

THE ORIGINAL MEANING OF RECESS

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ABSTRACT

This Article reevaluates the original meaning of “recess” in the Recess Appointments Clause. The dominant view of that word holds that it refers only to breaks between official Senate sessions. By identifying new evidence and correcting mistaken interpretations, this Article finds support only for the conclusion that the original public meaning of “recess” was ordinary and broad, referring to any time when a legislative body is not conducting business. The evidence does not support any particular limitation on recesses, although it does not rule out the possibility that one existed. For those seeking to limit “recess,” the Article poses four reasonable nonoriginalist limiting constructions. It also considers whether the divergence in views on “recess” can be attributed to methodological differences among originalists and finds that explanation improbable. Finally, the Article makes two general points that arise from its analysis: it may be more difficult than is widely appreciated to establish a specialized original meaning, and scholars making originalist claims should provide clear accounts of the scope and limitations of their research.

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INTRODUCTION

After more than a decade of skirmishes between the President and the Senate over the Recess Appointments Clause, the Supreme Court largely settled the matter in *National Labor Relations Board v. Noel Canning*.¹ Constitutional scholars anticipated that the case might be historically significant in two ways. First, the Court might dramatically alter the balance of power between the President and the Senate by giving one of them a firm upper hand in appointments.² Second, the case might produce a constitutional rarity: a Supreme Court decision squarely grounded in the original meaning of the Constitution.³ In fact, *Noel Canning* largely preserves recent practice regarding recess appointments. Indeed, in permitting appointments during intrasession recesses longer than nine days,⁴ as well as recesses from three to nine days long if justified by genuine need in unusual circumstances,⁵ the majority made a point of “put[ting] significant weight upon historical practice.”⁶

The role of originalism in the opinions, however, is more complicated. The dissent-like concurrence, written by Justice Antonin Scal-

¹ 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 573 U.S. __ (2014).

² The President urged the Court to permit recess appointments liberally so that he could circumvent the Senate’s advice and consent authority. The challenger asked the Court to authorize the Senate to block virtually all presidential appointments, recess or otherwise, and leave the President unable to govern effectively. See David J. Arkush, *The Senate and the Recess Appointments*, 127 HARV. L. REV. F. 1, 1 (2013).

³ Cf. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (noting the rarity of cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which “original understandings [take] center stage”); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420–32 (2013) (arguing that the “new originalist” emphasis on original public meaning has exerted a “gravitational force” on the Supreme Court even though its decisions rarely rely explicitly on original public meaning).

⁴ *NLRB v. Noel Canning*, No. 12-1281, slip op. at 20–21 (U.S. June 26, 2014) (“[W]e have not found a single example of a recess appointment made during an intrasession recess that was shorter than 10 days.”).

⁵ *Id.* at 21 (“We . . . leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.”).

⁶ *Id.* at 6 (emphasis omitted).

ia, purports to be grounded in the original meaning of the Recess Appointments Clause. It adopts a view promoted by originalist scholars in recent years, which rapidly has become the predominant view of the Clause's original meaning. This Article presents new evidence and argument that this view of the original meaning of the Clause is almost certainly mistaken, at least regarding the word recess, and likely regarding the word happen as well. Curiously, the majority, while not expressly originalist, comes closer to reflecting the Clause's original meaning.

Until recently, all three branches of government believed that "recess" for constitutional purposes has an ordinary, general meaning that refers to any time the Senate is not sitting for business, with the possible limit of a minimum duration. That longstanding consensus began to erode rapidly after the publication of a 2005 law review article by Michael Rappaport arguing that "recess" originally had a narrow, specialized meaning.⁷ In Rappaport's view, the Clause contemplated only the long breaks between annual, formal sessions of the Senate, which in the present day are sometimes called "inter-session" recesses.⁸ Rappaport also argues that the President may only fill a vacancy if it arises during the relevant recess.⁹ The combination of these positions would all but read the Recess Appointments Clause out of the Constitution. In the present day, inter-session recesses are often very short, and sometimes the Senate does not take one at all.¹⁰

This new position on the meaning of "recess," which we may call the "technical" or "narrow" view,¹¹ gained influence rapidly, with the

7 Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1491 (2005).

8 *Id.*

9 *Id.*

10 JT. COMM. ON PRINTING, 112TH U.S. CONG., CONGRESSIONAL DIRECTORY 535-38 (2011), available at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDIR> [hereinafter CONGRESSIONAL DIRECTORY] (providing the commencement adjournment dates for the first eighty Congresses as well as recess dates). The Senate does not appear to have taken a recess between the first and second sessions of the 111th Congress. On December 30, 2011, the Senate adjourned until January 3, 2012, without ending its first session. See 157 Cong. Rec. S8793. The second session began when the Senate met on January 3, 2012. See 158 Cong. Rec. S1.

11 Naming positions is a difficult task. Rappaport labels his view the "inter-session" position. *Id.* at 1547. This Article eschews that name because views may differ on the meaning of "session," rendering the label "inter-session" more confusing than illuminating. As an example, one might adopt the view that the Clause permits appointments only during "inter-session" breaks and that "session" is not limited to *official* Senate sessions. Perhaps a session for purposes of the Clause is any work period between breaks of one week or more. See *infra* text accompanying notes 361-69. This position is no less "inter-session," but it contemplates a much broader set of appointments than Rappaport's. When possible, it is useful to name viewpoints based on unique characteristics. Rappaport's view is

D.C. Circuit and Third Circuit adopting it in 2013 to strike down recess appointments by President Barack Obama,¹² and the four concurring Supreme Court Justices adopting it in *Noel Canning*.¹³ Because the narrow views of both “recess” and “happen” had become almost universally viewed as correct but stood in stark contrast to longstanding practice, *Noel Canning* was framed as a clash between text and tradition, original meaning and historical practice.¹⁴

This Article argues that the narrow, technical position on “recess” is mistaken as a matter of original meaning. Many contemporary originalists distinguish between “interpretation,” the work of ascertaining original public meaning, and “construction,” the act of supplementing original meaning where it is ambiguous or vague.¹⁵ This Article’s claim is that, as matter of interpretation, the evidence on “recess” supports only the conclusion that the word’s original public meaning was ordinary and general, just as it is today. By “ordinary” and “general,” this Article means that “recess” was not limited to a particular, technical type of break, such as the break between formal Senate sessions.

Within the broad original meaning of recess, there exist some reasonable narrowing constructions of the word, but the technical position is not one of them. The Senate likely has some authority under the Rules of Proceedings Clause to define its recesses and sessions for purposes of the Recess Appointments Clause, and the President may have some interpretive role as well. One might reasonably believe

alone in turning on formal or official Senate sessions. Naming it the “formal” position seems improper, as that label carries overtones of formalistic legal analysis and discussions of formalism and pragmatism in separation of powers cases. “Technical” and “narrow” are better descriptors, as Rappaport’s position relies on technical definitions rather than ordinary meanings and it adopts the narrowest possible meaning of the relevant terms.

12 See *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203, 208 (3d Cir. 2013) (“We hold that ‘the Recess of the Senate’ in the Recess Appointments Clause refers to only intersession breaks.”); *NLRB v. Noel Canning*, 705 F.3d 490, 499 (D.C. Cir. 2013) (holding that the presidential appointments in question were invalid under the “Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3”).

13 See *NLRB v. Noel Canning*, No. 12-1281, slip op. at 1 (U.S. June 26, 2014) (Scalia, J., concurring) (asserting that “the President lacked the authority” to make the appointments at issue).

14 Cf. Transcript of Oral Argument at 6, *Noel Canning*, No. 12-1281 (U.S. Jan. 13, 2014) (questioning by Justice Antonin Scalia asking, “What do you do when there is a practice that—that flatly contradicts a clear text of the Constitution? Which—which of the two prevails?”); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965, 966–67 (2013) (laying out his “minority” position favoring “original interpretation” of the Clause versus the meaning that has evolved through history).

15 See *infra* text accompanying notes 282–90.

that there should be pragmatic limits on appointment-enabling recesses, such as a minimum duration. Or perhaps “recess” refers to any break of some significance, such as the breaks between periods of ordinary legislative business—what contemporary senators refer to as “recesses” between “work periods.”¹⁶ Finally, it is possible that the only limit on “recess” is whatever the political process bars as a practical matter.

Evidence for each of these positions is too weak to support the conclusion that it was the exclusive original public meaning of “recess” in the late eighteenth century, but each is a reasonable elaboration or *construction* of the term. Among the constructions, this Article favors a “work period” view under which the President may make unilateral appointments during breaks, usually one week or longer, between ordinary periods of Senate business.¹⁷ The Senate appears to have adopted this position implicitly. It is also the most likely candidate for what the Framers meant by “recess” if they envisioned anything short of the broadest definition. This Article would further supplement that construction with a rule that is consistent with the purpose of the Clause and that the Senate would likely accept if relevant circumstances were to arise: the President can also make appointments when the need is urgent and the Senate is actually unavailable.

Part I of this Article presents the evidence for the ordinary, broad reading of “recess.” Historical dictionaries strongly support it. Nine ratification-era state constitutions appear to use “recess” in its ordinary, general sense, and none clearly uses it narrowly. Every unambiguous use of “recess” in the records of the Constitutional Convention is general. Examples of general usage can also be found in Blackstone’s *Commentaries on the Law*, Thomas Jefferson’s 1801 *Manual of Parliamentary Practice*, the records of the House of Commons, and records of state legislative proceedings in the years before the Constitution’s drafting. In one of the most compelling pieces of evidence, state legislative practices varied regarding the styling of sessions and recesses in the ratification era. An identical recess would have been “intra-session” in New Jersey and “inter-session” in Massachusetts. This variation makes it almost inconceivable that provisions of the United States Constitution would turn on the strict, formal application of any particular understanding of words like “recess” and “session.” Multiple structural inferences from the Constitution also sup-

¹⁶ See *infra* text accompanying notes 362–63.

¹⁷ See *infra* text accompanying notes 361–69.

port a general reading of “recess.” The Rules of Proceedings Clause of Article I grants the Senate the authority to define its own sessions and recesses. This Clause is inconsistent with the notion that the Recess Appointments Clause draws strict, technical distinctions based on the words “session” and “recess,” as those distinctions would effectively limit the Senate’s ability to control its own practices. Moreover, the Senate Vacancy Clause triggers state selection of senators during the “recess” of a state legislature. It is even more implausible that the Constitution implicitly prescribes, or turns on, a strict plan for state legislative practice regarding sessions and recesses. The Constitution also distinguishes between sessions of Congress and sessions of each house of Congress, further undermining the notion that the document embeds any particular prescription regarding sessions or recesses.

Part II reviews the evidence for the technical position and finds it wanting. Proponents of that position rely mostly on a few usage examples that, on close inspection, do not support a narrow reading of “recess.” The two texts on which they rely most heavily—the ratification-era Constitutions of Massachusetts and New Hampshire—use “recess” to refer to *intra*-session, not *inter*-session, breaks. Supporters of the technical position also attempt to draw on a constitutional distinction between “adjournments” and “recesses,” but they misread the text.

The strongest support for the technical position derives not from textual sources, as most theories of originalism prescribe, but from twenty-first-century reasoning about the Framers’ goals and expectations. As for goals, it is said that the Framers should have wanted the shortest possible terms for recess appointees, should have crafted a bright-line rule to prevent the President from circumventing the Senate, and should have limited the President’s unilateral appointment power to very long recesses. Each of these assertions contradicts the plain text of the Recess Appointments Clause. Some also contradict its universally accepted purposes, and none is supported by evidence of the Framers’ actual intent. Moreover, to the extent that the proposed policies have merit, a general reading of “recess” serves them as well as the technical position, if not better.

The technical position also draws support from a narrative about the Framers’ expectations for congressional practice: “recess” in the Clause must mean “inter-session recess” because that is the only type of recess the Framers expected the Senate to take. Most scholars, originalists and nonoriginalists alike, reject using arguments about the Framers’ expectations as a trump card in constitutional analysis because such claims involve counterfactual guesswork and carry a

high risk of motivated reasoning. Indeed, the “inter-session-expectations” narrative, as we can call it, ignores important historical evidence: the records of the Constitutional Convention reveal that some delegates believed the Senate would stay in session continually. Perhaps those delegates therefore would have expected most Senate recesses to occur during its formal session. At a minimum, the Framers would have had difficulty predicting how the Senate would style and enumerate its formal sessions and recesses.

It is also not difficult to generate other persuasive stories about the Framers’ expectations. One is what we might call a “military-responsiveness” narrative: the recess appointment power and related federal and state powers were established in the shadow of existential threats of violence, both foreign and domestic, which make nonsensical the notion that the powers would turn on the vagaries of legislative procedure. The point was to give the President, particularly but not exclusively when acting as Commander in Chief, the power to act quickly to respond to crises when the Senate is unavailable. On this view, to restrict the Recess Appointments Clause to formal inter-session recesses would undermine some of the Constitution’s most important, expressly granted federal powers.

Part III comments briefly on the original meanings of “session” and “happen,” making initial observations based on the most important evidence. That evidence suggests that “session” did not have a narrow technical, meaning, which casts further doubt on the possibility that “recess” had a narrow meaning. The technical position defines recesses as breaks between official Senate sessions. If “session” was not used in this technical sense, then it is highly unlikely that “recess” was. Regarding “happen,” this Article observes that the dominant, narrow view has less evidentiary support than is commonly believed, and the broader view more support. The “happen” question would benefit from more thorough research akin to this Article’s inquiry into “recess.”

Despite the evidence against the technical position on “recess,” several prominent originalists have endorsed it. Part IV asks whether the divergence between this Article’s and their conclusions can be attributed to differences in methodology. It examines four contemporary theories of originalism and concludes in most cases that methodological differences are an improbable explanation. Part IV also considers whether and how one might restrict the definition of an appointment-enabling “recess” despite the lack of evidence that the term’s original meaning was restricted in any particular way. In the parlance of originalist theory, this is an exercise in “construction” ra-

ther than “interpretation,” of supplementing what we know about original meaning rather than discerning that meaning conclusively.

Part IV then makes two points for contemporary originalist inquiry and debate that arise from this Article’s analysis and the sharp disagreement over the original meaning of “recess.” First, some originalists may underappreciate the difficulty of establishing narrow or specialized original meanings of particular terms. Second, because of originalism’s goal of objectivity, its special claim to authority, and the difficulties inherent in conducting originalist inquiries, originalist scholars should work to establish a set of standards or methods that promote quality, rigor, and thoroughness in originalist research. As a starting point, this Article proposes that originalists provide thorough and frank accountings of the scope and limitations of the research on which they rely.

I. THE ORDINARY READING OF RECESS

In recent years, two interpretive questions have arisen under the Recess Appointments Clause. One is whether the President can make recess appointments only during breaks between formal Senate sessions (“inter-session” recesses) or also during other Senate breaks (“intra-session” recesses). A second question is whether the President may fill vacancies only if they arise during a given recess, or also those that existed before the recess began. This Article touches only briefly on the latter question.

A. *Ordinary Reading: Text and Structure*

1. *Text: Dictionary Evidence and Interpretive Default Rules*

The Recess Appointments Clause states:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.¹⁸

When analyzing the word recess, we start with its ordinary, common-sense meaning, as evidenced by contemporaneous dictionaries. It appears to be universally accepted that the ordinary meaning of “recess” refers to any legislative break, both now and in early America. The 1755 and 1785 editions of Samuel Johnson’s *Dictionary of the English Language* define “recess” in relevant part as “[r]emission or sus-

¹⁸ U.S. CONST. art. II, § 2, cl. 3.

pension of any procedure” and provide the following usage example: “I conceived this parliament would find work, with convenient recesses, for the first three years.”¹⁹ Noah Webster’s 1828 *American Dictionary of the English Language* defines the term similarly, as “Remission or suspension of business or procedure; as, the house of representatives had a recess of half an hour.”²⁰ The *Oxford English Dictionary (OED)* defines recess, in relevant part, as “a period of cessation from usual work or employment” and identifies its early use as having been “chiefly of Parliament” before expanding to schools.²¹ The *OED*’s usage examples, which are from the 1600s and 1700s, do not limit the word to a specific recess.²²

In standard textual analysis, two related presumptions establish that one’s default position in interpreting the term recess should be its broad, ordinary meaning. The first holds that terms are to be given their ordinary meaning unless there is good evidence for some other meaning, which usually comes from contextual cues.²³ This principle applies to the interpretation of the Constitution as well as statutes.²⁴ Second, a general term like “recess” is read as applying

19 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1650 (1755), available at http://johnsonsdictionaryonline.com/?page_id=7070&i=1650 [hereinafter JOHNSON 1755] (attributing the statement to King Charles I); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 469 (6th ed. 1785), available at <http://publicdomainreview.org/collections/samuel-johnsons-dictionary-of-the-english-language-1785/> [hereinafter JOHNSON 1785].

20 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 428 (1828).

21 THE COMPACT OXFORD ENGLISH DICTIONARY 1525 (1991).

22 See e.g., *id.* (quoting, the 1620 Journal of the House of Lords, “They [sc. the Commons] humbly desire to know the Time of the Recess of this Parliament, and of the Access again as They may accordingly depart and meet again at the same Time their Lord-ships shall”); *id.* (quoting a 1706 Royal speech printed in the *London Gazette* as stating, “[i]t would be convenient to make a recess in some short time”).

23 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012) (“The ordinary-meaning rule is the most fundamental semantic rule of interpretation Interpreters should not be required to divine arcane nuances or to discover hidden meanings.”); see also Rappaport, *supra* note 7, at 1494 (“If two interpretations are possible, but one uses the language in a more natural or common way, then the more natural interpretation governs unless purpose, structure, and history provides evidence strong enough to outweigh the impact of the greater naturalness of the usage.”). Where a text concerns law, legal terms are typically given their ordinary legal meanings. See SCALIA & GARNER, *supra* note 23, at 73 (“And when the law is the subject, ordinary legal meaning is to be expected, which often differs from the common meaning.”). This point makes no difference regarding the words “recess.” The broad and narrow readings of the word are both contextually appropriate, legal meanings; each applies to legislative breaks. The relevant distinction is that the general meaning is ordinary and the narrow reading is specialized, or a term of art, even in discussions limited to legislatures.

24 See, e.g., SCALIA & GARNER, *supra* note 23, at 69 (“[E]very word in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some

generally, absent good reason to read it narrowly.²⁵ This latter principle typically holds in the face of arguments that the drafters actually had a narrower objective in mind²⁶ or could not have imagined the present application.²⁷ To be clear, these interpretive principles are only rebuttable presumptions, not rules of law, and it is impossible to state in the abstract what showing will suffice to unseat them in any given case. But they establish a default position and make clear where the burden lies—with the proponent of reading a broad, ordinary term to mean something narrower or more technical. This Article concludes that the evidence on the original meaning of “recess” falls far short of meeting that burden.

2. *Structure: The Rules of Proceedings Clause, the Senate Vacancy Clause, and the Textual Distinction Between Sessions of Congress and Sessions of the Senate*

Two constitutional provisions bear on the proper reading of “recess” in the Recess Appointments Clause, as does a conceptual distinction that the Constitution draws. First, Article I states that “Each House may determine the Rules of its Proceedings.”²⁸ Read naturally, this Clause applies to the Senate’s comings and goings, and therefore authorizes the Senate to define its recesses (and sessions) absent a clear, specific constitutional provision to the contrary.²⁹ It is hard to

ground to control, qualify, or enlarge it.” (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 436–37 (1833)); see also Jack M. Balkin, *Must we be Faithful to Original Meaning?*, 7 JERUSALEM REV. OF LEGAL STUD. 57, 72 (2013) (“[M]ost of the Constitution does not consist of generally recognized terms of art or of words with narrow meanings that would seem unusual to us today. With very few exceptions the words that constitute its abstract principles and vague standards mean today what they meant at the time of their adoption.”).

²⁵ See, e.g., SCALIA & GARNER, *supra* note 23, at 101–06 (discussing the “General-Terms Canon” of construction).

²⁶ See *id.* at 103–04 (discussing instances in which narrow meanings were rejected in favor of more general readings regardless of the primary intent of various drafters).

²⁷ See *id.* at 104–05 (discussing cases in which terms were given general interpretations even if Congress did not foresee the applications at issue).

²⁸ U.S. CONST. art. I, § 5, cl. 2.

²⁹ This is not to suggest that the Senate has limitless authority to define its recesses. At a minimum, the courts can likely police the boundaries of the word “recess” and reject absurd or outlandish Senate positions. This view is somewhat analogous to Justice Souter’s concurrence in *Nixon v. United States*, although this Article does not take a position on whether Justice Souter’s view or this Article’s position on Senate authority under the Rules of Proceedings Clause should be characterized as falling within the “political question” doctrine. See Arkush, *supra* note 2, at 2 n.4 (citing the argument in *Nixon v. United States*, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring in the judgment) that when the Senate exercises its duty to “try” impeachments under the Impeachment Trial Clause, the courts should yield under the political question doctrine to the Senate’s choice of

read the Recess Appointments Clause as such a provision. The Clause neither explicitly exempts recesses from the Senate's authority over its proceedings nor gives any other hint that it is meant to displace the Rules of Proceedings Clause regarding the word recess. Indeed, if the Recess Appointments Clause were meant to prescribe a fixed, constitutional definition of recess from which the Senate cannot deviate, one would expect it to provide that definition rather than leaving it open to debate. Instead, the Clause uses the most general terms available to describe the concepts it invokes. That word choice is consistent with an understanding that the terms are general and will be explicated, if at all, by the appropriate house of Congress in accordance with the Rules of Proceedings Clause. It is much less consistent with the view that the Framers were attempting to constitutionalize specific forms of sessions and recesses.

In fact, there appears to be universal agreement that the Senate can redefine its sessions and recesses, at least within reasonable limits. Michael Rappaport, the principal proponent of the technical position on "recess," doubts that the Constitution would prevent the Senate from redefining its own sessions, and he even suggests that Congress (or the Senate)³⁰ could have chosen to hold semiannual sessions with two of what he calls "inter-session" recesses.³¹ But the Senate's authority to redefine its sessions is deeply problematic for the technical position on recess. If "session" is not a fixed constitutional concept—if the Senate can redefine its sessions at will—then an "inter-session" requirement establishes nothing of significance. There is no obvious

procedure "within broad boundaries," but the courts might properly intervene if the Senate were to range too far outside those boundaries, for example by using a coin toss).

30 One might argue that Congress and the President can alter the congressional sessions by passing a law, but a single house cannot. Cf. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 422–23 (2005) (noting that "[t]he two houses of Congress can control when they are in recess by concurrent resolution" and can end sessions if they act concurrently). This is not the place to endorse or dispute that argument, as it makes no difference to the point here: if the definitions of recesses and sessions are mutable, then it makes little sense to say that the Recess Appointments Clause invokes either concept in a narrow, technical sense.

31 See Rappaport, *supra* note 7, at 1570 ("[T]he alternative interpretation [permitting intrasession recess appointments that expire upon the next intrasession recess] has the curious effect of depriving Congress of control over the length and number of its sessions."); *id.* at 1565 n.235 (citing Michael Carrier for the proposition that inter-session recesses are at least one month long, whereas intra-sessions are generally shorter than twenty days); see also Hartnett, *supra* note 30 at 413 ("Nothing in the Constitution precludes Congress from having multiple sessions each year. The First Congress had three sessions, as did the Fifth Congress. Considering only the antebellum years, four additional Congresses—the Eleventh, Thirteenth, Twenty-Fifth, and Twenty-Seventh—held three sessions each.").

reason why the Senate could not opt for monthly or even weekly sessions, with the latter establishing what Rappaport calls an “inter-session” recess every weekend.³² (Rappaport does not put any minimum time duration on an appointment-enabling inter-session recess.) In other words, the Senate’s authority to redefine its sessions renders the technical position nonsensically ephemeral, making it a deeply unlikely candidate for adoption in the Constitution. Additionally, there is a simpler and more direct way to produce the same result—by permitting appointments during any “recess,” which is also a term that the Senate can define.

We also have historical evidence about the Framers’ concerns regarding congressional rules, and none of it suggests a desire to limit congressional control over the styling or enumeration of sessions or recesses. The Framers carefully considered questions regarding how Congress should convene and adjourn, viewing them as important to congressional independence.³³ They settled on three simple rules. Congress must meet at least once each year. Each house of Congress must consent before the other may adjourn for more than three days during a legislative session. And the President can adjourn the Congress if the two houses disagree on when to adjourn.³⁴ In contrast to their careful consideration of these rules, the Framers did not discuss the meaning of the terms “recess” or “session,” as used in the Recess Appointments Clause,³⁵ nor for that matter did they discuss “adjournment,” which appears in the next section of the Constitution.³⁶ No one has discovered any suggestion by the Framers that these terms were intended to have anything but their ordinary, commonsense meanings. Moreover, a broad, ordinary, and practical meaning fits what we know about the pragmatic, dual purpose of the Recess Appointments Clause. It was intended to relieve the Senate of the burden of remaining in perpetual session to provide advice and

³² See Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 *CARDOZO L. REV.* 443, 459 (2005) (“I would think that pursuant to the authority of each House to make rules for its own proceedings Congress could decide to hold twelve ‘sessions’ each calendar year, with a few days off—perhaps just a weekend—between them.”).

³³ See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. CHI. L. REV.* 361, 386–88 (2004) (explaining how certain constitutional provisions relating to the convening and adjourning of Congress reflect the value of congressional independence and discussing debates about this value).

³⁴ See *id.* at 386–87 (“Article II gives certain scheduling powers to the president, who may ‘. . . in Case of Disagreement between them, with Respect to the Time of Adjournment . . . adjourn them to such Time as he shall think proper.’” (quoting U.S. CONST. art. II, § 3)).

³⁵ U.S. CONST. art. II, § 2, cl. 3.

³⁶ *Id.* at § 3.

consent on presidential appointments and to enable the President to fill important offices temporarily when the Senate is unavailable.³⁷ Notably, the view that the Senate can define its own recesses also advances the primary policy underlying narrower interpretations of the Clause—limiting the President’s recess appointment power to prevent circumvention of the Senate—and does so without unduly tying the Senate’s hands.

The Senate Vacancy Clause is also relevant to the Recess Appointments Clause. Before the ratification of the Seventeenth Amendment, which established the direct popular election of United States senators,³⁸ Article I of the Constitution provided that state legislatures selected senators, and it gave state executives the power to appoint senators “during the Recess of the Legislature of [the executive’s] state.”³⁹ To hold that “the Recess” has a narrow, technical meaning in the Senate Vacancy Clause would imply that the Constitution prescribes a uniform session and recess practice not only for the United States Congress, but also for state legislatures. This would be peculiar. The Constitution has virtually nothing to say about the structure or internal workings of state governments except that the federal government should guarantee each state a “Republican Form of Government.”⁴⁰ If, on the other hand, the Clause does not restrict state practice, then it is hard to say that it limits the Senate’s.

A final structural inference stems from the Constitution’s distinction between sessions of Congress and the sessions of the individual houses of Congress. The Recess Appointments Clause states that recess appointments expire at the end of “their next Session,” by which it means *the Senate’s* next session.⁴¹ The Adjournments Clause, by contrast, states that each house needs the other’s permission to adjourn for more than three days during “the Session of Congress.”⁴² Section 6

37 See THE FEDERALIST NO. 67 (Alexander Hamilton) (discussing the last clause of Article II and noting that “it would have been improper to oblige this body [the Senate] to be continually in session for the appointment of officers and as vacancies might happen”).

38 U.S. CONST. amend. XVII.

39 *Id.* at art. I, § 3, cl. 2.

40 *Id.* at art. IV, § 4.

41 *Id.* at art. II, § 2, cl. 3.

