Original Mean[der]ings

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ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION. By Jack N. Rakove.† New York: Alfred A. Knopf. 1996. 420 pp. $35.

Jack Rakove's Pulitzer prizewinning book Original Meanings *will likely change the terms of the constitutional interpretation debate. As Judge Kozinski and Mr. Susman explain, Rakove's book offers a number of interesting insights into raging constitutional disputes. In particular, although* Original Meanings *provides some support for advocates of non-Article V constitutional change, such as Professors Bruce Ackerman and Akhil Amar, it cautions against the use of informal procedures. Moreover,* Original Meanings *presents an intriguing account of the ratification procedure, focusing on its all-or-nothing character. Kozinski and Susman argue that this account sounds the death knell for the strict originalist position. Finally,* Original Meanings *also illustrates the potential to hijack various interpretative methods for purely political purposes.*

John Marshall's famous dictum reminds all would-be constitutional interpreters to "never forget that it is a *constitution* we are expounding";[1] Jack Rakove's Pulitzer prizewinning book *Original Meanings* warns those interpreters who seek guidance from the historical records of the founding to "never forget that it is a debate they are interpreting."[2] Rakove's warning hints at his purpose: to add historical rigor to the debate over originalist interpretation by providing a contextual account of the making of the Constitution. Although Rakove's book may not settle many constitutional debates, it should defang the notion that the written record of the founding, from Madison's notes to *The Federalist Papers*, is a sacred text that if studied thoroughly enough, will reveal its true, intended meaning.[3] Instead, a thorough investigation of the history reveals a remarkably profound, often overheated, and primarily theoretical de-

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). *But see* Alex Kozinski & J.D. Williams, *It Is a Constitution We Are Expounding: A Debate*, 1987 UTAH L. REV. 977, 977-85.

2. P. 10.

3. For a similar analogy between biblical and constitutional interpretation, see Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 1-11 (1989). Howe predicts that, just as historical inquiry into the Bible's origins during the nineteenth century led to "a distinct relativising of the Bible," causing people to see it less as a "universal standard," historical study of the Constitution will lead to an appreciation that "[t]he agenda of 1787-88 will not provide answers to the problems of our day." *Id.* at 10.

bate over the Ratifiers' decision either to accept or reject the proposed Constitution without changes. Rakove's main concern is not what consequence this portrait of the founding has for constitutional interpreters; he is a historian, not a lawyer. Yet Rakove's history lesson is of value beyond the history department; it can teach much to students across campus in the law school, as well as down the street in the courthouse.

Original Meanings presents an interesting take on whether the founding was legal and thus ultimately whether informal amendments are consistent with the original constitutional plan. Rakove focuses solely on the historical question of whether the Framers thought they were acting legally—he does not care how the *law* would characterize their actions. His conclusion, consistent with Professor Bruce Ackerman's assessment, is that the Framers understood the Constitution to be a violation of the Articles of Confederation.[4] But Rakove's account does not support the further inference that if the Framers could break the preexisting rules for constitutional change, so too may their successors. Instead, by focusing on the innovative character of ratification, Rakove's account helps pinpoint exactly what made the founding unique—i.e., original—and thus difficult to imitate informally.

Rakove's account also poses serious problems for advocates of the strict originalist position. Strict originalist interpretations depend on sanctifying the words of the Ratifiers because their collective power gave the Constitution its special force. Strict originalists regard the Framers as mere drafters of language whose meaning the Ratifiers were free to change.[5] But Rakove points out how constrained the Ratifiers really were: They could only accept completely or reject entirely the proposed Constitution. The Antifederalists tried to change the text of the Constitution to express their understanding more clearly. They failed because the Federalists forced an "all-or-nothing" vote on the proposed Constitution, and "nothing" risked dissolution of the Union (as the states might have proved unwilling to continue living under the Articles of Confederation while the proposed Constitution was being rewritten). This "adhesionary" aspect of the ratification procedure raises doubt that constitutional interpreters can ever divine the Ratifiers' intended meaning, as they never had a chance to express their specific intent.[6]

The book also reveals how tempting originalist inquiries are. Originalism is attractive, in part, because the historical record of the founding reveals such an intriguing debate about popular government. Moreover, originalism offers a seemingly neutral, apolitical method of interpretation. Nevertheless, *Original*

4. *See* p. 129 ("[I]n the end, as the legal scholar Bruce Ackerman has ably argued, the Framers and many Federalists also knew they could never defend their decision to abandon the Articles of the Confederation in strictly legal terms.").

5. *Compare* Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 510-11 (1988) (arguing that the Framers' intent is not controlling because the Ratifiers did not have access to it), *with* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (explaining that difficulties in identifying the Ratifiers' intent require accepting the Framers' explanations as authoritative).

6. For a discussion of the Constitution as a contract of adhesion, see text accompanying notes 100-111 *infra*.

Meanings ends with a cautionary tale about originalism's siren song: It can, and during the Founders' generation did, serve purely political agendas.[7]

I. RAKOVE AND INTERPRETATION

The big mystery in Rakove's book is where he stands in the current debate over the use of originalism in constitutional interpretation. In a footnote, Rakove acknowledges that, although he is often asked whether he thinks originalist interpretation is valid or viable, his preferred answer is "suitably ambivalent."[8] Rakove offers two reasons for his ambivalence: First, he considers it "anti-democratic" to allow "distant (political) ancestors" to constrain current generations.[9] Second, he has "serious questions about the capacity of originalist forays to yield . . . definitive conclusions."[10] Nevertheless, Rakove acknowledges the appeal of originalist inquiries, especially when they support outcomes he likes.[11] This ambivalence may be appropriate, but it's also unsatisfying, especially given the depth of Rakove's commitment to studying the founding.

Rakove's primary explanation for his coyness about originalism is that he's a historian, and "historians have little stake in ascertaining the original meaning of a clause for its own sake."[12] But why should historians have such little stake in figuring out what certain words mean, especially such historically significant words? Rakove argues that, unlike lawyers and judges who use the historical record to answer specific problems, historians don't have to reach conclusions and can happily accept the indeterminacy of the historical record.[13] Thus, Rakove seems to argue that historians can accept "I don't know" as an answer, whereas lawyers and judges can't.

There's much truth to Rakove's point. Although many lawyers and judges have declared the historical record indeterminate—from Justice Jackson's famous statement that the records of the founding are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh"[14] to Justice Brennan's

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7. *See* p. 365 ("[I]f originalism could . . . be defended as a neutral mode of interpretation, the temptation to resort to it was manifestly political. It was dictated not by the prior conviction that this was the most appropriate strategy to ascertain the meaning of the Constitution but by considerations of partisan advantage.").

8. P. xv n.*.

9. P. xv n.*.

10. P. xv n.*.

11. *See* p. xv n.*.

12. P. 9.

13. *See* pp. 9-10 ("Historians can rest content with—even revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion."); *see also* Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 441 (1996). Sherry writes:

> [A]ll of the scholars that I have mentioned this morning are either law professors or political scientists. Why have I not discussed any professional historians . . . ? The answer is that professional historians do not attempt to answer the questions [about how the Framers would answer current interpretive controversies], because they recognize that history is indeterminate.

Id.

14. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

accusation that the assumption that we can discover the Framers' original intent "is little more than arrogance cloaked as humility"[15]—such declarations are more often rhetorical swipes at originalist inquiries than conclusions reached after serious historical investigation. This isn't too surprising. As Justice Scalia argues, lawyers aren't necessarily well-equipped to conduct originalist inquiries.[16] When lawyers do engage in originalist investigations, they do so as either litigators gathering historical facts with an advocate's biased eye or legal academics whose factual knowledge is often based on the minimal facts reported in Supreme Court case law; in either case, they are not the best historians.[17]

Moreover, just as lawyers would not trust historians with their cases, historians shouldn't trust lawyers with the past.[18] If Rakove, the historian, truly believes that a historically faithful interpretation of the constitutional founding yields few firm conclusions or interpretations, it is unfortunate that he refuses to share his views. After all, originalist interpreters can easily dismiss Justice Brennan's historical conclusions as mere attempts to excuse his activist jurisprudence,[19] but they would have a harder time ignoring the same conclusion when it comes, albeit reluctantly, from a well-respected historian like Rakove. After all, Pharaoh may not have been willing to buy Joseph's interpretations if Pharaoh's servant had not recommended Joseph so highly.

Rakove ultimately keeps his cards close to his vest throughout the book, steadfastly maintaining the historian's perspective—the "old-fashioned and perhaps naïve desire to get the story right for its own sake"[20]—and leaving questions of law for lawyers and judges. So does Rakove even want lawyers to read his book? The answer is plainly "yes," as he acknowledges that he is attempting to "advance a debate that is very much about a specific moment in

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15. William J. Brennan, Jr., Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (The Federalist Soc'y ed., 1986). As Justice Brennan notes, "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers . . . . All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention." *Id.*

16. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989) (arguing that, when properly done, an originalist inquiry is "a task sometimes better suited to the historian than the lawyer").

17. *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1745 (1996) (book review). Professor Cloud states:

> [I]t is important that we recognize lawyers' histories for what they are, and for what they are not. This kind of work is not constitutional *history*, it is not legal *history*; it is not *history*. It is a lawyer's selective use of historical data to advance a legal argument. It is part of a time-honored tradition in which most legal scholars who write about constitutional history participate from time to time.

Id. (footnote omitted).

18. This is especially true given the state of the historical record of the founding and ratification. As Rakove notes, there is such a cacophony of opinions expressed in the historical records that "many an interpretation can be plausibly sustained, few conclusively verified or falsified." P. 133. This provides a great temptation for lawyers to misuse history as a tool for advocacy. *See* Cloud, *supra* note 17, at 1745.

19. *See, e.g.*, Lino A. Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1986, at 19 (criticizing Justice Brennan's Georgetown speech).

20. P. 22.

history but is not about history alone."[21] Although Rakove is largely successful in keeping his personal beliefs out of the originalist interpretation debate, he accepts that his scholarship will not remain outside the fray—that lawyers like us will inevitably use his scholarship as a tool of persuasion in constitutional interpretation arguments.[22]

II. FOUNDING: LEGAL OR ILLEGAL

The Framers were innovators, and the idea of ratification was perhaps their most significant innovation. Although the concept of the popular ratification of a constitution was not unheard of when the delegates gathered in Philadelphia, it was still a little-used procedure.[23] Of the state constitutions in force by 1787, only Massachusetts' had been submitted to the people for approval.[24] Pennsylvanians were given an opportunity to comment publicly on their proposed constitution, but after three weeks of public discussion, the Pennsylvania convention simply pronounced the constitution adopted.[25] Even the Massachusetts ratification procedure, which called for assent of two-thirds of all adult males, was not properly executed. When the state constitutional convention began to count the results of votes taken in various town meetings, the convention "could not tidily aggregate [the voters'] preferences because the town meetings had not posed the question in a uniform way."[26] Eventually, the convention exercised its discretion and announced that the constitution had been approved.[27] As Rakove points out, the most important facet of this state of affairs was that no one really questioned the legitimacy of the constitutions that were not popularly ratified.[28] Whereas today we consider ratification inherent in the concept of legitimate constitutionalism, it was not inherent to the mind of late-1780s Americans.

The Framers became enchanted with the concept of ratification for a number of reasons, some admirable and others somewhat embarrassing. The Continental Congress gave delegates to the Philadelphia Convention only three instructions: They were to revise the Articles of Confederation, present their results to the Congress for approval, and report their results to the states for approval.[29] To some extent, the delegates disobeyed all three. The delegates quickly dismissed the first instruction,[30] as the Articles were obviously beyond repair. The second and third orders (reporting to the Congress and the states)

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21. P. 22.

22. *See, e.g.*, Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 620 (1997) (denouncing Rakove for failing to "bring scholarly objectivity to this debate").

23. As Rakove notes, the concept of popular ratification first appeared in England in 1649, when the radical republicans drafted *The Agreement of the People*, which called for popular approval. *See* p. 97.

24. *See* pp. 97-99.

25. *See* p. 97.

26. P. 98.

27. *See* p. 98.

28. *See* p. 97 ("Initial reservations . . . were directed more toward the character of the bodies that framed the constitutions than toward the absence of popular ratification.").

29. *See* pp. 101-02.

30. *See* p. 102.

did not provoke immediate concern because they hinged on a significant contingency, namely, that the delegates would reach agreement about a proposed constitution. Nevertheless, the delegates' awareness that others would eventually sit in judgment of their work had an "immensely liberating effect on [their] deliberations" because they knew they could make mistakes.[31] Only when the delegates realized that the Convention would produce an agreement did they seriously consider how their work would be evaluated, and thus they began discussing ratification.[32]

This ratification discussion was in turn dominated by pragmatic and political concerns.[33] The most important political concern was that ratification would protect the new Constitution from tinkering. Unratified, the Constitution would be subject to legislative revision under the well-established principle *quod leges posteriores priores contrarias abrogant*: Between two legislative acts of equal jurisdictional status, the more recent enactment takes precedence.[34] The Framers therefore wanted to find a way to elevate the jurisdictional status of the Constitution.[35] The most pressing pragmatic concern, however, was the need to circumvent Article XIII of the Articles of Confederation, which required unanimity for amendments.[36] Rhode Island's refusal even to send delegates to Philadelphia made it obvious that unanimous approval would be impossible.[37] Compliance with Article XIII simply was not an option.

Whether this failure to comply with Article XIII makes the founding illegal is a point of dispute between Professors Akhil Amar and Bruce Ackerman. Professor Amar contends that the founding was legal—or at least that the Founders thought it was.[38] Professor Ackerman, however, contends that the founding was illegal, although quite democratic.[39] Professor Amar argues that, although the Founders' actions were inconsistent with Article XIII, "inconsistency is not illegality."[40] Article XIII, he argues, applied only so long as the Articles of Confederation were in effect. Professor Amar further asserts that the Articles were merely a treaty and that, under prevailing international law, the numerous violations of the Articles' terms permitted the contracting parties—the states—to renounce their agreement.[41] Unfortunately, the historical record reveals a paucity of explicit endorsements of this "breached-treaty" jus-

31. P. 102.

32. *See* p. 103 (discussing the chronology of discussions about the role of ratification).

33. *See* p. 103.

34. *See* p. 99.

35. *See* pp. 99-101.

36. *See* pp. 103-04.

37. *See* p. 104.

