

## SUNDAYS EXCEPTED

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### I. INTRODUCTION

In the recent debates over the permissibility of religious displays in public courthouses, proponents of these displays have revived historical arguments that America is a Christian nation and that the Constitution is a Christian text.<sup>1</sup> Throughout the nineteenth century, courts considered Christianity

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1. See, e.g., JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 375–76 (1987) (pointing to the

part of the common law.<sup>2</sup> The long debate over the Christian origins of the Constitution led to the National Reform Association's campaign in the latter half of the nineteenth century for a constitutional amendment to declare the United States a Christian nation.<sup>3</sup> In 1892, Justice Brewer, writing for a unanimous court, declared that "this is a Christian nation."<sup>4</sup> The Christian nation thesis goes to the heart of how we understand the relationship between church and state. Originalist claims about the Constitution's Framers on this issue feature largely in contemporary debates about church-state relations.<sup>5</sup>

To support the Christian nation thesis, Brewer's *Holy Trinity* opinion drew on a number of historical sources and one textual source, Article 1, §7 of the United States Constitution.<sup>6</sup> The Sunday exception in the Constitution's Presentment Clause eliminates Sundays from the ten-day period provided for the President to consider a bill before signing it or returning it to Congress with his veto.<sup>7</sup> The grafting of a seemingly religious practice—

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Sunday exception as support for the Christian origins of the text); Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149, 152 (1990) (relying on the Christian nation maxim to argue that the United States considered itself a Christian country until the middle of the twentieth century).

2. See, e.g., *Vidal v. Girard*, 43 U.S. (2 How.) 127, 198 (1844) (relying on Christianity as part of the common law of Pennsylvania in upholding the lower court's invalidation of a contract formed on Sunday). See generally Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998) (discussing the historical role of Christianity in the common law).

3. See generally NATIONAL REFORM ASSOCIATION, MEMORIAL TO CONGRESS (1864), reprinted in AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 341–348 (William Addison Blakely ed., De Capo Press 1970) (1911) [hereinafter AMERICAN STATE PAPERS]; 3 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 583–92 (1950) (describing the National Reform Association's (NRA) activities and proposals for a Christian amendment in the 1860s through the 1880s).

4. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (documenting support, including the Sunday exception as well as evidence outside of the Constitution's text, for the proposition that "this is a Christian nation"). "[T]he Christian nation maxim generally stood for a culture in which Protestantism received preferential treatment and recognition in the political and legal arenas." Steven K. Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427, 431 (1999). Justice Brewer continued to expound his Christian nation thesis in speeches and in writings after the *Church of the Holy Trinity* decision. See, e.g., DAVID J. BREWER, THE UNITED STATES A CHRISTIAN NATION 57–65 (1905). But see *Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting) (criticizing Justice Brewer's Christian nation assertion as "arrogant").

5. In the 2005 case of *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), both sides argued that history supported their view of the Establishment Clause. Compare Brief for the Petitioners at 10, *McCreary County*, 545 U.S. 844 (No. 03-1693) ("[T]hat the Ten Commandments influenced American law and government can hardly be questioned."), with Brief for the Respondents at 41, *McCreary County*, 545 U.S. 844 (No. 03-1693) ("[H]istory demonstrates that American law is not rooted in the Ten Commandments.").

6. See *Church of the Holy Trinity*, 143 U.S. at 465–71.

7. The Presentment Clause reads in its entirety:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (*Sundays excepted*)

Sunday worship—onto the text of the Constitution helped convince Justice Brewer that America was a Christian nation.<sup>8</sup> Others have argued that the Sunday exception evinces the Founders' conception of the President as a Sunday Sabbath observer, most likely Christian.<sup>9</sup> These arguments conflict sharply with the Constitution's prohibition on religious tests as qualifications for national office and the provisions allowing officeholders to swear—on the basis of religious belief—or affirm—to secular authorities—their oaths to defend the Constitution.<sup>10</sup>

While the origins and the constitutionality of state Sunday Sabbath laws have received much attention in courts and in scholarly literature,<sup>11</sup> the origins of the Constitution's Sunday exception remain unexplored.<sup>12</sup> Indeed, as discussed below, the debates of the Constitutional Convention in Philadelphia provide hardly any hints as to the purposes of the Sunday exception.<sup>13</sup> A careful review of the almost forty state constitutions that contain Sunday exceptions—all enacted after the federal Constitution's Sunday exception—indicates they are silent as to the purpose of the exception.<sup>14</sup> Unlike the fre-

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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 prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

8. See *Church of the Holy Trinity*, 143 U.S. at 470–71.

9. See, e.g., Joel Hefley, *Congress and Religion: One Representative's View*, 20 NOTRE DAME J.L. ETHICS & POL'Y, 335, 341 (2006).

10. The religious oaths clause appears in Article VI of the Constitution and states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3. In three separate provisions, the Constitution permits members of Congress to affirm or swear fidelity to the Constitution. See *id.* art. I, § 3 (when the Senate is sitting for the purposes of impeachment); *id.* art. II, § 1, (President's oath); *id.* art. VI, cl. 3 (religious oaths clause for all officeholders).

11. See, e.g., *Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–11 (1985); *McGowan v. Maryland*, 366 U.S. 420, 431–53 (1961); Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675 (2000) (tracing the history of Sunday laws and challenges to those laws); Marc A. Stadtmauer, Essay, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L.J. 213 (1994) (discussing the history of New York's Sunday laws); Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729 (1960) [hereinafter *Religious Guarantees*] (evaluating the constitutionality of state Sunday laws).

12. One of the few discussions of the Sunday exception, Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996), describes the late nineteenth-century resurgence of arguments based on the Sunday exception that the Constitution enshrines Christianity.

13. See *infra* text accompanying notes 23–41.

14. Other states, including Georgia, have abandoned their Sunday exceptions. Compare GA. CONST. of 1861, art. III, § 2, pt. 6 (granting the governor “five days (Sundays excepted)” to consider a bill), with GA. CONST. of 1983, art. III, § 5, para. XIII (allowing the governor “six days”). Currently, at least thirty-four state and territorial constitutions contain a form of the Sunday exception in the grant of a veto power to the executive. See ALA. CONST. art. V, § 125; ALASKA CONST. art. II, § 17; ARIZ. CONST. art. V, § 7; ARK. CONST. art. VI, § 15; CAL. CONST. art. IV, § 10; DEL. CONST. art. III, § 18; IDAHO CONST. art. IV, § 10; IOWA CONST. art. III, § 16; KY. CONST. § 88; ME. CONST. art. IV, pt. 3, § 2; MD. CONST. art. II, § 17; MINN. CONST. art. IV, § 23; MISS. CONST. art. IV, § 72; NEB. CONST. art. IV, § 15; NEV.

quent challenges to state Sunday laws,<sup>15</sup> there has been no litigation about the meaning of the Sunday exception, which presents obvious standing problems.

This Essay offers a historical account of the Sunday exception and argues that rather than endorsing religious observance, the Sunday exception reflects two related principles: a deliberation principle and a federalism principle. First, the Framers afforded the President a ten-day period (Sundays excepted) for the consideration of bills; this was a longer period than those contained in the two state constitutions which granted an executive veto in 1787.<sup>16</sup> The ten-day period reflects the Framers' conception of a deliberative President, one who relied on advisors and collaborated with Congress in wielding his negative. Second, the Sunday exception reflects the fact that each of the thirteen colonies had Sunday laws (commonly called Blue Laws)<sup>17</sup> of various types at the time of the Constitutional Convention.<sup>18</sup> Many of these statutes prohibited labor and travel on Sundays.<sup>19</sup> Thus, in order for the President to deliberate and to call upon the aid of his advisors without violating these laws, the Constitution needed an exception from the brief period allowed for executive deliberation. By 1787, state legislatures and courts had already begun the gradual process of secularizing the justification for Sunday laws.<sup>20</sup> Consequently, the Sunday laws which

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CONST. art. IV, § 35; N.H. CONST. pt. 2, art. 44; N.M. CONST. art. IV, § 22; N.Y. CONST. art. IV, § 7; N.D. CONST. art. V, § 9; OHIO CONST. art. II, § 16; OKLA. CONST. art. VI, § 11; OR. CONST. art. V, § 15(b)(3); R.I. CONST. art. IX, § 14; S.C. CONST. art. IV, § 21; TENN. CONST. art. III, § 18; TEX. CONST. art. IV, § 14; VT. CONST. ch. II, § 11; WASH. CONST. art. III, § 12; W. VA. CONST. art. VII, § 14; WIS. CONST. art. V, § 10(3); WYO. CONST. art. 4, § 8. The territorial constitutions of Puerto Rico and the Virgin Islands follow this model. *See* P.R. CONST art. III, § 19; Revised Organic Act of the Virgin Islands, § 9(d), Pub. L. No. 83-517, 68 Stat. 497 (codified at 48 U.S.C. § 1575 (2000)). A Sunday exception also appears in some provisions governing legislative adjournment. *See* KAN. CONST. art. II, § 8; MINN. CONST. art. IV, § 12; N.M. CONST. art. IV, § 14. The West Virginia Constitution grants a Sunday exception for the governor's consideration of appropriations bills. *See* W. VA. CONST. art. VI, § 51(D)(11). The Wisconsin constitution grants a reprieve on Sundays for the exercise of county board vetoes. *See* WIS. CONST. art. IV, § 23a.

15. *See, e.g., McGowan*, 366 U.S. at 453 (rejecting the first in a series of challenges to state Sunday closing laws and holding that these laws did not violate the Establishment Clause); *Petit v. Minnesota*, 177 U.S. 164, 168 (1900) (holding that a state Sunday law did not violate the due process rights of barbers in refusing to permit an exception for barbering on Sundays); *Hennington v. Georgia*, 163 U.S. 299, 318 (1896) (upholding a Georgia statute that criminalized the transportation of freight trains on Sundays on the basis that it did not unconstitutionally burden interstate commerce); *Philadelphia, Wilmington, & Baltimore R.R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 217–18 (1860) (holding that the Sunday accident defense was invalid because such laws only define a duty of a citizen to the state).

16. Massachusetts provided the governor with five days to consider legislation with no Sunday exception. MASS. CONST. of 1780, ch. 1, § 1, art. II. The New York Constitution of 1777 gave its executive council a ten-day period, again with no Sunday exception, in which to veto a bill. N.Y. CONST. of 1777, art. III.

17. At least one account of the term "blue laws" attributes the name to the color of the paper on which the colonial laws of New Haven were printed in 1665. *See* DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS* 8 (1987).

18. *See generally id.* at 29–37 (reprinting in part the blue laws of each state at the founding).

19. *See id.*

20. This process would last for over a century. *See McGowan*, 366 U.S. at 487–91 (Frankfurter, J., concurring) ("The earlier among the colonial Sunday statutes were unquestionably religious in purpose . . . But even the seventeenth century legislation does not show an exclusively religious preoccupation . . .

the Sunday exception sought to avoid were not uniformly religious laws.<sup>21</sup> As a result, the federalism principle inherent in the Sunday exception does not support the Christian executive thesis.