42 *Id.* at art. I, § 5, cl. 4 (emphasis added). Note that the Adjournments Clause’s use of “the session of Congress” also lends further support to the argument that the House may not constitutionally interfere with the President and the Senate’s appointment authority by refusing to grant the Senate permission to adjourn for more than three days in order to block recess appointments. See Arkush, *supra* note 2, at 6–7 (discussing the House’s lack of authority “to block recess appointments”). Under this view, the Senate’s consideration of executive business qualifies exclusively as the Senate’s own session, not “the session of Congress.” The session of Congress includes only the joint business of the House and

of Article I immunizes senators and representatives from arrest while they attend “the Session *of their respective Houses*.”⁴³ Thus, the text seems to contemplate a difference between the sessions of Congress and the sessions of each house. This makes sense because the Constitution supplies the houses with different powers. Senate consideration of treaties and nominations does not concern the House or require its presence, and, from the founding until the 1930s, the Senate frequently held special sessions without the House to consider these matters.⁴⁴ In the present day, when the Senate considers these executive-branch matters, its rules refer to the situation as “executive session.”⁴⁵ Additionally, the President may convene either or both houses on “extraordinary occasions,”⁴⁶ giving rise to any number of situations in which the two houses can have separate sessions. This constitutional distinction between sessions of Congress and sessions of each house suggests that the document contemplates a variety of possible sessions (and therefore a variety of “inter-session” recesses), further suggesting that the Constitution uses the broad, ordinary meaning of the words recess and session and does not limit the Senate’s ability to define them in the context of its own proceedings.

B. *Contemporaneous Usage*

Another common source of evidence regarding original meaning is contemporaneous usage.⁴⁷ This evidence overwhelmingly supports

Senate—legislating. Indeed, an early draft of the Adjournments Clause expressly exempted the Senate when conducting certain business. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 180 Sect. 8 (Max Farrand ed., 1911) (“Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate, when it shall exercise the powers mentioned in the article.”). An intermediate proposal, not adopted, would have changed the language to “during the session of the House of Reps.” *Id.* at 262. Then, the delegates amended the provision to add “during the session of the legislature” and the sentence exempting the Senate. *Id.* The records do not explain the change, and there was no debate about the Senate exemption. The amendment was arguably more cosmetic, merely reaching the same result by more elegant means. Compare *id.* at 456, with *id.* at 474.) (“[S]ession of the Legislature” was “changed to session of Congress” by the Committee of Style and Arrangement.)

⁴³ U.S. CONST. art. I, § 6, cl. 1 (emphasis added).

⁴⁴ See CONGRESSIONAL DIRECTORY, *supra* note 10, at 522–28.

⁴⁵ MATTHEW MCGOWAN, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 112-1, at 55–59 (2011) (providing rules XXIX–XXXI which pertain to executive sessions).

⁴⁶ U.S. CONST. art. II, § 3.

⁴⁷ See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 93 (2004) (noting that the “shift to original public meaning” brings references to “common contemporary meanings”).

an ordinary reading of “recess” or, perhaps more precisely, is inconsistent with the view that the word was limited to “inter-session” recesses. For this Article, I began by surveying the Federalist Papers and records from the Constitutional Convention and the ratification debates.⁴⁸ In these sources, every unambiguous use of the word “recess” is inconsistent with the technical “inter-session” position.⁴⁹ For example, George Washington referred to a ten-day break from the Constitutional Convention during which the Committee of Detail drafted the Constitution as “the recess.”⁵⁰

The nine ratification-era state constitutions that use the word recess also invoke its broad meaning.⁵¹ Typically one can discern this

⁴⁸ When referring to the convention, this Article cites the 1911 edition of Max Farrand’s *Records of the Federal Convention of 1787*. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42. Later editions have corrected errors and added to the original. However, none of the modifications are directly relevant to the original meaning of recess, and the 1911 edition has the advantage of being available online. I also surveyed Jonathan Elliot’s five-volume collection of ratification-era materials, but found no non-duplicative, unambiguous uses of “recess” there. See JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (2d ed. 1827). The Federalist Papers use “recess” only in three places. One refers to “the recess of the Senate” of the Achaean League, an ancient Hellenistic confederation, in a passage from which the modern reader can glean nothing useful about the meaning of recess in the Constitution. THE FEDERALIST NO. 18 (James Madison and Alexander Hamilton) (“The senate, in which they were represented, had the sole and exclusive right of peace and war; of sending and receiving ambassadors; of entering into treaties and alliances; of appointing a chief magistrate or praetor, as he was called, who commanded their armies, and who, with the advice and consent of ten of the senators, not only administered the government in the recess of the senate, but had a great share in its deliberations, when assembled.”). The other two instances, including a multi-paragraph discussion by Alexander Hamilton, also provide no guidance because their usage of recess simply mirrors that of the Recess Appointments Clause and the Senate Vacancy Clause. See THE FEDERALIST NO. 67 (Alexander Hamilton) (explaining the Recess Appointments Clause); THE FEDERALIST NO. 76 (Alexander Hamilton) (discussing the Senate Vacancy Clause).

⁴⁹ For unambiguous uses in correspondence, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 217; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 138, 269, 323, 601, 605. All uses at the Convention were ambiguous, tracking the usage in the Recess Appointments Clause itself. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 190, 372, 431; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 202, 545, 756, 765. Two uses were ambiguous on their faces but might be resolved with further research. See *id.* at 712, 722.

⁵⁰ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 76.

⁵¹ DEL. CONST. of 1776 art. 7; MD. CONST. of 1776 pt. 2, art. XIII, XLI; MASS. CONST. of 1780 pt. 2, ch. 2, § 1, art. V; N.C. CONST. of 1776 §§ XVIII–XIX; N.H. CONST. of 1792, pt. 2, § L; PA. CONST. of 1776 pt. 2, § 20; S.C. CONST. of 1778 arts. IX, XVIII, XXXV; VT. CONST. of 1777 ch. II, §§ XVII–XVIII; VT. CONST. of 1786 ch. II, § XI. Connecticut and Rhode Island did not adopt new constitutions after independence, instead maintaining their colonial charters from 1639 and 1663, respectively. The South Carolina Constitution of

meaning in a given state constitution because the document grants powers that it makes little or no sense to limit to inter-session recesses. For example, seven ratification-era constitutions authorize the executive to impose embargos for up to thirty days “in the recess” of the legislature.⁵² The North Carolina Constitution of 1776 empowers the governor “in the recess of the General Assembly . . . to embody the militia for the Public safety.”⁵³ These constitutions were adopted in wartime, during a revolution against the British Empire. It is implausible that the availability of these powers would turn on accidents of parliamentary procedure or nomenclature.⁵⁴

Robert Natelson has identified numerous ratification-era legislative enactments that granted similar emergency powers during re-

1776, as well as those of Georgia, New Jersey, and New York did not use the word “recess.” See GA. CONST. of 1777; N.J. CONST. of 1776; N.Y. CONST. of 1777; S.C. CONST. of 1776.

⁵² DEL. CONST. of 1776 art. 7 (“A president or chief magistrate . . . may, by and with the advice of the privy council, lay embargoes or prohibit the exportation of any commodity for any time not exceeding thirty days in the recess of the general assembly . . .”); MD. CONST. of 1776 pt. 2, art. XXIII (“[The Governor] may, during the recess of the General Assembly, lay embargoes, to prevent the departure of any shipping, or the exportation of any commodities, for any time not exceeding thirty days in any one year—summoning the General Assembly to meet within the time of the continuance of such embargo . . .”); N.C. CONST. of 1776 § XIX (“He [the Governor] also may by and with the advice of the Council of State, lay Embargoes or prohibit the Exportation of any Commodity for any Term not exceeding thirty days, at any one time, in the recess of the General Assembly . . .”); PA. CONST. of 1776 pt. 2, § 20 (“They may also lay embargoes, or prohibit the exportation of any commodity, for any time, not exceeding thirty days, in the recess of the house only. . . .”); S.C. CONST. of 1778 arts. XXXV (“That the governor and commander-in-chief for the time being, by and with the advice and consent of the privy council, may lay embargoes or prohibit the exportation of any commodity, for any time not exceeding thirty days, in the recess of the general assembly.”); VT. CONST. of 1777 ch. II, § XVIII (“[T]hey may also lay Embargoes, or prohibit the Exportation of any Commodity, for any time not exceeding thirty days, in the recess of the House only . . .”); VT. CONST. of 1786 ch. II, § XI (“[T]hey may also lay Embargoes, or prohibit the Exportation of any Commodity, for any time not exceeding thirty days, in the recess of the House only . . .”). Many of the ratification-era documents discussed in this section provide recess powers to the executive and a small committee, acting jointly, not solely to the executive. For simplicity, this discussion refers to each as if the grant is just to the executive.

⁵³ N.C. CONST. of 1776, § XVIII. The *OED* defines “embody” in relevant part as “[t]o form into a body or company for military or other purposes; to organize” and includes a usage example from Thomas Jefferson in 1779. See OXFORD ENGLISH DICTIONARY (3d ed. 2001) [hereinafter “OED”].

⁵⁴ Notably, when James Madison proposed language at the federal convention that would have barred states from laying embargoes, George Mason argued that the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments—He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 440–41.

cesses,⁵⁵ including authority to “call out the militia” and “issue other military orders.”⁵⁶ Natelson asserts that the legislatures that granted these powers “obviously” meant them to be available only during long, inter-session recesses.⁵⁷ He appears to think it unlikely that a legislature would grant significant powers during short breaks. But the critical factor is whether the state might face an emergency that requires an immediate response, not how long the legislature plans to be away when a crisis happens to arise. Natelson appears to be asserting that the assemblies meant to leave their states without anyone who had authority to call out the militia or issue military orders merely because the legislature happened to be on a break that was called one thing rather than another (or was relatively short rather than long). In colonies that were actively contemplating or waging war against the world’s preeminent imperial power, at the same time as they faced threats of domestic rebellion, the notion is implausible.⁵⁸

Moreover, even if legislators had long, inter-session recesses *in mind* when granting these emergency powers, it seems unlikely that they would object to the governor using them to respond to crises

55 See Robert G. Natelson, *The Origins and Meaning of “Vacancies That May Happen During the Recess” in the Constitution’s Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL’Y 199, 218–24 (2014) (explaining the various states’ emergency recess powers).

56 *Id.* at 220.

57 *Id.* at 224.

58 Natelson agrees that “[i]n legislative practice, ‘recess’ (without ‘the’) could refer to any time when the legislature is not physically sitting, including intrasession breaks and apparently even a noon recess.” *Id.* at 213. But he asserts that the phrase “the recess” meant something different “in government practice”: “[i]t seems . . . that in government practice the phrase ‘the Recess’ always referred to the gap between sessions.” *Id.* (emphasis in original). There are several problems with this claim. First, it is mistaken as an empirical matter. This Article cites examples in which “the Recess” refers to intra-session recesses. Second, Natelson does not explain the difference between “legislative practice” and “government practice,” nor why a constitutional provision involving Senate recesses would use the “government” rather than “legislative” definition of a term. Third, Natelson does not explain why a reasonable drafter would distinguish among types of recesses by the oblique means of including or omitting the word “the.” That mode of drawing (or inferring) distinctions is implausible on its face. One expects to see the word “the” precede “recess” in many cases simply because the speaker is referring to a particular recess, not because the speaker is trying to limit the scope of the word “recess.” One who wishes to limit the term “recess” would be wise to use more obvious textual cues.

Natelson supports his claim regarding the phrase “the Recess” by citing two types of pre-ratification usage: instances in which (a) a text refers to a specific inter-session recess as “the Recess,” or (b) a state legislature granted recess powers that Natelson believes should have been limited to inter-session recesses (the examples mentioned in the text corresponding to this footnote). *Id.* at 214–27. The former fail to support Natelson’s position because they are silent on whether other recesses were *also* called “the Recess.” The latter do not support it because Natelson’s opinion that certain powers were intended only for “inter-session” recesses is no more obvious than the contrary view.

during other types of recesses. Imagine the governor receives word of a violent riot in the middle of the night between *daily* legislative sessions, and he responds by summoning a local militia to quell the unrest. Are we to assume that, on meeting the following morning, the assembly would chastise the governor for abusing his “recess” powers to defend the populace instead of convening the assembly first? If so, then let us modify the facts: imagine the mob was burning down the assembly building. This hypothetical is not a stretch. We know that the Framers contemplated situations in which domestic violence might prevent legislatures from meeting.⁵⁹

Similar evidence comes from ratification-era constitutional provisions that do not involve military matters or foreign relations. The North Carolina Constitution of 1776 generally gives the governor the power to “grant[] Pardons and Reprieves,” but specifies that in cases prosecuted by the General Assembly he “may in the recess grant a reprieve until the next sit[t]ing of the General Assembly.”⁶⁰ When the North Carolina legislature is away, surely the governor can grant a temporary reprieve to an individual with good cause who faces imminent and potentially irreversible punishment regardless of the technical styling of the legislature’s break.

The South Carolina Constitution of 1778 states:

[D]uring a recess the president of the senate and speaker of the house of representatives shall issue writs for filling up vacancies occasioned by death in their respective houses, giving at least three weeks and not more than thirty-five days’ previous notice of the time appointed for the election.⁶¹

It would make little sense to grant the officer of a legislative body the power to schedule a popular election to fill a vacancy within thirty-five days during one type of recess but not another. Why should public representation in the legislature turn on technicalities and accidents of timing regarding the definitions of legislative breaks?

The Maryland Constitution of 1776 authorizes the governor “in the recess of the General Assembly” to appoint a register of wills for a county in which the position becomes vacant.⁶² There are two ways to

59 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 467 (“Mr. Dickinson moved to insert the words, ‘or Executive’ after the words ‘application of its Legislature’—The occasion itself [the occasion requiring a state to ask for federal assistance responding to domestic violence] he remarked might hinder the Legislature from meeting.”).

60 N.C. CONST. of 1776, § XIX.

61 S.C. CONST. of 1778, art. XVIII.

62 MD. CONST. of 1776, pt. 2, art. XLI (“That there be a Register of Wills appointed for each county who shall be commissioned by the Governor, on the joint recommendation of the

discern that this use of “recess” is probably broad. First, as in the previous examples, it is unlikely that one would permit appointments of county registers of wills during only some narrow type of recess and not others. Second, the provision specifies that an appointee will hold the position “until the meeting of the General Assembly.”⁶³ It is doubtful that “meeting” refers only to formal sessions; the word likely means any convening for legislative business.⁶⁴ If the “meeting” that follows a recess has no specified type, then the recess also has none.

The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1792 use “recess” to refer to *intra-session* recesses. One can discern their usage from the text, without reasoning about the purpose of the provisions. Because the Massachusetts and New Hampshire Constitutions are often cited to support the technical position on “recess,” this Article discusses them in greater detail below, in its review of the evidence for that position.⁶⁵ Briefly, however, these constitutions give the governor power to “prorogue” the legislature, which means to end its session, during a recess. If the legislature is on “recess” and its session has not already ended—which

Senate and House of Delegates; and that, upon the death, resignation, disqualification, or removal out of the county of any Register of Wills, in the recess of the General Assembly the Governor, with the advice of the Council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the General Assembly.”). The Maryland Constitution also provides that the Governor may appoint “Treasurers . . . and the Commissioners of the Loan Office . . . in the recess of the General Assembly,” *id.* at pt. 2, art. XIII, as well as Clerks of court “in the vacation” of courts, *id.* at pt. 2, art. XLVII. By the document’s usage, “vacation” and “recess” appear to be virtual synonyms, with the former used to refer to judicial breaks and the latter legislative breaks.

⁶³ *Id.* at pt. 2, art. XLI.

⁶⁴ Both Johnson’s 1755 and 1785 dictionaries define “meeting,” in relevant part, merely as “[a]n assembly; a convention.” 2 JOHNSON 1755, *supra* note 19, at 1281; 2 JOHNSON 1785, *supra* note 19, at 112. The *OED* provides two relevant definitions, each dating from the Middle Ages or earlier and continuing in use to the present: “[t]he act or an instance of assembling or coming together for social, business, or other purposes; the action of encountering a person or persons” and “[a] gathering or assembly of a number of people for entertainment, discussion, legislation, etc.; the people so assembled.” *OED*, *supra* note 53. In addition, other usage in the Maryland Constitution confirms that “meeting” does not signify a formal session. For example, Article XIX supplies the Senate with power to fill a vacancy in its own ranks “immediately . . . or at their next meeting.” MD. CONST. of 1776, pt. 2, art. XIX. This provision would be nonsensical if “meeting” meant “formal session.” That reading would permit the Senate to fill a vacancy immediately if it happens to be in session when the vacancy arises, but if the Senate is on an *intra-session* recess would force it to leave the position open through the end of the current session and the subsequent *inter-session* recess, only to be filled at the onset of the next session.

⁶⁵ See *infra* text accompanying notes 124–32.

should often (if not always) be the case if the governor can “prorogue” it—then it must be on an “intra-session” recess.⁶⁶

Examples of ordinary usage abound elsewhere, including in other texts on which proponents of the technical position rely. Blackstone’s *Commentaries* uses “these recesses” to refer to three kinds of breaks—those following a parliamentary “adjournment,” “prorogation,” or “dissolution” (a “dissolution” dissolved the parliament):

As to all other privileges which obstruct the ordinary course of justice, they cease by the statutes 12 W. III. c. 3. and 11 Geo. II. c. 24. immediately after the dissolution or prorogation of the parliament, or adjournment of the houses for above a fortnight; and during *these recesses* a peer, or member of the house of commons, may be sued like an ordinary subject⁶⁷

Likewise, Thomas Jefferson’s 1801 *Manual of Parliamentary Practice*, written to guide the Senate, uses the term “recess” to refer to breaks following both prorogations and adjournments: “[c]ommittees may be appointed to sit during a recess by adjournment, but not by prorogation.”⁶⁸ The *Manual* further makes clear that recesses can occur during sessions because it states that an “[a]djournment . . . is no more than a continuance of the session from one day to another.”⁶⁹ If an adjournment “continu[es] . . . the session,” and there is such thing as a “recess by adjournment,” then the word recess must contemplate what modern observers call “intra-session” recesses—recesses without a break in the session.⁷⁰

The Blackstone and Jefferson passages quoted above each refer to English parliamentary practice. One might think it proper to look directly at parliamentary records as well. There, too, one finds examples of “recess” referring to intra-session recesses—or, leaving “session” out of the discussion—passages that refer to relatively brief recesses that follow adjournments rather than prorogations. For example, the record of the House of Commons from 1660 to 1680, published in 1742, includes the following passage:

The next Day, which was the 20th of December, the Money Bill, and the three other Bills being ready for the Royal Assent, the King came to the House of Peers Upon the passing of which, the Parliament *was ad-*

66 *See id.*

67 1 WILLIAM BLACKSTONE, COMMENTARIES *161 (emphasis added).

68 THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 174 (1801) (citations omitted). Rappaport cites this text when explaining English parliamentary practice regarding “adjournment” and “prorogation.” *See Rappaport, supra* note 7, at 1550–51 nn.192–94. But he appears to have missed its significance for his argument regarding the word “recess.”

69 *Id.* at 173.

70 *Id.* at 173–74.

journal'd to the 10th Day of January; and so breaking up, had a Recess for near three Weeks The Parliament being again met, January 10, *according to Adjournment, the joint Committee of Lords and Commons appointed to make enquiry during the Recess, into certain Plots about that time said to be on foot, gave in their Report*⁷¹

Numerous examples can be found in the American colonial legislatures as well. In 1754, Governor Jonathan Belcher of New Jersey sent a message to the General Assembly in which he referred to “the Recess” that he was granting them by adjourning from April 29 to June 1⁷²—and this appears to be the only use of the word “recess” in the four-year volume of New Jersey assembly records in which it appears. When Massachusetts legislators asked their governor on June 29, 1768 to grant them a “recess,” he responded as if either a “prorogation” or an “adjournment” would initiate a “recess,” saying, “I cannot consistently with my Sense of Duty *Prorogue or Adjourn* the General Court until I have receiv’d your Answer to his Majesty’s Requisition.”⁷³ In 1771 the *Pennsylvania Gazette* specified that a break which it called “the Recess” of New York’s legislature was an intra-session recess:

Captain McDougall . . . remains still in the New Gaol, for the Assembly was not prorogued, but adjourned; so that the Sessions is not at an End, and the Recess is only till the 25th Instant, when the Members are to meet again⁷⁴

On July 18, 1775, one month after the Battle of Bunker Hill and two weeks after George Washington was named Commander in Chief of the Continental Army, the Continental Congress adopted a resolution that foreshadowed the use of “recess” in several ratification-era constitutions:

RESOLVED, THAT it be recommended to the inhabitants of all the United English Colonies in North-America, that all able bodied effective

71 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 46–60 (1742), *available at* <http://www.british-history.ac.uk/report.aspx?compid=37617> (emphasis added). Not only does the House of Commons use “the Recess” to refer to the break following an adjournment; it is discussing a break similar in timing to the one at issue in *Noel Canning*.

72 THE PENNSYLVANIA GAZETTE, May 16, 1754, at 1 (digital copy on file with author); THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 10 (1785), *available at* <https://archive.org/details/votesproceedings1754newj> (Apr. 29, 1754). Ordinarily the Governor “prorogued” the New Jersey Assembly to end its sittings, meaning that what we would call a new session began at its next meeting. *See id.* at 12 (Dec. 14, 1752) (stating that the governor “directed a prorogation”); *id.* at 52 (May 16, 1753) (“[T]he Governor was pleased to prorogue the House to the 10th of July next.”). But on April 29, 1754, Governor Belcher issued a “Writ of Adjournment.” *Id.* at 10 (April 17, 1754 to April 25, 1754). The assembly met “pursuant to an Adjournment” on June 1. *Id.* at 11 (June 3, 1754).

73 45 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768–69, at 86, 88 (1976) (emphasis added).

74 THE PENNSYLVANIA GAZETTE, Feb. 28, 1771, at 2–3 (digital copy on file with author).

men, between 16 and 50 years of age, in each Colony, immediately form themselves into regular companies of militia . . . * * * That all officers above the rank of a Captain be appointed by their respective Provincial Assemblies or Conventions, *or in their recess* by the Committees of safety appointed by said Assemblies or Conventions. That all officers be commissioned by the Provincial Assemblies or Conventions, *or in their recess* by the Committees of Safety appointed by said Assemblies or Conventions. * * * That it be recommended to each colony to appoint a Committee of Safety, to superintend and direct all matters necessary for the security and defence of their respective Colonies, *in the recess* of their Assemblies and Conventions.⁷⁵

It is doubtful that the Continental Congress meant these provisions to turn on a particular definition of “recess.” In that case, it would have needed to canvass the session and recess practices of each colonial legislative assembly before crafting its one-size-fits-all recommendation—or, worse, made one in ignorance. It also would have to have concluded, inexplicably, that the assemblies should leave critical military posts vacant and their territories without emergency legislative powers when they happen to be on breaks that fall during rather than between formal legislative sessions.

In fact, ratification-era state legislatures varied substantially in their nomenclature for legislative sessions. This evidence casts strong doubt on the possibility that federal drafters would craft rules that turn on strict semantic distinctions between “inter-session” and “intra-session” recesses. The contrast between New Jersey and Massachusetts practices illustrate the point. The New Jersey legislature enumerated its “sessions” by year and called each work period within a given (annual) session a “sitting.”⁷⁶ By contrast, when the Massachusetts legislature met multiple times a year, it called each sitting a new “session.”⁷⁷ Imagine, then, that the U.S. Constitution limits recess appointments to “inter-session” recesses in accordance with the technical position (it does not use the word, but let us assume it is fairly implied). In that case, one cannot tell whether the document incorporates the New Jersey or the Massachusetts sense of “inter-session.” The difference between the two is stark. The New Jersey definition

⁷⁵ THE PENNSYLVANIA GAZETTE, July 26, 1775, at 2 (digital copy on file with author) (emphasis added).

⁷⁶ See, e.g., THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY, *supra* note 72, at 5 (“At a SESSION begun at Trenton on the 25th Day of October, 1785, and continued by Adjournments. Being the first Sitting.”); *id.* at 177 (“Being the second Sitting”); *id.* at 265 (“Being the third Sitting”).

⁷⁷ See, e.g., 47 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770–1771, at vii (1978) (listing in the table of contents four sessions of the “General Court, 1770–1771”: “First Session: 30 May–25 June 1770;” “Second Session: 25 July–3 August 1770;” “Third Session: 26 September–20 November 1770;” “Fourth Session: 3–26 April 1771”).

would permit recess appointments only once per year, while the Massachusetts definition would permit them multiple times—for an identical pattern of legislative meetings and breaks. It is difficult to imagine, then, that the Constitution turns on the strict application of one of these definitions, particularly when there is no record of its drafters discussing which definition to choose.

To be sure, there are numerous examples from the 1770s and 1780s in which “recess” is used to refer to an *inter-session* recess.⁷⁸ But that is to be expected of a general term. General words are used to refer to various specific things, so long as each falls within the word’s general definition.

C. Purpose

The purpose of the Recess Appointments Clause is to enable the President to fill posts when necessary or convenient without requiring the Senate to remain in session continually or return to Washington when inconvenient.⁷⁹ This policy appears to be based on two beliefs: the Senate was not likely to—or perhaps *should not*—spend too much time in Washington, and generally it should not be forced to return to Washington merely to consider appointments. These views, in turn, appear to have been driven by the Framers’ relatively narrow expectations for federal legislative business and their brand of republican political theory, which held that elected representatives should spend a good deal of time in their local communities.⁸⁰

Three aspects of the Clause’s purpose are worth noting. The first, which has gone largely unnoticed, is that the Clause advances the interests of not just the President, but also the Senate. The Senate might prefer the President to have recess appointment power so that senators can spend more uninterrupted time in their home states. As a general matter, the Senate should hold this preference whenever it does not anticipate opposing the President’s nominations, which means most of the time. There is evidence that the Framers expected this to be the norm, as they believed the Senate would only rarely re-

78 See, e.g., THE PENNSYLVANIA GAZETTE, Jan. 19, 1774, at 2 (reporting that the Governor “opened the sixth Session of the General Assembly” and printing his speech to the assembly, which, among other things, recounts that “since your Recess” representatives from New York and Massachusetts reached a provisional agreement to settle the border between the two jurisdictions); see also THE PENNSYLVANIA GAZETTE, Feb. 9, 1774, at 1 (referring to a “Recess of the General Court by Propagation [*sic*]”).

79 See THE FEDERALIST NO. 67 (Alexander Hamilton).

80 See, e.g., Rappaport, *supra* note 7, at 1564, n.232 (noting Republican political theory and expectations regarding Congress’s legislative business).

ject presidential nominees.⁸¹ But regardless of their views, it should be the norm even in modern times. The Senate majority typically supports the President's nominations when it is aligned with him and opposes them only infrequently even when it is not. To the extent that the Clause's widely acknowledged purpose has any implication for how one reads its text, the fact that the Clause serves both the President and the Senate in most situations lends some support to broader readings. The technical position has a weaker connection to the Clause's purpose, as it seeks to protect the Senate from subversion by the President without accounting for the Senate's affirmative interest in recess appointments.⁸²

Second, the Clause is pragmatic and reflects a compromise between competing values. Although the Framers settled on presidential nomination and Senate consent as the primary method of appointment, the Clause embodies a recognition that practical considerations (from the perspective of the President, the Senate, or both) can trump the primary method. If any inference can be drawn from this purpose, it suggests the aptness of reading the Clause plainly, which establishes the following pragmatic arrangement: the terms of the Clause have their ordinary, general meanings, perhaps subject to the Senate's refinement under the Rules of Proceedings Clause. If disputes arise under the Clause, the President and the Senate are bound not by judicially imposed, technical interpretations of the Clause but by notions of reasonableness enforced largely, if not entirely, through the political process.⁸³ In this view, the Clause does

81 See, e.g., John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 653–54 (1993) (“Given that the Senate was not to exercise choice itself, it appeared to Alexander Hamilton that a nominee should be rejected only for ‘special and strong reasons.’ . . . [T]he original understanding of the Appointments Clause does not contemplate rejections for reasons of partisanship or disagreement over the nominee’s likely vote in a single case, because these reasons would be neither special nor strong.”); see also 4 ELLIOT, *supra* note 48, at 134 (quoting Iredell as saying, “Suppose a man nominated by the President; with what face would any senator object to him without a good reason? There must be some decorum in every public body”).

