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Cover Page Footnote

Professor of Law, New York University School of Law. I would like to thank Richard B. Bernstein, Chris Eigruber, John Ferejohn, Don Herzog, William Nelson, Liam O'Melinn, and Pasquale Pasquino for comments on an earlier draft. Thanks also to participants at the SYmposium on Fidelity in Constiitutional Theory at Fordham University School of Law and the NYU Legal History Colloquium.

FIDELITY TO HISTORY—AND THROUGH IT

Larry Kramer*

I was delighted when I first saw the title of Jack Rakove's paper, *Fidelity Through History (Or to It)*. Finally, I thought, someone who will make the point that keeping faith with the Constitution means tracking its evolution over time—that history is essential to constitutional theory because our understandings, our values, and the actual structure of our government are constantly, inevitably, changing. I confess to some disappointment upon realizing that it was “just” another paper on originalism.

I put the just in quotes because it is a very good paper on originalism, one that raises some difficult questions for legal scholars who style themselves originalist in the strong sense of the term. By this I mean scholars who believe that contemporary constitutional problems must be resolved by strict adherence to the intent of the Constitution's Framers or the understanding of its Ratifiers. Rakove takes this to be a dominant mode of using history in constitutional interpretation, which seems to me mistaken. This strong version of originalism is hardly reputable today. True, the dwindling number of scholars who cling to the position publish regularly in leading law journals, but that is mostly a product of their provocative conclusions and the fact that law journals are run by students. True, also, two members of the current Supreme Court—Justices Scalia and Thomas—may be originalist in this strong sense, though the need to deal with precedent and with colleagues means that not all their opinions can conform to the model. Nevertheless, the vast majority of judges, lawyers, and scholars have already rejected the jurisprudence that Rakove takes as his main target.

Most of those who engage seriously with problems of constitutional interpretation could more accurately be characterized as “weak” originalists. That is, they treat the Founding as special and privileged in some sense without making it fully determinative or conclusive. Rakove himself appears to fall somewhere in this genus. I call it a genus because there are numerous species of weak originalists, differentiated by the weight they give to evidence from the Founding and the role they assign this evidence in their analysis. Rakove could be described as a sort of “moderately weak” originalist in that he believes specific answers will rarely be found but seems willing to give considerable weight to what the historical record has to offer. Other schol-

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ars can be arrayed along a spectrum ranging from those who think that evidence from the Founding answers many or most questions, to those who treat the Founding as nothing more than a source of basic commitments understood at a high level of generality. What Rakove's critique says to or about such scholars varies, depending on how they use historical evidence.

What these scholars all share in common, however, is a belief that when we ask about the role of history in constitutional interpretation we are asking about the Founding. To be completely accurate, I suppose I should say "Foundings," since the relevant moment for subsequent amendments is some time after 1787-88. But the distinction is unimportant for present purposes. A Founding occurs when a constitutional provision is adopted and becomes law, and for most legal scholars the pertinent history for constitutional analysis is the history of these moments. There is disagreement about why the history matters and how much weight to give it. But constitutional theory can fairly be described as "Founding obsessed" in its use of history. There are Founding moments and the present—then and now—and little else. Whether we ask about these Foundings because what the Founders thought binds us today, or because we need to translate their assumptions and values to present circumstances, or in order to synthesize them with commitments made during other Foundings, the historical inquiry in constitutional interpretation is disproportionately devoted to understanding these discrete moments.¹

It is this point that I want to challenge. Because while I believe that history matters very much in constitutional interpretation—indeed, that constitutional interpretation cannot be done intelligently without a thorough historical grounding—the history that matters is not limited to Founding moments but must include subsequent developments as well. Moreover, once this point and the reasons for it are understood, we are led toward an understanding of the sources rather different from the one sketched by Rakove. The use of history in legal interpretation is, after all, a problem of forensic evidence, and both relevance and probative value depend on the theory of interpretation being used.

1. Ronald Dworkin's theory of interpretation as "integrity" may be an exception. As a conceptual matter, Dworkin's notion of "fit" seems to call for inclusion of our whole political history, though there tends to be a marked absence of anything other than Founding moments in discussions of particular issues. See Ronald Dworkin, *Law's Empire* 176-275, 355-99 (1986). The place of history in Dworkin's analysis is, nevertheless, difficult to characterize. The theory may best be described as "ahistorically historicist": All of history is present for an interpreter to use in constructing the best interpretation of a particular right or claim, but there is nothing special about it *as history*—nothing about its occurrence in time or its temporal sequence that matters particularly. Past events are merely present data to be used in flushing out the moral theory that provides the real motivating force behind interpretation.

