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Cover Page Footnote

Coe Professor of History and American Studies, Stanford University. For helpful comments, I thank the participants in the Symposium and my electronic colleague, Laura Kalman.

FIDELITY THROUGH HISTORY (OR TO IT)

Jack N. Rakove*

INTRODUCTION

A conception of fidelity comes naturally to historians. From their tutelage in graduate seminars through the prolonged apprenticeship of their dissertations, historians learn to ground their arguments firmly in the extant documentary record of the events or epochs they are studying. Fidelity to this evidentiary record is arguably the defining characteristic of the discipline of history. Indeed, it is what makes history a discipline not only in the conventional academic meaning of the term, but also in the sense of monastic avocation that historians sometimes profess.¹ Historians are the lonely long-distance runners of the human sciences, not only because the book-length monograph is their preferred mode of expression, but also because they remain reluctant to write, much less publish, until they complete their quest to canvass all the pertinent sources. Just as the validity of scientific research rests on the replication of experiments, so historians are expected to have an evidentiary source to sustain every claim. Primary sources, then, are primary in a dual sense: not merely as the original materials of research, but as the ultimate objects of explication.

The praise accorded two eminent historians, Simon Schama and John Demos, who have recently flouted these norms by patently inventing dialogue and interior monologues, only confirms that such feats of the historical imagination are the exceptions that prove the rule.² However provocative such works might prove in the classroom, they remain literary conceits to be indulged only after scholars have demonstrated their professional *bona fides* in the usual way. Like the study of kabbalah and the drinking of madeira, these are arts that can be safely practiced only after one attains the security of middle age. No serious historian would ever instruct his young charges to model their first professional labors on such works. Nor will most historians ever follow these enticing but ultimately distracting examples. Inferring, imagining, and speculating on the basis of evidence will always be essential elements of the historian's work; making it up where the evidence simply does not go—however cleverly one does it—will al-

* Coe Professor of History and American Studies, Stanford University. For helpful comments, I thank the participants in the Symposium and my electronic colleague, Laura Kalman.

1. Oscar Handlin, *Truth in History* 414-15 (1979).

2. See Simon Schama, *Dead Certainties (Unwarranted Speculations)* (1991); John Demos, *The Unredeemed Captive: A Family Story from Early America* (1994). For a tocsin-sounding review of Schama's book, see Gordon S. Wood, *Novel History*, N.Y. Rev. Books, June 27, 1991, at 12, 12.

ways be questionable at best. To the orthodox, it smacks of rank heresy.

So historians, given the doubly conservative nature of their discipline, already worship at one altar of fidelity. But is there an affinity between the norms of scholarship that require historians to be faithful to their evidence, on the one hand, and conceptions of fidelity that describe and justify various approaches to constitutional law, on the other? This is not, on its face, an easy question to answer, precisely because it poses normative issues that historians are rightly reluctant (or simply incompetent) to resolve. Immersion in the sources may allow historians to offer all manner of insights into the original understanding of the Constitution, but it cannot determine, as a matter of principle or theory, whether originalism is indeed the one true form of constitutional interpretation.³ Yet at least one prominent fidelitarian theory—originalism—is explicitly historical in its claims, and logically presupposes that the form of fidelity historians practice in their craft is transferable to the realm of jurisprudence. Originalism makes little sense if we lack confidence in our capacity to produce reasonably authoritative conclusions about the original meanings, intentions, and understandings underlying particular provisions of the Constitution. And that, of course, is why one of the most telling criticisms of originalism involves explaining why lawyers and jurists are unlikely to be able to master the sources well enough to make an originalist finding stick. As Charles A. Miller, Leonard W. Levy, and William E. Nelson have all argued, there is good historical evidence that jurists rarely make good historians, and that a theory of interpretation which requires judges to master the ambiguities of history demands a measure of faith that we, as citizens and scholars alike, should be reluctant to profess. Far from providing the constraints for which advocates of originalism yearn, Nelson wryly notes, an ambiguous historical record may simply give judges new paths for their interpretative meanderings.⁴

Skepticism about the limits of judicial reasoning does not require a blanket dismissal of the possibility that historically grounded approaches to originalism might indeed yield fruitful results. It is one of the ironies of Levy's *Original Intent and the Framers' Constitution*, for example, that the dean of American constitutional historians joins a

3. Or so, in all historical modesty, it seems to me. Yet it might be argued that historical research into the debates of 1787-88 could in theory demolish the whole premise of originalism simply by demonstrating that the adopters of the Constitution did not believe or recognize that their intentions and understandings were being expressed in ways that would either bind later interpreters or provide them with adequate means to recover the document's pristine original meaning.

4. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 5 (1988); see Leonard W. Levy, *Original Intent and the Framers' Constitution* 284-398 (1988); Charles A. Miller, *The Supreme Court and the Uses of History* (1969).

characteristically sharp assessment of the flaws in judicial forays into history with ample evidence of the strong conclusions his own monographs have enabled him to form about the original intentions and understandings underlying a number of clauses.⁵ The fact that historians can never replicate events does not make all interpretations of the past equally plausible or valid. Some accounts make more sense than others, and fidelity to the sources is one essential criterion in their evaluation. Historians may well feel reluctant to conclude that any one fixed meaning could ever have been ascribed to the Constitution's open-textured clauses, but that should not prevent them from narrowing and ranking the available range of meanings, or perhaps more important, from demonstrating the sheer implausibility of particularly egregious misreadings of the text. If, for example, Justice Scalia wants to make Article XXX of the Declaration of Rights of Massachusetts of 1780 the key to the original understanding of the doctrine of separated powers, some intrepid historian should come forward to point out that by 1787 American thinking was moving well past the rigid Montesquieuian axioms that the early state constitution writers had endorsed (as any casual reader of *The Federalist* No. 47 should know).⁶ Or again, if Justice Thomas wants to invoke the Tenth

5. Thus Levy describes Justice Rehnquist's originalist account of the Establishment Clause in *Wallace v. Jaffree*, 472 U.S. 38 (1985) in these terms:

If Rehnquist was right in believing that sound constitutional doctrine must rest on accurate constitutional history, his pernicious opinion in that case, endorsing the power of the United States to support religion financially, is utterly baseless. Rehnquist quite literally does not know the facts relating to the constitutional history of the establishment clause, let alone understand them rightly.

Levy, *supra* note 4, at 379. But that there are ascertainable historical facts of some value and importance is an underlying assumption of Levy's work (as it is of mine).

6. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996) [hereinafter Flaherty, *The Most Dangerous Branch*] (criticizing, on historical grounds, both judicial opinions and recent scholarly writings that take a rigidly formalist approach to the tripartite division of powers); *id.* at 1742-43 (discussing Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) as an example of this rigid formalism). Flaherty is one of a growing number of scholars jointly trained in law and history; it will be interesting to see what effect this aspect of the "law and" phenomenon has on the quality of originalist scholarship (and jurisprudence?) over the long run.