38. *See generally* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

39. *See generally* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

40. Amar, *supra* note 38, at 465.

41. *See id.* ("The Articles of Confederation were nothing more than a tight treaty among thirteen otherwise independent states . . . .").

tification. Amar's best evidence is that many of the Founders talked as if they believed the founding was perfectly legal.[42]

Rakove, however, appears to side with Ackerman's characterization. Rakove's account conveys the notion that the Framers understood early in the drafting process that they were going to have to *violate* Article XIII.[43] As Professor Ackerman has observed, no real effort was made to provide legalistic answers to the legalistic objection that the Constitution was inconsistent with Article XIII.[44] As Rakove notes, this was because the Framers "knew they could never defend their decision to abandon the Articles of Confederation in strictly legal terms."[45]

Although Rakove questions whether the founding was "illegal" in the sense intended by Professor Ackerman,[46] much of Rakove's account supports Professor Ackerman's reading of history.[47] Ackerman labels the founding a "constitutional moment,"[48] an unconventional break with preexisting procedures for constitutional lawmaking that nevertheless produced legitimate constitutional changes because such changes were backed by the will of the people. Thus, Ackerman concludes that, by recourse to metademocratic activity, constitutional change can legitimately occur outside the strictly prescribed rules of Article V. If the Founders could change the Articles of Confederation in seeming violation of Article XIII by adopting the ratification procedures, then so too could the New Dealers change the Constitution without complying with Article V by invoking their overwhelming electoral victories. Finally, Ackerman declares that "we should learn to look upon the Founding as a great precedent in the ongoing practice of popular sovereignty" and use "our unconventional Founding as a benchmark in assessing the claims of later Americans to make new constitutional law in the name of the People."[49]

How do the changes wrought by the New Deal Democrats measure up to this benchmark? Ackerman argues that the changes the New Dealers made

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42. *See id.* at 465-69.

43. *See* p. 105 (noting that statements about the need to appeal to popular sovereignty to circumvent Article XIII "were [not] heady statements hastily summoned to dispel the last-minute anxieties of the timid. Earlier debates had produced similar appeals as justifications for overriding the rules of the Confederation.").

44. *See* Ackerman & Katyal, *supra* note 39, at 512 ("[N]o one other than Madison [tried] to answer the dissenter's legalistic doubts. The Federalists had the votes, and that was that.").

45. P. 129.

46. Whether this makes their actions "illegal" is not so obvious. Rakove rhetorically notes that "the charge that the Convention somehow acted 'illegally' still seems somewhat puzzling, at least if one asks under what law the framers might have been prosecuted for ignoring the formal recommendations under which they were meeting." P. 384 n.20. In fact, Rakove argues that popular ratification created a new form of legality for constitutions. *See* p. 384 n.20 ("The crucial point is not the issue of the 'illegality' of the procedures proposed for ratification . . . but the recognition that . . . the legal defects of the existing state constitutions would become apparent in the light of the new understanding of what was required to make *any* constitution supreme law.").

47. This is not surprising given that Professor Ackerman and his collaborator thank Rakove in Ackerman's most recent article on the subject "for keeping us honest." Ackerman & Katyal, *supra* note 39, at 475 n.†.

48. *Id.* at 572 (describing the legitimacy of constitutional changes that use a democratic "bandwagon effect").

49. *Id.*

were based on and backed by the same authority as the Constitution—i.e., "sustained bandwagon[s] of democratic victories"—and, as such, are as legitimate as the Constitution itself.[50] If the founding is truly the benchmark, then we had better understand what it represents. Enter Jack Rakove.

The founding is more than *a* great precedent in our ongoing practice of popular sovereignty: It is *the* great precedent, *the* original act. Unlike their successors, the Founders were not acting in contravention of true popularly created rules. The Articles of Confederation and almost all state constitutions "rested on no authority greater than ordinary acts of legislation."[51] By employing the ratification device, the Framers not only circumvented preexisting rules, they also created a new set of rules based on an authority that would be impossible to trump. The Framers did not unleash an extralegal method of constitutional change; instead, they changed what it meant to make a constitution supreme law. Rather than establishing a benchmark for others to meet, the founding created a new set of rules based on authority that surpassed the preexisting "benchmark" for legitimate constitutional change—i.e., legislative approval. As Rakove writes, "[F]ar from being less legal than the other charters that had gone before it, the Constitution established a more profound criterion of legality itself."[52] The Founders may have intended that their new rules be obeyed unless subsequent generations found a legitimate way to change the rules themselves, as the Founders did.

When measuring the "constitutional changes" made by the New Dealers against those made by the Founders, Professor Ackerman ranks them as coequal. The Founders merely provided an example of how metademocratic change can occur outside preexisting institutions; they did not intend to preclude others from trying the same thing. But it may be a mistake to measure what occurred after the Constitution took effect by what came before.[53] The adoption of the Constitution fundamentally changed the rules of the game.[54] Perhaps, then, we should require that subsequent constitutional reformers either play by the rules or find a way to elevate the jurisdiction of their changes over those of existing rules.[55] At the very least, we should be cautious before as-

50. *Id.* at 573.

51. P. 129.

52. P. 130.

53. *Cf.* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1292 (1995) ("The method of the Constitution's adoption—*occurring when the Constitution itself was not in force*—simply cannot tell us whether similar procedures would be constitutional within the terms of the Constitution that was then adopted.").

54. Rakove urges his readers not to focus too much on the procedures used to create the Constitution, but rather to focus on the result of those procedures: a constitution immediately accepted as legitimate. *See* p. 130.

55. One might claim that the Reconstruction Republicans and New Deal Democrats appealed to a higher authority than the Founders. After all, a large segment of the population was left out of the "popular sovereignty" that invested the Constitution with its authority. *See, e.g.*, Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1498 n.44 (1985) (reporting that only about 2.5% of the population voted in favor of ratifying the Constitution); Laurence H. Tribe, *Federal Judicial Power and the "Consent" of the Governed*, in THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 207, 209 (A.E. Dick How-

suming that there is little difference between the Founders and the New Dealers except for the passage of 150 years.

There are plenty of other good reasons to be skeptical of Professor Ackerman's non-Article V amendment theory. The most forceful criticism of Ackerman's theory is that it's almost impossible to decide when a constitutional moment has occurred or, more importantly, is about to occur. This problem calls into doubt whether Ackerman's theory is a workable principle of constitutional adjudication: Judges have to be able to decide when a valid informal amendment has occurred.[56] Similarly, a significant difference exists between the founding and an informal amendment process: Ratification was a formal procedure and its formality mattered.[57]

Significantly, the form of each state's Ratification Convention was akin to its regular legislature: Both consisted of representatives elected by the citizens of the state.[58] Nevertheless, Rakove reports that the assent of the Ratification Conventions elevated the Constitution's authority above ordinary legislative enactments.[59] Why did formally similar lawmaking bodies command different authority? One answer is that delegates to the Ratification Conventions were qualitatively different from regular legislators because they were single-shot lawmakers and thus more likely to put the greater good above narrow self-interest. The best answer is that, even before the founding, everyone knew and essentially agreed that the Ratification Conventions would be special. The formality of the ratification procedure made it conspicuously different from ordinary, nonconstitutional lawmaking. As Rakove notes, "[W]hatever else might be said about the legality or illegality of this process, it produced a completely unambiguous result that ensured that the Constitution would attain immediate legitimacy."[60] In contrast, Professor Ackerman's constitutional moments hardly produced—either immediately or unambiguously—legitimate constitutional change.