This Essay proceeds in four parts. Part II discredits the notion that the Sunday exception supports the Christian nation thesis. It provides an account of the rather limited drafting history of the Sunday exception at the Convention in Philadelphia as well as the richer discussion of the Presentment Clause more generally. It describes the antecedent practices of the Continental Congress and the subsequent transmission of the Sunday exception into early federal statutes. It then explores the ways in which the Convention might have—but did not—enshrine a Christian President into the Constitution. Part III explains that the Sunday exception reflects a deliberation principle inherent in the Presentment Clause. Relying on coordinate clauses of the Constitution concerning executive power and the practice of early administrations, this Part roots the Sunday exception in the deliberative process of exercising the qualified veto. It concludes that the Framers envisioned a vast deliberative machinery at work during the ten-day period. Part IV describes the different types of Sunday laws extant in the colonies at the time of the Constitutional Convention. It further describes the secularization of the Sunday laws that was beginning as the Framers drafted the Sunday exception. It argues that federalism principles, rather than religious endorsement, animate the Sunday exception. Part V discusses the transmission of the Sunday exception to state constitutions and provides further support for the principles of deliberation and federalism found in an originalist view of the Sunday exception. The conclusion outlines the implications for understanding both the Framers' conception of the executive and the Christian nation thesis.

## II. THE ORIGINS OF THE SUNDAY EXCEPTION AND THE CHRISTIAN NATION THESIS

Justice Brewer relied on the Sunday exception in proclaiming America a Christian nation.<sup>22</sup> Originalist analysis shows that Brewer's reliance was misplaced. The drafting history of the Sunday exception does not provide conclusive proof that America is a Christian nation. Rather, the Convention debates, early federal practice, and the ratification debates offer a decidedly

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... In the latter half of the eighteenth century, the Sunday laws, while still giving evidence of concern for the 'immorality' of the practices they prohibit, tend no longer to be prefixed by preambles in the form of theological treatises."); *id.* at 491 n.59 (citing for support, among others, a 1785 New Hampshire law and a 1788 New York law). *See also* STOKES, *supra* note 3, at 167 (noting, in the 1950s, the shift in the motivation behind Sunday laws from religious to secular).

21. In 1673, the Rhode Island general assembly promulgated a Sunday ban with a preamble that indicated the assembly's intent "not to oppose or propagate any worship, but [to] prevent[] debaistness." A.H. LEWIS, *A CRITICAL HISTORY OF SUNDAY LEGISLATION FROM 321 TO 1888 A.D.* 196 (1888).

22. *See supra* note 4 and accompanying text.

different view: The founding generation eschewed the requirement of a Christian President.

A. *The Drafting History of the Sunday Exception at the Constitutional Convention*

The drafting of the Sunday exception at the Constitutional Convention produced a sparse record, although the Convention debated the broader contours of the Presentment Clause at length.<sup>23</sup> During initial discussions about the executive's veto power, Edmund Randolph offered a proposal for presentment to a Council of Revision composed of the Supreme Court and the President.<sup>24</sup> While the Convention rejected the idea of an executive council on the basis of separation of powers concerns,<sup>25</sup> this proposal provides important insights into the deliberation principle discussed in Part III.<sup>26</sup> Gouverneur Morris lobbied for an absolute veto power for the executive, one which could not be overridden by subsequent congressional action; however, this proposal also failed.<sup>27</sup> Having decided on a qualified or advisory veto,<sup>28</sup> the Convention then proceeded to debate the appropriate proportion of Congress required to override the veto and changed the proportion from three-fourths of both houses to two-thirds of both houses.<sup>29</sup>

The first draft of the Presentment Clause was introduced on August 6, 1787, in an early draft of the Constitution presented to the entire Convention by the Committee of Detail.<sup>30</sup> This draft borrowed heavily from the two

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23. For a general history of the early Presentment Clause, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION 183-85* (2005).

24. 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 622 (Jonathan Elliot ed., J.B. Lippincott Company 1941) (1836) [hereinafter *ELLIOT'S DEBATES*]. James Madison proposed a similar plan. 5 *id.* at 428.

25. The Convention rejected Madison's later proposal for a veto exercised by the executive and the Supreme Court on August 15, 1787, by a vote of three to eight. See EDWARD CAMPBELL MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT, AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES, 1789-1889*, at 21-22, 21 n.8 (Albert Bushnell Hart ed., Boston, Ginn & Co. 1890).

26. See *infra* text accompanying notes 66-107.

27. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 299 (Max Farrand ed., Yale University Press 1937) (1911) [hereinafter *FARRAND'S*].

28. See *id.* at 298-301.

29. The Committee of Style reported back a Presentment Clause and override requiring two-thirds, but the succeeding clause on overriding resolutions still required a vote of three-fourths. *Id.* at 594 n.10. On September 12, 1787, the Convention corrected this apparent scrivener's error and reverted back to a two-thirds requirement for both bills and resolutions. *Id.*

30. 5 *ELLIOT'S DEBATES*, *supra* note 24, at 378. The proposed Clause Thirteen of Article VI read much like the final version of the Presentment Clause:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of the other House

state constitutions that provided the executive with a veto on legislation—New York and Massachusetts—including their provision of a specific time period for the executive to exercise the veto power.<sup>31</sup> The Massachusetts Constitution of 1780 allowed the governor to consider a bill for five days, while the New York Constitution of 1777 afforded a ten-day period.<sup>32</sup> Neither document contained an exception for Sundays. However, both state constitutions announced the purpose of their specified time period for executive deliberation. The ten-day period was included “in order to prevent any unnecessary delays,” according to the New York constitution.<sup>33</sup> The Massachusetts constitution echoed this resolve.<sup>34</sup>

On August 15, 1787, the Convention returned to the issue of the presentment and veto procedure.<sup>35</sup> Shortly before the Convention adjourned for the day, “[i]t was moved” to change the seven-day period to a ten-day period with Sundays excepted—with no attribution to which delegate suggested the modification.<sup>36</sup> There was no debate recorded on the amendment.<sup>37</sup> It passed by a vote of nine to two, with New Hampshire and Connecticut as the only two nays.<sup>38</sup> The ten-day period and Sunday exception appeared in the draft of the Constitution reported out of the Committee of Revision on September 12, 1787.<sup>39</sup> The only other consideration given to this phrase was an unsuccessful effort by Madison to clarify when the ten-day count began.<sup>40</sup> The Convention rejected Madison’s attempt to eliminate fractions of days from the ten-day period as “unnecessary.”<sup>41</sup>

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also, it shall become a law. But, in all such cases the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

*Id.*

31. The influence of these state constitutions on the adoption of a federal constitutional veto has been discussed in MASON, *supra* note 25, at 18–19. Mason ascribes the predominant influence to the Massachusetts constitution because Elbridge Gerry of Massachusetts introduced the provision on which the veto clause is based. *Id.* at 19 n.2.

32. See MASS. CONST. of 1780, ch. 1, § 1, art. II; N.Y. CONST. of 1777, art. III.

33. N.Y. CONST. of 1777, art. III.

34. MASS. CONST. of 1780, ch. 1, § 1, Art. II (“And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of law.”).

35. See 1 ELLIOT’S DEBATES, *supra* note 24, at 243–44.

36. See *id.* at 244.

37. See *id.*

38. See *id.* The religious backgrounds of the delegates from these two states do not appear to be the reason for their objection to the ten-day period with the Sunday exception. The New Hampshire delegates, John Langdon and Nicholas Gilman, were both Congregationalists. The Massachusetts delegates included Rufus King (Episcopalian/Congregationalist) and Nathaniel Gorham (Congregationalist) as well as a non-signing delegate, Elbridge Gerry (Congregationalist). Gorham was a drafter of the Massachusetts Constitution which required religious tests. The rest of the Convention delegates were composed of primarily Episcopalians, Presbyterians (mid-Atlantic states); Quakers (Pennsylvania) and two Catholics (Maryland). See ROBERT G. FERRIS, SIGNERS OF THE CONSTITUTION: HISTORIC PLACES COMMEMORATING THE SIGNING OF THE CONSTITUTION 138 (1976).

39. See 1 ELLIOT’S DEBATES, *supra* note 24, at 300.

40. 5 *id.* at 540.

41. *Id.* at 540–41 (quoting Gouverneur Morris).

*B. Early Legislative Practice*

Some hints about the origin of the Sunday exception appear in the practice of the Convention itself and that of the Continental Congress. A few days after the adoption of the Sunday exception in the draft Constitution, the Convention adopted a resolution, governing its own meeting times, which excepted Sundays from regular meeting hours.<sup>42</sup> This Sunday exception most likely derived from the practice of the Continental Congress which passed a similar resolution on Saturday, December 7, 1776 “for the more speedy and effectual discharge of business.”<sup>43</sup> In September 1778, the Continental Congress temporarily extended its hours and retained the Sunday exception.<sup>44</sup> Anecdotal evidence suggests that these legislators did not travel to their home states when Congress and the Convention were in session.<sup>45</sup> Indeed, travel to and from Congressional sessions as well as deliberations would be considered “work” according to the Sundays labor bans extant at the time.<sup>46</sup>

The practice of excepting Sundays extended beyond legislative meetings. An early proposal for a Bank of the United States in the Continental Congress would have required inspectors to record and deliver to Congress each day—Sundays excepted—an account of the Bank’s transactions.<sup>47</sup> Foreshadowing the Sunday mail controversy of the early nineteenth century, a letter sent to the Continental Congress in 1786 complained that the post office must stay open all day on Sundays to accommodate the stage coach routes.<sup>48</sup>

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42. 1 *id.* at 248 (“Resolved, That this Convention will meet punctually at 10 o’clock, every morning, (Sundays excepted,) and sit till 4 o’clock in the afternoon, at which time the president shall adjourn the Convention; and that no motion for adjournment be allowed . . .”).

43. 6 LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1010 (1906) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

44. 12 *id.* at 870–71. The Continental Congress passed two other pieces of legislation that contained rules governing Sunday activities. The Articles of War/Regulations of Armed Forces, Article LXIV (June 30, 1775), prohibited the selling of liquor or providing any entertainment to soldiers on Sunday during the sermon. 2 *id.* at 121. The Rules for the Regulation of the Navy of the United Colonies (November 28, 1775) required, *inter alia*, that captains of ships of the thirteen colonies provide for a sermon to be preached on Sundays except when “bad weather or other extraordinary accidents prevent[ed] it.” 3 *id.* at 378.

45. Letters from delegates to family and friends suggest that Congress met every day except Sundays, even prior to the 1776 resolution, and that they did not often travel home during the session. For example, a July 1775 letter from a member of Congress to his wife described the grueling hours that the legislators kept. Letter from Silas Deane to Elizabeth Deane (July 15, 1775), in 1 LETTERS OF DELEGATES TO CONGRESS: AUGUST 1774–AUGUST 1775, at 626–27 (Paul H. Smith ed., 1985). A later letter from another member of Congress described his attendance at session every day but Saturdays and Sundays. Letter from David Howell to Nicholas Brown (Oct. 21, 1782), in 19 *id.*, at 283.