In *The Federalist* No. 47, Madison argued that the seeming simplicity or even rigidity of the tripartite division of legislative, executive, and judicial power was belied in countless ways by observable practice under both the British constitution that Montesquieu had taken as his model, and the American state constitutions, which in turn seemed to take Montesquieu as their prophet. See *The Federalist* No. 47 (James Madison). Notwithstanding the formal commitment to separated powers expressed in the state declarations of rights, Madison noted, numerous hybrid departures could be readily observed in the constitutions those declarations accompanied. Madison had previously alluded to the inherent difficulty of establishing any neat separation of powers in *The Federalist* No. 37:

Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary. . . . Questions

Amendment to justify state term limits on members of Congress,⁷ a historian can explain why Federalists or Anti-Federalists at the time would have found just such a conclusion astounding (though not, perhaps, inconceivable, if they read it in non-originalist ways).⁸

For this fidelity, historians expect other rewards than a pat on their conscience. One such reward is the conviction that they will come to understand their own trade better, not least by learning how to weigh the respective benefits and drawbacks that the use of different sources incurs. In the first part of this Article, I argue that serious forays in originalism require a careful assessment of the value of different types of sources, and a recognition of the difficulty of converting one crucially important set of sources, which I shall lump together under the heading of "Ratifier-understandings," into units of analysis that can be brought to bear on the particular clauses of the Constitution that are invariably in dispute. Historians earn a second and arguably greater reward when their fidelity to the mediating sources brings them closer to the actual events, so that the glass through which they look grows a shade or two less dark, and actors and actions appear a degree or two more vivid. An immersion in the sources that allow us

daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

The Federalist No. 37, at 235 (James Madison) (Jacob E. Cooke ed., 1961).

7. *United States Term Limits v. Thornton*, 115 S. Ct. 1842, 1875-83 (1995) (Thomas, J., dissenting).

8. See generally Jack Rakove, *Reading Today's Bias into "Original Intent,"* L.A. Times, May 28, 1995, at M2 (providing the author's thoughts on this subject); Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 Va. L. Rev. 493 (1996) (giving a different historical view regarding original intent). What strikes me as bizarrely problematic about the Tenth Amendment argument favoring state-imposed term limits is that it presents a story that both parties to the constitutional debates of 1787-88 would have found unacceptable. Federalists would have denied that states could restrict access to Congress in this way, because that would have enabled rival legislatures in the states to hamstring the election of the knowledgeable, experienced congressmen they hoped to recruit. But Anti-Federalists would have had their own reasons for opposing this interpretation. Had they understood the Qualifications Clause to permit state restrictions on the reeligibility of incumbents, most of their arguments about the consolidationist tendencies of the Constitution would have been made superfluous—because a Congress regulated in that way would be unlikely to evolve into the grasping aristocratic conspiracy they professed to fear. See Jack N. Rakove, *The Structure of Politics at the Accession of George Washington*, in *Beyond Confederation: Origins of the Constitution and American National Identity* 261 (Richard Beeman et al. eds., 1987); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203-43 (1996) [hereinafter Rakove, *Original Meanings*]. Of course, a Tenth Amendment argument adds an additional element to the problem, if it is interpreted as something more than a truism. But an originalist would still have to demonstrate that the course of debate between the adjournment of the Federal Convention and the ratification of the amendment had produced a public consensus countenancing the idea that states could restrict reelection to Congress if something like the eventual Tenth Amendment were adopted. Given the circumstances surrounding its adoption, this claim strikes me as highly implausible.

to imagine what the process of constitution-making in the 1780s⁹ was really like, I shall argue, supports a conclusion not easily reconciled with the legal fiction on which strong theories of originalism rest: that a particular set of pristine meanings, uncorrupted by interpretation, was somehow locked into the text of the Constitution at the moment of its adoption. If fidelity *through* history is the goal of originalism, fidelity *to* history may lead to results originalists would be reluctant to endorse.

I. FIDELITY THROUGH ORIGINALISM

A. *An Opportunity and Duty for Historians*

Originalism is not the only way to preach fidelity through history. The common law doctrine of *stare decisis*, which operates in some tension with originalism,¹⁰ has an avowedly historical dimension, insofar as it imagines legal reasoning as a cumulative process in which developments in doctrine must be made as consistent as possible with past precedents. We can think of the role that appeals to history play in the composition of judicial opinions not as the reasons driving decisions, but as an attractive rhetorical method of reassuring citizens that courts are acting consistently with deeply held values. Such a use is defensible in terms that James Madison would readily endorse, as conscious efforts to preserve "that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."¹¹ Moreover, the general turn to history that has occurred in recent legal scholarship—a turn taken by scholars who have little sympathy with originalism as a theory of interpretation—suggests that some form of fidelity to history has become an important element in contemporary constitutional theory.¹²

9. Because my own grasp of originalism is so closely bound up with the sources for the Revolutionary era proper, I offer no opinion as to whether my concerns apply equally to the Reconstruction amendments which are, of course, the other great (or arguably greater) source of constitutional disputation. Here the challenge would be to ask not only what original intentions and understandings can be ascribed to the Fourteenth Amendment per se, but also to ask how its Framers and Ratifiers understood the original meanings of 1787-88 and the developments that had taken place since. Among the contributors to this Symposium, Bruce Ackerman appears to my untutored eye to be the one who has thought most deeply about this problem, under the general rubric of "Fidelity as Synthesis."

10. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988).

11. *The Federalist* No. 49 (James Madison), in 10 *The Papers of James Madison* 460, 461 (R. Rutland et al. eds., 1977) [hereinafter *Papers of James Madison*].

12. For a critical assessment of the quality of historical reasoning that leading constitutional theorists have so far attained, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995); Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 Colum. L. Rev. 591 (1995); Cass R. Sunstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601 (1995). For his further reflections, see Flaherty, *The Most*

Originalism, however, is clearly the strongest—and the most controversial—form of pursuing fidelity through history. Why it remains so is itself a question of some historical interest. Americans, after all, are not a people known for their worship of ancestral wisdom. Moreover, one might have thought that the rejection of the Supreme Court nomination of Robert Bork a decade ago might have given a decisive rebuff to the originalist theory whose virtues he proclaimed.¹³ Nevertheless, avowedly originalist writings frequently appear in the law reviews;¹⁴ originalism has powerful proponents on the Supreme Court;¹⁵ conservative legal scholars principledly committed to originalism have gained increasing respect and resources;¹⁶ and (not least important), American law and politics retain their uncanny knack of making seemingly settled or even obsolete provisions of the Constitution active subjects of contemporary controversy, thus forcing us to recall why the Tenth Amendment was added to the Bill of Rights,¹⁷ for example, or to inquire whether the supervision of all criminal prosecutions was regarded as a core executive function.¹⁸

Dangerous Branch, *supra* note 6, at 1747-55. For a more general account of the rise of “law and history”—and a delightful essay on intellectual history—see Laura Kalman, *The Strange Career of Legal Liberalism* (1996). I once asked my colleague Lawrence Friedman how he accounted for the turn to history in contemporary legal scholarship; he suggested that it might be explained (historically) as a response to a recognition that the post-Warren-and-Burger Court would be less receptive to the bold formulations of constitutional theory that flourished in the 1960s and 1970s.

