “other persons” meant something narrow: other *officials owing a debt to the United States*.³⁹⁷ Additionally, Congress's “evident intention,” derived from the rest of the statute, pointed to this conclusion.³⁹⁸ This difference of opinion about whether the meaning of a law was uncertain meant that consequences would play a greater role for Justice Washington than for Chief Justice Marshall.

391. See generally 6 U.S. (2 Cranch) 358, 389-90 (1805) (opinion of Marshall, C.J.); *id.* at 397-400 (opinion of Washington, J.).

392. See *id.* at 362 (statement of the case) (emphasis omitted).

393. See *id.* at 389-90 (opinion of Marshall, C.J.).

394. *Id.* at 390.

395. *Id.* at 389.

396. See *id.* at 397-403 (opinion of Washington, J.).

397. See *id.* at 403 (emphasis omitted).

398. See *id.* at 399, 401.

In many ways, one could draw a parallel to other tests that turn on clarity or its absence, such as the Rule of Lenity,³⁹⁹ the erstwhile *Chevron* doctrine,⁴⁰⁰ and Thayerian deference.⁴⁰¹ People of good faith will read legal instruments and occasionally come to different conclusions about whether specific provisions are ambiguous. Some will apply a special rule of construction (lenity or deference) because they find uncertainty. Others will reject that rule's application, deeming it unavailable because they regard the meaning as clear.

Some contemporary critics of the use of consequences might cite the existence of subjectivity and differences of opinion and insist that the use of consequences is fraught with difficulties. This would be an argument *ab inconvenienti* against the Inconvenience Doctrine. But conflicts about meaning are inevitable, whether one considers consequences or not. I am unsure why the drawbacks of using consequences in determining meaning make much of a difference. I rather doubt whether the use of consequences is the straw that breaks the camel's back. The Founders certainly did not regard the use of consequences as calling into question the entire interpretive enterprise. From their point of view, the game (discovering meaning) was worth the candle (the use of consequences), despite the potential for smoke and fire.

F. The Relationship Between Uncertainty and Inconvenience

The canonical rule was that one considered consequences only after one determined that the meaning was uncertain.⁴⁰² Nonetheless, people may have departed from this rule, using consequences at the initial stage. First, people suggested that the meaning of statutory provisions could be more or less certain.⁴⁰³ That is, the meaning of some legal instruments was obvious, others

399. See generally *Rule of Lenity*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The judicial doctrine holding that a court, in construing an *ambiguous* criminal statute that sets out multiple or inconsistent punishments, should resolve the *ambiguity* in favor of the more lenient punishment." (emphasis added)).

400. See generally *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2254 (2024) ("If, and only if, congressional intent is *clear*, that is the end of the inquiry. But if the court determines that the statute is silent or *ambiguous* with respect to the specific issue at hand, the court must . . . defer to the agency's interpretation if it is based on a permissible construction of the statute." (emphasis added) (internal quotation marks omitted) (quoting *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984))).

401. See generally Cass R. Sunstein, *Thayerism*, U. CHI. L. REV. ONLINE, Feb. 19, 2024, at *1, *2-*3 (describing James Bradley Thayer as thinking that "in the face of a constitutional challenge, all *reasonable doubts* should be resolved favorably to Congress" (emphasis added)).

402. See *Fisher*, 6 U.S. (2 Cranch) at 389-90 (opinion of Marshall, C.J.).

403. See, e.g., Debates (21 June 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA; NO. 3, 1440, 1452 (John P. Kaminski et al. eds., 1993) (featuring a Virginia delegate observing that the phrase "arising under the Constitution" is "very ambiguous" (emphasis omitted)); *Bond v. Ross*, 3 F. Cas. 842, 843 (C.C.D. Va. 1815)

footnote continued on next page

slightly less clear, and still others extremely uncertain. People seemed to suppose that ambiguity, vagueness, and uncertainty existed on a spectrum. They perhaps understood that a word is more ambiguous the more definitions it has. Some words are bisemous, and others are quite polysemous. Similarly, some words may become vaguer in particular contexts. The word “tall” is vaguer when applied to a building than to a person, in the sense that a tall building could be anywhere from ten stories to a hundred and sixty-three.⁴⁰⁴

Likewise, inconvenience existed on a spectrum. For instance, Jefferson argued against “so impracticable a construction” of the President’s duty to commission.⁴⁰⁵ The alternative to his reading was *extremely* inconvenient, or so he supposed. Likewise, Madison disfavored a construction because it was “so injurious” compared to another he favored.⁴⁰⁶ Justice Story discussed a construction “highly inconvenient, not to say unjust” in defending his narrow interpretation of “arrival.”⁴⁰⁷ At the other end of the spectrum, Chief Justice Marshall once suggested that an inconvenience might not be “sufficient [enough] to justify” an alternate reading.⁴⁰⁸ Of course, we continue to distinguish “extremely inconvenient” from “scarcely inconvenient.”