This is not to say the Founders intended their new rules to straightjacket future generations. One of the ways in which the Constitution improved on the "perpetual" Articles of Confederation was its enhanced amendabililty[61]—Article V's requirements are hardly onerous when compared to those of Article

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ard ed., 1992) (arguing that slaves, women, and those without property did not consent to the Constitution, making popular consent an "illusory source of legitimacy"). To the extent subsequent constitutional changes were designed to expand political participation or backed by a broader-based segment of the population, they arguably rest on a higher jurisdictional level than the 1787 Constitution.

56. *See, e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)).

57. As Rakove notes, Madison latched onto the Ratification concept because "[h]e clearly believed that the authority of a constitution depended on the form of its promulgation." P. 101.

58. *See* p. 91.

59. *See* p. 101.

60. P. 130.

61. *See* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443, 2444 (1990) ("Perhaps the most remarkable feature of the 1787 Constitution—and perhaps as well its 'greatest improvement' on the theory of constitutionalism that preceded it—is precisely its own textual recognition of *alterability*.").

XIII. At the same time, however, Article V remains a big barrier to change. As Rakove suggests, too strict an originalist position threatens to convert Article V into an intolerable obstacle:

> It is one thing to rail against the evils of politically unaccountable judges enlarging constitutional rights beyond the ideas and purposes of their original adopters; another to explain why morally sustainable claims of equality should be held captive to the extraordinary obstacles of Article V or subject to the partial and incomplete understandings of 1789 or 1868.[62]

III. RATIFICATION: ALL OR NOTHING

The most striking aspect of Rakove's account of the founding is its focus on the scope of the ratification decision. When the various state ratifying conventions met in 1787-1788, they had before them a simple decision: either to accept or reject the entire proposed Constitution.[63] Although many Antifederalists attempted to resist this binary choice by calling for amendments or a second convention, the Federalists were able to restrain the burgeoning forces of full-fledged popular sovereignty.[64] Much like a judicial retention election in which unhappy voters can only choose to "throw the bum out," the Antifederalists could only reject the proposed Constitution.

The Federalists' strategy succeeded largely because the Articles of Confederation and the Antifederalists' political strategy were such failures. Rejecting the Constitution meant continued existence under the Articles, a situation so unbearable it was unlikely the Union would survive while a new constitution was drafted. Although this alone might not have doomed opposition to the Constitution, the Antifederalists squandered their remaining chances by failing to organize and develop a coherent alternative proposal. Instead, they chose to make ominous accusations, finding potential tyranny in even the most mundane clauses.[65] This tactic played squarely into the Federalists' hands, allowing them to avoid compromises. So long as the Antifederalists maintained that the Constitution was a complete disaster, the Federalists could ask them to take it or leave it without denying them their preferred choice—leaving it.

Despite the Federalists' claims that the Constitution was actually "laid before the citizens of the United States, unfettered by restraint,"[66] Rakove argues that the Constitution was laid before the people only so they could make a

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62. Pp. 367-68.

63. *See* p. 96; *see also* pp. 107-08 ("Article VII had to be designed and construed to permit only wholesale assent or rejection rather than a clause-by-clause referendum on the Constitution, precisely because the framers knew that ratification would indeed involve something more than executing a legal fiction.").

64. *See* pp. 114-16.

65. The Antifederalists saw tyranny rising from relatively innocuous clauses, like the clause permitting Congress to "make or alter such Regulations" the states adopted for the election of representatives. U.S. CONST. art. I, § 4, cl. 1. The Antifederalists feared that this power would allow the federal government to control the election of the states' representatives. *See* p. 146. We have recently seen evidence that this is not true. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1869 (1995) (finding that the "make or alter" clause has no effect on whether term limits are constitutional).

66. Charles A. Lofgren, *The Original Understanding of Original Intent?*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 117, 122 (Jack N. Rakove ed., 1990) [hereinafter

"gross comparison [between] the Confederation and the Constitution."[67] Given the "gross" nature of the decision at ratification, perhaps constitutional interpreters should reevaluate the level of generality at which they look to discover an original understanding—in the sense that ratification did not necessarily reflect consensus about the Constitution's meaning.

The Federalists struggled mightily to constrain the process of popular ratification,[68] realizing that they had given birth to an *enfant terrible* who could turn on them easily.[69] The Federalists first realized the scope of this problem in Philadelphia, when Edmund Randolph proposed that the Constitution be submitted to the state conventions so the states could propose amendments, which would then be resubmitted to a second federal convention.[70] Randolph's proposal elicited substantial opposition. Although the Federalists hated to envision their handiwork being set aside by the state conventions, more than author's pride made the prospect of revising the proposed Constitution troubling. The Federalists appreciated how lucky they were to have reached a consensus in Philadelphia, recognizing that it was highly unlikely that a new set of drafters could agree again. The Philadelphia Convention met without any set agenda, somewhat unexpectedly and in violation of its initial instructions, and produced a radical proposal. A second convention, by contrast, would have been much more constrained. In fact, delegates would likely have arrived with strict instructions from their states, making compromise unlikely if not impossible.[71] As a result of these fears, Randolph's motion was summarily defeated.[72]

Randolph's proposal raises interesting questions. Although compromise at a second convention may have seemed impossible to the Federalists, what if that assessment were wrong? After all, compromises had been reached at Philadelphia that might have seemed impossible at the inception of the Convention. Moreover, Rakove notes that the Philadelphia Convention's biggest failures were its two great compromises—about slavery and the Senate.[73] Although Rakove suggests that these were necessary compromises, he also wonders whether the Northern delegates could have bargained better on the slavery issue. For instance, Rakove questions whether South Carolina and Georgia would have left the Union over a ban on slave importation when, at the same time, they faced threats from Indian tribes and whether the Fugitive Slave

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INTERPRETING THE CONSTITUTION] (quoting James Wilson, Statement Before the Pennsylvania Ratification Convention (Dec. 4, 1787)).

67. P. 11.

68. This antidemocratic character of the Federalists' strategy is understandable given that the Federalists were driven to adopt the ratification procedure because of primarily pragmatic concerns. *See* text accompanying notes 33-37 *supra*.

69. *See* p. 107 ("The framers . . . left Philadelphia fearful that their new concept of ratification, so useful a device to circumvent the Confederation, could be wielded against the Convention itself.").

70. *See* p. 106.

71. *See* pp. 106-07 (discussing the constraints of a second Convention).

72. Randolph's proposal was "hastily rejected . . . as a prescription for chaos." P. 106.

73. For Rakove's discussion of the Philadelphia Convention's major compromises, see pp. 58, 73-74, 89-91.

Clause was truly a "necessary" concession.[74] Given a second chance, would the same bad bargains have been made?

Significantly, a second convention might have eliminated many of the sources of indeterminacy in the historical record. Given the substantial public interest in the ratification debates,[75] deliberations at a second convention would likely have been conducted in public. At the very least, the second convention would have needed to justify keeping its debates secret, whereas the Philadelphia delegates had decided on secrecy without much discussion. In short, secrecy during a second convention would likely have been untenable. As a result, had the Federalists welcomed a second convention, we would not have to rely solely on William Jackson's inadequate journal or Madison's daily notes to determine the scope and meaning of our Constitution.[76] Moreover, we would not have to contend with claims that we should disregard some of our best historical evidence because that evidence was kept "hidden."[77] But the Federalists were unwilling to risk a second convention, and that decision has greatly hindered our ability to derive firm conclusions about original meanings.