13. For his own account both of originalism and of his nomination struggle, see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

14. As used here, “avowedly originalist” can be read in two ways: either narrowly, as propounding a commitment to originalism as the one best mode of interpretation, or more broadly, as recognizing that some serious and responsible attempt to recover the original meanings of contested provisions is a necessary and proper element of the interpretive endeavor. A list of those who could be called originalists in one or both of these senses (especially the latter, latitudinal one) would include Bruce Ackerman, Akhil Amar, Chris Eisgruber, Daniel Farber, Martin Flaherty, Michael Klarman, Michael McConnell, Mark Killenbeck, Larry Kramer, Henry Monaghan, and William Treanor. But in truth, the turn to originalism seems so general that citation is almost beside the point.

15. Here, I allude to originalism as commitment, and identify Justices Scalia and Thomas, and Chief Justice Rehnquist, as its proponents. A study is sorely needed of how their form(s) of originalism operate(s) in practice. For a point of departure, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

16. For my money, perhaps the most effective example of scholarship by a committed originalist would be Michael W. McConnell’s article *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

17. The Republican victory in the 1994 congressional elections seemed to herald a revival of political interest in the Tenth Amendment, which became something of a political icon early in Congress’s opening session. See Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, in “Government from Reflection and Choice”: Constitutional Essays on War, Foreign Relations, and Federalism 70 (1986) (providing historical discussions).

18. See *Morrison v. Olson*, 487 U.S. 654 (1988).

If, then, originalism seems destined to remain with us, it behooves us to ask how its forays in historical recovery should be carried out. There may be no one method of originalist analysis that would command the consensual assent of historians and legal scholars. But the ease with which shallow or contrived appeals to historical evidence can be dismissed does suggest that some rules of inquiry might gain general recognition. All appeals to the original meanings, intentions, and understandings of the Constitution are, by definition, exercises in historical research, and as such they ought to be conducted with the same methods, and subject to the same forms of criticism, that historians normally employ and encounter. Yet originalism is more a theory of law than an agenda for research, and as such its objectives may well diverge from those of historians. When legal scholars resort to originalist forays, they are likely to be responding to some pressing claim or other matter of contemporary concern, and their stake in the resolution of that issue may well shape the course of their inquiry. So, too, both the defense and the refutation of originalism are explicable as byproducts of the interpretive wars that are the stuff of contemporary constitutional debate. Historians may well respond to the same stimuli, and they may well think that their discoveries about the past should have consequences in the present. But when they are acting as historians, with all the obligations of their craft, other concerns can (and should) come in the way. Ideally, they should strive to get the story right for its own sake, let the chips fall where they may. Purely as a speculative matter, it is possible that the historian's approach and methods could either confirm that originalism is indeed a viable, practicable mode of interpretation, or strike some balance in assessing both its possibilities and its limitations, or conclude that the premises upon which originalism rests do a gross injustice to the very events this theory purports to describe.

One curious feature of the ongoing debate over originalism is that its critics have examined its premises far more seriously than its advocates (for whom its appeal sometimes seems to rest on a statement of faith). Perhaps no legal scholar has done more to test the validity of originalist claims than H. Jefferson Powell. Not only did Powell write the leading article questioning whether our modern concept of originalism (as authorial intent) was itself originally available to the founding generation;¹⁹ he has also made a noteworthy effort to develop a sensible set of working "Rules for Originalists," designed to remind lawyers and jurists of the potential uses and limits of history

19. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985) [hereinafter Powell, *Original Understanding*]. Powell's argument was, however, effectively criticized by Charles Lofgren. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const. Commentary 77 (1988) [hereinafter Lofgren, *Original Intent*] (arguing that a theory of originalism emphasizing the understandings of the Ratifiers did emerge quickly after the ratification of the Constitution).

and the differences between legal and historical reasoning.²⁰ Like other legal (or legally trained) scholars who have reflected on the turn to history, Powell begins with an intuitive understanding of the nature of legal reasoning that a working historian like myself cannot pretend to have or even aspire to gain. But perhaps a historian may contribute something of value to the debate over the viability of originalism if he presents the challenge it raises not as a strategy of constitutional interpretation through historical means, but rather as a problem of historical recovery with legal implications. That is the perspective from which the rest of this essay will be developed, drawing extensively on the research that culminated in my own recent book on the framing and adoption of the Constitution.²¹

B. *Perspicuity Through Definitions*

What are the objects of the historical inquiries that originalists make? The results of such forays usually appear under one of three titles: "The Original Meaning of Term X"; or "Clause Y: The Original Intention"; or "Concept Z: The Original Understanding." But rarely if ever are these three key terms—meaning, intention, understanding—defined or distinguished. They tend to be used synonymously and interchangeably, at some cost to the linguistic clarity (or "perspicuity," as Madison might put it)²² that originalism seeks.

It might be useful, then, to give these terms a non-arbitrary measure of precision. The Constitution is the text whose *meaning* we seek to recover, and the term "original meaning" can accordingly be applied to the literal wording of its many provisions. In a sense, the search for this meaning seems to be the ultimate objective of originalism. But when that meaning is ambiguous or not transparent—as is true in all the interesting cases—we are entitled to turn to alternative formulations. *Intention* connotes purpose and forethought, and is accordingly best applied to those actors whose decisions produced the language whose meaning is at issue: the Framers at the Federal Convention of 1787, or the members of the First Federal Congress of 1789 who drafted the first ten and the twenty-seventh amendments.²³ *Under-*

20. H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659 (1987) [hereinafter Powell, *Rules for Originalists*].

21. See Rakove, *Original Meanings*, *supra* note 8, at 3-22 (chapter titled "The Perils of Originalism"). For earlier statements, see Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 *Persp. Am. Hist.* (n.s.) 233 (1984); Jack N. Rakove, *Comment*, 47 *Md. L. Rev.* 226 (1987).

22. Speech by James Madison (June 6, 1787), in 1 *The Records of the Federal Convention of 1787*, at 132, 138-39 (Max Farrand ed., rev. ed. 1937) [hereinafter *Records*]; Speech by James Madison (July 21, 1787), in 2 *Records*, *supra*, at 73, 74.

23. See, e.g., Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 243-48 (1993) (offering a short account of the curious voyage of the Twenty-Seventh Amendment).

standing, by contrast, may be used somewhat more broadly to cover the impressions formed by the Constitution's original readers: the citizens, polemicists, and state convention delegates who all participated, in one way or another, in the ratification campaign of 1787-88. In their case, the word "understanding" seems superior to "intention" for two reasons. First, it better captures the process of interpreting and absorbing a document produced by others; when we read a text, we speak of our understanding of its meaning (though admittedly our intention in reading it shapes our understanding). Second, and arguably more important, the only intention that the ratification process finally allowed its participants to express was to approve or reject the Constitution in its entirety. But constitutional interpretation, though it often relies on the structure of the document, is typically about individual provisions. As we shall see, the task of disaggregating a collective intention to ratify the Constitution into original understandings of particular clauses is one of the thorniest problems that serious originalism faces.

This threefold distinction among meaning, intention, and understanding, simple or simplistic as it may seem, has two advantages. First, it permits consistency and clarity of usage. Second, and more important, it shifts the burden of research away from lexicographical meaning *per se*, and toward the primary sources that will illuminate the intentions of the Framers and the understandings of the Ratifiers. It tells us that the meaning of the terms and concepts we need to gloss cannot be resolved by dialing up the *Oxford English Dictionary* over our modem, but has to be recovered by examining their use in these sources. That in turn is what makes the inquiry historical, not lexicographical, and which further requires that we weigh the benefits and drawbacks—the probative value—of the different sources.²⁴

C. *Inclusionary Rules of Evidence*

Broadly speaking, four categories of evidence can be brought to bear on originalist problems. Two of these may be labeled *textual*, not in the usual four-corners-of-the-document sense of the term, but rather to identify those materials that provide the most immediate and obvious sources for recovering the original meanings of the Constitution at the moment of adoption. The other two categories may be labeled *contextual*.