I. HISTORY AND THE THEORY OF ORIGINALISM

Before turning to these arguments, one point needs to be clarified: The role of history in constitutional theory cannot itself be resolved by historical inquiry. The point should be obvious. Offering historical evidence on the issue of how or whether historical evidence counts is question-begging without a theory that first explains what makes the evidence relevant. The role of history in constitutional interpretation is necessarily a theoretical question.

I mention this only because, at several places in his paper as well as in his recent book, Rakove appears to rely on historical evidence to establish points about the role of history without having made clear why this is probative, as if the evidence were itself proof of its relevance. Rakove quotes Madison, for example, to establish that it is the understanding of the Ratifiers, rather than the intent of the Framers, that matters.² But while Madison's argument—that it was only popular ratification that gave the Constitution legal force—might be persuasive, the fact that Madison made it is not. At least, not without a theory that explains why Madison's beliefs, or those of anyone else in the Founding generation, should carry special weight.

Even more striking is Rakove's final conclusion, that "[a]s a theory of fidelity through history, originalism ultimately fails because it is false to the history it purports to describe."³ This is based on one of Rakove's most powerful claims. As committed believers in reason and enlightenment, the Founders saw themselves engaged in a revolutionary experiment in government, near the end of what Franklin called the "age of experiments."⁴ To them, this was an ongoing process of trial and error, because no one had ever attempted what they were doing. To the extent the Founders had answers, these were provisional and subject to revision in light of experience. So, Rakove reminds us, "[n]o one at the time thought that the opinions being expressed about the Constitution would become firm guides to its later interpretation."⁵

The historical point is interesting in its own right, but whether it makes originalism implausible depends entirely on why one decides to be an originalist. One might, for example, become an originalist on the pragmatic ground that this is a good way to cabin judicial discretion. Even if the Founders' answers were provisional and contingent, the argument would go, better these than the free-floating musings of

2. Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *Fordham L. Rev.* 1587, 1601 (1997) [hereinafter Rakove, *Fidelity Through History*].

3. *Id.* at 1609.

4. Donald H. Meyer, *The Democratic Enlightenment* at vii (1976); see Henry F. May, *The Enlightenment in America* (1976).

5. Rakove, *Fidelity Through History*, *supra* note 2, at 1609.

unelected and unaccountable judges. This is a Scalian rationale.⁶ Or a conservative Ackermaniac (someone like, say, Pat Buchanan) might opt for originalism on popular sovereignty grounds: Provisional or not, these answers represent the most legitimate expression we have of what “We the People” think, binding unless and until “We the People” speak again.⁷

The point is not that Rakove is wrong about the importance of the Ratifiers or the possibilities for a robust originalism. It is, rather, that we cannot decide whether he is right or wrong without first articulating a theory about why historical evidence should matter.⁸

II. POSITIVISM WITHOUT ORIGINALISM

But what would such a theory look like? As with any problem of forensic evidence, determining the relevance of history to constitutional interpretation depends on what we’re looking for—depends, in other words, on our theory of the Constitution itself. It is axiomatic today that the central characteristic of our Constitution—of any constitution, for that matter—is that it constrains government.⁹ The recent debate about whether the constraints are all negative or include affirmative duties adds an interesting twist but in no way alters the primary emphasis on command and control. The Constitution is conceived as fundamental law imposed by the people on their government, antecedent to government, the source of its power and authority.

It is easy to see, given this understanding, why originalism might seem attractive. How can the entity supposedly controlled by the Constitution have authority to reinterpret it? It is black letter law that an agent cannot unilaterally redefine the scope of its agency but must await new instructions from the principal. If the Constitution is positive law adopted by the people to restrict government, its restrictions necessarily remain unaltered until revised by the only voice legiti-

6. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989) (advocating originalism to avoid “the main danger” in constitutional interpretation, which is “that the judges will mistake their own predilections for the law”).

7. See Bruce Ackerman, *We The People: Foundations* (1991).

8. For the same reason, H. Jefferson Powell’s article, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985), has always struck me as interesting but unhelpful. So what if recourse to extra-textual evidence of intent was not part of the interpretive apparatus of the Founders? If we have since decided, for whatever reason, that such evidence ought to be relevant or binding, nothing about their practices or beliefs should cause us to hesitate. One can decide to be an originalist for non-originalist reasons, ignoring the Founders to the extent they disagree, without succumbing to charges of inconsistency or incoherence.