82 See *infra* text accompanying notes 183–87.

83 Cf. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 577 (2012) (“Here, actual usage has not always precipitated fixed rules, but instead has structured a conversation between presidents and senators resulting in evolving understandings, conventions, and truces.”); Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 252–54 (2008) (discussing political confrontations between the President and the legislative branch); Herz, *supra* note 32, at 460 (“Thus, proposals for a fast-track confirmatory procedure, or for disaggregating spending into hundreds of separate ‘bills,’ never went anywhere. Neither would the twelve-sessions-a-year idea. There are surely many reasons why they do not. But the beginning of an answer would seem to lie in the facts that: (1)

not limit recesses to any particular type. One might reasonably wish to read minimum length limitations into the Clause, but that matter is largely left to the President and the Senate to negotiate.

Finally, the Framers scarcely discussed the Clause at all, and there is no record of any debate over it at the Constitutional Convention or the ratification conventions. This, too, lends slight support to a pragmatic, plain reading. If the Framers were concerned about the technicalities of the Clause or wished it to draw bright lines, one might expect them not only to have used narrower language, but to have discussed or debated their policy views, as well as their word choice. They were not averse to quibbling over technicalities. Regarding the ten-day period for the President to sign bills passed by Congress, the delegates at the Constitutional Convention considered whether the text should read “within ten days (sundays excepted) after it shall have been presented to him” or “within ten days (sundays excepted) after *the day on which* it shall have been presented to him.”⁸⁴ In contrast to this close consideration of the deadline for presidential signatures, the drafters did not debate the Recess Appointments Clause at all. Sometimes drafters who adopt general language are intentionally delegating authority to those who implement it. We have too little evidence to suggest intentional delegation in the Recess Appointments Clause. It is plausible, but it is no less plausible that the Framers simply did not think about the Clause much. At a minimum, however, they appear to have been unconcerned with the details of its operation enough that they did not bother to ensure that would be read more narrowly than its ordinary terms suggest.

D. History

The historical record also supports an ordinary reading of the Clause. This view predominated from the nation’s founding until 2013. The executive branch adopted a contrary view for no more than twenty-five years, from 1901 to 1921 and possibly from 1974 to 1979.

In the earliest years after independence, governors in Pennsylvania and Vermont exercised their embargo powers during intra-

Congress and the president both realize that two can play this game; (2) political will always matters as much as legal authority; and (3) the participants are all repeat players, who do not know whether their side is going to control the White House, Congress, both, or neither at any given point and so cannot risk shifting too much authority to any particular locus.”)

84 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 608 (citing Madison’s desire to add those words).

session recesses, suggesting that they interpreted “in the recess” in their state constitutions to include those recesses.⁸⁵ Likewise, in 1798, the Governor of New Jersey must have interpreted “Recess” in Article I of the United States Constitution to include intra-session recesses,⁸⁶ as he appointed a United States senator during an intra-session recess of the New Jersey General Assembly.⁸⁷

The earliest formal opinion on the Recess Appointments Clause, by Attorney General William Wirt in 1823, concerned whether the President could fill a pre-existing vacancy during a recess. Wirt did not consider the meaning of “recess” directly, but he described the Clause in terms that suggest, if anything, support for an ordinary, pragmatic reading of the Clause:

Now, if we interpret the word ‘happen’ as being merely equivalent to ‘happen to exist,’ (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist *at a time when the Senate cannot be consulted as to filling them,* may be temporarily filled by the President⁸⁸

If the Clause were perceived as enabling appointments only between formal sessions, this would be an odd way of referring to the period during which the President can make unilateral appointments. Wirt does not use the word “recess,” nor does he reference in any way a lengthy period between formal sessions of Congress. Instead, he describes the relevant period pragmatically, as “a time when the Senate cannot be consulted as to filling [vacancies].”⁸⁹ To be sure, Wirt was not squarely considering the “recess” question. But his description is unlikely if people in the early nineteenth century commonly believed that the Clause contemplated only recesses between official sessions of Congress.

As soon as the United States Congress began taking significant intra-session recesses, presidents began making intra-session recess appointments, and the historical record is bereft of any contemporaneous objection based on their intra-session nature. President Andrew

⁸⁵ See *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203, 225 (2013) (providing examples “of state executives assuming that a constitutional recess includes intrasession breaks”).

⁸⁶ Until the Seventeenth Amendment established direct popular elections of senators, see U.S. CONST. amend. XVII, Article I directed that state legislatures selected senators, and that “the Executive” of a state could appoint senators “during the Recess of the Legislature of [that] State.” U.S. CONST. art. I, § 3, cl. 2.

⁸⁷ See *New Vista*, 719 F.3d at 225–26 (“[The New Jersey’s Governor’s] appointment of a senator on December 19, 1798, shows that he construed recess to include intrasession breaks because the New Jersey General Assembly was in an intrasession break from November 8, 1798, until January 16, 1799.”).

⁸⁸ 1 Op. Att’y Gen. 633 (1823) (emphasis added).

⁸⁹ *Id.*

Johnson made fifty-seven appointments during four different intra-session recesses in 1867 and 1868.⁹⁰ The “intra-session” nature of these appointments appears to have generated no controversy at all. As Edward Hartnett has pointed out, although the Fortieth Congress impeached and tried Andrew Johnson on charges related to appointments and removals, it notably did not dispute the constitutionality of *intra-session* recess appointments.⁹¹ During this period, Attorney General William Evarts issued three opinions on recess appointments, none of which draws any distinction between intra-session and inter-session appointments.⁹² Similarly, a United States district court that passed on the validity of a Johnson recess appointment gave no attention to the question of the type of recess.⁹³ And the Court of Claims expressly affirmed the legitimacy of a Johnson intra-session recess appointment, stating that it had “no doubt” that the President could legally fill a vacancy during the recess in question.⁹⁴

Rappaport argues that Johnson’s contemporaries might have viewed the relevant recesses as “inter-session.”⁹⁵ The effort is unconvincing. First, Rappaport concedes that two of four relevant periods were intra-session recesses.⁹⁶ Regarding the remaining two, Rappaport points to aspects of the congressional record from which one might argue—or might have believed at the time—that the Senate had ended its session even though no one at the time voiced that perspective.⁹⁷ He then takes silence on the recess question as evidence in his favor. He doubts that the President would have taken the “unprecedented” step of making intra-session recess appointments without attempting to

90 See Hartnett, *supra* note 30, at 408–09 & n.143 (discussing President Johnson’s recess appointments); Michael B. Rappaport, *Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause* 26–33 (Jan. 3, 2014) (San Diego Legal Studies Paper No. 14-140), available at <http://ssrn.com/abstract=2374563> (discussing Andrew Johnson’s numerous recess appointments).

91 See Hartnett, *supra* note 30, at 409 & n.143 (“Attorney General William Evarts issued his opinion concurring with his predecessors that the President could exercise his recess appointment power even when the vacancy arose while the Senate was in session, as well as two other opinions approving recess appointments.”).

92 See *id.* at 409–10 n.143 (citing 12 Op. Att’y Gen. 449 (1868); 12 Op. Att’y Gen. 455, 457 (1868); 12 Op. Att’y Gen 469 (1868) in discussing these opinions).

93 The court found the appointment invalid because it predated the relevant recess, but it viewed the recess itself as adequate. *In re* District Attorney of the United States, 7 F. Cas. 731, 744 (E.D. Pa. 1868).

94 *Gould v. United States*, 19 Ct. Cl. 593, 595–96 (1884) (“We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned, from July 20 to November 21, 1867, could be and was legally filled by appointment of the President alone . . .”).

95 Rappaport, *supra* note 90, at 27–31.

96 *Id.* at 30.

97 *Id.* at 27, 28–29.

“justif[y]” them.⁹⁸ This argument assumes its conclusion. Perhaps the President did not attempt to justify the appointments because neither he nor anyone else thought they needed justification, as no one thought it relevant whether the Senate ended a formal session before the break in question.

The first known suggestion that the Constitution might *not* authorize intra-session recess appointments did not appear until 1901, in an opinion of Attorney General Philander Knox advising President Theodore Roosevelt against such appointments.⁹⁹ Knox mistakenly characterizes the Evarts opinions as “relat[ing] only to appointments during the recess of the Senate between two sessions of Congress,”¹⁰⁰ and he dismisses the Court of Claims decision with an unsupported suggestion that the circumstances giving rise to the intra-session recess were “unusual and involved results which should not be viewed as precedents.”¹⁰¹ There is no doubt that the circumstances were unusual; less clear is why the episode has no precedential value on the “recess” question.

Knox’s textual analysis relies principally on the definite article “the.” He states, “[i]t will be observed that the phrase is ‘*the* recess,’”¹⁰² arguing that “there have always been two sittings, sessions or assemblings of each Congress” and “the recess” is the break between them.¹⁰³ He also argues that the Constitution distinguishes between an “adjournment,” which means any break, and “the recess,” which is the single break between official sessions of Congress.¹⁰⁴ Knox’s assertion about sessions is simply mistaken. The Constitution does not establish the name or numbering of congressional sessions, and Congress can hold—and has held—multiple formal sessions in a single year if it chooses. The First and the Fifth Congresses each held three

⁹⁸ *Id.* at 29.

⁹⁹ *See* 23 Op. Att’y Gen. 599 (1901) (advising the President not “to appoint an appraiser of merchandise in the district of New York during the current holiday adjournment of the Senate”). The 1868 opinion of the district court that invalidated a Johnson appointment suggests that “[w]hether there was a recess of the senate upon adjournment of congress on 27th July last” is a question “upon which opinions have, I believe, differed.” *In re* District Attorney of the United States, 7 F. Cas. 731, 734, 744 (E.D. Pa. 1868). But the court did not specify whether the “believe[d]” disagreement concerned the intra-session nature of the appointment or something else; nor did it offer any source expressing the supposed belief.

¹⁰⁰ 23 Op. Att’y Gen., *supra* note 99, at 602. Hartnett caught this mistake. *See* Hartnett, *supra* note 30, at 410–11 (highlighting the mistake).

¹⁰¹ 23 Op. Att’y Gen., *supra* note 99, at 603.

¹⁰² *Id.* at 600 (emphasis in original).

¹⁰³ *Id.* at 603–04.

¹⁰⁴ *Id.* at 601.

sessions, as did four other antebellum Congresses.¹⁰⁵ On close inspection, the distinction between “adjournment” and “recess” also lacks merit. As this Article discusses in greater detail below, the Constitution uses “adjournment” as the noun form of “adjourn,” not as a means to distinguish between “recesses” and other breaks.¹⁰⁶

Knox was also motivated by policy concerns. He disliked the possibility that a recess appointment being made over a weekend, which he believed would be permissible if intra-session appointments were lawful.¹⁰⁷ At the same time, he apparently saw no limit on intra-session recess appointments other than that they fell between official sessions of Congress. His view led to President Theodore Roosevelt making appointments during what he called a “constructive recess” that occurred when the Senate ended one session and began another with a single gavel stroke.¹⁰⁸

When the Senate Judiciary Committee responded to Roosevelt’s appointments with a 1905 report defining recesses, it did not distinguish between inter-session and intra-session breaks. It endorsed a pragmatic view of the word recess:

[The Framers] used the word [recess] as the mass of mankind then understood it and now understand it. It means, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.¹⁰⁹

In 1921, Attorney General Harry Daugherty concurred with the Senate Judiciary Committee, rejecting Knox’s view and restoring the consensus view that the type of recess is not important.¹¹⁰ Daugherty did,

¹⁰⁵ See Hartnett, *supra* note 30, at 413 (“The First Congress had three sessions, as did the Fifth Congress. Considering only the antebellum years, four additional Congresses—the Eleventh, Thirteenth, Twenty-Fifth, and Twenty-Seventh—held three sessions each.”).

¹⁰⁶ See *infra* text accompanying notes 143–47.

¹⁰⁷ See 23 Op. Att’y Gen., *supra* note 99, at 603 (“If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.”).

¹⁰⁸ See Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2211–12 (1994) (“Roosevelt claimed that a split second separated the two sessions, thus creating a recess which allowed him to make recess appointments.”).

¹⁰⁹ S. REP. NO. 58-4389 (1905), *reprinted in* 39 CONG. REC. 3820, 3823 (emphasis omitted).

¹¹⁰ 33 Op. Att’y Gen. 20, 24 (1921) (“If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no.”).

however, conclude that an appointment-enabling break might have some minimum length, likely more than “5 or even 10 days.”¹¹¹ But he believed that a precise number could not be determined, as the word recess “must be given a practical construction.”¹¹² Later presidents and attorneys general have all agreed with Daugherty’s rejection of a distinction between types of recess. They have differed only on the question of minimum length.¹¹³

In the second half of the twentieth century, intra-session recess appointments became much more common.¹¹⁴ President Harry Truman made twenty appointments during four intra-session recesses.¹¹⁵ President Dwight Eisenhower made nine, and President Richard Nixon made eight.¹¹⁶ A 1979 Office of Legal Counsel memorandum states that from 1974 to 1979, presidents were “reluctant” to make intra-session recess appointments because of the 1974 D.C. Circuit holding that the President could pocket-veto bills during intra-session recesses.¹¹⁷ But President James Carter resumed making them in 1979, and through 2012, presidents made 340.¹¹⁸ In 1979, a United States district court passed on the validity of an intra-session recess appointment without questioning the constitutionality of its intra-session rather than inter-session nature.¹¹⁹ Despite the increased use of intra-session recess appointments in recent decades, no court

111 *Id.* at 24–25.

112 *Id.* at 25.

113 *See* 41 Op. Att’y Gen. 463, 468 (1960) (agreeing with the court’s opinion in *Gould v. United States*, 19 Ct. Cl. 593 (1884)); 3 Op. O.L.C. 314, 316 (1979) (finding that “the President is authorized to make recess appointments during a summer recess of the Senate of a month’s duration”); 6 Op. O.L.C. 585, 585 (1982) (approving of a 2 month intra-session recess); 20 Op. O.L.C. 124, 161 (1996) (finding “that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play”); 36 Op. O.L.C. ___, at 2, 13 (Jan. 6, 2012) (concluding “that the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause”).

114 *See, e.g.,* Carrier, *supra* note 108, at 2212–16 (discussing the recess appointments made since 1947).

115 *See id.* at 2212–13.

116 *See id.*

117 *See* 3 Op. O.L.C., *supra* note 113, at 313 (1979) (citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)).

118 *See infra* note 352.

119 *See* *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979). The court rejected a statutory argument that the Federal Election Campaign Act required all appointees to be Senate-confirmed in apparent contravention of the Recess Appointments Clause, as well as an argument that the Clause provides recess appointment power only in “instances of absolute need.” *Id.* at 597. The court implicitly took the broad view of the words “recess” and “session.” It stated that “[r]ecess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session.” *Id.*

squarely addressed the “recess” question until 2004, when the Eleventh Circuit approved intra-session appointments.¹²⁰ A court first took the position that the Recess Appointments Clause is limited to recesses between sessions of Congress in 2013,¹²¹ 226 years after the ratification of the Constitution, 215 years after the word “recess” in the U.S. Constitution was first interpreted by the Governor of New Jersey to include intra-session recesses, and 146 years after the first intra-session recess appointments were made without any recorded objection. In short, with only two brief exceptions in the twentieth century, the word recess appears always to have been viewed as having an ordinary meaning, not limited to any formal type of recess.

II. A CRITIQUE OF THE TECHNICAL POSITION

Until very recently, the ordinary reading of “recess” dominated. Michael Rappaport overturned that longstanding consensus with a 2005 law review article arguing that original meaning of the Recess Appointments Clause was narrow and technical.¹²² Because of its influence, the argument merits a detailed evaluation. Perhaps most illuminating is what it does not argue: Rappaport did not uncover any evidence that the Framers intended “recess” to have a special meaning, nor for that matter any evidence that the Framers thought about the word at all. He and other proponents of the technical position also agree that the term, on its face, has a general meaning and cite historical dictionary evidence that exclusively supports the general meaning.¹²³ One might expect these points to end the inquiry, leaving the term its broad, ordinary meaning, subject only to Senate con-

¹²⁰ See *Evans v. Stevens*, 387 F.3d 1220, 1224–25 (11th Cir. 2004) (“[W]e accept that ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate’s acts of recessing, that is, taking a break.”).

¹²¹ See *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 208 (3d Cir. 2013) (We hold that ‘the Recess of the Senate’ in the Recess Appointments Clause refers to only intersession breaks.”); *NLRB v. Noel Canning*, 705 F.3d 490, 506 (D.C. Cir. 2013) (“In short, we hold that ‘the Recess’ is limited to intersession recesses.”).

¹²² See Rappaport, *supra* note 7, at 1490 (arguing that “the original meaning [of the Recess Appointments Clause] confers quite narrow authority” on the President to make recess appointments); see generally Brief of Originalist Scholars as Amici Curiae at 24, *NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013) (No. 12-1281), 2013 WL 6213265 at *24 [hereinafter Originalist Brief] (arguing that the narrow reading of the word “recess” “best comports with the Constitution’s text, structure, and purpose”).

¹²³ See Originalist Brief, *supra* note 122, at 23–34 (admitting that “‘recess’ could be used more generically to refer to any break in a legislature’s conduct of business, including short breaks during a session”); Rappaport, *supra* note 7, at 1550 (discussing dictionary definitions and an “interpretation [that] reads the term ‘recess’ to mean all periods, no matter how short, when the Senate is not conducting business”).

struction under the Rules of Proceedings Clause. Instead, Rappaport and others attempt to muster indirect evidence to support a narrow, technical reading of recess. The evidence is hard to find.

A. *Contemporaneous Usage*

The primary argument for the technical position derives not from the text of the Constitution, but the use of “recess” in two roughly contemporaneous documents.¹²⁴ The evidence is thin—a single passage in the Massachusetts Constitution of 1780, similar to one in the New Hampshire Constitution of 1792¹²⁵—and adherents to the technical position misread it. Rappaport begins by explaining that in England, breaks during a session were called adjournments, while inter-session breaks were called prorogations.¹²⁶ Then he quotes the Massachusetts Constitution:

The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [that is, the Massachusetts legislature], to adjourn or prorogue the same to any time the two Houses shall desire . . . and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess¹²⁷

The quoted passage states that the governor may prorogue the legislature “in the recess.” If, as Rappaport explains, a prorogation is “an order that . . . would end the session,”¹²⁸ then the legislature must be in session for the governor to prorogue it. Therefore, the phrase “in the recess” must refer to an intra-session recess. The passage appears to use “recess” to refer exclusively to intra-session recesses.¹²⁹

¹²⁴ See Rappaport, *supra* note 7, at 1549–53 (discussing the use of “recess” in both the Massachusetts and New Hampshire Constitutions); Originalist Brief, *supra* note 122, at 24–25 (discussing “[e]ighteenth-century state constitutions [that] used ‘recess’ to refer to the time that the legislature was not in session”).

¹²⁵ Rappaport, *supra* note 7, at 1551–52 (discussing and citing MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. V; N.H. CONST. of 1792, pt. 2, § L).

¹²⁶ Rappaport, *supra* note 7, at 1550–51 (explaining that “an adjournment was a break in the business of a house that occurred during the legislative session” while “a prorogation was an order by the King that Would end the session for both houses”).

¹²⁷ *Id.* at 1552 (quoting MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. V) (emphasis in original).

¹²⁸ Rappaport, *supra* note 7, at 1550–51.

¹²⁹ One caveat here is that perhaps the Massachusetts Governor could prorogue the assembly even when it was already prorogued. If that were the case, then the passage would appear to refer to both intra-session and inter-session recesses rather than just the former: the governor could “prorogue” the assembly when it was on “recess” regardless of whether the recess was inter-session or intra-session. It is not clear whether such authority existed in Massachusetts. It appears to have existed in New Jersey before independence, but not after. Pre-independence, one finds instances in which the New Jersey Governor prorogued the assembly to a certain date, but the assembly did not meet until later and, upon reconvening, noted “his Excellency’s several Prorogations.” MINUTES OF THE

Rappaport reaches the opposite conclusion. His argument appears to flow as follows:

- (1) If “in the recess” includes times when the legislature is in session, then the quoted passage should grant the governor power to adjourn as well as prorogue.
- (2) The passage grants power only to prorogue and not to adjourn.
- (3) Therefore “in the recess” must refer only to recesses in between sessions.¹³⁰

This gets it backward. When the legislature is in recess, it has already been adjourned (if not prorogued). Therefore it does not make sense to give the governor power to adjourn the legislature during a recess. The more sensible arrangement is that the governor has power to adjourn or prorogue the legislature during a session but only to prorogue when it is already on recess.

Rappaport makes one other argument about the passage: because one clause discusses what the governor may do “during the session” and the next addresses what he may do “in the recess,” the latter must refer to a time when the legislature is not in session.¹³¹ This reasoning begs the question by assuming that “session” and “recess” are mutually exclusive. The point of the inquiry is to determine whether the word “recess” can refer to a break during a session.

Note also that the italicized portion of passage states that the governor may prorogue the legislature “from time to time, not exceeding ninety days in any one recess.”¹³² The phrase’s use of “from time to time” is curious. It appears to mean something like, “the governor may occasionally prorogue the legislature during a recess, not to exceed ninety days in any one recess.” In any event, it arguably suggests an intent for the governor to use the granted power reasonably or in

PROVINCIAL CONGRESS AND THE COUNCIL OF SAFETY OF THE STATE OF NEW JERSEY 282 (1879) (Nov. 15, 1775). After independence, however, this practice appears to have ended, with the assembly instead meeting on the day appointed by law and continuing to new sittings by “adjournment.” See, e.g., THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY, *supra* note 72, at 8 (providing specific times for meeting after adjournment); THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 6–7 (1786) (providing specific times for meeting after adjournment). This author has not found evidence (whether pre- or post-independence) suggesting that the *Massachusetts* governor could prorogue its assembly when already prorogued, but it is possible that the power existed.

¹³⁰ See Rappaport, *supra* note 7, at 1552; see also Originalist Brief, *supra* note 122, at 25 (“The lack of authority to adjourn the legislature during its recess makes sense if the legislative session has ended; by definition, a legislature cannot be adjourned when it is not in session.”).

¹³¹ See Rappaport, *supra* note 7, at 1552.

¹³² MASS. CONST. of 1780, pt. 2, ch. 2 § 1, art. V.

moderation—and therefore to imply a belief that for some reason governors could be trusted to do so. In effect, the passage may evince an intent to establish a loose, pragmatic standard rather than a hard rule, and to trust the constraints of the political process to sort out the details. The Recess Appointments Clause arguably reflects a similar posture.

Proponents of the technical position also point to two additional sources—two passages in Blackstone’s *Commentaries* and a single order from the Virginia House of Delegates.¹³³ These texts provide little support. As discussed above, Blackstone sometimes uses “recess” in a general manner.¹³⁴ One of the Blackstone passages cited for the technical position appears to use words casually, not formally. It contemplates that a matter arising during an “intermission or recess of parliament” might be “brought . . . unto the next parliament” for resolution.¹³⁵ The word “intermission” likely refers to a relatively short break during a continuous session.¹³⁶ When an important matter arises during an intermission, it makes little sense to wait and present it to the “next parliament” rather than the current parliament, when it returns from the intermission. The natural inference is that this Blackstone passage uses words loosely and therefore provides little if any support for strict, technical usage.

The other Blackstone passage,¹³⁷ and the passage from the Virginia House of Delegates, appear to use “recess” and “session” in their narrow, technical senses, although one cannot be certain without examining other records. But no matter. These are instances in which

133 See Originalist Brief, *supra* note 122, at 25–26 (citing for support 3 BLACKSTONE, *supra* note 67, at *57; 4 BLACKSTONE, *supra* note 67, at *260; JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 123 (1777–81) (Thomas W. White ed., 1827)); Originalist Brief, *supra* note 122, at 26 (“Ordered, That the delegates for the several counties consult with their constituents, during the recess of Assembly, on the justice and expediency of passing [a bill] . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates at their next session.” (quoting JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA (1777–81), *supra* note 133, at 123)).

134 See *supra* text accompanying note 67.

135 1 BLACKSTONE, *supra* note 67, at *57 (emphasis omitted) (“This committee seems to have been established, lest there should be a defect of justice, for want of a supreme court of appeal, during any long intermission or recess of parliament; for the statute further directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said [committee] unto the next parliament, who shall finally determine the same.” (emphasis omitted)).

136 See *infra* note 231.

137 2 BLACKSTONE, *supra* note 67, at *338 (“During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the [high court of parliament]. . . . But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law. . . .”).

“recess” happens to have been used to refer to inter-session breaks. They demonstrate nothing about whether *other* types of breaks were *also* called “recesses.” The source from which the originalist scholars find the passage from the Virginia House of Delegates builds its principal argument about “recess” on this mistaken inference, committing it many times over.¹³⁸ One needs more than a few, or even many, examples of a technical meaning to establish that it was exclusive. Conversely, just a few examples of general usage go a long way toward rebutting claims of a technical meaning—and in fact such examples abound.

B. Structure: An Inference from “Adjournment”

Proponents of the technical position have also attempted to infer from the Constitution’s text a distinction between the words “recess” and “adjournment,” in which the former stands exclusively for inter-session recesses and the latter describes all legislative breaks. The argument begins with the notion that because the Constitution uses both words, they must have different meanings.¹³⁹ This interpretive move is by no means uncontroversial.¹⁴⁰ But that is no matter because the words do in fact mean different things, just not things that support the technical position. Adherents to the technical position argue that each use of “adjourn” or “adjournment” appears in a context that makes clear that the text refers to both intra-session and inter-session recesses, whereas “recess” appears only twice, in contexts that *might* refer only to inter-session recesses.¹⁴¹ Since “adjournment”

¹³⁸ See Natelson, *supra* note 55, at 215–17 (arguing, based on the Massachusetts and New Hampshire Constitutions and the Virginia House of Delegates document, “that it is clear that ‘the recess’ represented the period between sessions and was clearly distinguished from them”).

¹³⁹ Originalist Brief, *supra* note 122, at 30 (“The choice to use different language (‘the Recess’ rather than ‘Adjournment’) indicates a different meaning.”).

¹⁴⁰ See, e.g., SCALIA & GARNER, *supra* note 23, at 170 (explaining that presumption of consistent usage “more than most other canons . . . assumes a perfection of drafting that, as an empirical matter, is not often achieved”); cf. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 598 (1995) (Ginsburg, J., dissenting) (“The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.” (quoting Walter Wheeler Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933))); 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, 756 (2009) (noting, regarding the related rule against surplusage or redundancy, “[t]his interpretive rule, of course, is not absolute. While it provides weight in favor of one interpretation, it can be overridden by other considerations.”).

¹⁴¹ Originalist Brief, *supra* note 122, at 30.

clearly refers to all breaks, they argue, the “most obvious” inference is that “recess” means only inter-session recesses.¹⁴²

But a more obvious interpretation is apparent on the face of the text: the Constitution does not distinguish between one type of break called a “recess” and another called an “adjournment” because the document never refers to any break as an “adjournment.” It uses “adjournment” just three times,¹⁴³ and in each instance the word is a mere nominalization of the verb “to adjourn.” In other words, “adjourn” and its noun-form “adjournment” refer to the act of adjourning, while “recess” refers to a break that follows the act. To illustrate this point, one can substitute a verb form for “adjournment” each time it appears and fully preserve the meaning of the text. Here are the three passages, with the original usage bracketed and the illustrations in bracketed italics:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress [by their Adjournment] [*by adjourning*] prevent its Return, in which Case it shall not be a Law.¹⁴⁴

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on [a question of Adjournment]) [*a question of when to adjourn*] shall be presented to the President of the United States¹⁴⁵

. . . in Case of Disagreement between them, with Respect to the Time [of Adjournment] [*to adjourn*], he may adjourn them to such Time as he shall think proper¹⁴⁶

In short, to argue that the word “adjournment” implies a type of break distinct from a “recess” is to mistake style for substance.¹⁴⁷

142 *Id.* (“The most obvious explanation is that ‘the Recess’ had a narrower meaning encompassing only the expected longer (and, from an appointments standpoint, more problematic) break between sessions.”); *see also* Rappaport, *supra* note 7, at 1559–60 (“The most obvious explanation is that the Framers used the two terms to have different meanings. They used the term ‘adjournment’ to have the all-recess meaning, whereas they used the term ‘recess’ to have a narrower meaning.”). The D.C. Circuit adopted a form of this argument. *See* NLRB v. Noel Canning, 705 F.3d 490, 500 (D.C. Cir. 2013) (arguing that there is an “inescapable conclusion that the Framers intended something specific by the term ‘the Recess,’ and that it was something different than a generic break in proceedings”). The Third Circuit concluded that “recess must mean something narrower than any break that follows an adjournment,” but that “what this narrower definition is cannot be derived from the dichotomy between adjournment and recess alone.” *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203, 233 (3d Cir. 2013).