46. While Pennsylvania’s Sunday law at the time of the Philadelphia Convention was considered less strict than those in New England, it contained a ban on labor and travel. See 3 Pa. Laws 297, (folio ed.), reprinted in LEWIS, *supra* note 21, at 202–03. Similarly, an English court held that a justice could not receive a complaint or issue a warrant because of the ban on Sunday travel. *Loveridge v. Plaistow*, (1792) 126 Eng. Rep. 411 (L.R.C.P.).

47. 20 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 43, at 545 n.2.

48. 31 *id.* at 922. For a brief discussion of the Sunday mail controversy, see *infra* notes 151–157 and accompanying text. A more extensive review of the Sunday mail controversy appears in Kurt T. Lash,



Even after ratification of the Constitution and, later, the First Amendment, Congress enshrined the Sunday exceptions into governance of the territories and other legislative business.<sup>49</sup> Had the Congress intended to endorse religious observance with these Sunday exceptions, its efforts would have run afoul of the recently-enacted First Amendment.<sup>50</sup>

### C. *Original Understanding and the Christian Nation Thesis*

The brief review of the historical context in the preceding sections demonstrates that the Christian nation thesis for the Sunday exception finds no direct support in the historical record. More generally, the Constitution was not viewed as supportive of religion at the time of ratification. Delegates of at least five state ratifying conventions objected to the Constitution's silence on the recognition of God or Christianity.<sup>51</sup> Shortly after ratification, the Washington administration signed the Treaty of Tripoli.<sup>52</sup> It declared:

[T]he government of the United States of America is not, in any sense, founded on the Christian religion, as it has in itself no character of enmity against the laws, religion, or tranquillity, of Mussulmans; and, as the said States never entered into any war, or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext, arising from religious opinions, shall ever produce an interruption of the harmony existing between the two countries.<sup>53</sup>

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*Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1130–32 (1998).

49. See, e.g., 47 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 34th Cong. 426 (1856) (requiring that commission for the election to statehood in Kansas be open every day with Sundays excepted); 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 6th Cong., 1st Sess. 621 (1800) (considering a draft of a Presentment Clause for the governance of the Mississippi territory); see also *Rules of Procedure and Practice in the Senate When Sitting on the Trial of Impeachment*, in 61 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 40th Cong., 2d Sess. § 3, at 794–95 (1867) (proscribing meeting times for Senate impeachment proceedings for President Andrew Johnson).

50. During the Sunday mail controversy of the 1830s, Congress acknowledged that regulating Sunday behavior would conflict with the dictates of the First Amendment. HOUSE OF REPRESENTATIVES, 21ST CONG., REPORT ON SUNDAY MAILS, reprinted in AMERICAN STATE PAPERS, supra note 3, at 245–49 (“The committee look[ed] in vain to that instrument for a delegation of power authorizing this body to inquire and determine what part of time, or whether any, has been set apart by the Almighty for religious exercises.”). But see AKHIL REED AMAR, THE BILL OF RIGHTS 247–48 (1998) (arguing that, in regulating the territories, Congress was supportive of religion because these were “distinctive federal ‘enclaves’” in which Congress acted in place of a state legislature and was thus not bound by the dictates of the First Amendment).

51. 1 STOKES, supra note 3, at 583. These states were Virginia, Massachusetts, Pennsylvania, North Carolina, and Maryland. *Id.* at 606.

52. Treaty of Peace and Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154, reprinted in AMERICAN STATE PAPERS, supra note 3, at 162–63.

53. *Id.* The second treaty signed with Tripoli in 1805 did not contain the language about the Christian religion. Treaty of Peace, Amity, and Commerce, U.S.-Tripoli, art. XIV, June 4, 1805, 8 Stat. 214, reprinted in AMERICAN STATE PAPERS, supra note 3, at 162–63.

There is even some evidence that President Washington himself believed that the Constitution protected the rights of Saturday Sabbath observers from prosecutions for violating Sunday laws.<sup>54</sup>

Compelling religious observance or privileging Christian observance would have likely produced similar exceptions for Good Friday,<sup>55</sup> Christmas,<sup>56</sup> and other Christian holidays. In fact, no such religious holiday excep-

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54. This evidence is in the form of a reprinted version of a letter purportedly from President Washington to a Seventh-day Baptist society, some of whose members had been imprisoned for working on Sunday. See Letter from George Washington to the Seventh-day Baptist (Aug. 4, 1789), in AMERICAN STATE PAPERS, *supra* note 3, at 171. Washington's letter reveals his views about the protections for Saturday Sabbath observers:

If I had had the least idea of any difficulty resulting from the Constitution adopted by the convention of which I had the honor to be President, when it was formed, so as to endanger the rights of any religious denomination, then I never should have attached my name to that instrument. If I had any idea that the general government was so administered that liberty of conscience was endangered, I pray you be assured that no man would be more willing than myself to revise and alter that part of it, so as to avoid religious persecution. You can, without doubt, remember that I have often expressed my opinion that *every man who conducts himself as a good citizen is accountable alone to God for his religious faith, and should be protected in worshipping God according to the dictates of his own conscience.*

*Id.* An alternative reading of President Washington's letter suggests that he did not favor special exemptions from Sunday laws for Saturday Sabbath observers but believed only that they should not be persecuted for worshipping on Saturday. This view is similar to that adopted by the United States Supreme Court in *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961) (holding that Sunday law does not directly burden the religious exercise of Saturday Sabbath observers where they can refrain from work on both Saturday and Sunday).

55. Good Friday observance at the founding was much less formal and less uniform than Sunday observance by the state. See, e.g., VA. HOUSE OF BURGESSES, JOURNAL OF THE HOUSE OF BURGESSES, Gen. Assem., 7th Sess., at 52–54 (Williamsburg, Hunter 1761). Blackstone's Commentaries suggest that Good Friday was treated much like Sundays in England. 4 WILLIAM BLACKSTONE, COMMENTARIES \*413 (“No fair or market [s]hall be held on the principal fe[s]tivals, Good Friday, or any [S]unday (except the four [S]undays in harvest) on pain of forfeiting the goods exposed to [s]ale.”). However, the ban on labor and work on Good Friday did not cross the Atlantic intact. The Virginia House of Burgesses met and conducted legislative business on Good Friday in 1761. See JOURNAL OF THE HOUSE OF BURGESSES, *supra*, at 52–54. The Continental Congress did not meet in 1776 and 1777; however, in 1779, the Continental Congress met and then promptly adjourned on Good Friday. See 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 44, at 255–57; 7 *id.* at 205–07; 13 *id.* at 409–10. Good Friday laws in the states appeared slowly. The Puritans in Massachusetts resisted establishing Good Friday as a feast day. See *Griswold Inn, Inc. v. State*, 441 A.2d 16, 18 (Conn. 1981) (noting the resistance to this ritual by New England Puritans). In line with the Anglican traditions, the Connecticut governor appointed Good Friday as a public fast day in 1795. See *id.* at 19 (noting this appointment). Accordingly, state and municipal offices and courts were closed, but many commercial business remained opened. See *id.* (noting these openings and closures). By contrast, Maryland did not formally recognize Good Friday as a public holiday until 1865. Brief for Appellees at 3, *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (No. 97-1935), 1998 WL 34097530. At the founding, Good Friday was treated differently, often by the same or similar legislative bodies. The Bank of North America, chartered by Congress under the Articles of Confederation, was closed on Good Friday, but the Bank of the United States, chartered by Congress after ratification of the Constitution, was not. See THE UNITED STATES REGISTER FOR THE YEAR 1795, at 88–89 (Philadelphia, Mathew Carey 1794) (publishing the hours of operation for both institutions). Contemporary state Good Friday laws, where they exist, vary in scope. See STEVE RAJTAR, UNITED STATES HOLIDAYS AND OBSERVANCES 26 (2003).

56. State treatment of the observance of Christmas also varied considerably at the founding. In his dissenting opinion in *Lynch v. Donnelly*, Justice Brennan describes the divergence among the states treatment of Christmas at the founding: “The historical record . . . suggests that at the very least conflicting views toward the celebration of Christmas were an important element of that competition at the time of the adoption of the Constitution.” 465 U.S. 668, 723 (1984). Even earlier, the Massachusetts Bay Colony imposed the opposite of a labor and travel ban on Christmas, making the observance of Christmas an offense punishable by fine. *Id.* at 721.

tion exists. The ten-day period does not toll on Christmas day:<sup>57</sup> President Lincoln signed a bill on Christmas Eve,<sup>58</sup> and President Nixon failed to veto one, resulting in a bill becoming law on Christmas day.<sup>59</sup> In marked contrast to the absence of religious holiday exceptions in the Constitution, the acknowledgment of Christian holidays by the founding generation did not escape the notice of the founding generation. For example, the first House of Representatives recognized Good Friday as a holiday and adjourned for the day in 1790.<sup>60</sup> The Presentment Clause provides no such reprieve from the President's consideration of bills.<sup>61</sup>

Instead, the Framers provided two explicit provisions for religious neutrality in selecting federal officeholders. First, Article VI prohibited the practice of requiring officeholders to take a religious test, while requiring all judicial and legislative officers, "both of the United States and of the several States," to pledge their support for the Constitution.<sup>62</sup> In contrast to the eleven states that required religious oaths, this provision afforded unprecedented neutrality towards the religious backgrounds of officeholders.<sup>63</sup> Second, the fidelity oaths in the Constitution permitted officeholders to either swear or affirm their oaths, an innovation which allowed for religious pluralism.<sup>64</sup> Akhil Amar has argued that these provisions demonstrate the Founders' intentions for the federal government to accommodate the religiously pluralistic backgrounds of federal office holders.<sup>65</sup> To endorse religious observance in Article I's Presentment Clause only to require neutrality in Article VI attributes a striking inconsistency to the Founders. Available historical and textual evidence provides no such support for the Christian nation thesis.

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57. See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 452 n.1, 455 (1899) (listing statutes signed by Presidents over Christmas recess that were recognized as validly enacted); *United States v. Weil*, 29 Ct. Cl. 523, 525–26 (Ct. Cl. 1894) (calculating the ten-day period by excepting Sundays but not Christmas Day for a bill presented to President Harrison on December 20, 1892).

58. See *Gardner v. Collector*, 73 U.S. 499, 500 (1867).

59. See *Kennedy v. Sampson*, 511 F.2d 430, 437 (D.C. Cir. 1974).

60. 3 STOKES, *supra* note 3, at 178.

61. See U.S. CONST. art. I, § 7, cls. 2, 3.

62. U.S. CONST. art. VI, cl. 3.

63. See AMAR, *supra* note 23, at 166. Some delegates to the state ratifying conventions objected to the religious oaths clause on the grounds that it would permit non-Christians to occupy the presidency. See 4 ELLIOT'S DEBATES, *supra* note 24, at 215 (Remarks of Lancaster, Delegate to the North Carolina Constitutional Convention) ("This is most certain, that Papists may occupy that chair, and Mahometans may take it.").