9. See Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 96-97 (1993); Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* 123-33 (4th ed. 1968).

mately capable of revising them: the people, acting in their capacity as sovereign lawmakers.¹⁰

Nor, one can argue, is it more logical to hand power to redefine the limits over to courts. What is to prevent judges from relaxing limits they deem inconvenient or unimportant, as originalists maintain has happened in areas like federalism and separation of powers?¹¹ What is to prevent them from extending other limits in order to aggrandize their own power, as originalists urge has been true with respect to individual rights?¹² Judicial review is one thing, but in exercising the power of review, courts must take for their measure the Constitution as it was originally meant.

These arguments have answers, of course, answers rehashed in the literature for more than forty years. Nevertheless, the enduring appeal of originalism in some form lies partly, I think, in this notion of the Constitution as positive law designed to restrain government. Yet this is not the only conception available. Indeed, before the American Revolution, it was not even the dominant one. Emerging in well-developed form only in the early seventeenth century,¹³ the original idea of a "constitution" was rather different. There was, to be sure, a notion of fundamental law operating to constrain government, but most Englishmen saw their constitution simply as the arrangement of existing laws and practices that, literally, constituted the government. In Bolingbroke's well-known formulation: "By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed."¹⁴ This constitution was neither anterior nor superior to government or ordinary law. It was, in effect, the ordinary law itself. "[E]very act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional."¹⁵

A constitution, in this imagining, is neither fixed nor necessarily constraining. It mutates over time as wisdom and experience (not to mention the occasional revolution, glorious or otherwise) give rise to

10. See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237, 1260 (1986) (noting that originalism has its roots in positivism).

11. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541 (1994) (arguing that modern constitutional law has distorted the separation of powers scheme).

12. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

13. Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in *Conceptual Change and the Constitution* 35, 38-43 (Terence Ball & J.G.A. Pocock eds., 1988).

14. Henry Saint John, Lord Viscount Bolingbroke, *Letter X*, in 2 *The Works of Lord Bolingbroke* 88 (Philadelphia, Carey & Hart 1841).

15. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 261 (1969).

new forms and new laws. While not the explicit focus of analysis, the emphasis here is on evolving institutions rather than limiting principles. There was, to be sure, a widespread belief that England had molded a particularly excellent constitution in the Glorious Revolution and various acts of settlement that followed.¹⁶ But this sense of accomplishment was not accompanied by a belief that the constitution was fixed for all time. The constitution was, in the words of John Adams, "a frame, a scheme, a system, a combination of powers" designed "for a certain end, namely,—the good of the whole community."¹⁷ And it was understood that the constitution would be adjusted as needed to serve that end. Writing in 1766, William Hicks thus described the English constitution as "a nice piece of machinery which has undergone many changes and alterations."¹⁸

As the quotations from Adams and Hicks indicate, this conception of the constitution as an evolving framework was present in the colonies, where it long co-existed uncomfortably with the competing understanding of the constitution as fundamental law restraining government.¹⁹ A variety of political conditions and compromises muted the obvious tension between these two conceptions for the first half of the eighteenth century.²⁰ But this changed during the disturbances leading to independence, as Americans discovered—for a variety of reasons—the need to insist on principles over institutions and limits over evolution in thinking about the role of a constitution.²¹

16. Pride in the superiority of the British Constitution was shared by Whig and Tory, Court and Country, as well as conceded by Continental philosophes. See Bernard Bailyn, *The Origins of American Politics* 16-23 (1968); Caroline Robbins, *The Eighteenth-Century Commonwealthman* (1959); Isaac Kramnick, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (1968).

17. 3 *The Works of John Adams* 479 (Charles F. Adams ed., Books for Libraries Press 1969) (1850).

18. Bernard Bailyn, *The Ideological Origins of the American Revolution* 176 (1967) [hereinafter *Bailyn, Ideological Origins*] (quoting William Hicks, *Considerations upon the Rights of the Colonists to the Privileges of British Subjects . . .* (New York 1766)).

19. See *id.* at 68 n.12 (quoting a series of essays published in *The Maryland Gazette* in 1748 "elaborating the idea that parliaments 'are the very constitution itself,' that 'our constitution is at present but a series of alterations made by Parliament,' and ridiculing the notion that '*the Parliament cannot alter the constitution*'"). See also Richard Bland's 1764 description of "a legal constitution, that is, a legislature," in *The Colonel Dismounted* (Williamsburg 1764), reprinted in 1 *Pamphlets of the American Revolution 1750-1776*, at 301, 320 (Bernard Bailyn ed., 1965).

20. Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States 1607-1788*, at 7-76 (1986).

21. Making a complete list of reasons is as difficult as explaining the Revolution itself. The most important development was surely the emergence of parliamentary sovereignty in England, together with the simultaneous evolution of Parliament into a legislature in the modern sense (i.e., a body concerned with enacting new laws as much as with being the highest court in the land). An evolving constitution may have seemed acceptable so long as this was a matter of customary law, with the pace of change regulated by precedent. Things looked rather different when power to rede-

Whether right or wrong, and historians have adduced solid evidence to support the colonists' constitutional arguments,²² the American Revolutionaries developed and defended a conception of the constitution that differed sharply from the one subscribed to by their English and Loyalist counterparts.

This new conception did not emerge easily. After all, it was not until the crisis incited by the Stamp Act (and escalated by Parliament's subsequent efforts to tax and regulate) that Americans found it necessary to demand recognition of their version of the constitution.²³ And the development of their position was retarded by the uncertainty of a system based on customary law, as well as by a natural tendency on the part of many Patriot writers to claim no more than was necessary to establish a point in issue.²⁴ The full ramifications of their argument thus became apparent only slowly, even to them. Some grasped the problem and found a solution quickly, while others were unable or unwilling to repudiate the English version of the constitution until they had completed an arduous search for accommoda-

fine rights and protections was asserted by an active legislative body, particularly one in which American interests seemed so unlikely to receive fair consideration. As that happened, Americans found increased significance in seventeenth-century British precedents emphasizing the role of law in restraining government. See 3 John P. Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (1991). Other factors that played a role in the development of a distinctly American theory of constitutionalism include: the availability of and reliance on colonial charters to define the powers and rights of the colonies; the influence of covenant theology; the need to specify rights and powers in writing to make up for the absence of indigenous institutions familiar with defining and enforcing them; and the continuing development of the jurisprudence of positive law. See Wood, *supra* note 15, at 264-67; Bailyn, *Ideological Origins*, *supra* note 18, at 192-98; Gerald Stourzh, *The American Revolution, Modern Constitutionalism, and the Protection of Human Rights, in Truth and Tragedy: A Tribute to Hans Morgenthau* 162, 166-69 (Kenneth Thompson & Robert J. Myers eds., 1977).

22. The most important and comprehensive work in this respect is John Reid's four-volume *Constitutional History of the American Revolution* (1986). Other examples to the same effect include Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. Pa. L. Rev. 1157 (1976); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); Martin S. Flaherty, Note, *The Empire Strikes Back: Annesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 Colum. L. Rev. 593 (1987); Liam S. O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 Colum. L. Rev. 104 (1995). A useful summary of the main lines of argument is found in Greene, *supra* note 20, at 144-48. In a nutshell, these authorities show that the nature and content of the British Constitution was less settled in the mid-eighteenth century than previously thought. The colonists were thus able to draw on a body of legitimate precedent to support their argument that the assertion of parliamentary sovereignty was itself unconstitutional, if not in England, then in the colonies.

23. See 3 Reid, *supra* note 21, at 5-13.

24. See Wood, *supra* note 15, at 261-67; Bailyn, *Ideological Origins*, *supra* note 18, at 176-82; 3 Reid, *supra* note 21, at 7-13; Greene, *supra* note 20, at 79-150.

tion.²⁵ By 1776, however, the mature American conception—the conception so familiar to us today—had been fully articulated.²⁶

Historians tend to emphasize what was new and different here, focusing on the shift from thinking about the constitution as a description of the existing order to seeing it as a charter of fundamental principles that define and limit government. It is surely the case, moreover, that this emphasis was shared by the Americans who wrote new constitutions in the surge of activity triggered by the onset of hostilities with England.²⁷ It would be a mistake, however, to assume that this new conception simply replaced the older one, rather than supplementing and transforming it. A constitution was now understood to be more than a description of the form or frame of government; it was a charter, made by the people, reflecting their choices about what government should or should not be capable of doing. But as experience yielded to a second round of constitution-making and then to the drafting and selling of a new federal constitution, vestiges of the older understanding reemerged—in particular, the idea of government as a complex machine that evolves and changes shape over time. The outcome was (for lack of a better word) a dialectic: evolution to restraint to evolving restraints.