Given that both certainty about meaning and the inconvenience of a reading likely existed on spectrums, we should contemplate the possibility that inconvenience and clarity had a direct relationship. Specifically, we should be open to the prospect that an extreme inconvenience was apt to cause the interpreter to discover uncertainty about the meaning. After all, it might be hard to suppose that the lawmaker would desire so troubling a meaning. Given that tendency, there was perhaps a relationship between the two—uncertainty and inconvenience—that led to something of a proportional relationship. The more

(No. 1,623) (Marshall, Circuit Justice) (labeling a Virginia statute “extremely vague”); Debates (20 August 1787), in 37 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS: BILL OF RIGHTS; NO. 1; ORIGINS 119, 120 (John P. Kaminski et al. eds., 2020) (featuring a Mr. Dickinson calling the phrase “giving aid [and] comfort,” “too vague and extending too far”); Marcus IV, Norfolk and Portsmouth Journal (12 March 1788), in 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NORTH CAROLINA; NO. 1, *supra*, at 93, 96 (John P. Kaminski et al. eds. 2019) (arguing that the phrase “cruel and unusual” is “too vague to have been of any consequence, since they admit of no clear and precise signification”).

404. The Burj Khalifa has 163 floors. See Jacob Livesay, *Burj Khalifa Height: Here’s How Tall the Record-breaking Dubai Skyscraper Is*, USA TODAY (Apr. 6, 2023), <https://perma.cc/H46D-Y7XR>.

405. See Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

406. See Madison, *supra* note 332, at 517.

407. See *United States v. Shackford*, 27 F. Cas. 1038, 1039-40 (C.C.D. Me. 1830) (No. 16,262) (Story, Circuit Justice).

408. See *Meade v. Deputy Marshal*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (No. 9,372) (Marshall, Circuit Justice).

inconvenient some reading, the more likely someone was to say that the meaning of the underlying legal instrument was uncertain.

Return, for a moment, to Jefferson's discussion of commissions. The President has a duty to commission officers.⁴⁰⁹ He also had to appoint people to offices in the hinterlands, in a context where he was uncertain as to whether those appointed would ever serve in office.⁴¹⁰ If he made appointments and people rejected them, he would have to mail commission after commission. It might take months to finally find an official.⁴¹¹ Rather than do that, a President would sign a blank commission for an office and the Secretary of State would attach the seal, leaving some officer in the field to fill in the name of some citizen who would agree to serve.⁴¹² Why did they use this process? Because the alternative was troubled, if not impossible. "[G]overnment can in no country be carried on without [this practice] . . ." ⁴¹³

President Jefferson might be understood as saying one of two things. More narrowly, there is ambiguity about the procedures one must use to appoint and commission officers, and inconvenience decides the matter. If that is all he means, then he is merely applying the Inconvenience Doctrine. A more radical reading is that, given the calamitous consequences of following the "literal" meaning,⁴¹⁴ we should not imagine that the Constitution's makers sought such inconveniences. That supposition helps introduce doubt into our minds, which then authorizes us to consider consequences writ large. In other words, terrible consequences generate doubt about meaning, and that uncertainty about meaning permits us to avoid the negative consequence via the invocation of the Inconvenience Doctrine.

Chief Justice Marshall's discussion of two types of inconveniences points in a similar direction. In *United States v. Fisher*, the case about the federal government's liquidation preference, the Chief Justice says the following: "[W]here fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."⁴¹⁵ One way of understanding this is that given the massive and deleterious consequences, we need "irresistible" clarity to read a statute as if it meant to overthrow "fundamental principles." The more that is at stake, the

409. See U.S. CONST. art. II, § 3 (describing the duty to commission officers).

410. See *supra* notes 324-29 and accompanying text.

411. See *supra* notes 324-29 and accompanying text.

412. See *supra* notes 324-29 and accompanying text.

413. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 3.