24. Legal scholars should be sympathetic to this concern, for it demonstrates the extent to which historical inquiry is modeled on a legalistic notion of how evidence is to be handled. For a critical assessment of this characteristic of conventional historical inquiry, see the comments of eminent cliometrician Robert W. Fogel in his essay "*Scientific History and Traditional History, in Which Road to the Past? Two Views of History*" (Robert W. Fogel & G.R. Elton eds., 1983).

The first set of sources is gathered in Max Farrand's edition of *The Records of the Federal Convention*²⁵ and a limited number of other texts that illustrate how the Convention's agenda took shape,²⁶ and which can be linked most directly to the original (authorial) intentions of the Framers. The second set of sources consists of the corresponding but more voluminous and diffuse records of the ratification campaign that ensued: the polemical disputes waged in newspapers and pamphlets, the debates in the state conventions, the private correspondence of observers and participants.²⁷ By and large, these are the sources that illuminate the original understanding (as that term was previously defined) of the Constitution, but because of the prominent role that some Framers played in ratification, these sources offer further evidence of their intentions as well.²⁸

25. See Records, *supra* note 22. First published by Yale University Press in three volumes in 1911, this standard source was reprinted in 1937 with a fourth volume of additional documents, indices, and errata. In 1987, Yale reprinted the original three volumes along with a further volume, edited by James H. Hutson, titled *Supplement to Max Farrand's The Records of the Federal Convention of 1787*.

26. Foremost among these, I have repeatedly argued, are the letters that Madison wrote to Jefferson, Randolph, and Washington (respectively dated March 19, April 8, and April 16, 1787), and his memorandum on The Vices of the Political System of the United States [Apr. 1787], both of which allow us to trace how his assessments of the separate problems of federalism and of republican government within the states converged to provide the conceptual foundation for the Virginia Plan. See 9 Papers of James Madison, *supra* note 11, at 317, 318-19; 368, 369-71; 382, 383-85; 345, 345-58; see also Rakove, Original Meanings, *supra* note 8, at 35-56 (providing a more elaborate discussion).

27. It might perhaps be objected that merely private correspondence has no place in this inquiry, because the opinions expressed there never became part of the public record on which the legal act of ratification rested. But this seems wrong to me for two reasons. First, such expressions might still contribute to the task of recovering (or reducing) the range of plausible meanings. Second, it often provides more powerful evidence of the underlying concerns of the actors. This is certainly the case with James Madison, to take one crucial example. How we read *The Federalist* No. 10, the *Ur*-text of American political theory, varies significantly depending on whether we lay it alongside the letter Madison wrote only scant weeks earlier to Thomas Jefferson. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 Papers of James Madison, *supra* note 11, at 206. Indeed, different views of the import of this letter are a major point of divergence between my interpretations of Madison and those of Lance Banning. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (1995). On the other hand, Banning's interpretation and mine would look quite similar when laid next to any of the countless essays that depend on reading *The Federalist* unmediated by evidence of Madison's privately expressed views—or even his speeches at the Federal Convention.

28. The millennium will come first, but the multi-volume Documentary History of the Ratification of the Constitution (Merrill Jensen et al. eds., 1976-95) [hereinafter Documentary History of Ratification] is making progress toward becoming the standard source for the understanding of the Ratifiers. Also valuable are the seven strangely divided volumes of *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981); the Library of America's two-volume set of *The Debate on the Constitution* (Bernard Bailyn ed., 1993); and the five volumes of *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987).

The use of these sources does not seem, at first glance, to pose any extraordinary problems. The Federal Convention was a compressed meeting of a limited number of men about whom we have substantial biographical material, and its history should therefore be amenable to standard techniques of narration. Our chief disappointment is that the Framers spent too much time discussing issues whose politics can be easily tied to the interests of different coalitions of states, and too little exploring some non-trivial matters that sorely vex us—such as the scope of the Necessary and Proper and Supremacy Clauses, or their ideas of justiciability and judicial review, or the boundaries between federal and state judiciatures.

The ratification materials pose greater difficulties. Here we face a two-fold problem: the extraordinary diversity of the polemics the campaign produced, and the decentralized, unfocused nature of the debate. One solution to these difficulties is to treat *The Federalist* as authoritative, in part because it is the most comprehensive and systematic original commentary from this period, and in part because of the unique stature of its authors. But that move seems clearly mistaken. *The Federalist* exercised much less influence over the debates of 1787-88 than did James Wilson's published speeches to a Federalist crowd at the Pennsylvania statehouse and at the Harrisburg ratifying convention.²⁹ *The Federalist* is read far more closely today, and is presumably much better understood now, than it was when Hamilton and Madison were firing off their essays to the *New York Journal*.³⁰ So, too, the elaborate content analysis of the recurring themes of the de-

29. See Rakove, *Original Meanings*, *supra* note 8, at 136-37, 143-46, 319-20 (discussing the influence of Wilson's speeches); 13 *Documentary History of Ratification*, *supra* note 28, at 344 & n.1 (same).

It is worth noting that, despite their higher salaries, law school professors prefer the cheap paperback edition of *The Federalist* edited by Clinton Rossiter and published in 1961 under the erroneous title of *The Federalist Papers*. The authoritative scholarly edition is that edited by Jacob Cooke and published in 1961.

30. As Bernard Bailyn has observed, the enormous scholarly literature on *The Federalist* "inundates everything written on the history of the Constitution and on American political thought," attaining "an exquisite refinement of analysis that would have amazed the harried authors, who wrote polemically, to help win a political battle." Bernard Bailyn, *The Ideological Fulfillment of the American Revolution: A Commentary on the Constitution*, in *Faces of Revolution: Personalities and Themes in the Struggle for American Independence 270-71* n.12, 230-31 (Bernard Bailyn ed., 1990) [hereinafter *Faces of Revolution*]. The differences between modern and previous approaches to the essays are discussed in Jack N. Rakove, *Early Uses of The Federalist*, in *Saving the Revolution: The Federalist Papers and the American Founding 234* (Charles R. Kesler ed., 1987). Other essays in this volume provide a representative sample of the approach to *The Federalist* taken especially by political theorists. Other recent important discussions include: David F. Epstein, *The Political Theory of The Federalist* (1984); Morton White, *Philosophy, The Federalist, and the Constitution* (1987); Daniel W. Howe, *The Language of Faculty Psychology in The Federalist Papers*, in *Conceptual Change and the Constitution 107* (Terence Ball & J.G.A. Pocock eds., 1988); Albert Furtwangler, *The Authority of Publius: A Reading of the Federalist Papers* (1984).

bate that was compiled by the late distinguished political scientist William Riker lay far beyond the technical capacities of the participants.³¹

When these sources are inadequate—or when we pose the historian's fundamental question: *Why* did the Framers and Ratifiers take the positions they did?—we have to look beyond these explicit commentaries and reconstruct the underlying assumptions and concerns and the manifest events and experiences that presumably explain both authorial intentions and Ratifier understandings. Here there are the other two broad categories of evidence, which may be labeled *contextual*, that can be brought to bear.