143 *See infra* notes 150–52 and accompanying text.

144 U.S. CONST. art. I, § 7, cl. 2.

145 *Id.* at art. I, § 7, cl. 3.

146 *Id.* at art. II, § 3.

Finally, Rappaport notes that the Framers abandoned English parliamentary usage of the terms “adjournment” and “prorogation.”¹⁴⁸ This abandonment gives rise to the question whether, when the Framers eschewed distinctions between types of adjournments, they also left behind distinctions between types of recesses (if they believed any existed in the first place). To the extent that the Framers thought about the concept of prorogation, we have evidence that they were concerned about whether and when the President could adjourn the Congress,¹⁴⁹ and they supplied that power only when the House and Senate could not agree when to adjourn.¹⁵⁰ In contrast, we have no evidence that the Framers were concerned with distinctions between types of recesses. Rappaport states that, having adopted a broad use of “adjournment” to refer to all breaks, the Framers “needed” a new way to refer to *inter-session* breaks, for which they chose the word “recess.”¹⁵¹ But it is Rappaport, not the Framers, who needs this distinction, to support a narrow, technical reading of “recess.” If the Framers wished to draw distinctions between recesses similar to those that existed in England, then the most obvious course of action would have been to adopt (or at least adapt) English parliamentary usage, not abandon it in favor of new, more confusing usage.

147 Not only is this nominalization point apparent on the face of the Constitution’s text; the Eleventh Circuit made a similar point in 2004. *See Evans v. Stevens*, 387 F.3d 1220, 1225 (11th Cir. 2004) (“Instead of describing a block of time, the term ‘Adjournment’ in the Constitution can be read to signify a parliamentary action: Congress’s taking or having taken a break.”). So did Hartnett in 2005. *See Hartnett, supra* note 30, at 422 (explaining that “‘adjourn’ or ‘adjournment’ is used in the Constitution to refer to the parliamentary action of choosing to take a break, with ‘recess’ used to refer to the resulting break”). *Evans* also noted that Supreme Court usage in the 1938 Pocket-Veto case, *Wright v. United States*, 302 U.S. 583 (1938), would require a reading opposite that of the technical position on the Recess Appointments Clause—that “adjournment” refer only to inter-session breaks and “recess” to intra-session breaks. *See Evans*, 387 F.3d at 1225 (“We note, however, that even if the *Wright* Court’s usage of ‘Adjournment’ and ‘Recess’ were directly applicable here, their usage would suggest that the term ‘Adjournment’ is the formal break occurring at the end of a Session and that a ‘Recess’ is something that can and does occur during a Session. This usage by the Supreme Court tends to support our accepting the President’s interpretation that a ‘Recess’ includes a break during a Session.”)

148 Rappaport, *supra* note 7, at 1551.

149 *See supra* notes 33–34.

150 *See* U.S. CONST. art. II, § 3 (providing that “in Case of Disagreement between them [the House and the Senate], with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper”).

151 Rappaport, *supra* note 7, at 1551 n.198 (“Having abandoned the term ‘prorogation’ and using a broader meaning of ‘adjournment,’ the Framers needed a term to refer to breaks between the sessions—for which, I argue, they used ‘recess.’”).

C. Purpose

Given the want of textual evidence for the technical position, its proponents rely heavily on arguments about the Framers' original purpose in adopting the Recess Appointments Clause, or their expectations for how it would apply.¹⁵² This section reviews the evidence and analysis on those questions.

1. *The Duration of Recess Appointments*

Proponents of the technical position also argue that the relative length of different recess appointments supports their view. The Recess Appointments Clause specifies that appointments “shall expire at the End of [the Senate’s] next Session.”¹⁵³ Supporters of the technical position point out that an intra-session recess appointment would last through the end of the current official Senate session *and* the following Senate session, which they deem an “implausible” arrangement.¹⁵⁴ Similarly, Rappaport writes that intra-session recess appointments “could be considerably longer” than inter-session recess appointments, and reasons, “[b]ecause there is no reason why the Framers would have desired this result, this suggests that they did not intend the intrasession interpretation.”¹⁵⁵

This reasoning is flawed. If we assume that formal sessions are roughly one year in length, then the average intra-session recess appointment is eighteen months (from mid-way through one year to the end of the next formal session) and the average inter-session appointment twelve months (a full formal session). A six-month difference between appointment terms is not very significant; either length is far shorter than the tenure of a typical confirmed nominee, particularly in the case of judges, who enjoy life tenure. There is no reason to assume the Framers even noticed, much less sought to prevent, such a minor difference in duration of appointments. And it is abundantly possible that they would have preferred the longer of the two terms, particularly when one considers the tradeoffs involved. Prohibiting intra-session appointments would sharply limit the use-

¹⁵² See Herz, *supra* note 32, at 447–48, 456–57 (noting that arguments for and against intra-session recess appointments rely heavily on considerations of purpose).

¹⁵³ U.S. CONST. art. II, § 2, cl. 2.

¹⁵⁴ See Originalist Brief, *supra* note 122, at 30–31 (“If ‘Recess’ instead meant any break in legislative business, a recess appointment would last from the date of the appointment, through the end of the current session, through the intersession recess, and through the entire subsequent session. This arrangement is implausible.”).

¹⁵⁵ Rappaport, *supra* note 7, at 1567.

fulness of the Recess Appointments Clause by leaving the President unable to make key appointments when it is desirable to do so, thereby undercutting the Clause's purpose, in exchange for the small benefit of reducing the term of the average appointee by six months. Conversely, permitting intra-session recess appointments would advance the Clause's purpose—to allow the President to fill important posts so that the government can function properly and to allow senators to spend more uninterrupted time in the states—at the low price of accepting appointments that would last six months longer on average. It is not obvious why someone who would choose to adopt the Clause in the first place would limit it so sharply for so little benefit.

A second problem with the reasoning on duration of appointments is that it assumes part of the conclusion. It assumes that “session” means an official session of Congress. If the word is used in a general sense—with “next session” meaning something like “next Senate work period”—then the technical point on duration evaporates. All appointments would be bounded in the same manner, lasting until the end of the Senate's next work period, and they would be far shorter than the inter-session appointments envisioned by the technical position. This reading is textually plausible, given that it employs the ordinary meaning of “session.” It is also plausible as a matter of policy. It would have been reasonable for the Framers to anticipate that the Senate would readily confirm most recess appointees and that a relatively brief work period would be plenty of time to do so. As Hartnett has noted, the time from nomination to confirmation “frequently used to be measured in days, even for Supreme Court justices.”¹⁵⁶ Finally, the technical point also disappears if one combines the ordinary reading of “recess” with the Rules of Proceedings Clause. If one accepts that the Senate can define its own recesses and sessions, then third parties need not fiddle with the meanings of those terms to protect the Senate.

2. *Line-Drawing and Judicial Administrability*

Another policy consideration driving the “inter-session” position is a concern about line-drawing or “judicial administrability.”¹⁵⁷ Rapaport argues:

¹⁵⁶ Hartnett, *supra* note 30, at 425.

¹⁵⁷ Originalist Brief, *supra* note 122, at 33 (“Under this approach, there is no clear way to distinguish between legislative breaks that are long enough to count as recesses and those that are not.”); *see also* NLRB v. Noel Canning, 705 F.3d 490, 504 (D.C. Cir. 2013) (reject-

It seems plausible, in ordinary language, to use “recess” to mean a break in legislative business of a substantial degree, excluding very short interruptions as not really amounting to a recess. One significant problem with this understanding . . . is that there is no clear way to distinguish between legislative breaks that are long enough to count as recesses and those that are not. The extreme vagueness of this interpretation makes it unlikely that the Framers would have employed this concept of a “not-too-short” break in the legislative proceedings.¹⁵⁸

This position appears to have been first suggested by Attorney General Knox in 1901.¹⁵⁹ One response, drawing exclusively on the Constitution’s text, is that the purported problem is resolved by taking account of the Rules of Proceedings Clause. Under that Clause, there is no line-drawing problem because the Senate can define its own recesses, or draw its own lines, so to speak.

Setting aside the Rules of Proceedings Clause, there are three remaining problems. First is the lack of evidence that line-drawing concerns motivated the drafters. The Clause’s text, read naturally, suggests the opposite, as it employs the general terms “recess” and “session” without providing any limitation, caveat, or special definition. One might propose a general presumption that the Framers sought to draw bright lines and in turn apply that presumption to our reading of the Recess Appointments Clause in particular. The originalist brief suggests this position, but in support it cites only a single 1989 law review.¹⁶⁰ The relevant passage from that article suggests that the Framers generally preferred clarity to a lack of clarity and explains that anti-Federalists and Federalists debated whether the completed document was vague or precise.¹⁶¹ For this reason, the article cuts against the technical position as much as in its favor. It reminds us that James Madison, one of the most influential Framers,

ing the “functional approach” to interpreting the Recess Appointments Clause for being too vague and “flimsy”); Rappaport, *supra* note 7, at 1555 (rejecting an argument for creating a strict time length to constitute a recess).

158 Rappaport, *supra* note 7, at 1553; see also *Noel Canning*, 705 F.3d at 504 (“Some undefined but substantial number of days-break is not a plausible interpretation of ‘the Recess.’”).

159 See 23 Op. Att’y Gen., *supra* note 99, at 603 (“If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.”).

160 See Originalist Brief, *supra* note 122, at 33 (“The extreme vagueness of the ‘practical unavailability’ interpretation makes it unlikely that the Framers would have employed it.” (citing Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 306–09 (1989))).

161 See Hamburger, *supra* note 160, at 306 (“[T]he framers and ratifiers appear to have assumed that they should try to avoid vagueness or imprecision in the Constitution.”).

thought precision was impossible in legal drafting¹⁶² and believed that “the ‘exposition of the Constitution’ would be a ‘copious source’ of difficulties ‘until its meaning on all great points shall have been settled by precedents.’”¹⁶³ Despite their awareness of the difficulties inherent in drafting and interpreting texts, the Framers nonetheless used general terms like “recess” and “session” rather than more precise constructions. Perhaps they knew exactly what they were doing in choosing those words.

The propriety of a more general “bright-lines” presumption is also doubtful. Line-drawing questions are endemic to legal analysis and particularly common in constitutional decisionmaking. It is widely accepted that the Framers sought to draft a constitution to “endure for ages to come.”¹⁶⁴ That goal is not compatible with a practice of drawing bright lines wherever possible. It is more compatible with a practice of drawing standards in plain terms wherever possible, in the expectation that they will prove more flexible and workable.¹⁶⁵ Indeed, general, abstract usage is more common than not in the Constitution, which is why the document contains few anachronisms like the twenty-dollar trigger for civil jury trials.¹⁶⁶ The document reflects precisely what one would expect from sensible drafters: the use of specific, bright-line rules only where they seem especially warranted.¹⁶⁷

A second problem is that the “inter-session” position is a poor fit for the purposes it ascribes to the Framers. If the Framers were so troubled by recess appointments, despite feeling the need to establish

162 *See id.* at 309 (“Madison argued in the middle of his Lockean analysis of imprecision that obscure points in the Constitution would be resolved and made certain by caselaw: ‘All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.’” (quoting THE FEDERALIST No. 37 (James Madison))).

163 Hamburger, *supra* note 160, at 309 (quoting Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 PAPERS OF JAMES MADISON 250 (1979)).

164 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

165 *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 137 (recommending that, on general principle, constitutional drafters “insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable” and “use simple and precise language, and general propositions”).

166 *Cf.* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 406 (2013) (“The United States is relatively fortunate that the drafters of the Constitution tended to frame the rules somewhat abstractly, such that the Third Amendment is the exception rather than the rule.”).

167 *Cf.* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69–70 (2011) (“Were a constitution too specific, its original meaning probably would become outdated very quickly.”).

the authority, then it makes little sense for them to have permitted *all* inter-session recess appointments regardless of when they arise during a recess. Some might arise just before the Senate is scheduled to return from an inter-session recess. The “inter-session” position would permit an appointment in this situation despite maintaining that the Framers would have opposed it.¹⁶⁸ A much more obvious approach would have been to limit recess appointments to situations in which the Senate will be away for a long time.

Finally, the Framers might have had policy views wholly different from those that the technical position ascribes to them. For example, as suggested above, they may have expected (or desired) the Clause to operate pragmatically, perhaps even flexibly, as befits the Clause’s language.¹⁶⁹ Yet despite the absence of evidence that the Framers were concerned about line-drawing in the Clause, the “inter-session” position assumes that the concern was so weighty that the Framers let it override the Clause’s core purpose. To constitutionalize any bright line regarding what constitutes a “recess” would risk tying the President’s (and the Senate’s)¹⁷⁰ hands at times, preventing appointments when they would be useful to both branches—and in the national interest. Proponents of the technical view have not addressed the reasonable possibility that the Framers intended what is most consonant with a plain reading of the text of the Recess Appointments Clause—a pragmatic standard under which the President and Senate would be bound not by hard rules, but by notions of reasonableness enforced largely, if not entirely, through the political process.¹⁷¹

3. *The Length of Recesses*

Rappaport also argues that it would have been sensible for the Framers to limit the unilateral appointment power to very long recesses, using this point to support the notion that “recess” must have meant “inter-session recess.”¹⁷² Many of this argument’s problems are similar to those regarding the line-drawing point. One is that we

¹⁶⁸ Rappaport himself seems to think it would be “absurd” to permit recess appointments during a recess as short as two weeks. *See infra* text accompanying note 173.

¹⁶⁹ *See supra* text accompanying notes 82–84.

¹⁷⁰ A rigid construction of the Recess Appointments Clause would not only bar the President from making recess appointments at times, but also the Senate from *enabling* them when it wishes to do so. *See supra* text accompanying notes 81–82.

¹⁷¹ *See supra* text accompanying notes 82–84.

¹⁷² *See Rappaport, supra* note 7, at 1562–67 (discussing the Framers’ ideas about lengths of recesses); *id.* at 1563–64 (“Thus, by limiting the Recess Appointments Clause to inter-session recesses, the Framers would have restricted recess appointments to long recesses, without imposing an arbitrary time limit on the length of recesses.”).

have no direct evidence of the Framers' policy views. Here, more than anywhere else, Rappaport appears to fill the vacuum with his own. He believes it is "extremely unlikely" and "seems absurd to imagine" that the Framers would have permitted presidential appointments during recesses lasting only one or two weeks.¹⁷³ In his view, "[e]ven one-month recesses seem too short."¹⁷⁴ These assertions themselves might strike the reader as implausible given the historical evidence: ratification-era state constitutions used "recess" to trigger powers that one wants the executive to have in an emergency;¹⁷⁵ state legislatures in the ratification era sometimes took "inter-session" recesses as short as one month in length, if not shorter;¹⁷⁶ and every attorney general to have considered the question has concluded that the minimum duration of appointment-enabling recesses ranges between three days and roughly two weeks.¹⁷⁷

Moreover, as Hartnett has pointed out, the entire session of a court in the ratification era sometimes lasted only one or two weeks.¹⁷⁸ It is difficult to maintain that the Framers would have been "absurd" to give the President power to supply judges for courts before their sessions come and go. Rappaport responds to this evidence in two ways. First, he argues that, even though we can (and presumably the Framers could) imagine benefits to enabling appointments during

173 *Id.* at 1562.

174 *Id.*

175 *See supra* text accompanying notes 51–64.

176 *See, e.g.,* 47 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770–1771, *supra* note 77, at vii (reporting that one session ended on June 25 and the next began on July 25). It is possible that a thorough search would reveal even shorter inter-session recesses. This author happened upon this example of a one-month recess (and others) without even attempting an exhaustive search.

177 As discussed above, Attorney General Knox wrote the first opinion squarely addressing the validity of intra-session recesses in 1901. 23 Op. Att'y Gen., *supra* note 99. Because he rejected intra-session recesses, he did not squarely engage the question of the minimum length of a recess, although his opinion does suggest that he thought the Clause should not permit a recess appointment over a weekend. *See id.* at 603 (stating disapprovingly that "[i]f a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday"). In the earliest opinion to address that question, from 1921, Attorney General Harry Daugherty concluded that a break must be somewhere over ten days in length but could not be determined with precision, as the word recess "must be given a practical construction." 33 Op. Att'y Gen., *supra* note 110, at 25. More recent views have been eighteen days, twelve days, ten days, just three days, or possibly *no* minimum length. *See* Rappaport, *supra* note 7, at 1548–49 (discussing the various Presidents who made recess appointments during these lengths of time).

178 *See* Hartnett, *supra* note 30, at 416 n.172 ("At the founding, however, an entire term of a court might come and go within a week or two.").

relatively short recesses, the drawbacks would still be too great.¹⁷⁹ He does not offer evidence that the Framers analyzed these tradeoffs or that they agreed with his assessment of the costs and benefits. Rappaport's second response is to point out that Senate confirmations would sometimes take more than two weeks and to argue, therefore, that it would not have made sense to permit the President to act more quickly on a unilateral basis.¹⁸⁰ But as Rappaport notes elsewhere, the Senate could confirm nominees quickly when necessary.¹⁸¹ In fact, in the early years of the republic, the Senate commonly held *single-day* special sessions to consider nominations.¹⁸² It is difficult to maintain that the Framers would have been "absurd" to let the President fill vacancies with similar speed in the Senate's absence.

What appears to drive the inter-session position, as Rappaport's discussion of "costs" suggests, is a concern that the President might subvert the ordinary nomination process.¹⁸³ We have no evidence that the Framers shared this concern, much less shared it to a degree that would justify severe restrictions on the Clause,¹⁸⁴ and one might

179 See Rappaport, *supra* note 7, at 1562 n.226 ("The question, though, is not whether one can imagine circumstances when it might be convenient for a recess appointment to be made during a short recess. . . . Rather, the question is whether the Framers would have wanted the President to have the power to make recess appointments during all brief recesses, even though filling vacancies during these short recesses would generally not be critical. The answer to that question remains clear no.").

180 See *id.* ("It is hard to believe that the Framers would have wanted to take the extraordinary step of bypassing the Senate for a recess of a week or two, when a considerably longer period often would be needed to make either a recess appointment or an advice and consent appointment.")

181 See *id.* at 1511–12 (arguing that the President and Senate can quickly nominate and confirm appointees to fill late-session vacancies).

182 For example, the Second, Third, and Fifth Senates held one-day sessions of this type. See CONGRESSIONAL DIRECTORY, *supra* note 10, at 522 (providing the dates of these sessions).

183 See Rappaport, *supra* note 7, at 1491 (summarizing that contrary views "would allow recess appointments during recesses that seem far too brief to justify bypassing the Senate's constitutionally mandated role"); *id.* ("If the original meaning were followed . . . the President could only make recess appointments during the single annual intersession recess and only for vacancies that arose during that recess. This would make it extremely difficult for the President to use his recess appointment power as a means of appointing individuals who could not secure the consent of the Senate."); *id.* at 1494 (stating that "perhaps the biggest interpretive error concerning the Recess Appointments Clause has been the view that its sole purpose is to fill vacant offices, rather than to fill such offices while preventing the President from too easily circumventing the Senate's confirmation role"); *id.* at 1499–1500 & n.34 (deeming the Clause "striking" in how far it departs from the ordinary appointment method and asserting that "the significance of the recess appointment power conferred by the Framers is a strong reason for construing the Clause to apply only in narrow circumstances").

184 The closest Rappaport comes to attempting to substantiate the notion that the Framers' shared his concern is when he advocates reading the purpose of the Appointments Clause into the Recess Appointments Clause. *Id.* at 1494 ("[T]he Framers' decision to

reasonably conclude that history has shown the concern to be overstated. Presidential administrations have held since 1921 that the President can make intra-session recess appointments.¹⁸⁵ Apparently no majority of senators has ever objected to this view, and no President has “easily circumvented” the Senate’s advice and consent, to use Rappaport’s phrase.¹⁸⁶ This is particularly true if the Senate’s role is conceived as requiring majority rather than supermajority consent.¹⁸⁷

A final problem with the absurdity argument regarding the length of recesses is it presents a false choice between long and short breaks. The Framers could have preferred another design entirely. They might have thought it best to grant the Senate power to define its own recesses (and sessions), as the Rules of Proceedings Clause directs. That approach would quiet concerns about subversion of the Senate without constitutionalizing a rigid rule that could yield undesirable or arbitrary results. Alternatively, the Framers might have thought it best to establish a pragmatic regime in which the Constitution defines the recess appointment power in broad, even vague, terms and leaves it to the Senate and the President to negotiate the meaning over time, constrained by the political process.

4. *The Framers’ Expectations*

a. *The Inter-session-Expectations Narrative*

One argument that Rappaport does not state explicitly, but that one gathers impressionistically from his analysis, is that “recess” signi-

employ the Appointments Clause, I will argue, helps to illuminate their purposes in enacting the Recess Appointments Clause.”). Rappaport argues that we should read the unilateral appointment power in the Recess Appointments Clause narrowly because it cuts against the Framers’ baseline design of joint power. In light of the baseline, he reasons, it is “hard to believe” that the Framers would have designed a “broad recess appointment power” that would allow the President “to easily circumvent” the Senate. *Id.* at 1507. But the purpose of an exception is to cut against the rule from which it departs. There is no basis for a general rule that all exceptions should be construed narrowly, and Rappaport provides no special reason—certainly not one attributable to the Framers—to adopt such a rule when reading the Recess Appointments Clause. The only Framers he cites who holds that view is Edmund Randolph. *Id.* at 1518–19 (discussing Randolph’s interpretation). But Randolph opposed the presidential appointment power and the Recess Appointments Clause and wanted to see them removed from the Constitution. *See infra* text accompanying notes 266–67. His views on the Clause can hardly be taken as representative of general opinion.

¹⁸⁵ *See supra* note 113 and accompanying text.

¹⁸⁶ Rappaport, *supra* note 7, at 1507.

¹⁸⁷ *See infra* text accompanying notes 350–58.

fies “inter-session recess” in part because that is simply what the Framers had in mind—or perhaps was the only type of recess they could have anticipated.¹⁸⁸ We can call this the “inter-session-expectations” narrative. It may be the most intuitively appealing point in favor of the technical position. The basic idea is that the Framers would have thought “recess” referred to long, inter-session recesses because at the time, legislatures typically held a single session annually, followed by a long break.¹⁸⁹ One reason was the difficulty of eighteenth-century travel and communication over long distances, which made it unlikely that Congress would choose to hold multiple work periods in a given year.¹⁹⁰ Another was a prevailing theory of republican governance, which held that representatives should spend a significant portion of their time at home.¹⁹¹

One problem with this narrative is that, even if we assume that the Framers thought Congress would *choose* not to take multiple breaks in a year—which is only an unsubstantiated guess¹⁹²—that is a far cry from *prohibiting* it from doing so, or from writing rigid constitutional rules that function properly only if Congress conforms to expectations. Moreover, reading the text in accordance with the inter-session-expectations narrative would have the strange result of actually frustrating the Framers’ presumed goals. Rappaport argues that the Framers expected Congress to hold one session annually and take one long recess between sessions.¹⁹³ He also argues that the Framers wanted (or should have wanted) to limit recess appointments to long recesses, and that the sensible way to accomplish that goal would be to limit the power to inter-session recesses.¹⁹⁴ From these points, he anomalously concludes that the Clause should be read to permit all

188 Rappaport does not state this claim explicitly, and it is possible that he does not support it. This Article’s discussion is directed at the position that it outlines and no more.

189 See Rappaport, *supra* note 7, at 1498, 1563 (“When the Constitution was written, inter-session recesses regularly lasted between six and nine months.”).

190 See, e.g., *id.* at 1498, 1564 (noting that early America was “a large nation during an age of slow transport” and that transportation costs were high and “distances would increase as the country grew,” which “meant that Congress would meet for one relatively short session per year followed by one long recess”).

191 See *id.* at 1564 (“[T]he republican political theory held during the early years of the Republic required that legislatures remain in session only for a fraction of the year, thereby allowing the legislators to return to their homes and behave like ordinary citizens.”).

192 Rappaport’s sole evidence on the point is not from the Framers themselves, but rather a 1924 text. See *id.* at 1563–64 nn.228, 230 (citing and quoting Robert Luce, LEGISLATIVE ASSEMBLIES 154 (1924), for the proposition that, “concerning state legislatures, ‘[i]n colonial times and indeed up to the development of our railroad systems, the slowness of travel made any but periodical gatherings out of the question’”).

193 See Rappaport, *supra* note 7, at 1563–64.

194 *Id.*

inter-session recesses and to bar all intra-session recesses, *regardless of their lengths*. In other words, he retains the inter-session element and discards duration as a factor—abandoning not just part of what he deems the original expectation behind “recess,” but the more significant part. He might respond that the Framers thought “inter-session” was synonymous with “long”¹⁹⁵ and therefore the “inter-session” view conforms to theirs. But in modern times, we know that intra-session recesses are often longer than inter-session recesses. In other words, if the Framers held the views that the technical position ascribes to them, then they are fortunate not to have written the word “inter-session” into the Recess Appointments Clause. Why, then, should *we* pencil it in?

This tangled web of counterfactual reasoning is one reason why originalists and nonoriginalists alike criticize the approach of reasoning from the Framers expectations. When one attempts to discern them, particularly in the absence of good evidence, one is engaging in a fundamentally creative, counter-factual enterprise, and it is difficult to avoid projecting one’s own knowledge and viewpoints onto the past.¹⁹⁶ Indeed, one reason the inter-session-expectations point is enticing is that it accords with our knowledge of certain historical facts. Early Congresses did, in fact, typically take multi-month inter-session recesses, although they sometimes took more than one in a single year.¹⁹⁷ They rarely took intra-session recesses at all and, when they did, those recesses were roughly one week in length.¹⁹⁸ But the fact that we know early Congresses followed a certain pattern does not establish that the Framers predicted the same events. The evidence on that point is much more equivocal. Alexander Hamilton predicted that the House and Senate would each meet once annually

195 See Rappaport, *supra* note 7, at 1562–66 (arguing that “the Framers took the length of recesses into account indirectly”).

196 See, e.g., Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 574–75 (2008) (arguing that “the expectations of the framers” and “the public meaning of the text” in early America cannot be known); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 729–30 & n.96 (2009) (discussing criticisms of the original meanings approach to interpreting the Constitution and citing Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 504 (2008)). As Rappaport notes in the context of an unrelated argument, “our world is completely different than the Framers’ world.” Rappaport, *supra* note 7, at 1512 n.70.

197 See CONGRESSIONAL DIRECTORY, *supra* note 10, at 522–23 (recording one-week recesses in 1800, 1817, and 1828).

198 See *Id.*

for three months and four to six months, respectively,¹⁹⁹ and some of the delegates to the Constitutional Convention were concerned that the Congress might not even meet once each year unless required to do so.²⁰⁰ But other delegates expressed concern that the Senate would stay in session most of the time,²⁰¹ and some favored frequent meetings of Congress.²⁰² Among those who expected the Senate to be “almost continually sitting,”²⁰³ it can hardly be said that “recess” must have meant “long, inter-session recess.” Of course, one also should not forget the extensive evidence from dictionaries and ratification-era usage examples that contradict the “inter-session” view.²⁰⁴ It is difficult to justify the assumption that “recess” meant something like “long, inter-session recess” to the Framers when our records of their correspondence suggest otherwise.