The Federalists were not merely determined to prevent a second convention; they were also determined not to allow amendments to the proposed text. By insisting that ratification focus solely on the choice between accepting the Constitution as written or rejecting it, "[t]he framers thereby sought to confine this exercise in popular sovereignty to the mere legal act of ratification."[78] In six states—Pennsylvania, North Carolina, Massachusetts, New Hampshire, Virginia, and New York—Antifederalists resisted this strategy, attempting to condition ratification on the adoption of amendments or the calling of a second convention.[79] The Federalists adamantly fought these challenges, equating conditional ratification with rejection.

Rakove's view of these debates differs from "[t]he usual story that historians tell about the difficult passage of the Constitution through these states," which portrays the Federalists as acceding to reasonable Antifederalist demands by agreeing to adopt a Bill of Rights after ratification.[80] Instead, Rakove claims that the "real winners" were the Federalists, who were able to beat back Antifederalists' demands for conditional ratification or a second con-

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74. *See* p. 93.

75. Because these interests were so acute, the Philadelphia delegates anticipated that the public would send their delegates off to a second convention with strict instructions on how to vote. *See* pp. 106-07.

76. Many have questioned the accuracy of Madison's notes, especially to the extent Madison may have "edited" them to reflect his own views; Rakove observes that, after mid-July, Madison's notes become noticeably brief. *See* p. 82. However, Rakove chalks this up to Madison's "mounting fatigue" and "the delegates' aversion for the long and polished speeches that were so frequent in June and July." P. 92.

77. *See, e.g.*, Rotunda, *supra* note 5, at 511 (asserting that many of the Convention notes were kept hidden and that "[t]he ratifiers of the new Constitution should not be held to have approved of the hidden Convention notes any more than your incorporation of my language necessarily incorporates my hidden intent").

78. P. 106.

79. *See* p. 116.

80. P. 116.

vention.[81] This struggle between Federalists and Antifederalists made for a close fight, especially in Virginia and New York.

Early in the ratification process, the Virginia Assembly actually approved funds to be used to send delegates to a second convention. But a few factors narrowly held back the Antifederalist push toward conditional ratification. Governor Edmund Randolph erratically switched from the Antifederalist to the Federalist side,[82] perhaps tempted by the prospect of becoming President under the new Constitution. More importantly, the Virginia Assembly postponed its ratification convention until June 2, 1788. Although Madison complained at the time that "this delay would earn 'no credit' for 'a State which has generally taken the lead on great occasions,'"[83] the decision may have saved the Constitution. On June 21, the same day Virginia finally voted against conditional ratification, New Hampshire became the ninth state to ratify the Constitution.[84] By waiting for so long, Virginia's delegates knew that conditional ratification likely meant rejection of the Union: It was too late for other states to agree to a uniform set of conditional amendments, which was the only practical way of conditionally ratifying the Constitution.[85] Virginia instead adopted only recommendations, not conditional amendments.

As in Virginia, New York Antifederalists came close to adopting truly conditional amendments, replacing at the last minute "the words 'upon condition nevertheless' with '*in full confidence nevertheless*,' in effect substituting a political expectation for a legal qualification."[86] New York, however, was the only state to adopt "explanatory" amendments.

New York's convention assembled one week before the Constitution went into effect by virtue of New Hampshire's ratification. Since the prospect of rejecting the Constitution was now futile, voting for conditional ratification would only jeopardize the state's ability to keep the national capital in New York City. So New York's Antifederalists at least sought to "explain" what the state meant when it joined the Union. According to Rakove, "[H]ere at last a state convention sought a formula to convert the legal act of ratification into an act of interpretation as well."[87]

The Federalists' reaction to this attempted end run around their all-or-nothing strategy was surprising: They didn't oppose it.[88] Rakove attributes this lack of opposition to the Federalists' view that explanatory amendments were the lesser of two evils. The Federalists were primarily concerned about defeating any conditional amendments and didn't perceive that explanatory amend-

81. *See* p. 116.

82. *See* pp. 122-23.

83. P. 122.

84. New Hampshire's vote was the final one needed for Ratification. *See* pp. 121-22.

85. *See* pp. 123-24.

86. P. 127.

87. Pp. 125-26.

88. In fact, John Jay introduced a resolution declaring that parts of the Constitution deemed in doubt should be explained. *See* p. 126.

ments—the clearest way of expressing the Ratifier's intent—would affect the actual "structure and authority of the federal government."[89]

The New York experience illustrates the limits of discerning the Ratifiers' intended meaning. If only one state even attempted to explain what it meant when it ratified the Constitution—and even that explanation was not taken seriously—how can we ever hope to recover the precise meaning originally intended by the Ratifiers? Moreover, the New York episode may illuminate whether the Ratifiers actually believed that their intent, as opposed to that of the Framers, should be binding on future interpreters. Charles Lofgren has argued that the Federalists believed that future interpreters would resort to ratifier intent. He supports this argument by pointing to an episode in the Pennsylvania Convention.[90] With defeat imminent, the Antifederalists sought to enter their objections to the Constitution into the convention journal, but the Federalists refused to allow them to do so. Lofgren argues that the Federalists sensed that "the record of the ratification process might help to shape future understandings" and that the Federalists didn't want the wrong understandings memorialized.[91] If Lofgren's argument is legitimate, however, a contrary inference can be drawn from the New York experience: If the New York Federalists were willing to allow their opponents to build a concrete record of their objections in the form of explanatory amendments, then they must not have been too worried that future interpreters would rely on, and be misled by, the Antifederalists' view of the Ratifiers' intent.

At the very least, the cramped conditions of the ratification decision should add force to a question previously posed by Rakove: "Why should we assume that those who merely ratified the Constitution grasped its meaning better than those who wrote it—or those who have since seen how it worked in practice?"[92] Two related responses are usually given. The first response is "who cares" what the Framers intended: Their work was nothing but words from a "private pen,"[93] which were only given meaning and operative force by the Ratifiers. From this perspective, the Ratifiers' intended meaning "*defines* [the Constitution's] meaning. The act of ratifying cannot be dismissed with the adverb 'merely.'"[94] The second response is that the Framers' understanding of the Constitution was kept secret from the Ratifiers anyway—the records were in George Washington's sole possession, and Madison's notes were still hidden at the time of ratification—so it makes no sense to attribute the Framers' understandings to the Ratifiers.[95]

Rakove's book provides forceful answers to both objections. First, the argument that "only the Ratifiers count" relies on a portrait of the Ratifiers as

89. P. 126.

90. *See* Lofgren, *supra* note 66, at 121.

91. *Id.* at 128.

92. Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, *in* INTERPRETING THE CONSTITUTION, *supra* note 66, at 179, 183.

93. Lofgren, *supra* note 66, at 122 (quoting James Wilson, Statement Before the Philadelphia Ratification Convention (Dec. 4, 1787)).

94. *Id.* at 143.

95. *See* note 77 *supra*.

"unfettered" decisionmakers.[96] This argument assumes that we can disregard the Framers' intent because the Ratifiers were free to disregard it. But Rakove instructs that the Ratifiers could not completely disregard the Framers' understanding; presumably, the words employed by the Framers could bear only certain meanings, and the Ratifiers were not free to change that wording.[97] Similarly, the argument that the Ratifiers could not have known the Framer's hidden intent places form over substance. The Ratifiers continually turned to the Philadelphia delegates for explanations of the Constitution's intended meaning. In fact, the great text of the ratification debates, *The Federalist Papers*, was written by two of the most influential Framers. These Framers may have put on their Ratifier hats while composing *The Federalist Papers*, but they were perceived as being authoritative experts precisely because they had a special understanding of the Constitution—the understanding of those who were present at the inception. Because the Ratifiers had access to the Framers' thinking, Rakove does not limit his search for original meanings to the understandings of the Ratifiers.