The first of these can best be described under the general heading of those intellectual sources of influence that shaped the mental world of the revolutionary generation. There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone. They were also well-versed in the richly polemical literature of seventeenth- and eighteenth-century English politics; the moral philosophy and faculty psychology of the Scottish enlightenment; the disquisitions on public law of such European authorities as Grotius, Pufendorf, and Delolme; and, one might add *en passant*, the inheritance of English jurisprudence.³² American thinking about politics was no doubt also shaped by reading in the classics,³³ the legacy of Newtonian science,³⁴ and even the emphasis on sympathy in eighteenth-century philosophy and literature (which resonates strongly in their notions of representa-

31. See, e.g., William H. Riker, *Why Negative Campaigning Is Rational: The Rhetoric of the Ratification Campaign of 1787-1788*, 5 *Stud. Am. Pol. Dev.* 224, 234 (1991) (assessing 3268 “summary sentences” in some 617 items yielding 178 “categories” of Federalist and Anti-Federalist thought).

32. The paradigmatic survey of sources of influence on late eighteenth-century American political thinking is Bernard Bailyn, *The Ideological Origins of the American Revolution* 22-54 (1967) (emphasizing the primacy of the Commonwealth tradition of political dissent over other major sources). For other approaches to the question of influence, see John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in John Locke: *Problems and Perspectives* 45 (John W. Yolton ed., 1969); Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (1978), which is roundly rebutted in Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's "Inventing America: Jefferson's Declaration of Independence,"* 36 *Wm. & Mary Q.* 503 (1979); Michael P. Zuckert, *Natural Rights and the New Republicanism* (1994); and, of course, J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975). There are countless other studies of the influence or absorption of other thinkers, too numerous to mention here.

33. See Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (1994).

34. See I. Bernard Cohen, *Science and the Founding Fathers: Science in the Political Thought of Jefferson, Franklin, Adams, and Madison* (1995); Richard Striner, *Political Newtonianism: The Cosmic Model of Politics in Europe and America*, 52 *Wm. & Mary Q.* 583 (1995).

tion).³⁵ All of these writings shaped the intellectual context in which the Framers and Ratifiers acted. Whether we think of these ideas as big concepts whose evolution can be traced in a classic history-of-ideas mode, or as elements of ideologies like republicanism or liberalism, or as competing Foucauldian discourses, it seems evident that they were essential elements of the original language of American constitutionalism. What is far less evident is the nature and extent of the influence they exerted, especially when we attempt to calculate just how such broad-gauged ideas could be deployed to solve particular problems of constitutional design or detail. Traces of these multiple sources of influence may be found anywhere or even everywhere—which is precisely what makes mapping and measuring their influence even more problematic.

The uncritical assumption that what we read determines what we think makes it more difficult to comprehend the import of the final, most difficult, but also potentially most useful, category of evidence that putative originalists have to sift. That evidence is to be found in the habits, attitudes, lessons, and concerns that Americans derived from their own political experiences. Just as our political attitudes reflect formative experiences—the Depression, Munich, Yalta; McCarthyism, the Cuban missile crisis, Tonkin Gulf; the civil rights movement, black power, the rise of multiculturalism—so we should assume that the Framers and Ratifiers were likewise the products (as well as makers) of their own history. For the constitutionalists of the late 1780s, lessons learned over the previous century and a half of Anglo-American politics were doubtless relevant, and still dominated their political vocabulary. But the lessons that arguably mattered most were the ones they derived from their own experience of revolution, and more important still, from the constitutional experiments that nearly all the states had been forced to initiate to emerge from the near-state of nature in which they had found themselves in 1775-76. One casualty of our absorption in the now-stale debate over the republican and liberal origins of American political ideology is a widespread misapprehension of the two principal works that inspired the dispute—Bernard Bailyn's *The Ideological Origins of the American Revolution* and Gordon Wood's *The Creation of the American Republic 1776-1787*. As much as Bailyn and Wood emphasize the influence of pre-Revolutionary ideologies, their works are primarily stories of

35. In writing the chapter on representation in *Original Meanings*, I was struck by how often the Anti-Federalists made sympathy between legislators and constituents the primary criterion for election of representatives. See Rakove, *Original Meanings*, *supra* note 8, at 203-43. Though a concern with the nature of sympathy was one of the major themes of eighteenth-century letters, no one (to my knowledge) has attempted to trace its passage from the realms (or discourses?) of literature and moral philosophy into the vocabulary of politics. For a different application, see Elizabeth B. Clark, "The Sacred Rights of the Weak": *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 *J. Am. Hist.* 463 (1995).

change and movement, not testaments to the abiding inertial force of reigning paradigms. Both books emphasize the extraordinary rapidity with which American ideas evolved after the respective moments that Bailyn and Wood make their points of departure.³⁶ And it is precisely this sense of movement, with its attendant emphasis on uncertainty, change, innovation, and unintended consequences, that a historically grounded approach to originalism would emphasize.

D. *Weighing the Evidence*

How such an emphasis, which comes naturally to historical writing, can be squared with the assumptions of originalism will be considered in the final section of this Article. But the prior question remains: What implications does a historian's fidelity to the sources have for the necessarily historical nature of constitutional originalism? Historians, like litigators, do not simply collect evidence, but also weigh it; the question of how it is to be weighed bears closely on the difference between historical and legal varieties of originalism. Within each of our subsets of sources, which should we prefer: the intentions of the Framers or the understandings developed during ratification, as expressed in the *textual* sources extant from the immediate period of the adoption of the Constitution? the influence of different intellectual traditions or the concerns and attitudes shaped by political history itself, as they shaped the *contexts* within which these debates unfolded?

A historian would naturally assume that the Framers of the Constitution would be a more reliable guide to its original meaning than the understandings (or we could say, the first interpretations) of the Ratifiers. The intentions of the Framers, after all, shaped the decisions that produced the actual language we now seek to decipher. It was their decision to add the phrase "This Constitution" to the Supremacy Clause, which was at first a weak provision introduced in the New Jersey Plan as an alternative to Madison's pet scheme for a congressional veto on state laws,³⁷ or to substitute "declare" for "make" in the clause determining how the nation would go formally to war.³⁸ And again, because the Convention was a single meeting with a limited number of actors, its deliberations and decisions are easier to reconstruct than those of the ratification conventions in the states. By contrast, ratification can be depicted as a cacophonous debate in which squibs, parodies, wildly fantastic predictions, and demagogic

36. For Bailyn, this is clearly the imperial debate launched by the Stamp Act of 1765; for Wood, the inauguration of the new state constitutions a decade later. How they imagine and describe the nature of this process of change diverges in interesting ways; but Wood clearly imbibed the great lesson of Bailyn's justly celebrated seminar, which was that all good historical writing is essentially a study of change (or getting from A to B, as the classic formulation in that course put it).

37. See 2 Records, *supra* note 22, at 25, 27-29; 163, 169; 384, 389; Rakove, Original Meanings, *supra* note 8 at 171-74.