64. See U.S. CONST. art. I, § 3, cl. 6 (when the Senate is sitting for the purposes of impeachment); *id.* art. II, § 1, cl. 8 (President's oath); *id.* art. VI, cl. 3 (religious oaths clause for all officeholders).

65. See generally AMAR, *supra* note 23, at 301 (noting that the option given to officeholders to affirm their oath as well as the prohibition on religious oaths permitted a religiously pluralistic federal government). The founding generation further demonstrated their intention that the federal government remain neutral on the issues of religious establishment in enacting the First Amendment. See AMAR, *supra* note 50, at 246. Prior to the incorporation of the First Amendment, states had a choice of whether to establish or disestablish. Indeed, the New England states ended their established churches around 1833. *Id.* at 251. "In short, the original establishment clause was a home rule-local option provision mandating imperial neutrality." *Id.* at 246.

## III. THE PRINCIPLE OF THE DELIBERATIVE EXECUTIVE

If not to endorse religious observance, then what purpose does the Sunday exception serve? Answering this question requires reading the Sunday exception in the context of the ten-day period of the Presentment Clause. Analysis of the ten-day period (Sundays excepted) demonstrates embedded process values, namely those of a deliberative executive. This principle further relies on two aspects of the President's powers—a duty of deliberation and the necessity of advice. The deliberative executive relies on an enterprise of advisors and deliberative activity to consider legislation. The deliberative executive would often need the full extent of the ten-day period before returning the bill to Congress. Considered in this context, the Sunday exception allows the work of due diligence and deliberation to coexist with the eighteenth century's bans on Sunday labor and travel.

A. *The Duty of Deliberation*

The structure and history of the Presentment Clause reflects the Founders' assessment that the exercise of the veto must be a considered judgment. Deliberation on proposed legislation required both time to deliberate as well as information on which to base any veto decision. The Presentment Clause and its companion, the Opinions Clause, endow the executive with both of these capabilities.<sup>66</sup>

The drafting history of the Constitution and the practices of the state constitutions in 1787 demonstrate a commitment to deliberation in exercising the executive's veto powers. At the time of the Convention, several states had executive commissions instead of a governor.<sup>67</sup> The form of the executive—whether a single person or a multi-member commission—endowed with the veto power may have influenced the length of the period for executive deliberation over bills. Thus, New York provided its commission a slightly longer period for reflection than did Massachusetts, which gave the veto to the governor.<sup>68</sup> At the Convention, Edmund Randolph of Virginia proposed that a Council of Revision, composed of the President and members of the judiciary, should exercise the veto power.<sup>69</sup> While the Randolph plan was eventually abandoned in favor of endowing the veto in a single person who would be more accountable to the people,<sup>70</sup> the debates over the form of the Presentment Clause demonstrate that the power of the

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66. See U.S. CONST. art. I, § 7, cl. 2; *id.* art. 2, § 2, cl. 1.

67. See MASON, *supra* note 25, at 18.

68. Cf. AMAR, *supra* note 23, at 137 (discussing the veto powers of New York's judge-dominated council and Massachusetts' governor).

69. See 4 ELLIOT'S DEBATES, *supra* note 24, at 621–22.

70. “[T]he Framers rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over Cabinet officers.” See Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647 (1996).

veto required considered judgment, often in the form of advice from other members of the Executive branch.<sup>71</sup>

In contrast to the absolute veto of the British Crown, the Framers endowed the executive with a qualified or advisory veto that puts additional deliberative pressures on the President.<sup>72</sup> Two aspects of the process described in the Presentment Clause are significant: the potential for a Congressional override and the requirement that the President articulate his objections to a vetoed bill in writing. Through these mechanisms, the Presentment Clause makes the veto process a collaborative and deliberative enterprise between the legislative and the executive.<sup>73</sup> The President carefully deliberates on the product of the legislative process and then Congress deliberates on the President's written objections to the bill.

The ten-day period reflects this deliberative function. The exercise of the veto envisioned in the Presentment Clause is the only executive power limited in time.<sup>74</sup> The ten-day period sharply contrasts with the "from time to time" language of the State of the Union and Recommendation Clause.<sup>75</sup> Moreover, the ten-day period is "self-executing."<sup>76</sup> The period for considering a bill is a mandatory, built-in pause in the frenzy of law-making. In Federalist No. 73, Publius described this pause as one of the main advantages of the executive veto:

The propriety of the [veto] does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn. The primary inducement to conferring the power in question upon the Executive is, to enable

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71. See *id.* at 661.

72. For a comparison of the qualified veto with the absolute veto of the British crown, see MASON, *supra* note 25, at 14–23, and THE FEDERALIST NO. 69, at 447 (Alexander Hamilton) (Robert B. Luce, Inc. 1976) ("The qualified negative of the President differs widely from this absolute negative of the British sovereign"). See also *United States v. Weil*, 29 Ct. Cl. 523, 539 (Ct. Cl. 1894) ("Under the American Constitution the assent of the President is not essential to the enactment of a single law. His authority over an act of Congress is simply revisory and advisory. If the king did not assent, that was the end of the matter. The Constitution, on the contrary, merely secures for legislation the personal scrutiny and counsel of the man who in public estimation is, or may be supposed to be, best fitted for the task. If he does not approve, he does not forbid; he does not, in the sense of the Roman law, veto.").

73. Amar describes this "coordinacy in the reporting and opining" in the text of the State of the Union and Presentment Clauses. Amar, *supra* note 70, at 658.

74. See U.S. CONST. art. II (endowing powers such as granting pardons, making treaties, and convene the Houses of the legislature without any time limit).

75. Compare U.S. CONST. art. I, § 7, cls. 2, 3 (Presentment Clause), with *id.* art. II, § 3, cl. 1 (State of the Union Clause), and *id.* cl. 2 (Recommendation Clause). For an analysis of the "time to time" language in the recommendation clause, see Vasani Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 13–17 (2002).

76. *Weil*, 29 Ct. Cl. at 547.

him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.<sup>77</sup>

The Supreme Court has also recognized the need for a period of executive consideration enshrined in the ten-day period.<sup>78</sup>

Not only does the ten-day period offer a check on the fast pace of Congressional law-making, but it also requires prospective legislation to undergo the independent examination of the executive, the branch with the greatest information-gathering abilities at the time of the founding. The superior information-gathering capability of the executive at the founding has been well-noted:<sup>79</sup> By virtue of his position as the head of the executive branch, the President had vast stores of information about policies and their relative merits which were unavailable to Congress.<sup>80</sup> He had at his command a network of advisors and officers, while the members of Congress had comparatively small staffs.<sup>81</sup> The 1803 edition of Blackstone's Commentaries describes the executive as possessing

more immediately the sources, and means of information than the other departments of government; and as it is indispensably necessary to wise deliberations and mature decisions . . . the constitution has made it the duty of the supreme executive functionary, to lay before the federal legislature, a state of such facts as may be necessary to assist their deliberations . . . .<sup>82</sup>

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77. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 72, at 477.

78. See, e.g., *Wright v. United States*, 302 U.S. 583, 596 (1938) (describing the purpose of the ten-day period as giving the President a "suitable opportunity" to consider bills); *Okanogan v. United States* (The Pocket Veto Case), 279 U.S. 655, 678 (1929) ("And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.).

79. See generally J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2086-89 (1989) (discussing the information-gathering functions of the executive that were unavailable to the Congress at the time of the founding).

80. *Id.* at 2088-89.

81. Until the 1890s, members of Congress had no personal staff beyond what their personal funds could afford. JOINT COMM. ON THE ORG. OF CONG., ORGANIZATION OF THE CONGRESS FINAL REPORT 4 (1993), available at <http://www.rules.house.gov/archives/jcoc2s.htm>. Congressional Committee staffs were not authorized until the 1850s. *Id.*

82. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. D, at 344 (Philadelphia, Birch & Small 1803) (editor's appendix).

Justice Story described this function as the President's "due diligence" function.<sup>83</sup> The executive served as the final gateway through which a bill would pass. These informational advantages further bolstered the President's ability to carefully consider legislation.

The requirement that the President provide written objections to Congress for the basis of his veto further ensures that the President would make a principled decision and prohibits exercising the veto at his whim.<sup>84</sup> The written objections requirement also mirrors the text of the Opinions Clause, discussed in the next Subpart, which permits the President to demand the advice of executive officers in writing.<sup>85</sup>

The principle of the deliberative executive illuminates the large amount of effort expended on consideration of bills. The President's deliberations on proposed legislation involved a great deal of information-gathering and consultation. The Presentment Clause required the deliberative executive to work, often on each day of the ten-day period. The extensive work required of the deliberative executive threatened conflict with the labor prohibitions in state Sunday laws.

### B. *The Need for Advice and Counsel*

While the Framers rejected the Council of Revision in favor of a single executive,<sup>86</sup> they did not abandon the President to exercise the veto in isolation. President Washington recognized the need for advice and counsel early in his presidency: "The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust."<sup>87</sup>

Granting veto power to a single person promoted accountability, but the Constitution invested the President, through the Opinions Clause,<sup>88</sup> with the ability to solicit the advice of his advisors.<sup>89</sup> James Iredell, later an associate justice of the Supreme Court,<sup>90</sup> emphasized this ability at the North Carolina

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83. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555, at 413 (1833).

84. See Amar, *supra* note 70, at 671–72 (noting the textual similarity of the "in writing" language of Opinions Clause and the requirement of written objections in the Presentment Clause); *id.* at 671 ("[T]he necessity of their opinions being in writing, will render them more cautious in giving them . . .") (quoting James Iredell).

85. See *id.*

86. See *supra* notes 24–25 and accompanying text.

87. 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939).

88. U.S. CONST. art. II, § 2 ("[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.").

89. There are several comprehensive treatments of the text, history, and structure of the Opinions Clause. However, each of these discussions studies implications for the theory of the unitary executive and the President's relationship to administrative agencies rather than the nature and process of the veto power. See Amar, *supra* note 70; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). Related analyses of the Recommendation Clause appears in Kesavan & Sidak, *supra* note 75, at 35–47, and Sidak, *supra* note 79.

90. See generally Fred L. Israel, *James Iredell*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME

ratifying convention: “[T]he President will personally have the credit of good, or the censure of bad measures; since, though he may ask advice, he is to use his own judgment in following or rejecting it.”<sup>91</sup> While the Opinions Clause power is not limited to advice on legislation,<sup>92</sup> there is a clear link between the two powers. The Opinions Clause contemplates advice “in writing” from executive officers to the President; the Presentment Clause requires the President to submit his objections to a bill to Congress in the same form.<sup>93</sup>

Early Congressional and executive practice also suggests that the Founders intended for the President to rely on advisors in deliberating on legislation. The First Congress created the position of Attorney General, whose statutory duties were to represent the government in the Supreme Court and to “give his advice and opinion upon questions of law when required” by the President or by the heads of other departments.<sup>94</sup> What more important questions of law could there be than the constitutionality of proposed legislation?<sup>95</sup>

The deliberative process value in the Presentment Clause and its relationship to the Opinions Clause are clearly demonstrated in President Washington’s review of the legislation. The bill to enact the Bank of the United States was so troubling that President Washington took the full extent of the ten-day period to consider it and even prepared a draft veto message before eventually signing it.<sup>96</sup> Furthermore, President Washington relied heavily on the advice of his Attorney General, Edmund Randolph, in weighing the constitutionality of the bill as well as that of Secretary of State Thomas Jefferson and Secretary of the Treasury Alexander Hamilton.<sup>97</sup> In exercising his first veto—that of an apportionment bill—President Washington again used the entirety of the ten-day period and relied on the written opinions of Jefferson, Madison, and Randolph.<sup>98</sup> Jefferson noted in his diary that after a

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COURT, 1789–1969, at 121–32 (Leon Friedman & Fred L. Israel eds., 1969).