But Rakove's account of ratification poses even more serious problems for the proponents of strict originalism.[98] Even if every Ratification Convention had adopted a policy of writing "advisory notes" to express clearly their preferred interpretation of the meaning of specific constitutional clauses, we still would not be able to state confidently that the Ratifiers agreed on certain intended meanings. This problem is inherent in the framing of the ratification decision as an all-or-nothing proposition. It's possible, for example, that the overwhelming majority of the Ratifiers disliked the wording of specific provisions, but not enough to risk rejecting the entire Constitution. Moreover, it's entirely possible that the Ratifiers vehemently disagreed over the meanings of vague provisions, like the Necessary and Proper Clause, but agreed to them despite uncertainty as to their meanings. That the Ratifiers voted for the Constitution doesn't mean they agreed on a specific meaning for each provision. Rather, as Rakove ultimately concludes, the only thing we can know for sure is that the Ratifiers assented to meanings at the most general level:

> Thus while arguments about particular provisions mattered a great deal, in the end, the sole decision the Ratifiers took was that of approving the Constitution as proposed or rejecting it. The only understanding we can be entirely confident the majority of Ratifiers shared was that they were indeed deciding whether the Constitution would 'form a more perfect union' than the Articles of Confederation . . . .[99]

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96. James Wilson used this term to describe the Ratifiers. *See* Lofgren, *supra* note 66, at 122.

97. *See* p. 341.

98. For an example of strict originalism, see Edwin Meese III, Address Before the American Bar Association 18 (July 9, 1985) (transcript available in the Stanford Law School Library) ("[O]nly the sense in which the Constitution was accepted and ratified by this nation . . . provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our constitution . . . ." (internal quotation marks omitted)); *see also* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 4-5 (1987) ("The Constitution as understood by the Founders has long been my beacon . . . .").

99. P. 17.

In light of this conclusion, it's possible to view the Constitution as a complicated contract of adhesion. It clearly seems to meet the hornbook definition of adhesionary contracts: The Constitution was offered as "a take-it-or-leave-it proposition," where the Ratifiers' "only alternative to complete adherence [was] outright rejection."[100] In an adhesionary situation, the law recognizes the limited nature of the parties' agreement: "Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction . . . ."[101] Applying this interpretive canon to the Ratifiers' situation, it's easy to map the boundaries of the Ratifiers' assent when they approved the Constitution. They agreed to no specifics and couldn't dicker over any terms, but they did agree to the general compromise embodied in the Constitution. This assessment is entirely substantiated by Rakove's account of what actually transpired during ratification. It also damages the argument that we should look exclusively, or perhaps even primarily, to the Ratifiers' intent in order to determine the Constitution's original meaning.

Comparing the Constitution to a contract of adhesion, however, raises some additional difficult questions. For example, who were the contracting parties? The Court, in *McCulloch v. Maryland*,[102] answered that question from a political perspective, asserting that "We the People," not the states, were the parties.[103] But "We the People" didn't write the terms of the contract; instead, they were written by the Framers. Although sent to Philadelphia by individual states, the Framers were essentially working under the auspices of the national government. The Continental Congress sent the draft to "We the People" for approval—as an all-or-nothing choice.[104]

These facts might suggest that the scope of federal power should be construed narrowly. Again, one could analogize to the interpretive rule often applied to contracts of adhesion: *contra proferentem*, which calls for ambiguities to be construed against the drafter of the language.[105] As a result, one could construe ambiguous terms that define the dimensions of the federal power (e.g., the Commerce Clause and the Necessary and Proper Clause) against the drafter—the federal government—so as to constrain federal power.

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100. E. ALLAN FARNSWORTH, CONTRACTS 312 (2d ed. 1990).

101. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

102. 17 U.S. (4 Wheat.) 316 (1918).

103. *See id.* at 403-04. Although the *McCulloch* court does not use the phrase "We the People"—speaking instead in general terms of "the people"—the phrase "We the People" is applicable here as a term of art.

104. This is not that unusual since trade organizations often write formulaic contracts for their members to use, many of which are ultimately deemed to be contracts of adhesion. Nevertheless, we assume that the members, who have their customers sign these "canned" contracts, are the drafters, even though they too have accepted someone else's language.

105. *See, e.g.*, JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 105 (1994) ("The most common corrective factor [when interpreting standardized insurance contracts] is the doctrine of contra proferentem . . . .").

Obviously, the analogy isn't perfect. To begin with, *contra proferentem* assumes that the terms are construed against an actual party to the contract.[106] Our current federal government was not, however, actually a party to the constitutional compact. In fact, the federal government that predated the Constitution was very different from the one created by ratification. But then again, the states had almost no role in forming the constitutional contract; their only protection was granted by "We the People" when the Tenth Amendment was adopted.[107] Therefore, as between the two levels of government, neither of which was actually a party to the constitutional compact, it's arguably just to construe terms against the one party that is at least partly responsible for the ambiguities—the federal government.

Although the contract of adhesion argument may seem anachronistic and strained,[108] it underscores the interpretive problems raised by the ratification procedure. The deal struck at ratification is strikingly similar to a type of agreement—namely, adhesionary contracts—that contract law has been struggling to interpret for decades. Although we may eventually find a satisfying interpretive method that gives effect to the parties' original intentions, we should appreciate how difficult this task will be given the circumstances. In fact, in so doing, we may have to confront the possibility that we cannot determine the Constitution's intended meaning.

One could take the contract of adhesion analogy even further. Perhaps Professor Ackerman is right that the Constitution is "illegal," but in a more insidious manner than Ackerman describes. After all, perhaps we should be reluctant to enforce a contract of adhesion that was signed under duress, which the Ratifiers were surely experiencing. Upon reflection, though, this argument seems silly. The Ratifiers were well-informed and not powerless parties to a contract. Instead, it was their tremendous power that the Federalists were trying to restrain. The state ratifying conventions consisted of popularly elected representatives, elected for the purpose of constitutionmaking. No other body of democratic representatives could claim a higher authority or clearer mandate to create a constitution. Nothing could stop them from junking the proposed Constitution and starting over or, at the very least, amending the proposed text.[109]

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106. *See id.* at 173.

107. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1876-77 (1995) (Thomas, J., dissenting).

108. The term "contract of adhesion" did not appear in the United States until 1919. *See* FARNSWORTH, *supra* note 100, at 312 n.4. In addition, it is problematic to interpret the Constitution as we would an ordinary contract. Should it instead be construed as a statute? *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) ("Early interpreters usually applied standard techniques of statutory construction to the Constitution.").

Rakove points to one interesting passage from the 1791 debate over the first bank bill. Madison, explaining his opposition to the bill, commented, "In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide. Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties." P. 352 (internal quotation marks omitted). Although the significance of this passage in the larger interpretive debate is unclear, Rakove notes that "here Madison implied that the Constitution was less like a statute than a contract." P. 352.

109. Rakove writes:

It's a tribute to the genius of the Federalists' all-or-nothing strategy that the state conventions never exercised their full power.