38. 2 Records, *supra* note 22, at 314, 318-19.

rhetoric alternated with the more serious analyses we associate with *The Federalist*, or Melancton Smith's *Letters from the Federal Farmer*,³⁹ or the best of the essays of "Brutus."

The obvious problem with this natural preference for Framers-intent is that the legal theory of originalism necessarily prefers Ratifier-understanding as the more powerful source of interpretive authority. That point has been made effectively by Charles A. Lofgren in his critique of H. Jefferson Powell's seminal article, *The Original Understanding of Original Intent*.⁴⁰ Powell convincingly argued that recourse to the extra-textual declared purposes of the authors of legal documents (including statutes) was not part of the interpretative arsenal on which American constitutionalists could draw.⁴¹ Lofgren concedes that looking to the intentions of the Framers is "a straw man" and "a bogus issue."⁴² But the same cannot be said, he adds, of what he calls "ratifier intent" (or "understanding," as used here).⁴³ From an early point, Lofgren argues, recourse was made to evidence of the Ratifiers' understandings of the Constitution.⁴⁴ Perhaps the best known illustration of this possibility was the key statement made by Madison during the debate over the Jay Treaty in 1796:

But, after all, whatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding [of] the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. 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.⁴⁵

Powell passes rather lightly over this speech, emphasizing the first sentence in this excerpt while slighting the implications of the last. Lofgren, by contrast, invokes this speech to suggest that "ratifier intent" deserves serious consideration.⁴⁶

39. I agree with Robert H. Webking, *Melancton Smith and the "Letters from the Federal Farmer,"* 44 *Wm. & Mary Q.* 510 (1987), that Smith, a moderate Anti-Federalist who played a crucial role in ratification in New York, is the most likely author of this important tract.

40. See Lofgren, *Original Intent*, *supra* note 19.

41. See Powell, *Original Understanding*, *supra* note 19.

42. Lofgren, *Original Intent*, *supra* note 19, at 85, 111.

43. *Id.* at 77-78 (quoting Charles A. Lofgren, Book Review, 4 *Const. Commentary* 177, 183-84 nn.16-18 (1987)).

44. *Id.* at 79-93.

45. James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), in 16 *Papers of James Madison*, *supra* note 11, at 290, 295-96.

46. Neither Lofgren nor Powell attempts to explain how Madison reached this conclusion, nor do they evaluate the difficulties he encountered in applying it in prac-

Taken seriously, this Ratifier-understanding variant of originalism poses difficult, if not insuperable, problems. Some are fairly obvious. As James Hutson has observed, the documentary record for the state conventions is ragged and uneven.⁴⁷ Some debates, like those in Virginia and New York, appear to have been reasonably well recorded (though speakers complained their remarks were mangled).⁴⁸ Elsewhere the printed debates are highly selective and abbreviated—often for partisan reasons—or simply inadequate.⁴⁹ By contrast, when we move beyond the debating chambers to the larger public discussion, we face a bewildering array of sources, ranging, Bernard Bailyn notes, “from rather silly lampooning squibs and jingle-jangle verses to scholarly treatises and brilliant polemical exchanges.”⁵⁰ And even if we could lay aside these reservations about the nature of the sources, we lack the formulas or coefficients needed to convert expressions of individual opinion, whether brilliant or fantastic, into shared, much less consensual understandings that we could confidently ascribe to greater or lesser aggregations of Ratifiers.

Too little appreciation has been paid, however, to another factor that illustrates both the strengths and weaknesses of the theory of originalism. Its legal power rests, again, on an argument about the supreme authority of popular sovereignty—and the origins of that argument can in turn be traced to the mixture of theoretical and political concerns that converged in 1787. When the Framers developed their procedures for ratification, they had two fundamental concerns in mind. The first was to surmount the legal uncertainties and irregularities that attended their project: the calling of a convention unknown to the Articles of Confederation; the improbability of securing the unanimous consent of all thirteen states, especially when renegade Rhode Island, proverbial home of “Jews, Turks, and infidels,” had boycotted the Convention; and the unlikelihood that the state legislatures would willingly surrender their authority and influence. Both at Philadelphia and afterward, Framers and Federalists were happy to appeal to necessity and “revolution principles” to justify their decision to abandon the rule of the Confederation.⁵¹ Yet the appeal to popular sovereignty (as expressed through popularly elected, one-time-only

tice. See Powell, *Original Understanding*, *supra* note 19, at 935, 941; Lofgren, *Original Intent*, *supra* note 19, at 102-11; Rakove, *Original Meanings*, *supra* note 8, at 339-68 (supplying the author's version of this story); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 *Const. Commentary* 159, 159-86 (1996) (emphasizing the political context in which originalist appeals were first expressed in the 1790s).

47. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 12-24 (1986).

48. *Id.* at 22-23 & n.94.

49. *Id.* at 21-24.

50. *Faces of Revolution*, *supra* note 30, at 229-30.

51. See 2 *Records*, *supra* note 22, at 461, 469; 475, 476-77; 2 *Documentary History of Ratification*, *supra* note 28, at 65, 74-94 (discussing the debates of late September 1787 in the Pennsylvania assembly).

ratification conventions) was also justified on theoretical grounds, as a legal mechanism to give the Constitution its status of supreme law, both to be enforced against the states and to regulate the acts of national institutions. Drawing upon the precedent set in the Massachusetts Constitution of 1780, the Framers converted this notion of popular sovereignty into the definitive element of American constitutional theory.⁵²

Having released the genie of popular sovereignty, the Framers and their Federalist allies faced the further challenge of limiting the miracles it could perform to the objectives they desired. If, for example, one thought of the state conventions as a pure expression of the sovereign will of the people, why could these bodies not propose amendments to the Constitution, or make their separate acts of ratification contingent upon the prior adoption of the revisions they sought, or even call a second general convention, which would have better information about what the sovereign people truly wanted? Foreseeing the procedural and substantive mischief to which such notions could lead, the Framers insisted that the will of the people, as expressed in their conventions, could be limited to one question only: to vote the Constitution, in its entirety, up or down. One of the most fascinating aspects of the ensuing ratification struggle is to trace how hard and how successfully the Federalists worked to prevent their opponents from escaping the procedural restraints the Framers had devised. Some Anti-Federalists clearly grasped that they could exploit the claims for popular sovereignty to their own ends. In the state ratification conventions, however, they failed to develop or implement an effective political strategy to deploy this theoretical insight to thwart the Federalist insistence upon voting upon the Constitution as a whole, and leaving amendments to be merely recommended for future consideration.⁵³

Two significant implications flow from this understanding of the nature of the ratification decision. First, it arguably allows us to view the current debate over the "legality" of the Constitution in a new light.⁵⁴ Far from being a legally doubtful end-run around Article XIII of the Confederation, the ratification mechanism of 1787-88 capitalized on the legally defective but no less expedient procedures that the revolutionaries of the mid-1770s had used to promulgate the new state constitutions. Those constitutions, Jefferson and Madison argued, were not properly constitutional because, as the acts of surrogate legisla-

52. For further discussion, see Rakove, *Original Meanings*, *supra* note 8, at 94-130.

53. *See id.* at 113-28.