91. 4 ELLIOT’S DEBATES, *supra* note 24, at 110.

92. See U.S. CONST. art. II, § 2.

93. Compare U.S. CONST. art. I, § 7, cl. 2, with *id.* art. II, § 2. See also Amar, *supra* note 70, at 658.

94. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 93 (1789) (codified at 28 U.S.C. § 511 (2000)); see also Lessig & Sunstein, *supra* note 89, at 16.

95. E.C. Mason argues that early Presidents used the veto power to strike down legislation on one of two grounds: constitutionality or expediency. See MASON, *supra* note 31, at 74–75. Through the Jackson administration, the veto was used only five or six times, out of twenty-one total vetoes, for reasons other than constitutionality. See *id.* at 75, 129 (“Most of the earlier vetoes of importance had been founded wholly on constitutional principles . . .”).

96. A description of Washington’s extended deliberations on the bill is available in President James K. Polk, Fourth Annual Message to Congress (Dec. 5, 1948), reprinted in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 629, 659–60 (New York, Bureau of National Literature, Inc. 1897).

97. For the written opinions of these three advisors, see M. ST. CLAIR CLARKE & D. A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86–91 (Augustus M. Kelley Publishers 1967) (1832); *Opinion on the Constitutionality of An Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97–134 (1965); *The Constitutionality of the Bill for Establishing a National Bank*, in 19 PAPERS OF THOMAS JEFFERSON 275–80 (1974).

98. See Thomas Jefferson’s Diary, reprinted in 4 ELLIOT’S DEBATES, *supra* note 24, at 624.



meeting with the President, Washington “went home, sent for Randolph, the attorney-general, desired him to get Mr. Madison immediately, and come to [him]; and if we three concurred in opinion, that he would negative the bill.”<sup>99</sup> From the early days of the presidency, the deliberative process not only implicated the labor of the President but also that of his advisors.

The text as well as early practice suggests that the ten-day period and the Sunday exception were part of a deliberative process contemplated by the Presentment Clause. Since the founding, this process has been resource-intensive and people-intensive. The executive relies on advisors at many different levels of government, particularly those contemplated in the Opinions Clause. The principal officers of each of the executive departments, in turn, may consult their staffs. The ten-day period thus required the machinery of the executive to operate at top speed in order to satisfy the deliberative requirements of the Presentment Clause. On any given day during the ten-day period, the President, his advisors, their staffs, and the President’s own cadre of personal advisors would be working on the proposed legislation. The deliberative enterprise required the President and his advisors to work and to travel on each of the ten days of the deliberative period.

### C. *Returning a Bill to Congress*

The President did not fulfill his duty merely by deliberating within the executive branch. Article I, Section 7 outlines a collaborative process between the legislature and the executive. The Presentment Clause imposes an obligation to “return [a bill], with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.”<sup>100</sup> The product of the President’s deliberation—in the case of a veto, his objections—must be shared with the Congress for their own deliberation.<sup>101</sup> The official form for forwarding his conclusions requires the President to physically return the bill and his written objections to the Congress.<sup>102</sup> The Congress, in turn, must be present to receive these objections and officially record their receipt.<sup>103</sup>

This requirement emphasizes the importance the founding generation placed on collaboration between the legislative and executive. The Presentment Clause allows the President to sign a bill into law when Congress is

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99. *Id.*

100. U.S. CONST. art. I, § 7, cl. 2.

101. *Id.*

102. *Id.*

103. *Id.* The legislative branch, unlike the executive, was geographically fixed. The President’s powers, and particularly the veto power, can be exercised from anywhere. This flexibility is necessary for the President to serve as Commander-in-Chief and simultaneously perform other executive functions. *See Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 628 (Ct. Cl. 1964) (considering whether the President may exercise his veto power from abroad). By contrast, Congress must reconvene in a specific place to perform its legislative functions. *Cf. id.* at 628 n.8 (noting that the Congress, by mutual consent, may assemble at a place other than the seat of government to perform its legislative duties).

not in session but does not permit him to veto a bill during a congressional adjournment.<sup>104</sup> This asymmetry further underscores the significance of the collaboration between the two branches in producing a legislative product for the nation. Congress must be in session for the President to return a veto. Since Congress did not meet on Sundays at the time of the founding, the Convention faced a practical dilemma: What would happen if the ten-day period expired on Sunday?<sup>105</sup> Who would officially record the veto and the President's objections? The members of Congress enjoyed the protections of Article I, Section 6, which granted them privilege from arrest when attending sessions of Congress and while traveling to and from those sessions.<sup>106</sup> However, this privilege does not extend to breach of the peace offenses, including violations of Sunday laws in most states.<sup>107</sup> Therefore, for the President to complete his obligations under the Presentment Clause and for the Congress to begin further deliberations on a vetoed bill, members of Congress, clerks, and their staffs would have to return to the capitol and begin work on Sundays should the ten-day period expire on that day.

Including Sunday in the ten-day deliberative period would require a large number of people to violate local Sunday laws or to abstain from the country's work.

#### IV. FEDERALISM AND THE BLUE LAWS

Given that the Constitution envisions a deliberative process for exercising the veto, the Framers were confronted with another problem: Should the President and his advisors deliberate on Sundays? The ten-day self-executing period meant that the executive was given a limited time for considering legislation; and every day counted. Working on Sundays would violate the local and state laws prohibiting work and travel on Sundays extant in every state at the time. Just as the delegates to the Constitutional

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104. The text of the Presentment Clause prevents the President from returning a bill to an adjourned Congress:

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 prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art I, § 7, cl. 2. *Compare* *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) (holding as valid under the Presentment Clause a bill signed into law during a congressional recess), *with* *Okanogan v. United States (The Pocket Veto Case)*, 279 U.S. 655, 680–92 (1929) (holding, in an unanimous opinion, that Congress's adjournment before the expiration of the ten-day period prevented the President from returning the bill, and therefore, according to the terms of the Presentment Clause, a bill not signed by the time of adjournment was effectively vetoed).

105. Issues arising from the timing of the ten-day period and the proper process for returning a bill have been litigated extensively. *See, e.g.*, *United States v. Kapsalis*, 214 F.2d 677, 679–83 (7th Cir. 1954) (examining whether Congress can present a bill to the President after it has adjourned); *Prevost v. Morgenthau*, 106 F.2d 330, 331–32 (D.C. Cir. 1939) (considering a veto returned by the President on the final day of the ten-day period but not recorded by the Senate until the eleventh day).

106. For a comprehensive discussion of the legislative privileges, see generally AMAR, *supra* note 23, at 101–27.

107. *See generally* *United States v. Wise*, 1 Hay. & Haz. 82 (D.C. Cir. 1842).

Convention were subject to the state laws of Pennsylvania and the municipal laws of Philadelphia, the federal executive and legislative officials were bound by the laws of their host state until the creation of the District of Columbia.<sup>108</sup> At the time of the founding, the Framers had no clear plan about where to locate the seat of the national government nor what types of Sunday laws the host state might have.<sup>109</sup> Thus, the Framers had two options: either to prevent the President from working on Sundays by excepting Sundays from the ten-day period or to preempt state Sunday laws. The Framers chose the former.<sup>110</sup> The Sunday exception thus created a pressure valve for the federalist system, allowing states to maintain their Sunday laws without creating an exception for the executive.

A. *State Sunday Laws at the Founding and the Process of Secularization*

While no state constitutions contained Sunday exceptions at the founding, each of the states had Sunday laws regulating work and travel on Sundays.<sup>111</sup> The 1677 statute of Charles II became the model for the Sunday laws in the colonies in the eighteenth century.<sup>112</sup> But the form and scope of the Sunday laws varied by colony. The first Sunday law enacted in the United States was a 1610 Virginia law that made church attendance compulsory and made absence from church services punishable by death for the third offense.<sup>113</sup> A subsequent Virginia statute required church attendance but loosened the prohibitions on work and amusement after church.<sup>114</sup> Similarly, the early laws of the Massachusetts Bay Colony banned Sunday labor.<sup>115</sup> The Pennsylvania Sunday statute of 1700 stated that no one could be compelled to attend church but that everyone should follow the “example of the primitive Christians” and abstain from labor.<sup>116</sup>

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108. For example, in 1783, Congress pled with the Supreme Executive Council of Pennsylvania to restore peace when a group of unpaid Revolutionary War recruits attempted to enter Congress. ROBERT FORTENBAUGH, *THE NINE CAPITALS OF THE UNITED STATES* 55 (1948) (“This [request] was quite proper as the keeping of the local peace was a responsibility of Pennsylvania.”). Because the Pennsylvania authorities did not respond effectively, the Congress removed to Princeton, New Jersey. *Id.* at 55–56.

109. See generally 1 WILHELMUS BOGART BRYAN, *A HISTORY OF THE NATIONAL CAPITAL* 1–34 (1914).

110. See generally *Int’l Mfrs. Co. of Am. v. United States*, 85 Ct. Cl. 683, 686 (Ct. Cl. 1937) (“By the exclusion of the day of presentation, the full ten days are given for consideration of the bill. The exception of Sundays emphasizes the intention of the Framers of the Constitution to give the entire ten days.”).

111. The colonial and state Sunday laws for each of the original thirteen states are excerpted in LABAND & HEINBUCH, *supra* note 17, at 29–37.

112. The Act of 29th of Charles II, vii, 1676 reprinted in LEWIS, *supra* note 21, at 109. *McGowan v. Maryland*, 366 U.S. 420, 432 (1961) (noting the Act’s influence).

113. See Statute of 1610, reprinted in LABAND & HEINBUCH, *supra* note 17, at 30.

114. See Act of March 5, 1623, § 2, reprinted in William Waller Hening, 1 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 164 (Richmond, J & G. Cochran 1821) (1776) [hereinafter *Laws of Virginia*].

115. Sabbath Law of 1668, reprinted in *THE COLONIAL LAWS OF MASSACHUSETTS* 134 (Whitmore ed., Boston, Rockwell & Churchill 1887) (1672).

116. Law Concerning Liberty of Conscience, 1700 PA. LAWS 3–4.

Not all of the Sunday laws advanced a religious purpose. From their inception, Rhode Island's Sunday laws were more secular than those of the other colonies. Roger Williams was a vocal opponent of Sunday laws; his opposition served as part of the grounds that led him to abandon Massachusetts and found Rhode Island.<sup>117</sup> The first such statute in Rhode Island included a preamble acknowledging that "we know by man not any can be forced to worship God, or for to keep holy or not to keep holy any day."<sup>118</sup> The secular purpose of the statute—"not to oppose or propagate any worship, but as [to] prevent[] debaistness"<sup>119</sup>—reflected the colony's commitment to liberty of conscience.