But the Federalists' strategy doesn't vitiate the fact that "We the People" ultimately agreed to the bargain. And as with all written agreements, the best way to figure out what the Constitution means is to focus on the text itself: "What gives any instrument meaning, be it a constitution, statute, or contract, is not its guiding principles—luminescent or obscure—but its words, words that convey precise and identifiable concepts."[110] Of course, words also have multiple shades of meaning; the art of skillful interpretation is to pick from among the pool of reasonable alternatives. One helpful method is to focus on the common understanding of the words at the time they were used—in this case, at ratification. Strong evidence indicates that this is how the Founders would have expected us to approach interpretive problems,[111] and it is to this question that we now turn.

IV. THE ORIGINAL POLITICS OF ORIGINALISM

Rakove praises scholars, like H. Jefferson Powell, who have attempted to uncover the Founders' views of originalist interpretation. According to Powell, the Framers' failure to specify an interpretive strategy indicated that they intended for existing common law norms of statutory construction to prevail.[112] These norms would focus on the objective meaning of words to the exclusion of extrinsic sources, such as legislative history. Thus, Powell would have us ignore both the Framers' and the Ratifiers' subjective intent and instead focus solely on the objective meaning of the Constitution's text. As Charles Lofgren has shown, however, there is also evidence that, in addition to the plain meaning of the text, the Ratifiers fully intended that their subjective understanding of the Constitution inform subsequent interpretations.[113] Like most constitutional interpreters, both Powell and Lofgren approach the interpretation debate as a search for a neutral method of figuring out what the text means.

> Once assembled, popularly elected conventions could claim to embody the sovereign will of the people more completely than any of the other bodies that would also participate in the adoption of the Constitution; and because they would meet for the special purpose of constitution-making, their authority would arguably be paramount to that of the legislatures whose enabling acts had summoned them into existence. In the abstract, there was no reason these bodies should have to obey the resolutions of the Convention and Congress and the relevant acts of their own legislatures.

P. 107.

110. Kozinski & Williams, *supra* note 1, at 980; *see also* Merit Music Serv. v. Sonneborn, 225 A.2d 470, 474 (Md. 1967) (holding that "the law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms").

111. *See* text accompanying notes 112-136 *infra* (discussing H. Jefferson Powell's work); *see also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006-11 (1991) (tracing the common law rule barring recourse to legislative history in construing statutes).

112. *See* Powell, *supra* note 108, at 948.

113. *See* Lofgren, *supra* note 66, at 112-13. *But see* text accompanying notes 66-95 *supra* (detailing the impossibility of determining ratifier intent given the "gross" nature of the ratification decision). Rakove also notes that Lofgren has uncovered Powell's "cavalier approach to evidence that weakens his argument." P. 341.

Whose account is right, Powell's or Lofgren's? Rakove's answer is neither, observing that "the story is more complicated still."[114] Naturally, Rakove intends to tease out these complexities. He does it by focusing on Madison's behavior during the Republic's early years. What emerges from Rakove's brief lesson on Madison's approach to originalism is a story that eerily resembles our contemporary experiences. It's a story about the transformation of interpretive methods to fit the interpreter's political agenda; it's also a story that casts doubt on whether there can ever be a truly neutral (nonpolitical) method of interpreting the Constitution.

Rakove's story about Madison illustrates the temptation to select an interpretive method for nonneutral, highly political reasons. Rakove begins his tale in mid-May 1789. Congress was in the throes of the "removal debate" over whether the Senate should have any role in the removal of executive officers.[115] Madison had provoked the debate by proposing a bill that would allow the President to remove executive officers despite no mention of such power in the Constitution. Rakove notes that, during the debate, of the nineteen former Framers in Congress, only one referred to the Convention's deliberations.[116] Instead, as Powell would predict, they "followed the prevailing rules of construction that called for a closely reasoned analysis of the text."[117] This debate suggests that Madison had no problem implying expanded executive powers.

In 1791, however, Madison stood before the House to argue for a strict construction of the text of the Constitution, arguing that the Necessary and Proper Clause does not authorize Congress to charter a national bank.[118] As support for his position, Madison informed other members that the Convention had considered and rejected a provision that would have given Congress the power to charter corporations. (Madison did not reveal, however, that he was the author of that proposal.[119]) Moreover, Madison cited passages from the ratification debates to prove that the Necessary and Proper Clause authorized no more than the enumerated powers. Although this evidence helped demonstrate "the meaning of the parties to the instrument,"[120] Madison's argument

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114. P. 341.

115. For Rakove's discussion of the removal debate, see pp. 347-50.

116. *See* p. 349.

117. P. 349.

118. For Rakove's discussion of the bank bill, see pp. 350-55.

119. *See* pp. 352-55. Madison's interpretation of the significance of this vote is subject to debate. Many have cited the power to incorporate a bank as an example of something on which the Framers were devilishly silent. The argument goes as follows: The Federalists wanted to empower the federal government to charter a national bank, but they knew that explicitly granting Congress the general power to charter corporations would jeopardize ratification. To compensate, the Federalists did not push for a vote on the specific power to charter a bank, purposefully leaving it unaddressed. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 104-05 (1957) ("Other advocates of the power held back from putting the question to a vote lest it be lost and the record be definitely against it, whereas if not acted on it could be held . . . that the power existed."). Many of the Framers who voted against Madison's proposal may have intended to preserve Congress's power to incorporate a bank rather than to reject it.

120. P. 352 (quoting Madison during the Bank Bill Debate).

for strict construction contradicted his earlier willingness to imply executive powers during the removal debate.[121]

Rakove sees a consistent theme shared by both arguments: By denying the Senate any role in removing executive officials and preventing Congress from chartering banks, Madison was trying to limit legislative power, which he consistently feared as posing the greatest threat to liberty. According to Rakove, Madison simply selected whatever interpretive technique best served his purpose.[122]

By 1796, Madison had selected a new interpretive theory, one which largely resembled the original understanding position (as distinguished from original intent). When Washington asked the House to appropriate money to implement the controversial Jay Treaty, which the Senate had ratified earlier, the House balked.[123] House Republicans, distrustful of the Federalist executive, demanded that they be given the executive papers so that they could determine what the Treaty entailed.[124] The debate quickly turned to the Constitution for guidance. The Constitution, however, did not explicitly provide a role for the House in the treatymaking process. Republicans, Madison included, initially offered a textual argument: If the House could be required to support a war triggered by treaty alliances, then it also had to be able to play some role in the treaty process in order to give meaning to its appropriations power. Republicans concluded that this was the only reading that gave "signification to every part of the Constitution."[125]

This argument provoked a powerful response from the Federalists, whose best evidence came from the Framers themselves.[126] Theodore Sedgwick pointed out that many Ratifiers were concerned about limiting the power to make treaties to the Senate and the President; yet during the ratification debates, none of the Framers had ever put forth the justification for the treaty power now advanced by Madison.[127] When the House voted to demand the presidential papers, Washington responded that—as the records of the Convention clearly reflected—a motion to require that treaties be approved by both Houses had been "explicitly rejected."[128] Madison was even mocked for his

121. This contradiction did not go unnoticed. As the Federalist Fisher Ames noted, during the previous two years, "we have scarcely made a law, in which we have not exercised our discretion, with respect to the true intent of the constitution." P. 353.

122. *See* p. 355 ("The rule of interpretation mattered less than the support each construction gave to preserving 'the exact balance or equipoise contemplated by the Constitution.'" (quoting Madison's speech on Feb. 8, 1791)).