414. See *generally id.* ("The most vital proceedings of our own government would become null were such a construction to prevail . . .").

415. 6 U.S. (2 Cranch) 358, 390 (1805) (opinion of Marshall, C.J.).

clearer Congress must be. He then pivoted, seeming to create a lesser standard of certainty for less meaningful statutes:

Where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience . . .⁴¹⁶

After all, Congress likely knew of those inconveniences and imposed them to secure other advantages.⁴¹⁷ In other words, when less is at stake, the courts should be less moved by supposed inconvenience. We can style these two types of inconvenience—fundamental inconvenience vs. ordinary inconvenience—recognizing that adverse consequences can be arrayed along a spectrum.

To be clear, I found no one expressly declaring that certain inconveniences were so calamitous that uncertainty should be assumed. Nor did anyone say that consequences are all that count. But I do think it possible that interpreters implicitly supposed that the more inconvenient some reading was, the more the interpreter ought to resist that reading and the imputation that the lawmaker sought that outcome. This might take the form of claiming uncertainty as to meaning, which would then let the interpreter choose a less disadvantageous reading. Given the use of context, subject matter, and spirit, it often would not be too challenging to construct a plausible argument for uncertainty.

A familiar, and somewhat longstanding, modern version of this move would be the claim that the Constitution is not a suicide pact.⁴¹⁸ If a reading leads to dreadful consequences, the reading must be wrong because the Constitution is not meant to generate such consequences. Later, after underscoring the monstrous consequences, a claim of uncertainty as to meaning might be elaborated and defended. But one might suspect that the primary impetus is the extreme inconvenience.

A more recent example from the statutory context is *King v. Burwell*.⁴¹⁹ The question was whether federal tax credits for purchase on exchanges “established by the State” were available for the purchase of insurance on *federal* exchanges.⁴²⁰ Writing for the majority, Chief Justice John Roberts observed that if federal subsidies were unavailable for the purchase of insurance from federal exchanges, “it would destabilize the individual insurance market in any

416. *Id.* (capitalization altered).

417. *Cf. id.* (referencing “an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in [the legislature’s] opinion, was probably overbalanced by the particular advantages it was calculated to produce”).

418. *See generally* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

419. 576 U.S. 473 (2015).

420. *See id.* at 479, 483 (emphasis omitted).

State [without its own exchange], and likely create . . . death spirals.”⁴²¹ In law, spirals are bad, and death spirals are worse. Premiums would skyrocket, and purchases on such federal exchanges would plummet.⁴²² Congress would not have wanted such outcomes, said the majority.⁴²³ This claim merely echoes arguments made in this Article. Arguments from consequences have long been grounded on the view that because the lawmaker would not have wanted to generate disadvantages, one should read the law to avoid those embarrassments. Legislatures do not want downward spirals, especially the deadly sort.

G. The Relevance of Consequences Today

For those moderns who think that consequences should matter in legal interpretation, one possible reaction to this Article is “no duh.” Another is “you’re rather late to the party, but welcome anyway.”

What of the courts and their potential reception of this Article’s claims? This Article does not require much from the courts, other than a candid recognition of the reality of what they are already doing and maybe a (slightly) greater openness to consequences.

Truth be told, some courts have long considered consequences, because they perhaps never jettisoned the traditional rule to adopt the newfangled textualism of Justice Scalia and his followers. To be sure, some state courts parrot the U.S. Supreme Court and say that they do not consider consequences.⁴²⁴ Yet other state judiciaries openly weigh consequences.⁴²⁵ In 2020, the Illinois Supreme Court noted, “When interpreting a statute, a court may always consider the consequences of construing the law one way or another and may always

421. *Id.* at 492 (internal quotation marks omitted); *see also id.* (noting that the “text is ambiguous”).

422. *See id.* at 494.

423. *See id.* at 494-95 (“It is implausible that Congress meant the Act to operate in this manner.”).

424. *Cf., e.g., Johnson v. Recca*, 821 N.W.2d 520, 530 (Mich. 2012) (“Whether or not a statute is productive of injustice, inconvenience, is unnecessary [sic], or otherwise, are questions with which courts . . . have no concern.” (misquote and ellipsis in original) (quoting *Voorhies v. Faust*, 189 N.W. 1006, 1007 (Mich. 1922))).