Moreover, we know little to nothing of how the Framers expected Congress to define its *sessions*, further complicating the notion that they had a certain type of “inter-session” recess in mind. Jefferson’s *Manual* reasons its way to a basis for how the Senate should define its sessions as if the matter remained unsettled in 1801.²⁰⁵ As discussed above, states followed different practices in the ratification era. For example, while New Jersey enumerated its sessions by year and used

199 THE FEDERALIST NO. 84 (Alexander Hamilton) (“Hence it is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps half, for the former.”).

200 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 200 (noting that the requirement that Congress meet once a year was added because “that point seems not to be freed from doubt”).

201 *Id.*, at 175; *id.* at 230; *id.* at 431; LUTHER MARTIN, GENUINE INFORMATION, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 255, 271; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 444. James Wilson seems to have had mixed views. Compare *id.* at 523 (reporting Wilson’s view that “[t]he Senate, will moreover in all probability be in constant Session”), with 2 ELLIOT, *supra* note 48, at 513 (reporting Wilson as saying, “I apprehend that . . . it will not be found necessary for the Senate always to sit. I know some gentlemen have insinuated and conjectured that this will be the case; but I am inclined to a contrary opinion”).

202 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 199 (“Mr. Sherman was decided for fixing the time, as well as for frequent meetings of the Legislative body.”).

203 GEORGE MASON, OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 638.

204 See *supra* Part I.A–B.

205 See JEFFERSON, *supra* note 68, at 96 (discussing motions to adjourn). This is not to say that the Senate had not settled into a practice, but rather that the basis or propriety of the practice might still have been unclear, which in turn suggests that the eventual practice might have been difficult to predict years earlier. Alternatively, the opposite could be true. Perhaps Congress was just doing what everyone expected. Under that view, Thomas Jefferson’s posture of working toward a legal explanation in the *Manual* is just that—posturing.

the word “sitting” to refer to individual work periods during a year, Massachusetts labeled each sitting a separate “session.”²⁰⁶ Observers following the technical definition of “recess,” then, would call the same type of break an “intra-session” recess in New Jersey and an “inter-session” recess in Massachusetts. How could the Framers have known which convention the U.S. Senate would adopt? Imagine some of them expected Congress to follow the Massachusetts model. In that case, the “inter-session” view actually defeats their intent. This discussion illustrates that if the Framers wished to constitutionalize a certain type of recess, one would expect them to have defined it more clearly, and possibly sketched a concept of the session as well. Of course, if they thought about the issue long enough to perceive these definitional needs, then they also would have been reasonable to eschew strict definitions altogether and leave the details to future political actors.²⁰⁷

b. A Counter-narrative: Military Responsiveness

One notable aspect of the inter-session-expectations view is its lack of context. It isolates a single point about what the Framers might have thought, from which it builds out a view on the Clause’s whole purpose. What might we see if we were to widen the inquiry at the starting point? Other possible narratives come into view, including one that counsels in favor of an ordinary reading of “recess” and a liberal reading of the Clause more generally.

It is common that the Constitution was born out of the failures of the Articles of Confederation. The federation lacked a central power adequate to respond to many of the problems that its member states faced, including existential threats posed by foreign powers and domestic unrest alike. Developments like Shays’ Rebellion, which began on August 29, 1786, are credited with bringing recalcitrant members like the Commonwealth of Massachusetts and others back to the drafting table.²⁰⁸ During that episode, Massachusetts Governor

²⁰⁶ See *supra* text accompanying notes 76–77.

²⁰⁷ Cf. Balkin, *supra* note 24, at 76 (“We should ask whether it makes sense for us to ascribe to the adopters the purpose of delegating a particular issue to be worked out in the future, *even though* the adopters might have had application beliefs about the issue in question. If it does not make sense to ascribe a purpose to delegate a question to the future, then we should infer that this content is part of the framework.”).

²⁰⁸ See DAVID P. SZATMARY, SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 120–31 (1980) (discussing the fact that the Rebellion showed that the states were weak as individuals and some early Americans’ arguments for a more unified national government).

James Bowdoin struggled for months to maintain order. When he called on local militia to halt violent attacks on courthouses, many militiamen refused, siding with the rebels.²⁰⁹ Bowdoin appealed to the Continental Congress, which responded by establishing a federal army, but troop recruitment efforts foundered when every state but Virginia refused to fund the force.²¹⁰ After months of violence, mercantile elites in Massachusetts funded a private army to quell the unrest.²¹¹ During this period, the former colonies had also just completed a war of independence and faced threats from England, France, and Spain.

This context helps us understand several interrelated provisions of the document that emerged from the 1787 convention in Philadelphia, which began less than three months after Shays' Rebellion was put down. The Constitution makes the President the Commander in Chief of the armed forces,²¹² provides the President authority to appoint "officers of the United States," a category that includes military officers, with the Senate's advice and consent,²¹³ as well as unilaterally on a temporary basis when the Senate is away,²¹⁴ and charges the federal government with protecting each state from domestic violence upon its request.²¹⁵

Given the historical circumstances and the apparent motivations of the drafters, it is implausible that these critical powers would turn on accidents of Senate procedure. If an emergency arises that requires a federal response, and effective action requires the President to fill vacant offices, then the Constitution provides a means to do so regardless of the Senate's availability. Under the technical position, it is not hard to imagine the United States experiencing a major attack to which the President cannot respond quickly and effectively because the Senate happens to be on an "intra-session" rather than "inter-session" recess. From the perspective of what we might call the "military-responsiveness" narrative, forbidding presidential appointments during intra-session recesses would undermine some of the Constitution's core purposes and most important grants of federal power.

209 *See id.* at 79–80.

210 *See id.* at 84 (discussing the failure of the attempt to create federal troops).

211 *See id.* at 82–86 (discussing the Massachusetts recruitment and how it was followed by similar recruitments in other states).

212 U.S. CONST. art. II, § 2, cl. 1.

213 *Id.* at art. II, § 2, cl. 2.

214 *Id.* at art. II, § 2, cl. 3.

215 *Id.* at art. IV, § 4.

III. INITIAL EVIDENCE ON SESSION AND HAPPEN

Although this Article does not take strong positions on the meaning of “session” or “happen,” as it does not engage in thorough analysis of those questions. But it is worth sketching a preliminary view on each. In short, the narrow readings of “session” and “happen” also appear to have surprisingly little evidentiary support.

A. *Session*

The definition of “session” is relevant to the technical position on “recess” because that view requires “session” to have two characteristics: it must be mutually exclusive with “recess,” and it must refer solely to the formal (typically annual) sessions of Congress.²¹⁶ A mere finding that recesses and sessions were mutually exclusive would not support the technical position because both words might be used in their ordinary senses, with session referring to any sitting and recess referring to any break in any sitting. And a mere finding that “session” refers only to formal sessions would not suffice because recesses might be taken during sessions. That is, of course, the central question regarding the propriety of intra-session recess appointments. Indeed, one extraordinary oversight by some who hold the technical position, including the D.C. Circuit, is that they assume that “session” refers to formal sessions of Congress—thereby assuming away half the question.²¹⁷ This Article does not conduct a comprehensive inquiry into “session,” but the initial evidence contradicts both of the technical position’s requirements. It is unclear whether “session” in the Recess Appointments Clause contemplates only formal sessions or means something like what the contemporary senators call a “work period,” any period of legislative business between breaks of a week or more.²¹⁸ Either is plausible—if anything the “work period” definition appears more likely, as it tracks ratification-era state legislative

216 See, e.g., Rappaport, *supra* note 7, at 1550 (“The intersession interpretation . . . reads the term ‘recess’ to mean a period when Congress is not in session. Under this view, a recess is not just any break in the business of the legislature, but only a break that occurs when the legislature is out of session.”); Rappaport, *supra* note 7, at 1487 (“The Article maintains that the Constitution permits recess appointments only during an intersession recess—the recess between two sessions of a Congress—and does not allow such appointments during an intrasession recess—the typically shorter recess taken during a session.”).

217 *NLRB v. Noel Canning*, 705 F.3d 490, 500 (D.C. Cir. 2013) (asserting without citing any authority that “[i]t is universally accepted that ‘Session’ here refers to the usually two or sometimes three sessions per Congress”).

218 See *infra* text accompanying notes 361–63.

practices²¹⁹—and neither would imply that the word “recess” must have a narrow, technical meaning.²²⁰

Evidence from dictionaries strongly suggests that the word session, like recess, had an ordinary, broad meaning. Johnson’s dictionaries define “session” in relevant part as “the space for which an assembly sits, without intermission or recess.”²²¹ (The dictionary defines “space” in part as a “[q]uantity of time.”²²²) Johnson’s makes no mention of a technical notion of “session” that would refer only to an official period of a legislative body. To the contrary, by stating that a session is a sitting without a break of any kind, the dictionary implies the opposite. Formal sessions are usually (if not always) too long to operate without breaks of any kind.

The *Oxford English Dictionary* (*OED*) supplies a technical definition of “session,” but only as a special usage of its third definition of the word. The *OED* leads with a rare usage, “[t]he action or act of sitting,”²²³ then provides the ordinary, general meaning of “session” as applied to legislative bodies: “[t]he sitting together of a number of persons (esp. of a court, a legislative, administrative, or deliberative body) for conference or the transaction of business.”²²⁴ Notably, the *OED* states that, in the past, this sense of “session” commonly referred to a single, continuous sitting²²⁵—a definition that undermines the technical position on “recess.” If “session” means a single, continuous sitting, and “recess” is defined a time when the body is not in “session” (which is the technical position)²²⁶ then “recess” must refer to any legislative break—any break in a single, continuous sitting, not just breaks between official sessions.

219 See *infra* text accompanying notes 361–66.

220 One problem for the technical position is the implausibility of the Framers restricting the Senate’s ability to define its own sessions, in direct contravention of the Rules of Proceedings Clause, not to mention doing so obliquely, with general terms in Article II rather than a clear statement in Article I. This point is made above in the discussion of the Rules of Proceedings Clause. There is no need to repeat it here.

221 2 JOHNSON 1755, *supra* note 19, at 1797; 2 JOHNSON 1785, *supra* note 19, at 608.

222 2 JOHNSON 1785, *supra* note 19, at 696.

223 *OED*, *supra* note 53.

224 *Id.* (“The sitting together of a number of persons (esp. of a court, a legislative, administrative, or deliberative body) for conference or the transaction of business. Also (now somewhat rarely), a single continuous sitting of persons assembled for conference or business.”).

225 *Id.*

226 See, e.g., Rappaport, *supra* note 7, at 1550 (“The intersession interpretation, by contrast, reads the term ‘recess’ to mean a period when Congress is not in session. Under this view, a recess is not just any break in the business of the legislature, but only a break that occurs when the legislature is out of session. This position views a recess as mutually exclusive with the legislative session.”).

Third, the *OED* supplies a narrower definition: “[a] continuous series of sittings or meetings . . . held daily or at short intervals; the period or term during which the sittings continue to be held; opposed to *recess* or *vacation*.”²²⁷ This definition still falls short of the technical position on “session,” as it corresponds not only to official sessions, but also to other periods of business that are bounded by significant breaks. In the contemporary Senate, this concept—a period of legislative business between Senate breaks of one or more weeks—is sometimes also referred to as a “work period.”²²⁸ It is here that the *OED* finally supplies a meaning of session like that maintained by the technical position, identifying it as a specific, English parliamentary usage: “[i]n English parliamentary use, applied to the period between the opening of Parliament and its prorogation.”²²⁹ One might argue that this definition may be precisely what the Framers intended to invoke, despite that it is a specialized meaning. But that point would be difficult to establish. As the *OED* explains, even in the specialized context of English parliament, the word is sometimes used—or misused—more broadly to refer to other legislative periods:

The term autumn session (instead of ‘autumn sitting’) is sometimes used to designate the exceptional resumption of the sittings of the Houses, after an adjournment, in what is normally the autumn recess; but this use is condemned by parliamentary authorities as incorrect.²³⁰

In sum, the evidence from dictionaries confirms the prevalence of the ordinary meaning of session and casts doubt on the technical position.²³¹

²²⁷ *OED*, *supra* note 53 (emphasis in original).

²²⁸ *See infra* text accompanying notes 362–63. The Senate Rules use “session” not only to refer to formal, usually annual sessions, but also other periods such as “daily sessions.” MCGOWAN, *supra* note 45, at 4 (printing of Rule IV, which governs the “Commencement of Daily Sessions”). The Senate Rules also refer to open session, closed session, and Executive Session. *See, e.g., id.* at 1 (referring to an “open session”); *id.* at 20 (discussing what happens “when the Senate meets in closed session”); *id.* at 55 (printing of Rule XXIX which pertains to “Executive Sessions”).

²²⁹ *OED*, *supra* note 53.

²³⁰ *Id.*

²³¹ Note that Johnson’s definition of “session” refers to an “intermission or recess,” suggesting that those two terms might refer to distinct concepts. Johnson’s 1755 Dictionary defines “intermission” in relevant part as “[c]essation for a time; pause; intermediate stop.” 1 JOHNSON 1755, *supra* note 19, at 1114. One can infer then, that “intermission” in the context of legislative business might have referred to an exceedingly short break, such as a lunch break. This inference does not help establish whether “recess” is used in an ordinary or technical sense in the Constitution, but it suggests an answer to the most common criticism of the ordinary reading of recess, which is that the Framers cannot have intended a broad meaning because it would embrace any break, even a lunch break. Perhaps such breaks were more commonly known as “intermissions” than “recesses.”

Aside from the dictionary evidence on “session,” this Article has already noted that the Constitution appears to distinguish between a “session of Congress” and a session of an individual house.²³² It has also noted the existence of variation in state practice for enumerating “sessions:” some state legislatures used a practice like the modern Senate’s, in which sessions are enumerated annually; others named each sitting a separate “session” regardless of how many they held in any given year.²³³ This usage strongly suggests that “session” in the Constitution does not have a fixed, narrow, and technical meaning referring only to the formal, typically annual, sessions of Congress. Rather, the word either refers to any legislative break or something akin to what the modern Senate calls the “work period.”²³⁴ It might seem odd that the term of a recess appointee could expire at the end of the Senate’s next work period. But if one recalls that the Senate is usually expected to confirm presidential nominees,²³⁵ then there is nothing obviously wrong with such an arrangement.

Finally, Edward Hartnett has argued that the Constitution’s structure suggests that recesses and sessions are not mutually exclusive. In his view, Congress can initiate recesses alone but needs the President’s assistance to initiate a new session.²³⁶ Because the Constitution puts recess-initiation and session-initiation in separate hands, he reasons, “it must contemplate that [recesses and sessions] are not inherently reciprocal.”²³⁷ Moreover, although Jefferson’s *Manual* uses “session” to refer to formal sessions in multiple places,²³⁸ Jefferson cites British Parliamentary sources for the proposition that the Senate may end its current session and start a new one whenever it desires, to solve procedural problems.²³⁹ His view accords with the point that sessions are malleable and not a fixed constitutional concept.

232 See *supra* text accompanying notes 41–46.

233 See *supra* text accompanying notes 76–77.

234 See *id.*

235 See *supra* text accompanying notes 81–82.

236 See Hartnett, *supra* note 30, at 422–24 (“The two houses of Congress can control when they are in recess by concurrent resolution, but they must act ‘by law’ to exercise control over their sessions . . . that is, by presenting a bill to the President for signature or veto.”).

237 *Id.* at 424.

238 See, e.g., JEFFERSON, *supra* note 68, at 38 (“Standing committees . . . are usually appointed at the first meeting, to continue through the session.”).

239 See, e.g., *id.* at 149 (“Or the session may be closed for one, two, three, or more days, and a new one commenced.”).

B. *Happen*

Having presented an affirmative case on “recess” and a comment on “session,” it now makes sense to discuss the “happen” issue briefly to generate a more full account of the Recess Appointments Clause. The question regarding “happen” is whether a vacancy must arise during a recess, or merely exist during it. Following Rappaport’s lead, we can call these positions the “arise” view and the “exist” view.²⁴⁰

As with the word “recess,” our default position on “happen” should be the term’s ordinary meaning. Initially, that meaning appears to be “occur” or “happen to arise,” as opposed to “happen to exist.” That is the word’s modern meaning, and it was certainly a use of the word in the ratification era as well. Johnson’s 1755 and 1785 dictionaries define the word primarily as “[t]o fall out; . . . to come to pass.”²⁴¹ *OED*’s first definition of “happen” is “[o]f an event, action, etc.: to take place, to come to pass, occur . . . to ensue as an effect or result.”²⁴²

Further study would be required to be confident that the *present* ordinary meaning of “happen” was the exclusive public meaning at the time of the Constitution’s drafting and ratification. There is strong evidence that “happen” might also have meant “exist.” The *OED*’s third definition is “[t]o chance to be . . .”²⁴³ It provides the following usage examples, some from or near the ratification era, which are worth quoting extensively because the usage is so foreign to modern ears:

Scho..tald his Eyme that he was hapnyt thar. (1488)
 He felt hym self happynnyt amynd his foyn. (1522)²⁴⁴
 The knots or kernels that happen in any part of the body. (1657)
 It made a Jest for every body that went by; and wou’d have been apprehended by the very blind Cuckold himself, had he hapned in the way. (1693)
 Two other Officers..coming up to us, asked how we happened abroad so late? (1755)²⁴⁵

²⁴⁰ See Rappaport, *supra* note 7, at 1502–03 (discussing the “arise” and “exist” interpretations of the term “happen” in the Clause).

²⁴¹ 1 JOHNSON 1755, *supra* note 19, at 965; 1 JOHNSON 1785, *supra* note 19, at 929.

²⁴² *OED*, *supra* note 53.

²⁴³ *OED*, *supra* note 53 (emphasis added).

²⁴⁴ This example is from the *Aeneid* and has also been translated as, “found himself amidst his foes.” VIRGIL, THE AENEID, book IX (trans. John Dryden, 1697), available at <http://classics.mit.edu/Virgil/aeneid.mb.txt>. When rephrased in something closer to modern English, the *OED* example apparently would read, “he found himself happened amidst his foes.”

I once happened in Company with a very ingenious Gentleman. (1776)

Some young Americans happening at Toulon. (1806)

Although most ratification-era dictionaries provide definitions similar to Johnson's,²⁴⁶ one also provides the definition "to be."²⁴⁷ In perhaps the most persuasive example, Thomas Jefferson actually used the word "happen" to mean exist in personal correspondence about vacancies.²⁴⁸ His usage is highly persuasive evidence because, unlike a direct opinion on the Clause, it is unlikely to have been strategic. It probably reflects ordinary usage by one of the more articulate members of the framing generation.

In addition, Attorney General Wirt's 1823 opinion approving the "exist" interpretation provides stronger support for that view as a matter of original meaning than has been recognized previously. Most commentators focus on Wirt's concession that the "most natural sense" of "happen" is the arise view.²⁴⁹ But Wirt noted that "[i]t may mean, also, *without violence to the sense*, 'happen to exist.'"²⁵⁰ In other words, although the "arise" reading was more natural, the "exist" reading was also plausible as a textual matter. Wirt's analysis comes thirty-six years after the Constitution was adopted, and therefore it is not the strongest evidence of ordinary meaning in 1787. But it is consistent with the possibility that the Constitution used a now-archaic meaning of "happen" that an 1823 reader could still recognize—and some writers, such as Thomas Jefferson, still used²⁵¹—even though it had already begun to sound less natural than the arise usage. The arise meaning was likely more common even in 1787, but

245 A fuller excerpt reads, "[o]rders were given that no Man should be out of his Quarters . . . my Comrade Johnston and I were going home, we met on the Market-place the Major, and two other Officers, who coming up to us, asked how we happened abroad so late? I answered we were going home . . ." THE MEMOIRS OF CAPT. PETER DRAKE 37 (1755), available at <http://books.google.com/books?id=k19DAAAAYAAJ>.

246 See Natelson, *supra* note 55, at 227–28 (discussing "[a] survey of Founding-Era dictionaries" concerning the meaning of the word "happen" and finding that "'happen' more likely was used to mean 'arise'").

247 See *id.* at 228 ("The only arguably dissenting work was that by Thomas Dyche and William Pardon, which gave as a secondary definition . . . the phrase 'to be.'" (quoting THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 379 (16th ed. 1777))).

248 Cf. Letter from Thomas Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), available at <http://founders.archives.gov/documents/Jefferson/01-36-02-0280> ("The phrase in the constitution is 'to fill up all vacancies that may happen during the recess of the Senate.' this may mean 'vacancies that may happen to be' or 'may happen to fall.' it is certainly susceptible of both constructions . . .").

249 1 Op. Att'y Gen., *supra* note 88, at 631–32.

250 *Id.* at 632 (emphasis added).

251 See *supra* note 248.

that a meaning was more common does not mean that the Constitution adopted it.

Alexander Hamilton's opinion is similar. He appears to endorse the "arise" view, with the important qualification that he was not considering it directly, but rather addressing the question whether a newly established office constitutes a "vacancy."²⁵² However, Hamilton characterizes his reading of "happen," which involves casualty or falling out by chance, not as the exclusive meaning of the word, but only its "most familiar and obvious sense."²⁵³ Perhaps this is a rhetorical flourish rather than a genuine qualification. But perhaps it means exactly what it implies: that "happen" also had other meanings.

Other evidence comes from appointment powers granted in state constitutions. Among the ratification-era state constitutions that provide some kind of special appointment power, most, if not all, supply it without regard to when the vacancy arises.²⁵⁴ For example, the South Carolina Constitutions of 1776 and 1778 state:

²⁵² See Letter from Alexander Hamilton to James McHenry (May 3, 1799), available at <http://founders.archives.gov/?q=Date%3A1799-05-03&s=1111311111&r=2> ("In my opinion Vacancy is a relative term, and presupposes that the Office has been once filled. If so, the power to fill the Vacancy is not the power to make an original appointment. The phrase 'Which may have happened' serves to confirm this construction. It implies casualty—and denotes such Offices as having been once filled, have become vacant by accidental circumstances. This at least is the most familiar and obvious sense, and in a matter of this kind it could not be adviseable to exercise a doubtful authority.").

²⁵³ *Id.*

²⁵⁴ See DEL. CONST. of 1776 art. 21 ("In case of vacancy of the offices above directed to be filled by the president and general assembly, the president and privy council may appoint others in their stead until there shall be a new election."); PA. CONST. of 1776 pt. 2, § 20 ("The president . . . shall supply every vacancy in any office, occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution."); S.C. CONST. of 1776 art. XXIV ("That in Case of Vacancy in any of the Offices above directed to be filled by the General Assembly and legislative Council, the President and Commander in Chief with the advice and Consent of the Privy Council, may appoint others in their stead, until there shall be an election by the General Assembly and legislative Council to fill those vacancies respectively."); S.C. CONST. of 1778 art. XXXI ("That in case of vacancy in any of the offices above directed to be filled by the senate and house of representatives, the governor and commander-in-chief, with the advice and consent of the privy council, may appoint others in their stead, until there shall be an election by the senate and house of representatives to fill those vacancies respectively."); GA. CONST. of 1777 art. XXI ("The Governor, with the Advice of the executive Council, shall fill up all intermediate Vacancies, that shall happen in Offices, till the next general Election . . ."); VT. CONST. of 1777 ch. 2, § XVIII ("The Governor . . . shall supply every vacancy in any Office, occasioned by Death, Resignation, Removal, or Disqualification until the Office can be filled in the time and manner directed by Law or this Constitution."); VT. CONST. of 1786 ch. 2, § XI ("The Governor . . . shall supply every vacancy in any office occasioned by death or otherwise, until the office can be filled in the manner directed by law or this Constitution."). Some of these documents

That in Case of Vacancy in any of the Offices above directed to be filled by the General Assembly and legislative Council, the President and Commander in Chief, with the advice and Consent of the Privy Council, may appoint others in their stead, until there shall be an election by the General Assembly and legislative Council to fill those vacancies respectively.²⁵⁵

Likewise, the Delaware Constitution of 1776 states:

In case of vacancy of the offices above directed to be filled by the president and general assembly, the president and privy council may appoint others in their stead until there shall be a new election.²⁵⁶

The Georgia Constitution of 1777 is the only ratification-era state constitution that uses the word “happen” when granting special appointment powers. It clearly adopts an “exist” view, and the word “happen” would serve the same function in the provision regardless of whether it means “arise” or “exist”:

The [g]overnor, with the [a]dvice of the executive [c]ouncil, shall fill up all intermediate [v]acancies, that shall happen in [o]ffices, till the next general [e]lection²⁵⁷

This power apparently extends to positions for which the Georgia legislature otherwise has *exclusive* appointment authority, such as county justices of the peace and registers of probate.²⁵⁸

Two possible exceptions to the general “exist” rule are the North Carolina and Maryland constitutions of 1776.²⁵⁹ The former is sometimes cited as evidencing the “arise” view of “happen” in the federal Constitution.²⁶⁰ Like all but one of the state constitutions, the North

grant unilateral appointment power to the executive in all situations and therefore must be discounted.

²⁵⁵ S.C. CONST. of 1776 art. XXIV; S.C. CONST. of 1778 art. XXXI.

²⁵⁶ DEL. CONST. of 1776 art. 21.

²⁵⁷ GA. CONST. of 1777 art. XXI.

²⁵⁸ *Id.* at art. LIII (“All civil Officers in each County shall be annually elected, on the Day of the general Election, except Justices of the Peace, and Registers of Probates, who shall be appointed by the House of Assembly.”).

²⁵⁹ *See* MD. CONST. of 1776 pt. 2, art. XLI (“That there be a Register of Wills appointed for each county who shall be commissioned by the Governor, on the joint recommendation of the Senate and House of Delegates; anal that, upon the death, resignation, disqualification, or removal out of the county of any Register of Wills, in the recess of the General Assembly the Governor, with the advice of the Council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the General Assembly.”); N.C. CONST. of 1776 § XX (“That in every case where any Officer the right of whose appointment is by this Constitution vested in the General Assembly, shall during their recess die or his Office by other means become vacant, the Governor shall have power with the advice of the Council of State to fill up such vacancy by granting a Temporary Commission, which shall expire at the end of the next Session of the General Assembly.”).

²⁶⁰ *See* NLRB v. Noel Canning, 705 F.3d 490, 501 (D.C. Cir. 2013) (citing the North Carolina Constitution for support that it, “like the Recess Appointments Clause, describes a singu-

Carolina and Maryland documents do not use the word “happen,” which limits their value as to the meaning of the precise text in the Recess Appointments Clause.²⁶¹ It is also questionable whether they actually incorporate the “arise” view. The North Carolina Constitution arguably limits the recess appointment power to vacancies that arise during a recess only in cases of vacancy caused by death. If the office “become[s] vacant” by “other means,” then it is not clear that the “during the recess” limitation applies. The provision reads:

[I]n every case where any [o]fficer, the right of whose appointment is by this Constitution vested in the General Assembly, shall during their recess die or his [o]ffice by other means become vacant, the Governor shall have power . . . to fill up such vacancy²⁶²

Under an ordinary reading of this passage, “during the recess” modifies “die,” not “by other means become vacant.” On the surface, it seems implausible that the document would distinguish between vacancies caused by death during recesses and vacancies caused by “other means.” But if one can think of any rational reason to do so, then a textualist should take the text as its word, so to speak.

Maryland’s Constitution contains a similar ambiguity. If its drafters intended the “arise” view, then they would have done better to insert an additional comma in the text. Here is the passage, with a bracketed comma that, if added, would tilt it toward the “arise” view:

. . . [U]pon the death, resignation, disqualification, or removal out of the county of any Register of Wills, in the recess of the General Assembly[,] the Governor . . . may appoint and commission a fit and proper person to such vacant office²⁶³

To improve the text further, the drafters could have omitted the comma after “Wills.” Without one or both of these edits, the phrase “in the recess” might modify the phrase “the Governor . . . may appoint” rather than the phrase “death disqualification, or removal.” That reading is the most natural, and it fits the “exist” view perfectly. After a vacancy arises, the governor may fill it in the recess if it still exists at that point.