123. For Rakove's discussion of the Jay Treaty, see pp. 355-65.

124. *See* pp. 356-57.

125. P. 358 (quoting Madison's speech on Mar. 10, 1796).

126. Rakove observes that the debates revealed that "the House was prepared to entertain interpretations reconstructing the positions of the framers, ratifiers, and 'the people.'" P. 360. In a veiled criticism of Powell's theory, Rakove cites the example of Edward Livingston, who complained about the indeterminacy of the historical record: "But that did not stop him from undertaking his own originalist analysis, nor did it recall the House to traditional rules of construction." P. 360.

127. *See* p. 359 ("[T]hey had instead argued that the power was well secured by the mutual check of the president and the Senate.").

128. P. 361 (quoting Washington). To illustrate that Madison might have remembered the founding better than participants themselves, Rakove recalls Madison's specific response to this motion. Ap-

conspicuous omission of any reference to the Framers' intentions on this subject, "the implication [being] that Madison had said little because the evidence did not sustain his position."[129]

Madison's response to this contention is often cited as his authoritative statement of interpretive theory. Madison plainly rejected any reliance on the Framer's intent, wholly advocating reliance on the plain meaning of the text as understood by the Ratifiers. He argued that the Framers produced "nothing but a dead letter" into which the Ratifiers breathed life.[130] Although Rakove notes that Madison's endorsement of this theory is somewhat undermined by his choice of evidence,[131] Rakove is more concerned with why Madison again changed his interpretive strategy. As far as the immediate debate was concerned, Rakove argues that Madison, faced with a stinging criticism, was driven to endorse ratifier understanding "less by his belief that [it] provided a viable method of interpretation than by the arguments of [opposing] speakers."[132] But it was more than injured pride that drove Madison to his new position. In 1791, Madison was still convinced that the House was too powerful and had to be restrained. By 1796, however, Madison realized that the growing importance of foreign policy had transformed the executive into a powerful force that could rival the House as a possible source of tyranny.[133] Once again, Madison adopted the interpretative approach that best served his political purpose—in this case, providing a role for the House in treatymaking in order to constrain the executive branch.

Rakove does not single out Madison as the only—or even the worst—sinner. Madison's opponents also employed originalist arguments when convenient. Although some attempted to justify their interpretive method by referring to the method's neutrality, Rakove concludes that these appeals were "dictated not by the prior conviction that this was the most appropriate strategy to ascertain the meaning of the Constitution but by considerations of partisan advantage."[134]

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parently, although Hamilton was not present in Philadelphia when Gouverneur Morris made the motion, he later reminded Washington of the motion's defeat. While Madison opposed the motion because it would overly complicate the treaty process, he also wondered whether "the Convention should distinguish types of treaties which might or might not require 'the concurrence of the whole Legislature.'" P. 361 (quoting Madison). This comment suggests that Madison was concerned that the failure of Morris' motion would be used to argue that the House was completely excluded from the treatymaking process, a concern that might have led Madison to try to preserve some role for the House by specifying what types of treaties required the House's approval. From these facts, Rakove concludes that the fears Madison expressed in 1787 "confirmed the crucial point of how the Constitution, as written, was to be interpreted [in 1796]—for, of course, no such distinction had been made." P. 361.

129. P. 361.

130. P. 362 (quoting Madison's speech on Apr. 6, 1796). Madison commanded, "If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution." P. 362.

131. *See* p. 364 ("Whatever clarity he gained by distinguishing framers from ratifiers was clouded by the difficulty of using the ambiguous debates and failed amendments of 1787-88 to offset an express constitutional provision.").

132. P. 364.

133. *See* p. 364.

134. P. 365.

This episode seems to tarnish the reputation of originalist interpretation. In theory, originalism is a neutral interpretive method; in practice, it can be highly political, or at least the *original* use of originalism was so. Rakove does not believe, however, that this original practice forever condemned originalist inquiry to the realm of the purely political.[135] Rather, "[i]t merely demonstrated that neutrality could rarely be attained when the Constitution was so highly politicized, or when politics was so highly constitutionalized."[136] Rakove's ultimate point, therefore, is to remind constitutional interpreters to appreciate the context in which they work and the degree to which that context may prevent a truly neutral inquiry.

CONCLUSION

Although Rakove attempts to tiptoe around the interpretive debate about originalism, his account of the founding makes it tempting to enter the interpretive fray, but with a greater appreciation of the context in which the Founders acted. Rakove's book sounds a cautionary note for those seeking definitive answers to the debate about original intent. Rakove's insights do not suggest that we should throw up our hands and declare records of the founding too complicated to support any conclusions. Nor do Rakove's observations suggest that the records are too sporadic or unreliable to justify firm conclusions. Instead, *Original Meanings* suggests that we need to appreciate the unusual circumstances under which our constitutional contract was created.

Rakove's book also illustrates that the Founders were truly original in the sense that they came first. They were the first to tap into the powerful concept of popular ratification of a constitution. As such, they created a new form of legal restraint that proved more difficult to circumvent than anything that had come before. In the face of this history, Professor Ackerman concludes that not only are we authorized to follow our predecessors in breaking from the existing rules, but that our predecessors also fully intended us to so do.[137] Rakove's work suggests that it's equally likely that the Founders intended restraint.

In short, the passion of independence may have given way to the reality that the rebels were now in control.[138] Moreover, it appears that these rebels-turned-rulers did not see themselves as acting outside the bounds of a set of rules. Professor Amar asserts that the Founders acted in ways inconsistent with existing law, but not in contravention of it.[139] In fact, the Founders' actions may not have been inconsistent with existing law at all. Existing law declared that, when inconsistent laws were created by bodies of equal jurisdiction, the

135. *See* p. 365 (qualifying that the fact that the Founders may have resorted to originalism for political reasons "did not prevent commentators from forming opinions with greater or lesser degrees of neutrality, nor did it banish the ideal of neutrality from the temples of constitutional judgment").

136. P. 365.

137. For discussion of Ackerman's work, see text accompanying notes 38-57 *supra*.

138. *See* United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) ("The youthful passion for independence accommodated itself to the reality that the former rebels were now in control of their own destiny, that the practical needs of stability and sound growth outweighed the abstraction of centrifugal philosophy . . . .").

139. For discussion of Amar's work, see text accompanying notes 38-42 *supra*.

most recent law prevailed. One corollary of this principle is that, when two laws are created by bodies with different jurisdictional authority, the product of the more authoritative body prevails. The creation of the Constitution was consistent with this second principle. Although Article V may present a difficult hurdle for those seeking to amend the Constitution, Rakove's account makes it difficult to believe that the Founders intended these requirements to be circumvented by simply backing the democratic bandwagon out of the garage.

Another ramification of Rakove's work is that it should make us less suspicious of those who, despite the extensive record of the founding, conclude that the Founders' intentions are not discernable. At the same time, this does not mean that it's useless to look to the founding for guidance in interpreting the Constitution. In fact, Rakove questions what motivates our yearning to look to our constitutional past for help, asking, "Is it because we truly believe that language can only mean now what it meant then? Or is it because the meditations about popular government that we encounter there remain more profound than those that the ordinary politics of our endless democratic present usually sustains?"[140] For the historian who delights in ambiguity, the answer seems obvious. For lawyers committed to originalism, this question will be harder to answer after reading *Original Meanings*.

140. P. 368.