425. *Cf., e.g., Dorsey v. N. Light Health*, 288 A.3d 386, 391 (Me. 2022) (“[T]o give effect to the Legislature’s intent . . . [we] tak[e] into account . . . the consequences of a particular interpretation.” (internal quotation marks omitted) (quoting *Dickau v. Vt. Mut. Ins. Co.*, 107 A.3d 621, 627 (Me. 2014))); *Hester v. Walker*, 320 So. 3d 362, 367-68 (La. 2021) (“[W]here a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result.” (quoting *First Nat’l Bank of Boston v. Beckwith Mach. Co.*, 650 So. 2d 1148, 1153 (La. 1995))); *Harvey v. Cath. Health Initiatives*, 495 P.3d 935, 939 (Colo. 2021) (en banc) (“If the statute is ambiguous . . . we may look to . . . the possible consequences of different interpretations to determine the statute’s proper construction.” (quoting *Elder v. Williams*, 477 P.3d 694, 698 (Colo. 2020))).

consider whether a particular interpretation of the statute will lead to absurd, inconvenient, or unjust results.”⁴²⁶ The Texas Supreme Court has previously declared that “statutory provisions will not be so construed or interpreted as to lead to absurd conclusions, great public inconvenience, or unjust discrimination.”⁴²⁷ In these states, consequences continue to matter and “result-oriented” is a somewhat accurate depiction.

In my opinion, the Supreme Court should reassess its stated opposition to the consideration of consequences. First, these ritualistic denunciations seem untrue, in that justices do cite the consequences of one or another reading, suggesting that they (and others) believe that consequences are relevant. In what world does someone say, “I don’t believe in astrology” and yet continue to recite and discuss their daily horoscopes? Second, the consequences should be relevant insofar as judges adopt the reasonable supposition that legislators do not wish to enact laws that lead to terrible consequences. That sensible view of legislators should matter, on the margin. It should matter especially when the meaning of the law—taking text, spirit, context, and subject matter into account—is uncertain. If one is unsure of what the law means, all things considered, one ought to decide by reference to the consequences of various interpretations. This framework is rooted in “plain sense.”⁴²⁸

It may be that the denunciations of consequences reflect a desire to fight the last battle. Many justices learnt the law in the lingering penumbra of the Warren Court. The conservative ones, of which there are many, likely suppose that the Warren Court was far too focused on results. If one regards that Court as having perverted or corrupted the judicial role, the dreadful example to avoid at all costs, one might seek to counteract that Court’s example by insisting that judges should never decide cases based on the results.

Relatedly, it may be that some judges believe that their counterparts are less restrained, as a group, than judges were at the Founding. These critics may believe that their colleagues are too self-indulgent, too willing to smuggle their preferences into the law. These critics may reject the use of consequences to prevent a dystopian world where consequences are the only things that matter in deciding cases, where it seems that courts are a super-legislature, creating laws in the guise of interpreting them. I admit my sympathies for this claim. Perhaps one needs to be told not to have any sugar or fats to ensure that one has only modest amounts of each. And perhaps judges need to periodically admonish each

426. *People v. Brown*, 164 N.E.3d 1187, 1195 (Ill. 2020).

427. *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942). Although *Cramer* is an old case, the Texas Supreme Court has cited this principle in more recent times. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356–57 n.20 (Tex. 2004) (using *Cramer* and similar cases to reject inconvenient consequences).

428. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 400 (1805) (opinion of Washington, J.).

other to ignore consequences to stave off the tendency to be utterly focused on them.

What of originalist scholars? It is easy for scholars to be less concerned about consequences because, after all, they are not the ones who decide cases (the judiciary), and they are not the ones who routinely implement the law (the Executive). It is also easier for academics to insist upon and stay true to their theories when nothing of great consequence comes from their consistency. Nonetheless, I think originalists should reassess their commitment to more extreme versions of textualism. As noted, I believe this Article's claims will have the greatest resonance with original public methods originalism. It turns out that one method from the Founding was the use of consequences.

However, this Article also should influence scholars committed to original public meaning. Original public meaning originalists are focused on what persons in the eighteenth century would take the law to mean.⁴²⁹ Presumably, those persons would be aware of and utilize dictionary meanings *and* prevailing interpretive techniques, including the Inconvenience Doctrine. Just as original public meaning originalists use ordinary meanings from the eighteenth century as inputs, they should likewise use ordinary interpretive techniques, including consequences, as inputs. The justification for the former but not the latter is a bit elusive.