Even if the North Carolina and Maryland Constitutions embody the “arise” view, they nonetheless betray an imprecision in drafting that is inconsistent with heightened concern over the point. They would also be outliers. To the extent that early American drafters of

lar recess and does not use the word ‘adjournment’); Turley, *supra* note 14, at 974–75 (discussing early views of the North Carolina Constitution and its relationship to the Recess Appointments Clause).

261 See MD. CONST. of 1776 pt. 2, art. XLI; N.C. CONST. of 1776 § XX.

262 N.C. CONST. of 1776 § XX.

263 MD. CONST. of 1776 pt. 2, art. XLI.

constitutions had a general vision of special appointment power, they generally do not appear to have cared whether the triggering event occurred during a recess. That position is sensible. The purpose of special recess powers is usually to ensure that the executive can meet immediate needs expediently. From this perspective, it makes little sense to the limit the powers based on when a vacancy happens to have arisen. If filling the vacancy is—or becomes—important, it should be filled. The ratification-era constitutions are weak evidence on the timing question, to be sure. But they suggest that recess powers were generally viewed as pragmatic in nature, and that their drafters and readers generally believed them to be available when necessary rather than based on technicalities of when triggering events occur.

Among other types of evidence, support for the “arise” view is weaker and more mixed than commonly perceived. Early opinions varied, for example with John Adams apparently taking the “exist” view and Alexander Hamilton taking the “arise” view.²⁶⁴ Proponents place great weight on the opinion of the first Attorney General, Edmund Randolph, and the practice of George Washington.²⁶⁵ Of course, one must be careful not to double-count here. To say that George Washington followed the arise interpretation is merely to say that he took his Attorney General’s advice. And there is strong reason to discount that advice as evidence of original meaning. Randolph was an opponent of presidential appointment power—so much that he originally refused to sign the Constitution in part because of it. At the federal convention, he appears to have objected to the appointment power in its entirety.²⁶⁶ When he later advocated ratifica-

²⁶⁴ Each opinion is subject to the important qualification that the author was not directly assessing the “happen” question, but rather the question whether a newly created office counts as a “vacancy.” See Hartnett, *supra* note 30, at 384 n.27 (“Care must be taken not to read such statements out of context. These authors were addressing the creation of new offices, and relying on the idea, less common in current usage, that only those things that occur by chance can be said to ‘happen.’ On this understanding, ‘happen’ is not used to designate a time, but rather to indicate the unplanned nature of the vacancy, best captured today by ‘happenstance,’ or ‘haphazard.’”); Rappaport, *supra* note 7, at 1538 (“Most readers of the Clause assume that the recess appointment must be made during the recess when the vacancy arose, but careful examination of the Clause reveals that its language does not say specifically when the appointment must be made. This silence as to when the recess appointment must be made occurs under both the arise interpretation and the exist interpretation.”).

²⁶⁵ See Rappaport, *supra* note 7, at 1538 (“By contrast, the Washington Administration’s practice, especially as justified by the Randolph opinion, is entitled to enormous respect.”).

²⁶⁶ See EDMUND RANDOLPH, OBJECTIONS TO THE CONSTITUTION (1787) (“Objections to the Constitution as far as it has advanced . . . 9th The appointment of officials will produce to great influence in the Executive.”).

tion at the Virginia convention, he narrowed his objection, at least publicly, complaining only about the appointment (and recess appointment) of *judges*. He qualified his endorsement of the Constitution by expressing hope that other states would join Virginia

in taking from [the president] the power of nominating to the judiciary offices, or of filling up vacancies which may there happen during the recess of the senate, by granting commissions which shall expire at the end of their next sessions.²⁶⁷

Rappaport finds that Randolph's opinion "is entitled to enormous respect" because he was an executive official arguing for narrower executive power—and also because Randolph engaged in "penetrating analysis" and "clearly placed great importance on the Constitution that he had done so much to draft and ratify."²⁶⁸ Apparently, Rappaport is not aware of Randolph's strong objections to the appointment power. Rappaport notes, just before discussing Randolph's opinion, that we should be skeptical of early interpretations that may have been motivated by self-interest.²⁶⁹ For this reason, he apparently discounts the view of any executive official who took the "exist" view because it favors the executive.²⁷⁰ But Randolph's example shows that we should be skeptical of the assumption that early officials simply favored their respective branches of government. When Randolph gained the opportunity to set precedents as attorney general, it is far from obvious that he would conform his views to a general executive-branch boosterism, or for that matter expound earnestly on the "true" meaning of constitutional text. More likely is that he would take the opportunity to implement his strong, preexisting preferences and weaken a provision that he had openly wished to excise from the Constitution.

Moreover, as a matter of original meaning, Randolph's opinion lends less support to the "arise" view than is commonly assumed. Randolph scarcely engages in textual analysis. He merely notes that a vacancy "may be said to have *happened*" on the day that it "commenced," giving no consideration to whether "happen" might also

²⁶⁷ See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 127.

²⁶⁸ See, e.g., Rappaport, *supra* note 7, at 1538 & n.155 (citing *Edmund Randolph*, NOTABLE NAMES DATABASE, <http://www.nndb.com/people/099/000049949/>).

²⁶⁹ Rappaport, *supra* note 7, at 1537 ("The weight to be accorded early interpretations, however, turns on whether the interpreter impartially based his decision on a genuine and considered view of the constitutional provision. One reason why an early interpretation might be given reduced weight is if it was motivated by the interpreter's self-interest.").

²⁷⁰ See *id.* ("The evidence supplied by Hartnett of Presidents and executive branch officials who may have interpreted the Recess Appointments Clause broadly raises the suspicion that these interpretations were influenced by a desire to enhance executive power. Interpretations in these circumstances are entitled to less respect.").

mean “exist.”²⁷¹ Perhaps he failed to consider the “exist” interpretation because it did not occur to him or it appeared unworthy of comment. But perhaps Randolph deliberately chose not to mention it because he did not want to lend credibility to an opposing position. In any event, Randolph expends little energy on the text. Instead, he relies primarily on his view that the “[s]pirit of the Constitution favors the participation of the Senate in all appointments,” and therefore the Recess Appointments Clause “ought . . . to be interpreted strictly.”²⁷² This is a statement about one man’s policy preferences, not evidence of original meaning.

There is another way in which Randolph’s opinion is notably pragmatic rather than formalist or textualist. He explains that he would accept that a vacancy constructively arises during a recess if the President nominates a candidate and the Senate confirms but the candidate declines the position during the recess.²⁷³ In truth, of course, the position has not been filled, and therefore the vacancy predates the recess. Randolph would nonetheless permit a recess appointment on the basis that “the Senate have had a full opportunity to shew their sense” and “the vacancy was filled up, as far as the President and Senate could go.”²⁷⁴ In other words, Randolph departs from the arise position when his view of “the Spirit of the Constitution” points another direction. Again Randolph demonstrates that his partial endorsement of the “arise” view rests more on his policy preferences than his view of original meaning. That Randolph opposed the Clause in its entirety only further diminishes his credibility as a source of meaning. His view of “the Spirit of the Constitution” conforms closely to his own preferences regarding the Constitution—which happen to be preferences that the Constitution’s drafters and ratifiers *rejected* when they approved presidential appointments and recess appointments.

Not only are the early opinions on the “happen” question mixed at best; each is the work of a political actor who may have had an agenda beyond the mere ascertainment of original meaning. In sum, the “arise” view of the “happen” question is the right starting point, as to the modern reader it seems to reflect the word’s ordinary meaning, but there is good cause to investigate the issue much more thoroughly. Dictionary evidence and early opinions suggest that the “ex-

271 Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), available at <http://founders.archives.gov/documents/Jefferson/01-24-02-0176>.

272 *Id.*

273 *Id.*

274 *Id.*

ist” view was plausible, and most early documents granting recess powers adopt the “exist” view, suggesting that in general most founders were willing to forgo legislative participation when expedience demanded it.

IV. CONTEMPORARY THEORIES OF ORIGINALISM AND THE RECESS APPOINTMENTS CLAUSE

Despite strong evidence for an ordinary meaning of recess, multiple prominent originalists have endorsed the technical position. The existence of serious disagreement on the original meaning of “recess” raises interesting questions. One might start by asking whether originalists must agree with one another. The general answer is no. There are multiple theories of originalism, and it is only natural that different methodologies might yield divergent conclusions.²⁷⁵ This Part introduces four contemporary originalist theories and considers how each might analyze the evidence on “recess.” It finds that, regarding the meaning of recess, most of the divergence in conclusions is not predicted by theoretical or methodological differences.

A. *New Originalism*

The most prominent contemporary originalist theory is known as “original public meaning originalism”²⁷⁶ or simply “New Originalism.”²⁷⁷ A good deal of current originalist discussion is framed around New Originalism and its concepts, with participants expressing agreement, suggesting refinements or clarifications, or objecting. It is therefore the obvious starting point when discussing current originalist theory.

1. *Original Public Meaning, Not Intent or Expectations*

New Originalism is distinguished by two main features. The first is that it attempts to find the original public meaning of the Constitu-

²⁷⁵ See, e.g., Whittington, *supra* note 166, at 394 n.82 (“Perhaps it goes without saying that originalists will no doubt disagree among themselves about the actual content of the Constitution. Although such interpretive disagreements might derive from theoretical disagreements, they are more likely to derive from simply different approaches to and evaluation of the available evidence about original meaning, and are, potentially, resolvable within the confines of originalist theory.”).

²⁷⁶ See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 463 (2013) (discussing the origins of “original public meaning originalism”).

²⁷⁷ See, e.g., Barnett, *supra* note 3, at 412 (explaining what “New Originalism” is).

tion.²⁷⁸ This represents a major break with earlier incarnations of originalism, which focused on original *intent* or *expectations* of the Framers.²⁷⁹ Ronald Dworkin is often cited to explain the difference: “[t]his is the crucial distinction between what some officials intended to say in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it.”²⁸⁰ There are many reasons for this move, and we need not rehearse them at length. The most frequently cited are that it is hard to discern the intent or expectation of the Framers and that, notwithstanding the previous point, the Framers do not appear to have intended legal actors to divine the original intent behind the document.²⁸¹

2. Interpretation and Construction

The second key feature of New Originalism is that it distinguishes between the concepts of “interpretation” and “construction.”²⁸² Interpretation is the act of discerning the semantic or communicative meaning of a text. It is an empirical practice in which one resolves ambiguities to discover a text’s objective, public meaning (as opposed to a private or idiosyncratic meaning).²⁸³ Construction, by contrast, is

278 For foundational texts, see BARNETT, *supra* note 47; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Randy E. Barnett, *An Originalism for Non-originalists*, 45 *LOY. L. REV.* 611 (1999) [hereinafter Barnett, *Nonoriginalists*].

279 See Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin’s Living Originalism*, 7 *JERUSALEM REV. OF LEGAL STUD.* 42, 44–45 (2013) (specifying that New Originalism does not focus on the Framers’ intentions); Solum, *supra* note 276, at 462–63 (discussing early originalists’ focuses on original intentions); Whittington, *supra* note 166, at 378–80 (discussing the interaction between original meaning and original intent). Although original intent and original expectations are distinct concepts, they share common characteristics and can be treated together for present purposes.

280 Barnett, *Nonoriginalists*, *supra* note 278, at 622 (quoting Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 116 (Amy Gutmann ed. 1997)) (emphasis in original).

281 The most influential critiques on these points are those of Paul Brest and H. Jefferson Powell, respectively. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 204 (1980) (discussing “strict originalism”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 885–88 (1985) (discussing the original meaning of “original intent”).

282 See, e.g., Solum, *supra* note 276, at 457 (asserting that interpretation “is the activity that discerns the communicative content (linguistic meaning) of the constitutional text” while construction “is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text”).

283 See Barnett, *supra* note 167, at 66 (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empiri-*

what one does when interpretation falls short because a text contains irreducible ambiguity, vagueness, gaps, or internal contradictions.²⁸⁴ In this discussion, ambiguity and vagueness are not synonymous. An ambiguous word has more than one meaning, whereas vagueness refers to marginal facts that may or may not be included within a word.²⁸⁵ The question whether “arms” in the Second Amendment refers to human limbs or weapons is one of ambiguity;²⁸⁶ the question whether it includes shoulder-launched surface-to-air missiles is one of vagueness. In situations where the meaning of the constitutional text cannot be determined with enough precision to govern particular facts, the text is “underdeterminate” and one engages in construction.²⁸⁷ Unlike interpretation, construction is a normative enterprise and is not “originalist.”²⁸⁸ In theory, any norms can be used, whether stemming from political morality, ethics, or legal practice.²⁸⁹ Larry Solum has termed the area outside the text’s determinate meaning the “construction zone.”²⁹⁰

The question where interpretation ends and construction begins can be difficult, and there is substantial disagreement over the exist-

cal, not normative.”); Solum, *supra* note 276, at 472 (“Constitutional interpretation is essentially a factually driven enterprise.”).

284 See Solum, *supra* note 276, at 469 (“Construction becomes the focus of explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested.”); see also Barnett, *supra* note 3, at 419 (“New Originalists refer to this activity [of “supplement[ing] information revealed by interpretation”] as ‘constitutional construction,’ as distinct from ‘constitutional interpretation’ . . .”). In other words, construction is what one does when interpretation “runs out.” Barnett, *supra* note 3, at 419.

285 See Barnett, *supra* note 167, at 67 (“*Ambiguity* refers to words that have more than one sense or meaning. *Vagueness* refers to the penumbra or borderline of a word’s meaning, where it may be unclear whether a certain object is included within it or not.”); Solum, *supra* note 276, at 469–70 (providing that “[a] text is ambiguous if it can have more than one meaning” but vagueness “refers to expressions that have borderline cases”).

286 See BARNETT, *supra* note 47, at 119 (arguing that deciphering what is meant by “arms” is a matter of interpretation).

287 See Solum, *supra* note 276, at 458 (“But in other cases, the constitutional text does not provide determinate answers to constitutional questions. For example, the text may be vague or irreducibly ambiguous. We can call this domain of constitutional underdeterminacy ‘the construction zone.’”); see also Barnett, *supra* note 3, at 419 (“. . . although the activity of construction is constrained by the original meaning of the text, construction is needed precisely when that *communicative meaning is not sufficiently determinate to dictate a unique application.*”).

288 See Solum, *supra* note 276, at 472 (observing “that construction is essentially normative”); see, e.g., Barnett, *supra* note 3, at 419, 420 (providing that “originalists can and do disagree on how extra-originalist constitutional construction is to be done”).

289 See Solum, *supra* note 276, at 472 (arguing that there is a “range of normative possibilities” that could drive constitutional construction).

290 *Id.* at 458, 472 (“We can call this domain of constitutional underdeterminacy ‘the construction zone.’”).

ence and size of the “construction zone.” New Originalists like Randy Barnett and Larry Solum argue that interpretation suffices to determine the meaning of most of the Constitution, particularly the structural aspects of the document, but also believe there remains a substantial construction zone.²⁹¹ Others, like Jack Balkin, believe that the Constitution is largely a “framework” for construction.²⁹² Still other originalists who object to much of the “new” theory, such as Gary Lawson, Michael Rappaport, and John McGinnis, argue there is little or no need for construction at all.²⁹³ Distinguishing between interpretation and construction can lend clarity to what one is doing in constitutional decisionmaking and therefore is worth doing.

3. *Interpreting Recess*

Consider the “recess” question. Given the evidence reviewed in this Article, one can conclude that the question whether “recess” refers only to “inter-session” recesses or to something broader is a matter of *interpretation*, or resolving ambiguity. There is overwhelming evidence that the original public meaning of “recess” included “intra-session” breaks, just as the word does at present.²⁹⁴ There is no evidence that anyone in the public or the federal or state government believed otherwise until Attorney General Knox’s opinion in 1901, which the Senate Judiciary Committee declined to endorse in 1905 and Attorney General Daugherty rejected in 1921.²⁹⁵ Since then, no President or Senate majority has disputed the issue.

²⁹¹ See Barnett, *supra* note 3, at 419 (“By adopting the interpretation-construction distinction, the New Originalism frankly acknowledges that the text of ‘this Constitution’ does not provide definitive answers to all cases and controversies that come before Congress or the courts.”); Solum, *supra* note 276, at 530 (“As I understand the position of the New Originalists (and I count myself as among them), most of the provisions of the Constitution are structural and have clear original meanings Many of the vague provisions (including important individual rights provisions) create construction zones, but this is because the discernable original meaning underdetermines some constitutional questions.”).

²⁹² See JACK M. BALKIN, *LIVING ORIGINALISM* 13 (2011); Solum, *supra* note 276, at 468 (referring to Balkin and stating that he “explicitly adopts the idea of constitutional construction”).

²⁹³ See Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1233 (2012) (“I want to dissent from the originalist construction project and declare the Constitution a ‘no-construction zone.’”); McGinnis & Rappaport, *supra* note 140, at 772–73 (presenting “objections to construction”); Solum, *supra* note 276, at 472 (observing that some originalists “deny the existence of the construction zone”).

²⁹⁴ See *supra* Part I.

²⁹⁵ See *supra* text accompanying notes 99–110.

To be clear, the point is not that “recess” certainly included all legislative breaks. Rather, to one engaging strictly in originalist interpretation, that is as far as the evidence points. Dictionary evidence strongly suggests that the ordinary meaning of “recess” was broad and general.²⁹⁶ Ordinary meaning is also the default position, the presumption to be rebutted in interpreting texts. On “recess,” we lack evidence adequate to conclude that “recess” was limited in any particular way in the Recess Appointments Clause. Evidence for the most commonly endorsed limitation—restricting the word to breaks between official Senate sessions—is so lacking that, even if viewed independently, it would fail to rebut the presumption of ordinary meaning. But that evidence does not stand alone. The record strongly contradicts it, as there are many ratification-era examples of “recess” referring to intra-session breaks.²⁹⁷ Moreover, the definition of an official “session” varied across different jurisdictions, and the Framers could not have predicted Senate session practice. For these reasons, it is implausible that the Constitution would incorporate one particular definition of official sessions or recesses, particularly without any evidence that its drafters wrestled with the choice among definitions.

4. *New Originalism and the Recess Question*

This Article has attempted to analyze the evidence on “recess” in a manner consistent with New Originalism. The New Originalist would use most if not all of the sources discussed in Part I. One conducting this type of inquiry need not reject any particular form of evidence,²⁹⁸ although one expects a loose hierarchy of evidentiary value. Most important are the core tools of textual analysis: the close reading of text, including which words appear and which do not, their relationships to other words and provisions in the same document, and evidence regarding the “plain meaning” of relevant terms to an ordinary reader.²⁹⁹ The latter could stem from contemporaneous dictionaries or other instances of contemporaneous usage.³⁰⁰ Next would come

296 See *supra* Part I.A.1.

297 See *supra* Part I.B.

298 See, e.g., WHITTINGTON, *supra* note 278, at 389.

299 See, e.g., *id.* at 389–90.

300 See, e.g., BARNETT, *supra* note 47, at 93 (observing that original public meaning references “dictionaries, common contemporary meanings, an analysis of how particular words and phrases are used elsewhere in the document or in other foundational documents and cases, and logical inferences from the structure and general purposes of the text”); Barnett, *supra* note 3, at 416 (“[E]stablishing the semantic meaning of the words in the text,

evidence of purpose or values that one finds in the text or structure of the document, so long as purpose is treated as evidence of meaning rather than an end in itself that trumps the text.³⁰¹ Further down is extrinsic evidence of purpose, such as statements by the Framers, historical interpretations, or other historical practices.

The strongest evidence discussed in Part I for the ordinary meaning of “recess” is the type that New Originalism values: a close reading of text and structure, informed by evidence from contemporaneous dictionaries and other sources regarding the ordinary understanding of those terms. By contrast, the technical position draws significantly less support from these types of evidence. Perhaps the most compelling support for the technical position is a narrative about the Framers’ expectations³⁰²—a type of reasoning that New Originalism rejects.

Perhaps it is not always easy to distinguish between original meaning and original intent or expectations. One could take the view that the inter-session-expectations narrative is evidence about the meaning of the word “recess” rather than an argument that the Framers’ expectations trump the evidence on meaning. After all, in most cases, one would expect the original meaning of words used in the Constitution to reflect the intentions or expectations of the document’s presumably competent drafters and ratifiers.³⁰³ For this reason, there should be times when strong evidence of original intent or expectations can help establish original meaning. But the inter-session-expectations narrative cannot play that role here because it is not supported by evidence regarding the Framers’ actual expectations. Moreover, the inter-session-expectations narrative runs counter to the weight of the evidence on the text’s meaning. For these reasons, it should fail to persuade the New Originalist regardless of whether it is viewed squarely as an appeal to original expectations or as one of the sole arguments supporting the conclusion that the original public meaning of “recess” was narrow and technical.

given the publicly available context, requires a survey of relevant usage. The search for original public meaning should be as systematic and comprehensive as possible with respect to any source one surveys, reporting deviant as well as predominate usage.”).

301 See, e.g., WHITTINGTON, *supra* note 278, at 390.

302 See *supra* text accompanying notes 188–91.

303 See Solum, *supra* note 276, at 464 (“Under normal circumstances, the intentions of the Framers will be reflected in the public meaning of the constitutional text: as competent speakers and writers of the natural language English, the Framers are likely to have understood that the best way to convey their intentions would be to state them clearly in language that would be grasped by the officials and citizens to whom the constitutional text was addressed.”).

Two additional points are worth raising about the inter-session-expectations narrative. First, it is a particularly weak form of expectations argument because it turns on arbitrary historical changes. It says that the Framers expected inter-session rather than intra-session recesses only because of now-irrelevant technological constraints in communications and transportation. By similar reasoning, one might as well hold that the Second Amendment does not protect the right to bear semi-automatic firearms, which did not exist in the eighteenth century and therefore were not what the Framers had in mind. Or one might argue that women cannot hold federal office, for the Constitution repeatedly refers to representatives, senators, and the President as “he,” and surely the Framers did not have women in mind.³⁰⁴ These arguments are widely rejected for good reason; and the same reasoning applies to the inter-session-expectations narrative.

In a related point, the inter-session-expectations argument is internally contradictory. To the extent that it turns on failures of imagination, it tacitly admits that “recess” does not affirmatively exclude intra-session recesses as a textual matter. It is incoherent to say that the Framers meant to preclude unilateral appointments during a type of recess that they did not imagine. To the contrary, at most the narrative points to a vagueness problem—a question whether modern intra-session recesses *should be* included or excluded, which cannot be resolved by originalist evidence. A common source of vagueness is the lack of complete knowledge on the part of drafters, and one cause of imperfect knowledge is inter-temporal change. Randy Barnett illustrates this point with the question whether thermal imaging of a house constitutes a “search” for Fourth Amendment purposes.³⁰⁵ One cannot answer the question with an objective, historical inquiry, he notes, because it is “counterfactual, not . . . factual.”³⁰⁶ This type of dilemma is precisely why constitutional drafters prefer general principles to narrow prescriptions where possible.³⁰⁷

The discussion of vagueness returns us to the question whether the analyses in Parts I and II of this Article are exercises in interpretation or construction. With minor exceptions, this Article has engaged in interpretation, as it has sought to derive the original mean-

304 See, e.g., U.S. CONST. art. I, § 2, cl. 2 (referring to state representatives using the male pronoun); *id.* at art. I, § 3, cl. 3 (referring to senators using the male pronoun); *id.* at art. II, § 1, cl. 1 (using the male pronoun to refer to the President).

305 See BARNETT, *supra* note 47, at 119–20 (using the example of thermal imaging to show that “original meaning may not by itself tell us whether [something] lies outside its core meaning but still possibly within its margins”).

306 *Id.* at 120.

307 See *supra* text accompanying notes 164–67.

ing of “recess” as an objective matter, without resort to extra-originalist sources.³⁰⁸ To the extent that this Article relies on evidence of purpose or intent, it analyzes that evidence for its relevance to the meaning of the text of the Constitution. The Article considers constructions of “recess” separately, in Subpart E below.

The foregoing discussion suggests that the divergence between this Article’s conclusion and that of some New Originalists is not likely attributable to a difference in interpretive methodology. After a more comprehensive view of the evidence, one might expect New Originalists to agree with the positions in this Article. Or they might muster more evidence for the technical position, although this Article has attempted to canvas the most probative sources. Alternatively, they might conclude that the term is irreducibly ambiguous.

B. *Original Methods Originalism*

A second contemporary originalist theory is what John McGinnis and Michael Rappaport have called “Original Methods Originalism.”³⁰⁹ Under this approach, one interprets the Constitution using the “methods that the constitutional enactors would have deemed applicable to it.”³¹⁰ Although McGinnis and Rappaport do not provide a comprehensive account of ratification-era interpretive rules, they argue that the practices embody attempts to discern both original meaning and original intent.³¹¹ The particular interpretive methods that they identify appear similar to contemporary tools of legal analysis. For example, they contemplate the use of structure, purpose, intent, and history³¹² and, regarding the reading of text itself, they discuss the use of common canons of construction.³¹³

McGinnis and Rappaport’s principal points appear to be that original methods were originalist rather than “dynamic or otherwise nonoriginalist”³¹⁴ and that those methods involve not just textual

³⁰⁸ An exception is the discussion of the “military-responsiveness” narrative, which this Article poses as a challenge to the “inter-session-expectations” narrative. See *supra* text accompanying notes 208–15.

³⁰⁹ See McGinnis & Rappaport, *supra* note 140, at 751 (titling their article *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*).

³¹⁰ *Id.* at 751, 754.

³¹¹ See *id.* at 752 (“[W]e do not attempt to determine the precise interpretive rules”); *id.* at 786 (“We do not have space to provide a comprehensive account of the original interpretive rules.”).

³¹² *Id.* at 752 (“[T]he evidence suggests that ambiguity and vagueness were resolved [in the Framers’ era] by considering evidence of history, structure, purpose, and intent.”).

³¹³ See, e.g., *id.* at 756 (discussing the “antiredundancy rule”).

³¹⁴ *Id.* at 786.

analysis but also considerations of intent.³¹⁵ One distinction between Original Methods Originalism and New Originalism, then, is that the former approves of considering original intent because, on its account, ratification-era legal actors would have done so.³¹⁶ McGinnis and Rappaport also depart from New Originalism in arguing that, though the use of original methods, one can fully ascertain the meaning of the Constitution without resort to construction.³¹⁷ They argue that the Framers resolved ambiguity and vagueness “by considering evidence of history, structure, purpose, and intent,” as opposed to “extraconstitutional” sources that are used in construction.³¹⁸ To the New Originalist, the disagreement over construction appears largely semantic. On this view, everyone must engage in construction, including McGinnis and Rappaport. Irreducible ambiguity and vagueness are inherent in the Constitution.³¹⁹ The Original Methods Originalist is merely arguing about the size of the toolset, and shrinking the list of tools does not mean one is not engaged in construction. The Original Methods Originalist would likely respond that original methods can reduce or even eliminate the need for construction if those methods require one to choose the best possible answer in cases of uncertainty. If one is compelled by original methods to choose an outcome supported by the preponderance of the evidence, then one can be said to be engaging in the determinate, originalist act of interpretation, not the indeterminate, nonoriginalist act of construction.

Because McGinnis and Rappaport do not provide a comprehensive account of original methods, one cannot be certain how their

315 *See id.* (“We present some evidence showing the original interpretive methods were intentionalist . . .”).

316 *Cf. id.* For a contrary view, see Powell, *supra* note 281, at 887 (“Turning to the views on constitutional interpretation expressed during and immediately after the ratification process, I conclude that there was a tension during this period between a global rejection of any and all methods of constitutional construction and a willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes.”).

317 *See* McGinnis & Rappaport, *supra* note 140, at 752 (“We find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing.”).