54. For the major statements, see Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475 (1995); Richard McKay, *The Illegality of the Constitution*, 4 Const. Commentary 57 (1987).

tures, they were vulnerable to violation by subsequent legislatures under the doctrine of *quod leges posteriores priores contrarias abrogant*.⁵⁵ Once the new Federal Constitution gained the approval of popular conventions, specially called for the sole purpose of ratification, its authority would be properly paramount to that of the state legislatures. Now it would be clearly understood that these early constitutions were themselves less than fully constitutional, and hence inferior in authority to the new federal charter (thereby reinforcing the thrust of the Supremacy Clause).⁵⁶

The second implication offers a potentially fatal blow to the strong form of originalism which ultimately rests on the same principle. Simply put, the binary, up-or-down quality of the decision of 1787-88 makes it impossible to disaggregate the decision "to form a more perfect union" into understandings of the merits and meanings of all the individual clauses that are the true objects of constitutional adjudication. A few years earlier, the Massachusetts towns had been given no clear instructions as to how they were to express their decisions on the constitution proposed by the convention of 1779. When the convention reassembled to review the town returns, which took predictably diverse forms, it finally had to throw up its hands, in effect, and declare the constitution ratified.⁵⁷ No such procedural ambiguity surrounded the Federal Constitution of 1787. Its adoption arguably made it a more legal constitution than its antecedent counterparts in the states, and certainly no less legitimate. But the byproduct of attaining this procedural clarity was to make it even more difficult, if not impossible, to derive a calculus of consent to measure the original understanding of particular clauses.

That does not mean that historians cannot provide informative and bounded accounts of the range of potential meanings that Federalists and Anti-Federalists attached to particular clauses. Again, this was a richly documented debate, and if it includes a lot of "noise" at the paranoid margin of political fantasy, it also permits us to reconstruct the central tendencies and concerns that were voiced. If this is true, fidelity through history means that historians can deliver sound, balanced, and rich accounts of the remarkable debates of the late 1780s. But whether such accounts can ever reach or surpass the threshold level of confidence needed to convert originalism from a statement of

55. This maxim of statutory construction can be loosely interpreted as follows: Later laws (statutes) contradicting prior/earlier ones, abrogate them. That is, where two statutes stand in conflict with each other, interpreters should act as if the more recent enactment supersedes the earlier one.

56. Rakove, *Original Meanings*, *supra* note 8, at 96-108.

57. *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, at 25 (Oscar Handlin & Mary Handlin eds., 1966). For further discussion, see Willi P. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 1760-1790* (Rita Kimber & Robert Kimber trans., 1980).

faith into a viable strategy of constitutional interpretation is another matter entirely. Such a theory will always be vulnerable to two powerful objections. First, it cannot demonstrate that advocates and jurists will reliably conduct the source-sensitive approaches to the task of reconstruction needed to satisfy the historian's persnickety obsession with the variety, complexity, nuance, uncertainty, and downright ambiguity of the evidence. Second, even if it did, originalism will always find it difficult to develop a factor analysis capable of disaggregating the final decisions on ratification into measurable expressions of opinion on the meaning of particular clauses.

II. FIDELITY TO HISTORY

The very notion of fidelity *through* history tells us that history offers an instrumental means to secure certain desired results in the realm of constitutional interpretation. Nor is there anything atypical in this attitude toward the uses of historical knowledge. Time and again, from grade school on, we are reminded that we study history to make sense of the present, to learn the lessons it teaches and to avoid its mistakes, or at least to understand that too great an obsession with its lessons may lead us to misperceive the realities of the present. Moreover, many historians would themselves argue that the value of historical knowledge is measured in its utility, not least when it liberates us from an uncritical acceptance of the myths of our own past. For all its theoretical aspirations and pretensions, the scholarship of constitutional law remains deeply instrumental, for its ultimate concerns are to influence the course of adjudication by making some theories of interpretation more compelling than others.

A conception of fidelity *to* history has different implications. It suggests that historians have other obligations: to study the past "for its own sake"; to get the story right; to avoid anachronism; to respect the integrity of the documentary record; to balk at speculating excessively about this evidence to demonstrate one's own cuteness or cleverness. Such an attitude may also enjoin us to use some restraint in subjecting past acts and actors to the harsh judgment of our own exquisitely refined moral sensibilities.⁵⁸ As Gordon Wood has acutely noted, many

58. This concern was on my mind at the Symposium, partly because of the concurrent appearance on the newsstands of a provocative (though hardly original) article by Conor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, *Atlantic Monthly*, Oct. 1996, at 53, 72-74 (arguing that Jefferson's numerous sins will soon place him beyond redemption in the American Civil Religion—Official Version of the next, multicultural century). But I was more struck by the seeming disjunction between two sets of remarks by Bruce Ackerman, one expressed at a dinner held before the Symposium began, the other thrown off the next day in the course of the session devoted to his paper. The dinner remarks counseled the wisdom of not jeopardizing the Bosnian "peace process," such as it is, by pushing too hard to bring Serbians accused of war crimes to trial before the international tribunal currently prosecuting such cases. Ackerman argued, and by no means unpersuasively, that whatever justice

American historians (and their readers) are uncomfortable with a view of the past that emphasizes just how embedded its occupants were in the limitations of their own time:

They do not want to hear about the unusability and pastness of the past or about the latent limitations within which people in the past were obliged to act. They do not want to hear about the blindness of people in the past or about the inescapable boundaries of their actions. Such a history has no immediate utility and is apt to remind us of our own powerlessness, of our own inability to control events and predict the future.⁵⁹

A discipline of history conducted in this key might thus (like originalism) have an inherently conservative bias, for the real lesson it teaches “tends to inculcate skepticism about people’s ability to order their destinies at will.”⁶⁰

If this form of fidelity has its own virtuous reward, however, it lies in the hope or conviction that it will give us a deeper, perhaps more

might be attained by going after the Bosnian Serb leaders should not outweigh the importance of securing peace. A half-century after the Holocaust, one might suppose, just for the sake of moral argument, that toleration of genocidal behavior in one country is an invitation to its perpetration elsewhere; yet *realpolitik* tells us to swallow our principles and be pragmatic. I was reminded of a similar argument made a decade ago by Ronald Dworkin, the leadoff speaker at the Symposium, in (again) a not-unpersuasive defense of the careful distinctions that the new civilian government of post-Falklands War Argentina had made in determining how to proceed against the military officers who had carried out the hideous campaign of terror and (literal) kidnapping against political activists, students, and their children. See Ronald M. Dworkin, *Report from Hell*, N.Y. Rev. Books, July 17, 1986, at 11, 11.

The next day, however, Ackerman wondered what deference we need pay to the constitutional values of the 1780s because, after all, theirs was a society of slaveholders—and indeed, many of our ostensible heroes (Madison, Jefferson, Washington, Mason) held slaves, too. Clearly we are their moral superiors. We know slavery is an absolute wrong; they did, too, but could not bring themselves to act against it. Whether that was because it was not in their interest to do so, or because they could not imagine how freed slaves and their former masters could possibly coexist, does not matter.

Meanwhile, however, we should recognize that the claims to seek justice against the perpetrators of genocide in the former Yugoslavia do not trump the pragmatic *raisons d’etat* that caution prudence and restraint—in no small measure, too, because our interests do not command us to intervene in any more forceful way. Of course, Bosnia is another society, and our moral obligation to pursue justice beyond our own borders may be less compelling than the duty of pursuing justice within them. Yet I wonder whether future historians in, say, the year 2197, assessing the moral failures of both late-eighteenth- and late-twentieth-century Americans, will be more disturbed by our failings or theirs.