Now, some public meaning originalists disdain the originalism of the past, particularly original intent. Some boast that modern originalism is superior to earlier versions in the sense that originalism has been "working itself pure."⁴³⁰ Yet one must wonder whether originalism can continue to hold itself out as a theory designed to recover *original* meaning when some originalists minimize or disparage standard Founding-era interpretive techniques. I would argue that if one eschews such methods, one cannot recover anything resembling original meaning. Hence, consequences ought to matter to someone seeking to recover the Constitution's original public meaning, for consequences would matter to the public's understanding of the law in the eighteenth century. Blackstone, Jefferson, Madison, Hamilton, Justice Story, and Chief Justice Marshall confirm as much.

429. See generally Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1962-63 (2021) ("The public meaning of a legal text is the communicative meaning conveyed or made accessible to the public by the text, where 'the public' is understood as a linguistic community (or set of overlapping linguistic subcommunities) encompassing the contemporaneous competent speakers of the natural language in which the text was written, in the jurisdiction in which the text has legal effect." (footnote omitted)).

430. See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003).

Conclusion

“[T]he law is a[n] ass,” or so said Charles Dickens,⁴³¹ and later, Lord Denning.⁴³² One way of understanding the phrase is that the speaker is decrying the “stupidly rigid application of the law.”⁴³³ This sort of complaint is perhaps inevitable because someone harmed by a law will believe it is unjust and unyielding. But it hardly follows that law always must be rigid or that interpretation should be wholly unconcerned with consequences. The law need not *invariably* be an ass.

An interpreter who only considers effects, consequences, inconvenience, and advantages is not honoring the notion that someone else is the lawmaker. The lawmaker makes judgments about what is best, and the interpreter, while she may disagree, is not charged with making those judgments. And yet the need to avoid having every interpreter become a lawmaker is no reason to eschew consequences altogether. One might assume that lawmakers want their laws to yield beneficial consequences and, therefore, they might expect the use of consequences in interpretation, at least in some instances and on the margin.

Although one can easily imagine a legal regime where the consequences never matter, that was not the system at the Founding. The British went from a highly robust consideration of consequences—an inconvenient reading is mistaken and not the law—to a more modest role for consequences. For the British, and then the Americans, when the meaning was uncertain, the consequences helped decide the meaning. This more modest role for consequences perhaps reflected the increasing preponderance of statutory law, a transformation that highlighted the primacy of lawmakers and diminished the role of interpreters and judges.

Even after this adjustment, consequences continued to be quite influential. First, the meaning of the law was a function of multiple considerations—factors that extended beyond the text. In this context, interpreters might reject the meaning of an unambiguous text because spirit, context, and subject matter suggested a different meaning, one not as tethered to the text. Less powerfully, those three factors might generate an uncertainty or doubt as to meaning. Second, when a law’s meaning was uncertain, consequences decided the meaning of the law. This was hardly a rare occurrence, as seen from its repeated invocation. Third and relatedly, the serious disadvantages of a particular reading might induce an interpreter to belatedly discover an uncertainty as to meaning. Again, all agreed with the general proposition that the legislature did not wish to spawn profound inconveniences. Given this common supposition, an

431. CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* 489 (London, Chapman & Hall 1897) (1837-1839).

432. *See* Fed. Com. & Navigation Co. v. Tradax Exp. S.A. [1977] 2 All ER 41 (AC) at 47 (Eng.).

433. Gary Martin, *The Law Is an Ass*, PHRASE FINDER, <https://perma.cc/F6Y5-EDWQ> (archived Oct. 16, 2025).

interpreter could harbor doubts about the plausibility of a disadvantageous interpretation. At some point, those doubts as to meaning might ripen and permit the use of consequences to avert the inconvenience. Of course, there would be differences of opinion, with some interpreters beholding the legal uncertainty and others discovering clarity.

There always will be disputes about whether a particular reading of the law reflects interpretation or lawmaking. The fact that many interpreters today do not want to be accused of making the law is no sound reason for pretending to pay no heed to consequences, much less for banishing their consideration. If the Founders were able to use consequences to make sense of the law and not thereby collapse the distinction between interpreting the law and making it, we can do the same. Categorically ignoring consequences is far too inconvenient.