318 *Id.*

319 McGinnis and Rappaport concede that, as a theoretical matter, there might be some residual need for construction. John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 752 n.54 (2012) (“It is theoretically possible that the interpretive rules may not resolve every uncertainty, especially uncertainty resulting from vagueness. We have argued that such uncertainties are unlikely if the interpretive rules require interpreters to choose the meaning that is more likely, even if other meanings are possible. But if there is a remaining uncertainty, then one might be in a situation involving construction, where the original meaning does not provide an answer.”).

theory would apply to the evidence on the meaning of recess. However, there are three reasons to believe that most of the analysis in Part I of this Article is apt. First, as mentioned above, original methods appear to have been largely consistent with contemporary practice. Second, Rappaport's own analysis of the Recess Appointments Clause evaluates similar types of evidence.³²⁰ There, Rappaport states that he will seek to understand how "knowledgeable individuals would have understood this language in the late 1780s when it was drafted and ratified."³²¹ He also implies that what he will seek the meaning in the manner that "[i]nterpreters at the time would have,"³²² but that he will accomplish that task by "examin[ing] various factors, including text, purpose, structure, and history."³²³ Finally, to the extent that this Article's analysis is limited to *interpretation*, it should not run afoul of Original Methods Originalism's prohibition on construction, regardless of the tools one uses to conduct that analysis.

On the basis of text and structure, it appears that an Original Methods Originalist should reach the same conclusion as a New Originalist—that the weight of the evidence supports the general meaning of "recess," or at least that the balance of the evidence does not rebut the presumption in favor of ordinary meaning. McGinnis and Rappaport part ways with the New Originalists, however, in that they would also consider evidence regarding original intent or expectations. This difference in methodology could explain the difference in conclusions regarding the meaning of "recess."³²⁴ As discussed above, the most intuitively appealing support for the narrow view of "recess" is the inter-session-expectations narrative—that the Framers expected Congress to take long inter-session recesses and no significant other breaks, and therefore long inter-session recesses are what they meant by "recess."³²⁵ This Article has disputed that view in two way: by arguing that even if one assumes those were the Framers ex-

³²⁰ Rappaport wrote his analysis of the Recess Appointments Clause in 2005 and proposed Original Methods Originalism with McGinnis in 2009, which naturally raises the question whether his 2005 analysis followed Original Methods Originalism. Rappaport re-endorsed the 2005 analysis in a 2013 brief to the Supreme Court, which suggests that it cannot have ventured far outside the bounds of his preferred method. *See generally*, Originalist Brief, *supra* note 122.

³²¹ Rappaport, *supra* note 7, at 1493.

³²² *Id.*

³²³ *Id.*

³²⁴ John McGinnis joined the "originalist" amicus brief to the Supreme Court in *Noel Canning* advocating the technical position. Rappaport, of course, is the principal advocate of that view.

³²⁵ *See supra* text accompanying notes 188–91.

pectations, they might not have written those expectations into the Constitution and by offering a “military-responsiveness” counter-narrative.³²⁶ But one certainly cannot disprove the narrative that the Framers expected “recess” to mean “inter-session recess.”

It is noteworthy, however, that McGinnis and Rappaport have recognized an exception to following original expectations that applies to the “recess” question. They have written that modern actors need not follow original expectations that were based on mistakes of fact, as opposed to “moral or policy beliefs” with which we happen to disagree.³²⁷ Following this reasoning, we need not adhere to what Rappaport argues is the original expected application of “recess.” Even if the inter-session-expectations narrative accurately characterizes the Framers’ beliefs, those beliefs were mistaken. The Senate now follows a very different pattern of recesses.

Another aspect of original methods also might cut against the technical position. There is some evidence that original methods included a view that historical usage and precedent settle the meaning of terms, trumping their original public meaning. Under that view, one should defer to the near-complete consensus of the past several decades, if not since the nation’s founding, that the Recess Appointments Clause permits intra-session recess appointments. One piece of evidence for the existence of this “original method” stems from a well-known series of events in which James Madison reversed his position on the constitutionality of a national bank, from opposition to support (or at least acquiescence), over a twenty-five-year period.³²⁸ Madison’s reasoning was that his view was contradicted for more than twenty years by usage and precedent, which effectively settled the question. The precedent did not alter the meaning of the Constitution’s text, on which Madison’s “abstract opinion” remained unchanged,³²⁹ but rather changed its proper application to the specific question of Congress’s power to create a national bank. The bank’s

³²⁶ See *supra* text accompanying notes 208–15.

³²⁷ See John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379–80 (2007) (“While expected applications are important evidence of the meaning of a provision, they are not always to be followed, even if they are widely held. But the circumstances must provide strong reasons for believing the applications were mistaken, rather than being merely applications modern interpreters happen to reject.”).

³²⁸ See Powell, *supra* note 281, at 939–40 (providing that as a result of “the exposition of the Constitution provided by actual governmental practice and judicial precedents . . . Madison felt himself compelled to change his position on the controversial issue of Congress’s constitutional power to incorporate a national bank”).

³²⁹ *Id.*

constitutionality was “a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning.”³³⁰ From the perspective of Original Methods Originalism, what is most interesting about this episode is that Madison claimed that his perspective on precedent was not just his personal view, but one generally intended by the Framers.³³¹ If Madison was correct, then one would expect to see Original Methods Originalists accede to the ordinary, general reading of recess based on the historical record.

C. *Original Defaults Originalism*

A third set of originalist theories supports applying constitutional default rules to resolve residual uncertainty when deciding cases. Accordingly, we can refer to these views as Original Defaults Originalism. Gary Lawson has rightly pointed out that one does not need epistemic certainty to make decisions in the face of legal indeterminacy; one need only set a burden of proof and allocate it.³³² He and Michael Paulsen have independently argued for the existence of default rules prescribed by the text of the Constitution itself. Paulsen’s rule, in brief, is that when a government act is not clearly unconstitutional, one should defer to the political branches.³³³ Lawson’s is a presumption “against the existence of federal power and in favor of the existence of state power.”³³⁴

330 *Id.* (quoting Letter from James Madison to Marquis de LaFayette (Nov. 1826)); *see also* Letter from James Madison to Mr. Ingersoll (June 25, 1831) (referencing “the obligations derived from a course of precedents amounting to the requisite evidence of national judgment and intention”).

331 *See* Powell, *supra* note 281, at 940–41 (“Madison claimed, this view represented not just his opinion, but the general expectation – the ‘interpretive intention’ – that prevailed at the time of the Constitution’s framing and ratification.”).

332 *See* Lawson, *supra* note 293, at 1233–34 (“The trier of fact may be genuinely uncertain about the facts. The solution to this uncertainty is not to come up with some extra-evidentiary mechanism for constructing facts but to *allocate the burden of uncertainty* to one party or the other.”); *see generally* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411 (1996).

333 *See generally* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009).

334 Lawson, *supra* note 293, at 1234. Larry Solum labels Paulsen and Lawson’s views, or something like them, “Originalist Thayerianism.” Solum notes that the position he sketches might not conform precisely to their views. *See* Solum, *supra* note 276, at 472–73 & n.76, 512 (noting that “[t]he Originalist Thayerian Theory is related to and inspired by the views of Gary Lawson and Michael Paulsen” but “[t]o the extent that neither Lawson nor Paulsen embraces Originalist Thayerianism as described here, this discussion does not directly apply to their views”). I follow Solum with the same disclaimer. Solum’s label derives from James Bradley Thayer’s influential argument in the late nineteenth century that a court can deem a statute unconstitutional only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear

To the extent that this Article engages only in *interpretation*, a difference in methodology could not explain disagreement with Original Defaults Originalists because their theories concern what to do when interpretation runs out. In other words, their default rules should come into play only if they are unpersuaded by this Article's account, or they do not view it as an exercise in interpretation. Let us assume that is their response. In that case, the effect of Lawson's default rule—a presumption against federal power—is unclear in a separation-of-powers controversy within the federal government. Where a private litigant challenges a federal action asserting a separation-of-powers violation, one might believe at first blush that a presumption against federal power cuts in favor of the challenger. But the case does not concern the existence of federal power; it concerns the allocation between two political branches of a clearly extant power. The presumption appears not to apply.

In contrast, Paulsen's presumption would instruct a court to permit a presidential recess appointment even of dubious constitutionality unless it is clearly unconstitutional—or presumably unless it is genuinely disputed by the Senate. If the Senate disputes a recess appointment, then a presumption of deference to the political branches cannot apply because two branches are in conflict. Moreover, in that case, if one agrees with this Article's account of the Rules of Proceedings Clause, then that Clause should resolve most disputes between the Senate and the White House. Because clear distinctions among recesses cannot be found through interpretation of the Constitution's text, courts following Paulsen's default rule apparently should approve most if not all recess appointments that a majority of senators do not dispute.

D. *Living Originalism*

Finally, Jack Balkin describes his “Living Originalism” as a method of “text and principle.”³³⁵ It is a form of New Originalism, as it holds

that it is not open to rational question.” James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17, 144 (1893); see Solum, *supra* note 276, at 472–73 (“[W]hen the meaning of the text is unclear or uncertain, then judges should defer to decisions made by the political branches. Thus, in a case where the requirements of equal protection are unclear (because of vagueness, for example), judges should refrain from declaring legislative or executive action unconstitutional.”). The Thayerian label is most clearly apt as to Paulsen, who straightforwardly advances a theory of deference to the political branches. On my reading, Lawson's presumption prescribes deference to state governments and the opposite of deference to federal political branches. See *supra* notes 333–34.

335 BALKIN, *supra* note 292, at 3.

that the Constitution's text is fixed and binding.³³⁶ But it parts with many originalists, new and old, in its view of the limits of interpretation. Balkin argues that much of the Constitution is underdetermined and must be resolved through construction, but this is by design.³³⁷ In his view, the Constitution provides a "framework" for later generations of political and legal actors to build on.³³⁸ Rather than just a restraint on government actors, the Constitution is a "plan for politics."³³⁹ The text is binding as far as it goes. When it clearly states a rule, we must follow the rule. But when it invokes a standard or a principle, it delegates construction to future actors appealing to the principles underlying the text.³⁴⁰

This Article's reading of "recess" fits well with Living Originalism. The starting point for the analysis is interpretation of the text: the original meaning of "recess" was broad, encompassing any legislative break. The word's generality indicates that it is used to establish a standard rather than a rule. When the Constitution invokes a standard or principle rather than establishes a hard rule, it implicitly delegates interpretation to future generations.³⁴¹ In the case of the Recess Appointments Clause, a portion of the delegation is unusually explicit. The Constitution gives the Senate authority over the rules of its proceedings, and those rules likely include the meaning of Senate recesses.

But it is also reasonable to hold that the President must have a role in interpreting "recess," for it is primarily the President whose constitutional duties are at stake in ensuring that the federal government is staffed adequately. On this view, the President is at risk of failing to meet executive-branch obligations if the Senate has complete control over the concept of an appointment-enabling recess. At a minimum, if the Senate is unavailable as a practical matter, then it

336 *Id.* at 412–28.

337 *Id.* at 3.

338 *See id.* at 3 (labeling his position as "framework originalism").

339 *Id.* at 22, 3307; *see also id.* at 275–78 ("Constitutions are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future decision-making but to enable it. The job of a constitution, in short, is to make politics possible.").

340 *Id.* at 479–80 ("Thus, choosing a standard or principle normally means that adopters are delegating the task of application to later generations."); *id.* at 162 ("And where the text offers an abstract standard or principle, we must try to determine what principles underlie the text in order to build constructions that are consistent with it.").

341 *Id.* at 165–66 ("Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be worked out and implemented by later generations.").

cannot correct any mistakes or oversights it might have made. Some of the executive obligations at issue are tightly linked to some of the most critical motivations for establishing a “more perfect Union.”³⁴² Article IV mandates that “[t]he United States . . . shall protect [each state] against Invasion” and upon request, “against domestic violence.”³⁴³ These obligations might arise urgently at the onset of a short break that the Senate did not contemplate as an appointment-enabling recess, such as a weekend. They might also require executive-branch appointments. It is reasonable under these circumstances for the President to note that the Senate break is within the definition of the relevant constitutional text, “recess;” consider the principles underlying the Recess Appointments Clause, principally the importance of ensuring that the President can meet federal obligations when the Senate is not available and permitting the Senate to take breaks without disrupting the federal government’s functioning, as well as the backdrop of constitutional obligations such as defending the states;³⁴⁴ and conclude that the Senate break qualifies as an appointment-enabling recess under the Constitution. This is the method of “text and principle” in action.

To a lesser extent, the courts might also have a role in building out the Clause, as arbiters of intractable conflict between the other branches or as guardians of the text’s outer boundaries, ensuring that neither political branch stretches the text beyond plausibility. This vision, in which the Constitution establishes a basic framework that future actors, largely the political branches, will build upon and implement by appealing to principles underlying the text, is a good illustration of Living Originalism.

Finally, it is noteworthy that, to the Living Originalist, adherents to the technical position are actually engaging in Living Originalism. The technical position is based principally on a narrative about original expected application. It is also based on a principle that its proponents argue is embedded in the Clause—ensuring maximal Senate participation in appointments. The appeal to principle plainly meets Living Originalism’s method of “text and principle.”

To the Living Originalist, original expected application is a tool of construction that might help us understand original meaning of text

³⁴² U.S. CONST. preamble.

³⁴³ *Id.* at art. IV, § 4.

³⁴⁴ *Cf.* BALKIN, *supra* note 292, at 3310 (“Because the Constitution as a whole is a plan for politics, we do not look at a particular text or clause in isolation but try to view the Constitution holistically, as a coherent project of governance—or one that at least strives for coherence.”).

or the principles underlying it. But the inquiry into original expectations should not be confused with an inquiry into original meaning; nor should original expectations be viewed as binding. What is binding is the text itself, and here the text is far more general than the technical position holds. Indeed, it is the very generality of the word “recess” that enables appeals to original expected application.

In other words, Living Originalism is the most descriptively accurate of the originalist theories. It aptly characterizes the bulk of analysis of the Recess Appointments Clause, with the curious exception of the *Noel Canning* majority’s ten-day and three-day minimum durations of recesses.

E. Judicial Construction and Recess

Although interpretation does not yield a limit on the meaning of “recess,” it also does not rule out the possibility that some limit might have existed (aside from the technical position) or that some limit is advisable. One common concern with an ordinary, general meaning of “recess” is that the President could use broad recess appointment power to circumvent the Senate by making an appointment during an overnight or weekend break. Perhaps, then, appointment-enabling recesses have (or should have) a minimum duration. The evidence on original intent or expectations does not support that conclusion; however compelling the possibility of presidential abuse might seem to modern observers, we have no evidence that the Framers’ shared it, and we have some reason to believe they did not. The Framers appear to have expected public officials to act with more “decorum” than some recent Presidents and senators have shown,³⁴⁵ and they expected the Senate to confirm presidential nominees in all but extraordinary cases.³⁴⁶ That belief would obviate the need to prevent the President from abusing the recess appointment power. But this evidence on original expectations does not rule out the possibility of limits on the word recess, and one might choose to engage in construction to derive one. Below, this Article first considers whether a limiting construction is necessary or advisable, then examines possible constructions.

³⁴⁵ Cf. 4 ELLIOT, *supra* note 48, at 134 (questioning by Iredell, asking, “[s]uppose a man nominated by the President; with what face would any senator object to him without a good reason? There must be some decorum in every public body.”).

³⁴⁶ See *supra* text accompanying notes 81–82.

1. *The Need for Constructions of Recess*

The principal policy concern driving narrower interpretations of “recess” is that, under broader readings, the President might abuse the appointment power and circumvent the Senate by making appointments during any break, however short or insignificant. Attorney General Knox first raised this concern in 1901, suggesting that to permit intra-session recess appointments would be to permit unilateral appointments over a mere weekend.³⁴⁷ In more recent years, some have come to believe that abuses have rendered the Clause a source of intractable conflict between the President and the Senate that requires resolution by the courts.

Before the courts attempt to remedy these problems with a limiting construction of “recess,” it is worth investigating the need more thoroughly. The record suggests that the concern regarding presidential abuse may be overblown, and the President and the Senate are negotiating the Clause’s application reasonably well. This is particularly true if one considers the Senate *majority*, the relevant Senate body for purposes of the Clause, rather than the minority. There is good reason to do so. Under Senate rules, a simple majority of senators control the decision to adjourn, and therefore a simple majority can choose to enable or block recess appointments by deciding whether and how to adjourn.³⁴⁸ Moreover, the Senate recently changed its rules to eliminate filibusters of all nominees except those to the Supreme Court,³⁴⁹ meaning that the Senate itself has chosen simple majority rule for nearly all appointments. A future Senate majority will likely adopt the same rule for Supreme Court nominees as soon as one is filibustered. This shift to simple-majority voting on nominees may end the problem of controversial recess appointments, for the principal reason Presidents made them was to circumvent obstruction by minority-party senators.

Even if not for the Senate rule change, the record shows little cause for concern over presidential abuse; nor does it suggest that conflict over the Clause between the political branches is intractable, requiring a judicial reponse. Since 1979, when intra-session recess

³⁴⁷ See 23 Op. Att’y Gen., *supra* note 99, at 603.

³⁴⁸ See Arkush, *supra* note 2, at 5–6 (“Senate rules, in turn, place power to initiate recesses in the hands of a simple majority. . . . The upshot of these rules is that a simple majority of senators can initiate a recess, intersession or intrasession, at any time.”).

³⁴⁹ See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?pagewanted=all&module=Search&mabReward=relbias%3A&_r=0.

appointments began their sharp rise, no President has made one during a recess of fewer than ten days.³⁵⁰ Apparently, then, there is little reason to fear weekend or overnight appointments. One possible exception, of course, is President Obama's 2012 decision to make appointments during a break that ranged from three days to several weeks, depending how one defines "recess."³⁵¹ But Obama's appointments appear to have had Senate majority support,³⁵² which sharply diminishes the constitutional or democratic concerns that they might raise.

Indeed, majority support for recess appointments is the norm. Since 1979, Presidents have made 231 intra-session recess appointments when their allies controlled the Senate and 109 when the opposition did.³⁵³ Of the 109 appointments made during opposition-controlled senates, of course, only a small fraction were controversial. The vast majority of President George W. Bush's and all of President Obama's intra-session recess appointments had Senate majority support.³⁵⁴ Bush made fourteen intra-session recess appointments in 2001 and 2002, when Democrats controlled the Senate. When Republicans gained control, he doubled his pace, with 118 appointments from 2003 to 2006, an average of nearly thirty each year.³⁵⁵ But when Democrats regained control of the Senate, Bush made just four

350 For the years 1981–2013, see HENRY B. HOGUE, CONGRESSIONAL RESEARCH SERVICE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 7 (2013). The shortest intersession recess during which a President made appointments was eleven days. *See id.* For the year 1979, see Brief for the Petitioner at 31a, *Noel Canning v. NLRB*, No. 12-1281 (U.S. Sept. 13, 2013) (listing appointments and dates) and CONGRESSIONAL DIRECTORY, *supra* note 10, at 531–38 (listing dates of intra-session recesses).

351 *See* Brief for the Petitioner, *supra* note 350, at 64a (listing the appointees and dates of appointment).

352 *See* Arkush, *supra* note 2, at 2–3 (“It is uncontroversial that the Senate majority has generally supported the President’s nominees, and the most plausible inference is that the majority also supported his recess appointments.”).

353 Except where otherwise noted, the source for this section’s facts on intra-session recess appointments is data on file with the author. The data was compiled by combining information from HENRY B. HOGUE ET AL., CONGRESSIONAL RESEARCH SERVICE, THE NOEL CANNING DECISION AND RECESS APPOINTMENTS MADE FROM 1981–2013 (2013); Brief for the Petitioner, *supra* note 350, and U.S. Senate, *Party Division in the Senate, 1789–Present*, SENATE.GOV, http://www.senate.gov/pagelayout/history/one_item_and_teasers/party_div.htm.

354 Obama made twenty-two intra-session recess appointments in 2010 and four in 2012. Data on file with author.

355 President George W. Bush made multiple controversial intra-session appointments during the first three-quarters of his presidency. *See* HOGUE, *supra* note 350, at 10 (noting appointments of William H. Pryor and Charles W. Pickering to United States Courts of Appeals); Jim VandeHei & Colum Lynch, *Bush Names Bolton U.N. Ambassador in Recess Appointment*, WASH. POST (Aug. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/01/AR2005080100436.html>.

more intra-session recess appointments before the new majority attempted to stop him by holding “pro forma” sessions in which a single senator gavel the Senate in and out of session once every three days.³⁵⁶ The gambit worked. Rather than test whether the Senate could lawfully use pro forma sessions to block recess appointments, Bush declined to make any more.³⁵⁷ This episode arguably ended the practice of making recess appointments over Senate majority opposition. In that case, the worst practice regarding intra-session recess appointments—making controversial appointments over Senate-majority opposition—arose under President H. W. Bush in 1991 and disappeared by 2007.³⁵⁸

In summary, the Senate has been well on its way toward ending the recess appointments controversy since late 2013, when it adopted simple-majority voting for nominations. Even before then, the most controversial type of recess appointments ceased in 2007, possibly never to resume. In 2007, the Senate majority and the President set a precedent that the Senate majority can hold pro forma sessions to block intra-session recess appointments that it opposes. No President has tested that limit. Although President Obama made appointments during a recess between pro forma sessions in 2012, the Senate majority shared his political party and appears to have supported his appointees. The pro forma sessions were not chosen by the Senate majority, but rather forced by the House. If all that remained of the intra-session recess appointment controversy was a practice of making appointments to circumvent obstruction by the Senate minority—or for that matter, by the House of Representatives, as in the case of the 2012 appointments—then it is not clear that the practice would present significant constitutional or democratic concerns. More likely,

356 See HOGUE, *supra* note 350, at 11.

357 *See id.*

358 All of Carter and Ronald Reagan’s “controversial” intra-session appointments were made when the Senate shared their respective political parties. Reagan made three intra-session appointments in 1988, but they do not appear to have been controversial. President H. W. Bush began making controversial appointments over a Democratic Senate majority in 1991, with an appointment to the Legal Services Corporation. *See Carrier, supra* note 108, at 2215–16 (“Both the Ashley appointment and the Legal Services Corporation controversy[, which resulted from his making eleven recess appointments] suggest that Bush’s legal advisers viewed the clause as an offensive weapon in tilting the balance of power between the President and the Senate—by evading Senate confirmation procedures – rather than as a supplement to the general appointment power – in filling vacancies when the Senate could not provide its confirmation.”). He continued making such appointments throughout his term, including some just before he left office. *Id.* at 2204–05 (discussing the recess appointments he made two weeks before leaving office).

even less remains, as the Senate has changed its rules to permit simple majority approval for most appointments.

2. *Constructions of Recess*

The preceding discussion suggests that there is probably no need for the courts to adopt limiting constructions of the Recess Appointments Clause. But for one who perceives a need to limit the meaning of “recess” in some manner, this Subpart offers four reasonable answers. The first two adhere closely to the interpretive evidence, while the latter two engage more extensively in construction.

a. *Senate Control*

First, one could hold that the Senate has authority under the Rules of Proceedings Clause to define with binding force the terms “recess” and “session,” so long as it stays within the broad boundaries of the ordinary meanings of the words. Under this theory, the Senate could protect itself from presidential abuse. A shortcoming, of course, is that the President would have no relief from Senate obstruction, aside from a judicial decision that the Senate has violated the separation of powers or exceeded the boundaries of what “recess” could possibly mean.

Additionally, one must answer how the Senate adopts its views as a procedural matter. Must it make an official, affirmative statement, explicitly defining them in rules or a resolution, or can it refine the meaning of “recess” and “session” implicitly through practice? If the former, then the Senate appears not to have defined the words. If the latter, then one could argue that the Senate has accepted that “recess” includes intra-session breaks, as it has recognized intra-session recess appointments as valid for decades. One could also argue that the Senate has drawn a lower boundary for the duration of appointment-enabling recesses. They must be longer than three days, at least when the Senate majority is exercising its prerogative to control its recesses. This rule is derived from the Senate’s 2007–2008 practice of holding pro forma sessions to block appointments. The Senate majority plainly did not want the President to make appointments during the recesses between pro forma sessions at that time.³⁵⁹

³⁵⁹ See *supra* text accompanying notes 356–57. Note, however, that the pro forma sessions at issue in *Noel Canning* are a special case because the Senate majority did not want to hold them. Rather, the House of Representatives refused the Senate permission to adjourn for more than three days, and as a result the Senate majority believed it had no choice but to

Less clear is whether the Senate believed that recesses must be longer than three days as a matter of law, merely hoped that a court would adopt that position, or expected its pro forma sessions to have more political than legal impact. Under the “Senate control” view, the Senate simply has the power to make the relevant law.

b. Ordinary Meaning Plus Politics

Under a second theory, one could hold that “recess” retains its broad, ordinary meaning and that the President’s and the Senate’s actions under the Clause are limited primarily, if not exclusively, by the political process. At first glance, this position appears to be in tension with the Rules of Proceedings Clause. But one can reconcile the two by holding that although the Senate can define “recess” and “session” for purposes of the Recess Appointments Clause, its decisions are not judicially enforceable. Under this view, the Senate has interpretive authority, but it is political rather than legal. Another possibility is to hold that the joint nature of appointment power re-

hold pro forma sessions if senators wished to go home for the holidays. See Arkush, *supra* note 2, at 2–3, 6–7 (discussing whether the House has authority to block recess appointments and the fact that the Senate felt forced to hold pro forma sessions as a result of the House’s actions). One could argue that, having established a practice that the breaks between pro forma sessions do not constitute “recesses,” the President and Senate majority were bound by that practice in 2012. But the result would be perverse: a holding, justified by the Senate’s control over its own proceedings, that pro forma sessions forced by the House dictate whether the Senate is in recess.

Moreover, the House’s actions were probably unconstitutional. See Arkush, *supra* note 2, at 6–7 (discussing “reasons to doubt that” the House has authority “to block recess appointments”). It purported to act under the Adjournments Clause, which affirmatively grants each house the ability to block the other from adjourning for more than three days. U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”). But it is unlikely this power extends to interference with appointments. Article II clearly assigns appointment power to the President and the Senate. It grants the House a single role: the ability to join the Senate in passing legislation that authorizes the President to make unilateral appointments of inferior officers. *Id.* at art. II, § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”). It is unlikely that the Adjournments Clause operates as a back-door means for the House to interfere in matters assigned to other branches. Moreover, the Adjournments Clause operates “during the session of Congress,” *id.* at art. I, § 5, cl. 4, whereas the Recess Appointments Clause turns on *Senate* sessions and recesses. *Id.* at art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the *Recess of the Senate*, by granting Commissions which shall expire at the End of *their next Session*.”) (emphases added). It makes sense for the Adjournments Clause to operate when the two houses of Congress have joint business, “the session of Congress,” but not with respect to the Senate’s own business.

quires recognizing a limited exception to the Rules of Proceedings Clause and permitting the President some role in deciding when the Senate is in recess.³⁶⁰ In either case, politics remains the primary limitation on the Clause so long as the courts largely leave controversies over recess appointments to the political branches.

c. A “Work Periods” View

A third possibility is that the Clause embodies a concept of recess that is narrower than “any break” but still much broader than the technical position. The best candidate is the break between what the modern Senate refers to colloquially as “work periods.”³⁶¹ A work period is any period of legislative business between a break of one or more weeks. The Senate in fact calls these breaks “recesses,” often using more specific names like “the Easter recess”³⁶² or “the August recess.”³⁶³

Recall that, in the ratification era, New Jersey and Massachusetts used different nomenclature for the same underlying concepts. New Jersey called each period of legislative business a “sitting,” while Massachusetts called it a “session.” To someone drawing distinctions between recesses based on official sessions, an identical recess would have been “intra-session” in the former and “inter-session” in the latter. This arbitrary variation is why the Framers did not likely make “recess” turn on official Senate sessions, particularly without defining that term or prescribing Senate practice. More likely is that the Framers had in mind a general *concept* that encompassed the breaks between New Jersey “sittings” and Massachusetts “sessions.” That concept, in colloquial Senate parlance, is the recess between work periods. It is characterized by senators taking a break from the ordinary

³⁶⁰ This is a variation on the President’s *Noel Canning* argument.