There is some evidence that the states were beginning to secularize their Sunday laws at the time of the Constitutional Convention. States began repealing statutes requiring church attendance around the time of the drafting of the Constitution.<sup>120</sup> The frequent violations of the Sunday laws noted in amendments to Sunday laws in the Connecticut, New Haven, Plymouth, and Massachusetts Bay Colonies suggest that there was growing disregard for

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117. See EDWIN S. GAUSTAD, *ROGER WILLIAMS: PROPHET OF LIBERTY* 55 (2001) (establishing Roger Williams as Rhode Island's founder). For a discussion of Rogers Williams' opposition to punishing a breach of the Sabbath in 1631 and his subsequent summons to a court in Salem in 1635, see AMERICAN STATE PAPERS, *supra* note 3, at 60–61, 66–67. See also 3 STOKES, *supra* note 3, at 169 (explaining that the cofounder of the Christian denomination Disciples of Christ, Alexander Campbell, viewed Sunday laws, which tried to compel non-believers to observe the Christian Sabbath as "contrary to the gospel").

118. Statute of Sept. 2, 1673, *reprinted in* LEWIS, *supra* note 21, at 195–97.

119. *Id.* The statute, in its substantial entirety, read:

Voted, this Assembly considering that the King hath granted us that not any in this colony are to be molested in the liberty of their consciences, who are not disturbers of the civil peace, and we are persuaded that a most flourishing civil government, with loyalty, may be best propagated where liberty of conscience by any corporal power is not obstructed, that is not to any unchasteness of body, and not by a body doing any hurt to a body, neither endeavoring so to do, and although we know by man not any can be forced to worship God, or for to keep holy or not to keep holy any day; but forasmuch as the first days of the weeks it is usual for parents and masters not to employ their children or servants, as upon other days, and some others also that are not under such government, accounting it as spare time, and so spend it in debaistness or tippling, and unlawful games, and wantonness, and most abominably there practiced by those that live with the English, at such times to resort to towns. Therefore, this Assembly, not to oppose or propagate any worship, but as by preventing debaistness, although we know masters or parents can not, and are not, by violence to endeavor to force any under their government, to any worship, or from any worship, that is not debaistness or disturbant to the civil peace, but they are to require them, and if that will not prevail, if they can, they should compel them not to do what is debaistness, or uncivil, or inhuman, not to frequent any immodest company or practices.

*Id.* at 195–97. Read in this context, the term debaistness is a form of the verb, debase. The Oxford English Dictionary offers three meanings of debase: "[t]o lower in position, rank, or dignity; . . . [t]o lower in estimation; to decry, depreciate, vilify; . . . [t]o lower in quality, value, or character; to make base, degrade . . ." OXFORD ENGLISH DICTIONARY 77 (2d ed. 1989). The United States Supreme Court has distinguished moral debasement from the promotion of religious observances. See *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885) ("Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.").

120. See, e.g., Virginia Act of 1776, ch. II, § I, *reprinted in* 9 LAWS OF VIRGINIA, *supra* note 114, at 164.

these statutes in the eighteenth century.<sup>121</sup> In 1761, a Connecticut statute declared that traveling on Sundays is a “growing evil.”<sup>122</sup>

The United States Supreme Court documented a trend of secularization in the Sunday laws’ espoused purposes. In 1961, the Court considered several challenges to the constitutionality of state Sunday laws.<sup>123</sup> In *Gallagher v. Crown Kosher Super Market, Inc.*, the Court reviewed the history of Massachusetts Sunday laws and concluded that by 1782, “the statute’s announced purpose was no longer solely religious.”<sup>124</sup> In 1653, the Massachusetts colonial laws addressed “the abuses of the Dishonor of God and the Reproach of Religion which were Grieving the Souls of God’s Servants.”<sup>125</sup> Subsequently, “[i]n 1665, Neglect of God’s Public Worship was made a crime.”<sup>126</sup> Similarly, the 1692 law required all to adhere to Duties of Religion and Piety on Sunday.<sup>127</sup> The preamble to the 1761 statute “added that Profanation of the Lord’s Day is highly offensive to Almighty God.”<sup>128</sup> Moreover, the Court observed that

[a] change came about in 1782. The preamble added the following: “Whereas the Observance of the Lord’s Day is highly promotive of the Welfare of a Community, by affording necessary Seasons for Relaxation from Labor and the Cares of Business; for moral Reflections and Conversation on the Duties of Life, and the frequent Errors of human Conduct; . . .”<sup>129</sup>

The legislature added this secular rationale, a need for rest and reflection, alongside the earlier, religious purpose. The *Gallagher* Court relied upon this shift to a public welfare rationale to conclude that the laws were no longer impermissible establishments of religion.<sup>130</sup> Over time, virtually all states adopted secular rationales and eliminated the religious purposes.<sup>131</sup>

These secular rationales for Sunday laws typically espoused the “universal truth”—later characterized as scientific—that one day of rest in seven is important for public health and welfare. Then-California Supreme Court Justice Field articulated the later version of this rationale based on health

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121. See LEWIS, *supra* note 21, at 178–92.

122. *Id.* at 195; see also ii Del. Laws 1209 (1795), reprinted in AMERICAN STATE PAPERS, *supra* note 3, at 56 (increasing penalties because of the frequency of violations).

123. See *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

124. 366 U.S. at 626.

125. *Id.* at 625 (citing THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 115, at 132–33).

126. *Id.*

127. *Id.* at 625–26.

128. *Id.* at 626.

129. *Id.* (quoting Massachusetts Amendment of Mar. 8, 1792 to Massachusetts Statute of Mar. 11, 1797, reprinted in AMERICAN STATE PAPERS, *supra* note 3, at 40) (addition of second, more secular rationale based on public health and welfare).

130. *Id.* at 626, 630.

131. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 444–45 (1961).

and science in *Ex parte Newman*.<sup>132</sup> That case was one of the earliest successful challenges to Sunday laws. In his dissent, Justice Field summarized all of the secular rationales for Sunday laws:

[The Sunday law's] requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science . . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted.<sup>133</sup>

Beginning in the late eighteenth century, many other states adopted similar justifications for their Sunday laws.<sup>134</sup> “Thus it seems that by the end of the eighteenth century, Sunday legislation could not be said to have a solely religious basis.”<sup>135</sup>

At the same time, the English began a similar process of secularization of Sunday laws. In *Swann v. Broome*,<sup>136</sup> Lord Mansfield, Chief Justice, freed the English common law from a full observance of the English Puritan Sabbath.<sup>137</sup> In *Drury v. Defontaine*,<sup>138</sup> Lord Mansfield reaffirmed the fact that the common law baseline, in the absence of explicit statutory command, treated Sunday as any other day.<sup>139</sup> The *Drury* opinion was heavily influential in the early American common law of contract.<sup>140</sup> Blackstone's Commentaries similarly offered a secular justification for Sunday laws which was adopted by several of the states.<sup>141</sup>

In sum, the delegates at Philadelphia were all aware of the Sunday prohibitions and the inevitable conflict caused by requiring the President and his advisors to work on Sunday. Significantly, each delegate's experience

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132. 9 Cal. 502, 518–29 (Cal. 1858) (Field, J., dissenting). See generally King, *supra* note 11, at 697–700 (discussing the history of *Ex parte Newman*). The California legislature subsequently enacted a new Sunday law in 1861, removing all references to Christianity. *Id.* at 699. The California Supreme Court, with two new justices, upheld the 1861 statute in *Ex parte Andrews*, 18 Cal. 678, 680, 685 (Cal. 1861).

133. *Ex parte Newman*, 9 Cal. at 520, 529 (Field J., dissenting).

134. See, e.g., *People v. Havnor*, 43 N.E. 541, 543 (N.Y. 1896).

135. *Religious Guarantees*, *supra* note 11, at 730.

136. 96 Eng. Rep. 305 (1764).

137. *Id.* at 307–08 (holding valid a “recovery” formally transacted on a Sunday).

138. 127 Eng. Rep. 781 (1808).

139. *Id.* at 783–84.

140. See, e.g., *Merritt v. Earle*, 31 Barb. 38, 40–41 (N.Y. Gen. Term 1859) (citing *Drury* for the proposition that “[a]t the common law judicial proceedings, only, were prohibited on Sunday . . . . [b]ut all other business transactions are valid, except so far as prohibited by statute. . . .”).

141. 4 WILLIAM BLACKSTONE, COMMENTARIES \*63–64. See also *McGowan v. Maryland*, 366 U.S. 420, 433–44 (1961) (advancing both a religious and a secular justification—one day of relaxation in seven “is of admirable service to a state, considered merely as a civil institution”) (quoting Blackstone).

with Sunday laws was different from his colleagues, with the widely diverging scope, stringency, and purposes of the state Sunday laws.

*B. The Federalism Dilemma: Preempt or Except?*

While state Sunday laws acquired secular justifications, their labor and travel restrictions remained in force at the time of the founding. Problematically for the deliberative executive, courts were generally unwilling to construe travel on business as “necessity,” one of the few exceptions to the Sunday laws.<sup>142</sup> Without the Sunday exception, the President and his advisors might have to violate local Sunday laws prohibiting travel and labor in order to consider a bill. Exactly such a fate befell President Washington when he decided to travel through Massachusetts on a Sunday.<sup>143</sup>

The Framers, therefore, were faced with two options: to except Sundays from the ten-day period or to preempt state law. Preemption would not be unprecedented. The Founders demonstrated an ability and willingness to preempt state law and practice in the Article VI religious oaths clause which prohibits tests for any federal officeholder, regardless of whether state law requires it.<sup>144</sup> As noted in Subpart II.C., Article VI also requires state as well as federal officers to uphold the Constitution, preempting any conflicting state laws. For a time, the religious oaths test preempted state constitutional requirements mandating religious tests, although most states rapidly adopted provisions similar to Article VI, clause 3 in their constitutional revisions after ratification.<sup>145</sup> While preemption of state Sunday laws remained an option in theory, it may have devastated ratification efforts. John Adams himself remarked that “I knew they [those endeavoring to unite the colonies] might as well turn the heavenly bodies out of their annual and diurnal courses, as the people of Massachusetts at the present day [1774] from their meeting-house and Sunday laws.”<sup>146</sup> Indeed, the near arrest of President Washington for traveling on Sundays indicates that New Englanders looked unkindly on anyone—even the President of the United States—violating their Sunday laws.

The deliberation principle suggests that the preemption option would have required more than just a special exemption for the President himself. Rather, the entire deliberative enterprise—the President and his advisors—would need a get out of jail-free-card for Sunday laws. Otherwise, the state laws would grind the deliberative process to a halt and rob the President of one, and sometimes two, days of his ten-day deliberative period. Resistance

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142. See JAMES T. RINGGOLD, *SUNDAY: LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK* 238–40 (Frederick D. Linn & Co. 1891).