59. Gordon S. Wood, *The Creative Imagination of Bernard Bailyn, in The Transformation of Early American History: Society, Authority, and Ideology* 16, 46 (James A. Henretta et al. eds., 1991) [hereinafter *Transformation of Early American History*].

60. *Id.* Wood’s remarks, though occasioned by the historians’ debate over Bernard Bailyn’s marvelous biography, *The Ordeal of Thomas Hutchinson* (1974), also seem to reflect the ongoing quarrel among historians over how to assess the Founders’ attitude toward slavery. For Bailyn’s own reflections on moral reasoning in history, see his essay, *Context in History* 16-22 (1995).

intuitive understanding of the history we study. The past may be a foreign country, as the saying goes, but if we visit it often enough, make some of its corners our regular haunts, then over time we ought to be able to understand some of its more curious customs and mores, and even a bit of the *argot* in which the natives banter with each other. For the working historian, the great pleasure of scholarship comes from mastering some set of sources in order to solve—first to one's own satisfaction, then to the persuasion of knowing readers—some problem, often quite technical, of historical explanation. And in solving these problems, we historians like to think, we also narrow the distance between past and present—not (again) by finding some obvious moral or lesson to be applied to the present—but by providing reasons for thinking we actually come to understand what the past was like. Nor does this belief entail a naively pre-postmodern confidence in the ultimate objectivity of historical knowledge. *Pace* Peter Novick, no one understands the objective limits of historical knowledge better than those who wrestle with the evidence on which it rests.⁶¹

How might a working historian's notion of fidelity *to* the history of revolutionary constitutionalism influence his assessment of the possibility of attaining constitutional fidelity *through* history? No one would deny that originalism poses a set of legitimate, bona fide questions about the past.⁶² As Charles Lofgren has observed, “[t]hey offer the historian puzzles about people who acted as if, and evidently thought, that they were up to important things, and who . . . in retrospect seem really to have been engaged in critical activities.”⁶³ Each clause of the Constitution must have had its separate, distinct history, for none emerged *ex nihilo* to find its way into the final text by sheer chance. As much as we may doubt whether the structure of decision-making permitted coherent Ratifier-understandings of each provision to coalesce, establishing Framers-intentions should not lie beyond the boundaries of recoverable knowledge.

Yet there is a sense, I believe, in which the suppositions of originalism are false (or unfaithful, though not adulterous) to the deeper his-

61. See Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (1988).

62. Such questions, however, may not be the ones that historians would naturally ask, at least in the first instance. Insofar as originalist inquiries presuppose that some set of meanings was conclusively locked into the Constitution at one moment of historical time, they require a freeze-frame approach to the unwinding reel of the past that seems false to the ongoing process of history itself. A more properly historical approach to originalism might suggest that the conventional goal of explaining why certain decisions were taken at particular moments is not tantamount to assuming that such decisions created binding meanings consensually understood by all participants or ever-widening circles of interpreters. See Rakove, *Original Meanings*, *supra* note 8, at 9-10; Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 *Wm. & Mary Q.* 628, 632-33 (1987).

63. Charles A. Lofgren, “Government from Reflection and Choice”: Constitutional Essays on War, Foreign Relations, and Federalism 73 (1986).

torical experience of American revolutionary constitutionalism. The logic of originalism demands that we treat the decisions of 1787-88 as the conclusive culmination of some prior course of reflection and deliberation. Indeed, *culmination* may be too weak a term; in the modern vernacular, *closure* seems to fit the logic of originalism better. Somehow, a set of definitive meanings was locked into the Constitution at the moment of its adoption, presumably because the Framers (and Ratifiers) already possessed a sufficient body of materials and experiences on which to form their final judgments.

Such an impression can be sustained, however, only by minimizing or downright ignoring the avowedly experimental nature of revolutionary constitutionalism, or by assuming that the writings of prior authorities or the dictates of prior experience provided the pellucid "teachings" that the Americans had only to apply. But if any one theme should emerge clearly from the historical writings of the past generation, it is that the break with Britain posed questions and presented opportunities for which tested wisdom and proven precedent seemed inadequate. The narration of this "experiment in republicanism" is replete with a sense of movement, innovation, creativity, and the uncertainties and gaps of comprehension this progress necessarily carried in its wake. That is why the controlling metaphors of Bailyn's *Ideological Origins* repeatedly portray the colonists undertaking intellectual efforts that variously "mark," "touch," "probe," "press against," "burst," "seep past," and "propel themselves" beyond "the boundaries of traditional thought," "the boundaries of received political wisdom," or "the frontiers of eighteenth-century political culture."⁶⁴ That is why, too, Wood's *The Creation of the American Republic* moves from a broad portrait of the sources of late-colonial political thought into a fast-paced yet still sweeping account of the rapid and dramatic changes that followed the adoption of the first state constitutions—changes that were so profound and sharp as to leave the Anti-Federalists of 1787 "holding remnants of thought that had lost their significance," even while their Federalist betters, whom Wood portrays almost elegiacally, were struggling to preserve some semblance of aristocratic norms in a proto-democratic age.⁶⁵ And that is why, too, my own work has sought to explain how serious constitutional thinking was shaped by intense involvement in contingent political events.

If this sense of movement and uncertainty captures the essence of revolutionary constitutionalism, as conveyed in the larger evidentiary

64. Jack N. Rakove, "How Else Could It End?": Bernard Bailyn and the Problem of Authority in Early America, in *Transformation of Early American History*, *supra* note 59, at 51, 63 & 275 n.32 (providing further citations to Bailyn's use of these images).

65. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 524 (1969).

record in which historians immerse themselves, fidelity to history will provide only a weak foundation for the possibility of fidelity through history. This conception of fidelity to history challenges originalism not by denying our capacity to explain why the Constitution took the form it did, but rather by questioning the nature and finality of the judgments that Framers and Ratifiers had to reach for the Constitution to become supreme law. No one at the time thought that the opinions being expressed about the Constitution would become firm guides to its later interpretation, except when Federalists warned that Anti-Federalist misrepresentations, if credited, ran the perverse risk of making the Constitution more threatening than it would otherwise have been.⁶⁶ Perhaps more important, participants in the debates of 1787-88 probably understood that their writings comprised predictions about the likely characteristics and tendencies of the government the Constitution would create. The validity of those predictions could be confirmed only by the evidence of experience—that is, by an ongoing history beyond the original “founding” moment.

Fidelity to this notion of constitutional history does not mean that the Constitution was written as a vacuously open-textured, “living” document. The fear of loose construction was certainly part of the constitutional vocabulary of the 1780s, just as the fear of innovation resonated especially deeply among the Anti-Federalists.⁶⁷ But that is not the same thing as saying that the decisions of 1787-88 embedded a particular set of binding meanings into the fabric of the Constitution. As a theory of fidelity through history, originalism ultimately fails because it is false to the history it purports to describe.

66. Rakove, *Original Meanings*, *supra* note 8, at 343-44.

67. *Id.* at 151-53.