³⁶¹ See, e.g., 159 CONG. REC. S7563 (daily ed. Oct. 28, 2013) (statement of Sen. Maj. Leader Harry Reid, *Upcoming Work Period*), (“This work period is going to be 4 weeks long. We have a great deal to accomplish during this 4-week period and it will go by quickly During this next work period, the only time we will have off will be November 11 for the celebration of Veterans Day. Therefore, if we are going to finish our work in this 4-week period, that means we are going to have to work on Mondays and Fridays. I hope we don’t have to work weekends, but we have to get this work done.”).

³⁶² See, e.g., Erik Wasson & Bernie Becker, *Senate Democrats Strain to Get Budget Over Finish Line by Easter Recess*, THE HILL (Mar. 11, 2013), <http://thehill.com/blogs/on-the-money/budget/287237-senate-dems-straining-to-get-first-budget-in-four-years-over-finish-line>.

³⁶³ See, e.g., Ramsey Cox, *Durbin Releases 2013 Senate Calendar*, THE HILL (Nov. 30, 2012), <http://thehill.com/blogs/floor-action/senate/270365-durbin-releases-2013-senate-calendar> (“The August recess will last for slightly more than a month, going from Aug. 5 to Sept. 6, 2013.”).

course of legislative business practice and leaving town for some period of time—a sensible trigger for recess powers. Indeed, the technical, “inter-session” position has been justified largely by the narrative that the Framers thought inter-session recesses were the only significant breaks that Congress would take.³⁶⁴ But the record provides little basis to conclude that the Framers held or implemented that view.³⁶⁵ A less ambitious and more plausible assumption about the Framers’ expectations, if one chooses to speculate about them, is that they meant to confine recess appointments to breaks of some significance, when legislators may be unavailable because they are not in the midst of a work period, without claiming that the Framers predicted exactly what form those breaks would take. The “work periods” view would preclude recess appointments on nights or weekends. Rather, the appointment power would be triggered when the Senate takes a recess from a general *period* of business.

To the extent one is motivated by the Senate’s authority to define its sessions and recesses, or by historical precedent, then it is noteworthy that the work period concept of “recess” is consistent with what the contemporary Senate calls recesses, as well as its practice of accepting appointments during intra-session recesses in the Johnson Administration and from the Truman Administration to the present. It is also consistent with Attorney General Wirt’s 1823 intuition that appointments should not be made over a weekend,³⁶⁶ Attorney General Daugherty’s 1921 view that an appointment-enabling recess should likely be more than five to ten days long,³⁶⁷ and more contemporary views that perhaps a recess must be longer than three days.³⁶⁸ Indeed, the work period view is also consistent with the Senate’s attempts to use pro forma sessions to block appointments in 2007 and 2008. The three-day break between pro forma sessions is shorter than the typical recess between work periods. It comes closer to approximating a weekend, which in the Senate often spans three or four days rather than two.³⁶⁹ For all of these reasons, the work period view may be the longstanding consensus position on “recess” dating

364 See *supra* text accompanying notes 188–91.

365 See *supra* text accompanying notes 199–204.

366 See 23 Op. Att’y Gen., *supra* note 99, at 603.

367 See *supra* text accompanying notes 110–11.

368 See *supra* text accompanying note 177.

369 It is common for the Senate not to work on Monday, Friday, or both. See, e.g., *Days in Session Calendars, 113th Congress 1st Session*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/ds/h1131.html> (showing the days that the Senate is in session during the 2013 calendar year, which often excludes many Mondays and Fridays).

back to the Framers themselves, even though it has never been precisely articulated.

The work period view satisfies the Recess Appointments Clause's pragmatic purposes better than the technical position, providing a means for the President to make appointments when the Senate is away and for the Senate to leave Washington more frequently without needing to return to consider nominees. As a result, it also better satisfies specific values that likely motivated the Framers, such as the need for military responsiveness. Under the work periods view, if the President needs to make emergency appointments in response to the attack on the country while the Senate is away on a long "intra-session" recess, the appointments would have been constitutional. By contrast, under the technical position, the appointments would have been unconstitutional, leaving the President unable to fulfill one of the federal government's principal purposes and leaving the nation at risk.

Note that under the work periods view, if one holds that "recesses" and "sessions" are mutually exclusive, then a recess appointment would expire at the end of the Senate's next work period. The typical recess appointment would last roughly four to eight weeks. This arrangement might sound implausible initially. But recall that from the founding until recent years, the Senate was expected to confirm most nominees. If one holds that view, and the Framers appear to have held it,³⁷⁰ then short terms for recess appointees present little problem, for the Senate can simply confirm them during its next work period. In the rare case, it might reject one. But if one presumes that the Senate will reject an appointee only for good cause, then it is all the better for the appointee to have had a short term. However, it is not obvious that "recess" and "session" are mutually exclusive, and Senate practice does not treat them that way. The Senate has accepted appointments made during "intra-session" recesses but adhered to the common understanding that the terms of appointees last until the end of the Senate's next formal session.

d. Work Periods Plus

A final construction would supplement the "work periods" view with allowances for practical necessity. Under this theory, a legislative break would constitute a "recess" if it falls between Senate work periods or if the Senate is actually unavailable and the President needs to

³⁷⁰ See *supra* text accompanying notes 81–82.

make appointments urgently. To give the most extreme example, if the Senate merely stepped out for lunch and downtown Washington was annihilated by a nuclear attack, the President could make recess appointments to replace important officers quickly rather than wait for the Senate to be reconstituted and to consider nominations. This construction best serves the main principle underlying the Clause—ensuring that Senate unavailability does not unduly hamper the federal government’s ability to meet its constitutional obligations.

V. NOEL CANNING, ORIGINALISMS, AND THE RECESS APPOINTMENTS CLAUSE

A. *Noel Canning and Originalism*

The role of originalism in the majority and concurrence is in some ways precisely what one would expect, given the author of each opinion: Justice Stephen Breyer’s majority opinion makes a point of asserting that precedent and tradition can trump original meaning, while Justice Scalia’s dissent-like concurrence stridently claims to adhere to original meaning. What is perhaps surprising is that despite its disclaimer regarding the authority of original meaning, the majority comes much closer than the concurrence to respecting the original meaning of “recess,” and likely “happen” as well. The majority opinion largely reads the Clause correctly. But its argument would perhaps be stronger if it were more firmly grounded in Living Originalism—in “text and principle” rather than what we might call an ad hoc mixture of precedent, pragmatism, and deference to politics.

The majority comes much closer than the concurrence to respecting the original meaning of “recess” because, despite its point regarding precedent and tradition, it takes care to ensure that its analysis falls within the bounds of the text.³⁷¹ It recognizes that the meaning of “recess” is broad and that it does not rule out any particular type of break.³⁷² Beyond this point, the majority opinion uses multiple analytic tools—precedent, purpose, pragmatism, and deference to politics. It relies on precedent, purpose, and deference to the political branches in establishing a ten-day presumptive minimum for recesses, noting that limiting the Clause to inter-session recesses would “frustrate its purpose” and citing apparently “settled practice” of the polit-

³⁷¹ NLRB v. Noel Canning, No. 12-1281, slip op. at 21 (U.S. June 26, 2014).

³⁷² *Id.* at 21 (“[W]e conclude that the phrase ‘the recess’ applies to both intra-session and inter-session recesses.”).

ical branches accepting intra-session recess appointments.³⁷³ It also reasons that because no President has ever made an appointment during a recess shorter than ten days, appointments “[are] not needed in that context.”³⁷⁴ The majority then notes an exception to the ten-day minimum for “very unusual circumstance[s]” such as a “national catastrophe,”³⁷⁵ apparently as a pragmatic means to ensure that the federal government can meet its responsibilities even during unprecedentedly short and (therefore presumptively non-qualifying) recesses. Finally, the majority announces a three-day, hard floor on qualifying recesses, holding that a three-day recess is constitutionally *de minimis*.³⁷⁶ It appears to justify this conclusion in part by deference to the political branches—the Solicitor General conceded that three days was too short³⁷⁷—but also by a loose analogy to the Adjournments Clause, which states that either house of Congress must obtain the other’s consent before adjourning for more than three days.³⁷⁸ Implicit in the absence of any exception to the three-day floor is a pragmatic judgment that the President should not need to make recess appointments during so short a break.

Some aspects of the majority opinion could be characterized as Living Originalist. Its analysis of the recess questions begins with text and purpose. It observes that the phrase “the recess” was used in the ratification era to signify intra-session as well as inter-session recesses,³⁷⁹ and it also notes that the principle underlying the text—allowing unilateral appointments “so that the President can ensure the continued functioning of the Federal Government when the Senate is away”³⁸⁰ applies to both inter and intra-session recesses. The majority’s analysis of “happen” is largely Living Originalist as well. It notes that the text supports either reading of the word, even though the “arise” reading is more natural,³⁸¹ and it reasons that the narrow read-

373 *Id.* at 16.

374 *Id.* at 20.

375 *Id.* at 21.

376 *Id.* at 20 (“The Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business. As the Solicitor General says, it is constitutionally *de minimis*.”).

377 *Id.* at 19–20 (“As the Solicitor General says, it is constitutionally *de minimis*.”).

378 *Id.* (“The Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business.”).

379 *Id.* at 9–10 (“The Founders themselves used the word [recess] to refer to intra-session, as well as to inter-session, breaks.”).

380 *Id.* at 11.

381 *Id.* at 22 (“We believe that the Clause’s language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural mean-

ing of the word happen could do more to damage to the Clause's purpose by preventing the President from making appointments, "no matter how dire the need," "how uncontroversial the appointment," or "how late in the session the office fell vacant."³⁸² It also notes that its reading is consistent with longstanding historical practice and the apparent agreement of the political branches.³⁸³

By contrast, the latter aspects of the majority opinion on "recess"—the ten-day presumptive minimum, the pragmatic exception to that presumption, and the absolute three-day floor—are driven by an assortment of analytic tools and rationales. In each case, the majority's argument or conclusion could be improved by the application of Living Originalist method. First, there are Living Originalist grounds on which to support the majority's ten-day minimum and the pragmatic exception to it. Historical evidence and the principles underlying the Clause suggest that what fits best with the constitutional framework, and what the Framers likely expected, is that the Clause would typically enable unilateral appointments during Senate breaks of some significance (a concept similar to what the majority calls recesses of "substantial length").³⁸⁴ The most obvious candidate for a break of significance is what this Article has identified as the break between "work periods," a concept that embraces both intersession and intra-session recesses of significance at the time of the framing and that corresponds roughly to a minimum of ten days, as well as to what the Senate refers to as recesses.³⁸⁵ Indeed, the likely reason why this definition corresponds almost perfectly to the ten-day minimum that the *Noel Canning* majority derives from political-branch precedent is that the modern Senate and the President have been implicitly following the "work period" view. In fact, the same was probably true at the time of President Andrew Johnson's appointments.

The majority is right to sense that the Clause's broad text and its underlying principles are in tension with forbidding unilateral appointments during any break when they are genuinely needed and the Senate is unavailable, even if the break in question does not fit typical expectations for appointment-enabling recesses. For this rea-

ing of "happens" as applied to a "vacancy" (at least to a modern ear) is that the vacancy "happens" when it initially occurs.").

382 *Id.* at 26.

383 *Id.* at 26–33 (discussing the practices of George Washington, John Adams, and Thomas Jefferson and the lack of Senate hostility to presidential appointments).

384 *Cf. id.* at 9 ("All agree that the phrase 'the recess of the Senate' covers intersession recesses.").

385 *See supra* text accompanying notes 361–63.

son, the majority's exception for "unusual circumstances" is amply justified by text and principle. For the same reason, the same cannot be said for its absolute three-day floor. The text is broader; as the majority recognizes, ratification-era dictionaries "define the word 'recess' much as we do today, simply as 'a period of cessation from usual work.'"³⁸⁶ And the reasoning behind the "unusual circumstances" exception applies to three-day breaks as well as three to nine-day breaks. The drafters and ratifiers did not establish a minimum duration of recesses, and any such limit runs the risk of subverting the Clause's core purpose in a time of grave national need.

Despite claiming to follow original meaning, the concurrence's analysis is deeply flawed, as it largely mirrors the incomplete and mistaken originalist scholarship that this Article discusses. Like that scholarship, the concurrence engages in construction (rather than interpretation) to reach a definition of "recess" that is narrower than the word's original public meaning. The concurrence supports its construction mainly by appeals to original expectations and the principles underlying the text, but these arguments are unpersuasive because they have weak evidentiary support: the concurrence relies on the counter-factual inter-session expectations narrative³⁸⁷ and ignores important expected applications such as prompt and effective federal military responses to foreign invasion and domestic rebellion.³⁸⁸ It also credits a strained and unpersuasive attempt to dismiss evidence that legal actors around the time of the Andrew Johnson Administration were not concerned about the intra-session nature of many of his recess appointments.³⁸⁹

The concurrence's discussion of "happen" is similarly flawed. It ignores contrary evidence from ratification-era dictionaries and usage, even stating that "no reasonable reader" would have understood "happen" in the "exist" sense,³⁹⁰ despite that Thomas Jefferson used the word that way.³⁹¹ It also relies credulously on constructions by ear-

³⁸⁶ *Noel Canning*, slip op. at 9.

³⁸⁷ *See id.* at 8 (Scalia, J., concurring) ("In the founding era, the terms 'recess' and 'session' had well-understood meanings in the marking out of legislative time. . . . By contrast, other provisions of the Constitution use the verb 'adjourn' rather than 'recess' to refer to the commencement of breaks during a formal legislative session.").

³⁸⁸ *See supra* text accompanying notes 208–15.

³⁸⁹ *See Noel Canning*, slip op. at 17–18 (Scalia, J., concurring) (finding that "the precise nature and historical understanding of many of [the Johnson] appointments is subject to debate").

³⁹⁰ *Id.* at 28.

³⁹¹ *See id.* at 22 (majority opinion) ("Jefferson used the phrase in the [exist] sense when he wrote to a job seeker that a particular position was unavailable . . ."); *supra* text accompanying note 248.

ly legal actors who appear to have been politically motivated, like Edmund Randolph.³⁹² And it invokes a partial and flawed account of the principles and original expectations underlying the Clause, emphasizing the need to prevent the President from side-stepping the Senate³⁹³ while giving short shrift to the Clause's primary purpose of ensuring that the federal government fulfill its functions and failing to credit evidence that the Framers expected both branches to act reasonably.³⁹⁴ Instead of citing evidence, the concurrence merely states that it is "unthinkable" that ratifiers would have overlooked the perils of a permissive appointment policy.³⁹⁵

B. Originalisms and the Analysis of the Recess Appointments Clause

It is common among many originalists that the meaning of most constitutional text, and particularly the "structural constitution," can be ascertained as a matter of objective fact.³⁹⁶ The sharp disagreement between this Article's and other originalist analyses poses a challenge to claims regarding objectivity in originalist interpretation. One response, of course, is that everyone makes mistakes, and that as a result we can expect to observe occasional disagreement even on matters of objective fact. That response is surely correct. But here, regarding the word "recess," if not "happen," one view has far more substantial grounding in textual evidence, the principles and purposes underlying the Recess Appointments Clause, and likely even the original expectations of the Framers. If "recess" has an objective meaning, then the technical position is mistaken. Even if one disagrees with that view, it remains that proponents of the technical position—whose ranks include prominent originalists—have failed to consider or respond to some of the most important evidence and ar-

392 See *Noel Canning*, slip op. at 30 (Scalia, J., concurring) (approvingly citing Randolph and stating that he "provided the Executive Branch's first formal interpretation of the Clause").

393 *Id.* at 29 (arguing that under the majority's view, "[w]henver there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*" and that [i]t is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates").

394 See *id.* (assuming that the Senate and President would be in conflict); see also *id.* at 34–35.

395 *Id.* at 29 ("It is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates.").

396 See, e.g., Solum, *supra* note 276, at 530 ("As I understand the position of the New Originalists (and I count myself as among them), most of the provisions of the Constitution are structural and have clear original meanings . . .").

gument. What is one to make of these lapses? This Subpart offers two initial suggestions.

1. The Difficulty of Establishing Narrow or Specialized Original Meanings

First is a simple but potentially useful point that appears to be underappreciated: it is difficult to establish a specialized original meaning of a general term. One cannot establish it with a handful of usage examples, as has been attempted with the technical position on “recess.” Those examples do not rule out other possible uses. Rather, to support a narrow meaning of a general term through usage examples, one must find an overwhelming number of the particular uses and none (or virtually none) to the contrary.³⁹⁷ An illustration will help make this point: imagine that one wishes to establish that “instrument” refers only to *musical* instruments. One cannot accomplish the task simply by citing a few (or even many) examples in which “instrument” was used to refer to a musical instrument. Despite these examples, the word also might have been used to refer to other objects that fall within the general word “instrument,” such as surgical equipment. Conversely, just a few examples in which “instrument” refers to something other than a musical instrument will deeply undermine the claim of narrow meaning. Better evidence, of course, would be a document that refers to many types of objects that are arguably “instruments” but uses that word to refer only to musical instruments. A single document of this type might still be the result of chance; several examples would look convincing. Better still, of course, would be texts that explicitly discuss when “instrument” is and is not apt, or ones that actually define it. Aside from dictionaries, documents like these will be rare. None of them exist to support the technical position on “recess.” The closest—and it is not very close—is the *OED*’s definition of “session,” which lists a technical meaning of *that* word, not “recess,” as a specific usage in English parliamentary practice.³⁹⁸ Even in that context, the *OED* notes that “session” is sometimes used more broadly.³⁹⁹ Had the difficulty of establishing specialized original meanings been more widely appreciated, then

³⁹⁷ I do not take a position on the dispute between Randy Barnett and John Balkin regarding the original meaning of the Commerce Clause, but Barnett’s work is a good example of attempting to undertake comprehensive research to establish a narrow meaning. See Barnett, *supra* note 3, at 416 (detailing comprehensive research that he argues yields overwhelming support for a particular reading of “commerce”).

³⁹⁸ See *supra* text accompanying notes 223–30.

³⁹⁹ See *id.*

perhaps the technical position on “recess” would have gained less traction in the first place.

2. *Methods of Objective Inquiry—and Originalist Claims and Disclaimers*

Claims regarding the Constitution’s original meaning can have great force in contemporary legal analysis, as they purport to flow from the highest authority in a textualist legal culture and to be objective in nature. This force no doubt helps explain why the technical position on “recess” gained influence so rapidly despite contradicting a longstanding consensus among all three branches of government. Not every claim about original meaning is given such a wide berth, of course, particularly not those that implicate complex and controversial questions of policy, political philosophy, ethics, or morality.⁴⁰⁰ Unlike those arguments, however, the technical position on “recess” involves a provision in which few people have an enduring interest or stake. Therefore, there is little reason to resist an apparently authoritative account of the word’s original meaning.

At the same time, originalist interpretation is not an easy task. There are countless sources one could (and arguably should) investigate, many of which are not readily accessible or easy to search, and it is not always clear how to weigh them. Few, if any, originalist accounts will examine *all* potentially relevant evidence. And despite claims of objectivity, as well as extensive research into the original meaning of particular language, disputes regarding original meaning are common. To be sure, there are instances in which the original public meaning of constitutional text can be established objectively, so to speak. There are standard examples, like that the President must be at least thirty-five years old.⁴⁰¹ Indeed, in these cases, the text’s meaning is so plain that no inquiry is necessary to resolve it, and no one disputes its meaning. Even prominent “living constitutionalists” like David Strauss agree that we must follow the letter of these provisions.⁴⁰² Beyond some core of text whose meaning we can readily treat as objective, whether due to the unanimous consent of all observers or some other means, originalists who seek objective answers to disputed text would do well to adopt a set of standards or methods to assure quality, rigor, and thoroughness in their analyses.

400 Cf. Barnett, *supra* note 3, at 420 (referring to his back-and-forth with Jack Balkin over the original meaning of “commerce”).

401 See, e.g., BALKIN, *supra* note 292, at 56.

402 See STRAUSS, *supra* note 3.

In other fields that seek objective answers, such as the “hard” sciences and social science, as well as in courts that attempt to establish facts, inquiries are guided by rules, standards, and methods geared to increase quality and reliability.

It is far beyond the scope of this Article to suggest methodological standards for originalist legal inquiry. It is perhaps a good test for originalism whether any such standards can be developed. If they cannot, then perhaps the notion of objectivity in original public meaning should be limited to those areas in which everyone can agree. Even that metric is one of consensus rather than objectivity itself—a mere absence of dispute. But this Article can suggest a modest initial step: originalist scholarship would benefit from a practice of providing a clear accounting of its scope and limitations. To the extent possible, originalist researchers should identify potentially useful sources that they did not examine and analyses that they do not conduct. Judges and scholars should exercise caution before relying on originalist scholarship that does not provide this type of accounting. Because of originalism’s special claim to authority, and the complexity of the enterprise, scholarly accounts of original meaning should be thorough.⁴⁰³ No less important, as few if any inquiries into original meaning can be complete, they should frankly acknowledge their limitations.

Here, then, are this Article’s accounts of its evidence and its disclaimers. Some are discussed above, but it is useful to collect them in a single place. This Article is based on textual analysis of the Constitution (the Recess Appointments Clause, the Rules of Proceedings Clause, the Senate Vacancy Clause, and the use of potentially relevant terms like “session” and “adjournment” elsewhere in the document), a survey of Johnson’s dictionaries and the *OED*, and a comprehensive examination of the usage of “recess,” as well as discussions of the Recess Appointments Clause’s purpose to the extent they exist, in the records of the Constitutional Convention and the ratification debates, ratification-era state constitutions, and the Federalist Papers. The Article relies on a few other sources, such as the records of the House of Commons, Blackstone’s *Commentaries*, Jefferson’s *Manual for the Senate*, some personal correspondence of the Framers, and some records of the *Pennsylvania Gazette*, and certain ratification-era state

⁴⁰³ Barnett has written that originalist research “should be as systematic and comprehensive as possible with respect to any source one surveys, reporting deviant as well as predominate usage.” Barnett, *supra* note 3, at 416.

statutes. It does not rely on a systematic or thorough study of these latter sources.

This Article also considers dictionary evidence on “session” and reads that word in the context of the Constitution and contemporaneous state legislative usage, but it does not adopt a firm position on the word’s meaning.⁴⁰⁴ It also contemplates a provisional view on “happen”⁴⁰⁵ but does not rely on an in-depth study of that word. Nor does it conduct a thorough study of other potentially relevant terms such as “adjourn,” “adjournment,” “intermission,” or “prorogation.” The Article does not undertake a comprehensive analysis of the Rules of Proceedings Clause. Finally, this Article does not offer a comprehensive view on the *Noel Canning* controversy. To evaluate that case, one would need a more complete account of the Recess Appointments Clause and should likely consider questions on which this Article barely touches, such as the constitutionality of filibusters of presidential nominees and House interference with the President’s and the Senate’s appointment powers.

CONCLUSION: ERASING THE RECESS APPOINTMENTS CLAUSE?

The recent willingness to read the Recess Appointments Clause narrowly appears to stem from two factors: a distaste for the presidential practice of using recess appointments to avoid Senate confirmation and a sense that the Clause has become irrelevant in an era of rapid communication and travel.⁴⁰⁶ Neither of these contemporary notions should influence one’s assessment of the Clause’s original meaning.

Presidents have typically used recess appointments to combat obstruction by Senate minorities, not majorities.⁴⁰⁷ Whatever the desirability of that practice, it does not clearly present a constitutional problem, as filibusters of nominees may have no more constitutional basis than intra-session recess appointments.⁴⁰⁸ Most recently, the Presi-

404 This Article’s view is that a settled meaning of “session” would not compel any particular meaning of “recess,” see *supra* text accompanying notes 218–20, but one might argue to the contrary.

405 See *supra* text accompanying notes 240–74.

406 See, e.g., *NLRB v. Noel Canning*, No. 12-1281, slip op. at 12 (U.S. June 26, 2014) (Scalia, J., concurring) (“The Recess Appointments Clause therefore is, or rather, should be, an anachronism—‘essentially an historic relic, something whose original purpose has disappeared.’” (citation omitted)).

407 See *supra* text accompanying notes 348–58.

408 See, e.g., Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 480 (2011) (“[T]he sixty-vote supermajority requirement in Senate Rule XXII is unconstitutional because it conflicts with the Constitution in seven ways.”).

dent used recess appointments to circumvent obstruction by the House of Representatives, which likely acted unconstitutionally when it attempted to interfere with appointments.⁴⁰⁹ Moreover, the Senate recently changed its rules to prevent most filibusters of nominees, which suggests that we may witness a sharp decline in the use of recess appointments to avoid Senate obstruction. When the Senate majority opposes the President's nominees, it can reject them. When it supports nominees, it can confirm them by simple majority vote, without interference by the minority. In short, there is little reason to let the filibuster and presidential responses to it guide our view of the Recess Appointments Clause.

The sense that the Clause is a needless anachronism requires more discussion. The idea is that, in modern times, if the President needs to make an appointment and the Senate is away, he can simply ask it to return quickly.⁴¹⁰ This is an unduly superficial take on the Clause. Both of its generally accepted purposes—enabling to President to make appointments when the Senate is unavailable and permitting the Senate to spend more time away from Washington—remain relevant despite the relative ease of travel. One can imagine circumstances in which the President needs to make appointments quickly and the Senate is not available, for example in the event of a military conflict or natural disaster.⁴¹¹ Indeed, if the Senate is ever away and unable to return quickly, it is more likely to be on an intra-session than inter-session recess, as the former are much more common. It would make little sense for the Constitution to bar the President from appointing replacements for officers killed by an enemy merely because an attack happens to have occurred during an intra-session rather than inter-session recess. Moreover, as communication and travel have hastened, so have world events that could give rise to a need for urgent appointments. There is no reason to assume that the speed at which the President and Senate can respond to crises has outpaced the speed at which they emerge.

409 See Arkush, *supra* note 2, at 6–7 (“The Constitution assigns virtually all authority over appointments to the President and the Senate . . .”).

410 *Id.* at 5 (“If the President needs to make an appointment and the Senate is out of town, the argument goes, he can call it back quickly.”).

411 The Framers were certainly aware that an invasion or domestic rebellion might prevent legislatures from acting, at least in the case of state legislatures. That is why they gave state executives, not just legislatures, the power to trigger federal aid in the Guarantee Clause. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 42, at 467 (“Mr. Dickinson moved to insert the words, ‘or Executive’ after the words ‘application of its Legislature’—The occasion itself he remarked might hinder the Legislature from meeting.”).

Even when the Senate is available and the United States does not face an imminent threat of violence, recess appointments may serve a useful purpose. Senators may simply wish to spend more uninterrupted time in their home states, as the Framers' republican theory prescribes.⁴¹² Perhaps someday Gary Lawson's, Randy Barnett's, or Justice Clarence Thomas's views of limited federal powers will prevail, and the Senate will choose to spend less time in Washington, holding brief semiannual or quarterly work periods with long intra-session recesses between them. Even if the Senate keeps with its current meeting practices, there will still be times when it is simply inefficient to call one hundred senators back to Washington to confirm a nominee whom a majority of senators would gladly permit the President to appoint unilaterally.⁴¹³

As for the Clause's original meaning, the ordinary tools of textual analysis strongly support a general reading of the word recess, and that reading is consistent with the Clause's widely accepted purposes. By contrast, the technical position finds little support from the Constitution's text or contemporaneous usage. It pencils in the word "inter-session" to force the Clause to conform to a twenty-first-century narrative about the Framers' expectations for Senate practice, and it transforms the Clause from a pragmatic tool for the President and the Senate to advance the national interest into, curiously, a bulwark against presidential usurpation. In the process, it effectively reads the Recess Appointments Clause out of the Constitution. By contrast, under a method that recognizes the text's broad original meaning and adheres to its underlying principles, the Clause remains a relevant and potentially valuable part of the constitutional framework.

⁴¹² See *supra* note 80.

⁴¹³ Note that the view that the President can quickly call the Senate back to confirm a nominee implies that the Senate would grant consent quickly. In that case, there is particularly little value in barring the Senate from permitting a recess appointment.