143. AMERICAN STATE PAPERS, *supra* note 3, at 38 n.1. Fortunately, the new President was not arrested because he explained that he was traveling in order to attend a religious service, one of the few permissible reasons under the law. See *id.*

144. See *supra* note 10 and accompanying text.

145. See *supra* notes 62–65 and accompanying text.

146. AMERICAN STATE PAPERS, *supra* note 3, at 59 (quoting the diary of John Adams).

to preemption of state Sunday laws is more easily understood once one envisions a grant of immunity to large numbers of the country's leadership.

Instead, the Framers opted for the second method: carving out a Sunday exception to eliminate conflict with state and local laws. The Sunday exception permitted states to retain their Sunday laws intact, regardless of their espoused purpose. Thus, under the Sunday exception, the President and his advisors could respect both the demands of deliberation imposed by the Presentment Clause and the necessities of abiding by state law. Before the creation of the District of Columbia, the Framers could not anticipate the likely scope or purpose of the Sunday laws governing the federal government.

Avoiding the conflict with state laws parallels the federalism principle later enshrined in the First Amendment during the first Congress.<sup>147</sup> The First Amendment codified an understanding that already existed at the Framing: Congress did not have jurisdiction to make laws respecting the establishment of religion.<sup>148</sup> Under the First Amendment, Congress could not establish or disestablish religion. Rather, states retained the choice about establishing or disestablishing.<sup>149</sup> The Sunday exception serves as a precursor to this federalism aspect of the First Amendment. Thus the Sunday exception avoided conflict with these laws but remained silent as to their nature and their religious or secular motivations.

### C. Subsequent Support for the Federalism Principle

The federalism principle inherent in the Sunday exception was later acknowledged by the Congress and by the states. The Second Great Awakening targeted the lack of Sunday observance as one of society's great ills.<sup>150</sup> During this period, the delivery of the mail on Sunday became a *cause celebre* for the some of era's most prominent protestant ministers.<sup>151</sup> The 1810s-

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147. The federalism reading of the First Amendment's Establishment Clause has been well-documented. *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting) (“[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. . . . Each State was left free to go its own way and pursue its own policy with respect to religion.”) (internal citations omitted); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1161 (2d ed. 1988) (acknowledging the Framers' intentions that the Establishment Clause “protect state religious establishments from national displacement”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1157–60 (1991); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *NW. U. L. REV.* 1113, 1132–35 (1988). This view suggests that the Establishment Clause's command that “Congress shall make no law respecting an establishment of religion,” U.S. CONST. amend. I, limited only the federal government's powers, while reserving the power of states to establish or disestablish religion. For a review of the debate on the Establishment Clause's federalist origins, see generally Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085 (1995).

148. AMAR, *supra* note 50, at 247.

149. *Id.* at 246.

150. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 152 (1996).

151. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 54 (2005).



1820s witnessed the Sunday Mail controversy over the creation of the federal postal system and the requirement that mail be delivered seven days per week.<sup>152</sup> Congress received angry petitions from Sabbatarians who made the Sunday mail controversy the focus of their energies for two decades.<sup>153</sup> Members of Congress argued that regulation of Sunday behavior remained properly with the states.<sup>154</sup> To those who lobbied Congress for a ban on the delivery of mail on Sunday, the House of Representative responded: “If the arm of government be necessary to compel men to respect and obey the laws of God, do not the State governments possess infinitely more power in this respect? Let the petitioners turn to *them*, and see if they can induce the passage of laws to respect the observance of the Sabbath . . . .”<sup>155</sup> While advocates for a prohibition on the Sunday mails pointed to the Sunday exception, the federalism view prevailed in Congress.<sup>156</sup> The U.S. postal service continued to deliver mail seven days per week until the early twentieth century.<sup>157</sup>

Later in the nineteenth century and shortly before Justice Brewer’s Christian nation declaration,<sup>158</sup> the National Reform Association proposed a Christian amendment to the Constitution.<sup>159</sup> The NRA supported Sunday laws and teaching the Bible in schools.<sup>160</sup> The need for a Christian amendment to the Constitution was based, in part, on the federalism principle embodied in both the First Amendment and the Sunday exception.<sup>161</sup> In the 1860s, the NRA acknowledged that “[t]he authority to enact a general Sabbath law for the entire country does not belong to the government of the United States.”<sup>162</sup> The NRA saw a constitutional amendment as the only way to undo the federalism compromise over the relationship between church and state that was inherent in the Sunday exception.<sup>163</sup>

In choosing to except Sundays from the President’s deliberative period instead of preempting state law, the Framers demonstrated a commitment to principles of federalism. Each state was allowed to retain its Sunday laws,

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152. *Id.* For a discussion of the first wave of opposition to the Sunday mail statute, see Richard R. John, *Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of American Political Culture*, 10 J. EARLY REPUBLIC 517 (1990).

153. *See* H. COMM. ON THE POST-OFFICES & POST-ROADS, 21<sup>ST</sup> CONG., REPORT ON SUNDAY MAILS (1830), reprinted in AMERICAN STATE PAPERS, *supra* note 3, at 245, 263; FELDMAN, *supra* note 151, at 54–55.

154. *See* FELDMAN, *supra* note 151, at 54–55.

155. REPORT ON SUNDAY MAILS, *supra* note 153, reprinted in AMERICAN STATE PAPERS, *supra* note 3, at 245, 263.

156. FELDMAN, *supra* note 151, at 56.

157. *See id.* at 55.

158. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

159. *See* AMERICAN STATE PAPERS, *supra* note 3, at 341 (providing excerpts from the NRA’s Constitution).

160. *Id.* at 342.

161. *Id.* at 344–45 (excerpting NRA’s Constitution and explaining the federalism relationship).

162. R.C. WYLIE, SABBATH LAWS IN THE UNITED STATES 175 (1905) (published by the National Reform Association).

163. *See* AMERICAN STATE PAPERS, *supra* note 3, at 345 (explaining that the NRA believed federal action was necessary to empower state Sunday laws).

whatever their form, without a challenge from the federal government in the form of preemption for federal officeholders.

## V. THE ADOPTION OF THE SUNDAY EXCEPTION IN STATE CONSTITUTIONS

The Framers drafted the Sunday exception as the states were just beginning the process of secularizing their Sunday laws. At that time, no state constitution contained a Sunday exception, although many states adopted them after ratifying the federal Constitution. The transmission of the Sunday exception to state constitutions is somewhat more complicated than its adoption in the federal Constitution, but a close examination of the state Sunday exceptions supports the deliberation and federalism principles.

This Part presents an account of the Sunday exception in three states: Connecticut, New York, and Georgia. Like most of New England, Connecticut had one of the strictest Sunday laws at the time of ratification.<sup>164</sup> Its post-ratification state constitution adopted the Sunday exception, only to be modified in a later crisis over the length of the deliberative period.<sup>165</sup> New York, like the mid-Atlantic states, maintained less strict Sunday laws.<sup>166</sup> The state adopted a Sunday exception in what appears to be an effort to copy the federal Constitution.<sup>167</sup> The most interesting story is that of Georgia which had the least strict Sunday laws at the time of the founding.<sup>168</sup> While the state's Presentment Clause adopted after ratification copies most of the federal Presentment Clause, the state did not adopt the Sunday exception.<sup>169</sup> Georgia did so later in a constitutional revision at secession.<sup>170</sup> In 1983, the state again dropped the Sunday exception.<sup>171</sup>

The experience of the three states examined here suggests that the adoption of the Sunday exception in state constitutions is linked to the need for a deliberative executive and to the recognition of state Sunday laws.<sup>172</sup>

### A. Connecticut

At the founding, Connecticut's Constitutional Ordinance of 1776 contained no veto power.<sup>173</sup> Disestablishment of the Congregationalist Church

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164. See *infra* Subpart V.A.

165. See *infra* notes 173–185 and accompanying text.

166. See LABAND & HEINBUCH, *supra* note 17, at 29–37 (reprinting in part the blue laws of New York and the Mid-Atlantic states).

167. N.Y. CONST. of 1777, § 3.

168. See *supra* note 166.

169. See GA. CONST. of 1789, art. II, § 10.

170. GA. CONST. of 1861, art. III, § 2, pt. 6.

171. See GA. CONST. of 1983, art. V, § 2, para. IV, *amended by* GA. CONST. art. III, § 5, para. XIII.

172. A recent controversy in Ohio indicates that the need for deliberation is not unique to the early republic. On his final day in office, Ohio's out-going governor attempted to pocket veto a controversial bill. Because Ohio's constitution is unclear on whether the ten-day period for a pocket veto excepts Sundays, a dispute arose about when the deliberative period expired and under whose gubernatorial tenure. The issue will likely be decided by the courts. See Aaron Marshall & Sheryl Harris, *Strickland Vetoes Consumer Limits*, THE PLAIN DEALER, Jan. 9, 2007, at A1.

motivated the reforms of 1818 and absorbed most of the attention of that constitutional convention.<sup>174</sup> The 1818 Constitution included Presentment Clause based on that of the federal Constitution.<sup>175</sup> This Presentment Clause contained a three-day period with Sundays excepted.<sup>176</sup>

Subsequently, the three-day period prompted “[o]ne of the gravest constitutional crises in the history of Connecticut.”<sup>177</sup> In the 1920s, Connecticut governors routinely held bills for longer than the constitutionally-mandated three-day period (Sundays excepted) at the end of the legislative session.<sup>178</sup> Chief Justice Wheeler’s opinion for the unanimous Connecticut Supreme Court in *State v. McCook*<sup>179</sup> held that this practice violated the constitutional mandate.<sup>180</sup> The effect was devastating: Almost every statute passed in the 1925 and 1927 sessions was invalidated.<sup>181</sup> The legislature quickly met in special session to address the problem and promptly validated all of the offending laws.<sup>182</sup> The Connecticut Supreme Court reviewed these statutes in *Preveslin v. Derby & Ansonia Developing Co.*,<sup>183</sup> and declared the validating acts unconstitutional.<sup>184</sup> The General Assembly responded by amending the Presentment Clause to give the governor five days to consider a bill, with Sundays and official holidays excepted.<sup>185</sup>

The deliberative demands on the executive thus necessitated an extension of the three-day period to five days and the Sunday exception to include official holidays. Significantly, the exception of official holidays, not religious holidays, from the deliberative period confined the exception to secular observances.

### B. New York

The inclusion of the Sunday exception in New York’s constitution is typical of the story of most similar state constitutional provisions. After ratification of the federal Constitution, most states drafted new constitutions to bring their governance in line with the federal practice.<sup>186</sup>

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173. See WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION A REFERENCE GUIDE 111 (1993) (explaining the veto power derives from CONN. CONST. of 1818, art. IV, § 12).

174. *Id.* at 8.

175. See CONN. CONST. of 1818, art. IV, § 12.

176. *Id.*

177. HORTON, *supra* note 173, at 112.

178. *Id.*

179. 147 A. 126 (Conn. 1929).

180. *Id.* at 135.

181. HORTON, *supra* note 173, at 112.

182. *Id.*

183. 151 A. 518 (Conn. 1930).

184. *Id.* at 518; HORTON, *supra* note 173, at 112.

185. CONN. CONST. of 1818, art. XL (1934); see also HORTON, *supra* note 173, at 112.

186. See, e.g., N.Y. CONST. of 1777; GA. CONST. of 1777; see also HORTON, *supra* note 173, at 5 (noting that, unlike most states’ constitutions, Connecticut’s Charter of 1662 needed little alteration as a result of independence).

As discussed previously, the New York Constitution contained a veto power and provided for a ten-day period, without a Sunday exception.<sup>187</sup> In 1821, the state constitutional convention revisited the veto power and adopted a Presentment Clause virtually identical to that in the federal Constitution.<sup>188</sup> At the convention, the first substantive proposal considered was to abolish Section III, the provision outlining the veto power, and to replace it with the text of what later became Article I, Section 12, which added a Sunday exception to the ten-day period.<sup>189</sup> When the new Presentment Clause was brought for full discussion, the convention considered a number of proposals, including a proposed Council of Revision that would have radically altered the presentment structure.<sup>190</sup> Interestingly, the Council of Revision proposal contained a ten-day period but no Sunday exception.<sup>191</sup> Each of these proposals failed, and the initial proposal for a Presentment Clause modeled on the federal Constitution, passed by a vote of 101-17.<sup>192</sup> Despite later constitutional revisions in 1846,<sup>193</sup> 1894,<sup>194</sup> and 1939,<sup>195</sup> each version retained the Sunday exception in the Presentment Clause.<sup>196</sup>

Thus, the adoption of the Sunday exception in the New York constitution merely imitated that in the federal Constitution. The federal Sunday exception had become the uncontroversial standard.

### C. Georgia

Georgia, a state with some of the most lenient Sunday laws at the founding, did not adopt a Sunday exception in the wake of ratification.<sup>197</sup> The subsequent reforms of the Georgia constitution provide hints that the Sunday exception reduced conflict with state and local Sunday laws.

Georgia's Constitution of 1777 contained no presentment clause and no veto power.<sup>198</sup> Like most states, Georgia redrafted its constitution after the ratification of the new federal Constitution.<sup>199</sup> The Constitution of 1789 was modeled on the federal Constitution.<sup>200</sup> It created a unified executive, broadened the governor's powers of pardon and veto, and made the executive elected by legislature.<sup>201</sup> The new Presentment Clause contained a five-

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187. N.Y. CONST. of 1777, § 3.

188. See N.Y. CONST. of 1821, art. I, § 12.

189. JOURNAL OF THE CONVENTION OF THE STATE OF NEW-YORK 19-21 (Albany, Cantine & Leak 1821).

190. *Id.* at 33-37.

191. *Id.* at 37-39.

192. *Id.* at 39-42.

193. See N.Y. CONST. of 1846, art. IV, § 9.

194. See N.Y. CONST. of 1894, art. IV, § 9.

195. See N.Y. CONST., art. IV, § 7.

196. See *id.*

197. See GA. CONST. of 1777.

198. See *id.*

199. See GA. CONST. of 1789.

200. MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION 4 (1994).

201. GA. CONST. of 1789, art. I, §§ 1, 2, 7, 10.

day period with no Sunday exception.<sup>202</sup> While there is no evidence explaining why the convention declined to adopt the Sunday exception, its conspicuous omission from the Georgia Presentment Clause, which was otherwise identical to the federal prototype, presents opportunities for speculation. The failure to adopt a Sunday exception may suggest that Georgia's relatively lax Sunday laws would not have reached the work of executive deliberation and so a Sunday exception was not needed to prevent a conflict.<sup>203</sup> The 1798 constitution that was drafted in reaction to the United States Supreme Court's decision in *Chisholm v. Georgia*,<sup>204</sup> retained the earlier incarnation of the Presentment Clause.<sup>205</sup>

A Sunday exception was first introduced in the post-secession Constitution of 1861.<sup>206</sup> The 1861 Constitutional Convention amended the Presentment Clause in only two ways: adding the Sunday exception and providing for a line item veto.<sup>207</sup> These changes were proposed five days after the Convention considered and unanimously voted to ratify the Confederate Constitution, which also contained a Sunday exception.<sup>208</sup> The Convention discussed the entirety of Article III very quickly with no discussion of the Presentment Clause or veto power.<sup>209</sup> The Sunday exception was retained in the Constitutions of 1868,<sup>210</sup> 1877,<sup>211</sup> 1945,<sup>212</sup> 1976.<sup>213</sup>

By 1983, Georgia had only limited restrictions on Sunday behavior, and certainly none of these would regulate the activities of the executive.<sup>214</sup> This

202. GA. CONST. of 1789, art. II, § 10.

203. See generally LABAND & HEINBUCH, *supra* note 17, at 29–37 (reprinting in part the blue laws of each state at the founding). Other plausible explanations exist for Georgia's failure to adopt a Sunday exception. For example, it may be that the Georgia drafters wanted the executive to be bound by Sunday laws instead of preempting or excepting them or that the governor's work on Sunday was regulated by custom rather than by law.

204. 2 U.S. (1 Dall.) 419 (1793) (allowing suits against a state by citizens of another state). *Chisholm* served as the catalyst for the subsequent adoption of the Eleventh Amendment. *Florida v. Georgia*, 58 U.S. 478, 519–20 (1854).

205. GA. CONST. of 1798, art. II, § 10. Article II was amended in 1824 to provide for popular election of the Governor. ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA, 1732–1968, at 175 (The University of Georgia Press 1970).

206. GA. CONST. of 1861, art. III, § 2, pt. 6 (providing for “five days (Sundays excepted)”).

207. Compare *id.* with GA. CONST. of 1798, art. II, § 10.

208. GA. CONSTITUTIONAL CONVENTION, JOURNAL OF THE PUBLIC AND SECRET PROCEEDINGS OF THE CONVENTION OF THE PEOPLE OF GEORGIA, HELD IN MILLEDGEVILLE AND SAVANNAH IN 1861, at 181, 187–88 (Milledgeville, Boughton, Nisbet, & Barnes 1861) [hereinafter GEORGIA CONVENTION OF 1861]. Notably, the Confederate Congress adopted a Sunday exception in its Presentment Clause but defeated a proposal to amend the Confederate Constitution's First Amendment analog which would have banned all Sunday Labor. 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861–1865, at 872–73 (1904). The proposal would have inserted, “or requiring of any citizen to perform secular labor on Sunday, except in cases of absolute necessity” after the text mirroring the language of the First Amendment. *Id.* at 872. It was defeated in a vote of 2–4. *Id.* at 873.

209. GEORGIA CONVENTION OF 1861, *supra* note 208, at 260.

210. GA. CONST. of 1868, art. IV, § 2, pt. 6.

211. GA. CONST. of 1877, art. V, § 1, para. XVI.

212. GA. CONST. of 1945, art. V, § 1, para. XV.

213. GA. CONST. of 1976, art. V, § 2, para. VI.

214. See *Kilpatrick v. State*, 256 S.E.2d 900, 901 (Ga. 1979) (discussing extant Sunday legislation, which regulated dancing, fishing, and sales of playing cards); *Hughes v. Reynolds*, 157 S.E.2d 746, 749–50 (Ga. 1967) (holding the Sunday Business Activities Act, regulating the sale of certain goods on Sunday, unconstitutional on equal protection grounds).

demise of Sunday laws coincided with the removal of the Sunday exception: The redrafting of the Constitution in 1983 removed the both five-day period and the Sunday exception.<sup>215</sup> The Constitution was subsequently amended to add back a new six-day period for consideration of bills, without a Sunday exception.<sup>216</sup> The available evidence on Georgia's Sunday exception, while only circumstantial, indicates a correlation between the Sunday exception and the state's Sunday laws.

The histories of the Sunday exceptions in these three states demonstrate that the Sunday exception is linked both to the nature of the state Sunday laws as well as to the need for deliberation. The deliberation principle is most evident in Connecticut's reforms. In Connecticut, a state with strict Sunday laws, the Sunday exception was added to mimic the federal Constitution.<sup>217</sup> However, a crisis over the executive's need for deliberation produced an extended deliberation period and additional exceptions—Sundays as well as official holidays.<sup>218</sup>

While the Sunday exception did not produce a large amount of debate in any of the state constitutional conventions, the context in which Sunday exception arose in each of these states illuminates the deliberation and federalism principles of the federal Constitution's Sunday exception.

## VI. CONCLUSION

The sparse but interesting history of the Constitution's Sunday exception provides surprising insights into the nature of the executive and the principle of federalism at the time of the drafting of the Constitution.

Rather than endorsing a particular religious practice, the Sunday exception illustrates process values embedded in the Presentment Clause. The Framers intended the Presentment Clause's ten-day period to serve as a pause in the law-making process. The President's institutional capacities of deliberation, information, and advice were important aspects of this process. The President's ability to marshal information and guidance from his advisors, as contemplated by the Opinions Clause, is an important aspect of the deliberative executive.

A self-executing period for the President's consideration of legislation meant that every day counted. Indeed, President Washington used the full extent of the ten-day period on at least two occasions. Thus, the Framers faced a choice between preempting state law that prohibited Sunday labor and travel or excepting Sundays from the President's deliberation. In choosing the latter, the Framers gestured toward a view of federalism on religious matters later codified in the First Amendment. The subsequent history of

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215. Georgia has the "newest" constitution of any state in the nation" because it underwent a complete constitutional revision from 1977 to 1982. See HILL, *supra* note 200, at 1. See also GA. CONST. of 1983, art. V, § 2, para. IV, amended by GA. CONST. art. III, § 5, para. XIII.

216. GA. CONST. art. III, § V, para. XIII.

217. See CONN. CONST. art. V, § 15.

218. See *supra* note 185 and accompanying text.

Sunday exceptions in three states demonstrates the relationship between state Sunday laws and the need to except Sundays from the governor's deliberation.

The Christian nation thesis appears in new forms in arguments about the "religious heritage" of the United States.<sup>219</sup> While this Essay has not questioned the accuracy of claims about the religious heritage of the American people or even of the founders themselves, it has untethered that argument from its textual moorings. The Christian nation thesis of Justice Brewer and others finds little support in the Sunday exception. This examination of the Sunday exception—its history, structure and function—demonstrates that this parenthetical did not encode Christian observance into the text of the Constitution by some silent agreement among the participants in Philadelphia. Rather than illustrate unanimity on the proposition that the United States was a Christian nation, the Sunday exception exposes the diversity of Sunday laws in the states at that time. The Sunday exception accommodated these different laws, which were at different stages in the gradual process of secularization.

The Sunday exception provides a window into the enduring debates on church-state relations and the structure of government. In examining even the smallest phrase of the Constitution, we see several operating principles that loom large in contemporary debates over the nature of our government. In this respect, the Sunday exception is no exception.

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219. See *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (discussing our acknowledged religious heritage as a basis for rejecting the strict "absolutist approach" to the Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").