Rakove suggests something like this by emphasizing “the avowedly experimental nature of revolutionary constitutionalism.”²⁸ The idea that constitutional arrangements will be remodeled in practice is, in fact, a frequent refrain in the ratification debates. Hamilton began *The Federalist* No. 82, for example, by patiently explaining:

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system,

25. See Bailyn, *Ideological Origins*, *supra* note 18, at 176-81 (describing the struggles of James Otis in this regard).

26. See *The Genuine Principles of the Ancient Saxon or English Constitution* (Philadelphia 1776), reprinted in 1 *American Political Writing During the Founding Era 1760-1805*, at 340 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter *American Political Writing*]; *Four Letters on Interesting Subjects* (Philadelphia 1776), reprinted in *American Political Writing*, *supra*, at 368; Willi P. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 18-22* (Rita Kimber & Robert Kimber trans., 1980). I refer here to the problem of defining the Constitution's status as fundamental law. Other questions, like how to adopt a constitution in a way that secures this status, were not resolved for many more years, and we're still trying to figure out how to interpret one.

27. See Adams, *supra* note 26, at 18-22, 63-66, 88-90.

28. Rakove, *Fidelity Through History*, *supra* note 2, at 1608.

can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.²⁹

Madison, somewhat less patiently, made a similar point in response to what he regarded as excessive nitpicking by Anti-Federalist opponents of the Constitution:

Is it an unreasonable conjecture that the errors which may be contained in the plan of the Convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject, than from a want of accuracy or care in the investigation of it; and consequently such as will not be ascertained until an actual trial shall have pointed them out?³⁰

The gist of these statements (and countless others to the same effect) is their recognition of governing as a process shaped by experience, and of the Constitution as something that must be accommodated to lessons learned in practice. Any plan of government will disclose errors, uncertainties, ambiguities, and imperfections; and these will require correction, revision, and modification. We may need to distinguish “[t]he special task of correcting *errors* by a process of constitutional amendment” from “the ongoing enterprise of resolving ‘obscure and equivocal’ *ambiguities* through . . . interpretation,” as Rakove observes, but “in both cases . . . only knowledge created by intervening developments could supply the ‘want of antecedent experience’ felt by the framers.”³¹

Given what I said in part I, it would be rather ridiculous of me to maintain that we should take this idea of an evolving Constitution seriously because the Founders did. But one noncontroversial use of history is to illuminate and illustrate problems. The men who formulated and wrote the first American constitutions thought they could avoid the dangers and uncertainties of parliamentary sovereignty by specifying terms. “[T]he Constitution is fix[e]d,” wrote Samuel Adams in 1768.³² Two decades later, his more sophisticated successors had a slightly different, more sober perspective. Defining and constraining government remained central to the constitutional enter-

29. The Federalist No. 82, at 553 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

30. The Federalist No. 38, at 241-42 (James Madison) (Jacob E. Cooke ed., 1961).

31. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 159 (1996) [hereinafter Rakove, *Original Meanings*] (quoting The Federalist Nos. 37, 38 (James Madison)); see also Jack N. Rakove, *The Original Intention of Original Understanding*, 13 Const. Commentary 159, 168 (1996) [hereinafter Rakove, *Original Intention*] (stating that “the intended meaning of the Constitution would only become evident over time, as a course of ‘discussions and adjudications’ set the precedents required to illuminate and clarify exactly where the boundaries and landmarks of power lay”).

32. Circular Letter from the Massachusetts House of Representatives to the Speakers of Other Houses of Representatives (Feb. 11, 1768), in 1 *The Writings of Samuel Adams* 184, 185 (Harry A. Cushing ed., 1904).

prise, but within a framework that recognized the necessity and inevitability of growth and adaptation.

That the Framers saw and thought this may not, by itself, mean that we should. Indeed, it is doubtful that the Framers understood the process of accommodation and adjustment as broadly as I am suggesting; they probably envisioned a more bounded period of experimentation after which things would either have settled into place or we would try again. But doesn't a conception that recognizes continuing evolution make sense, especially in light of our actual experience with governing? Republican government on an extended scale is enormously demanding. The sheer complexity of day-to-day operations, complicated by the strictures of separation of powers and federalism, necessitates the creation of an elaborate administrative machinery. Making matters worse, ours is a system built on the premise of safety through competition, of pitting sources of political power against each other. As each branch, each department, each office asserts its prerogatives, other branches, departments, and offices react; as each adjusts to changes in itself or elsewhere in the system, it triggers further innovations.

If equilibrium is ever achieved in such a system (a nearly impossible feat), it is dynamic, and fleeting. The cycle of action and reaction is never-ending—inevitable and unavoidable. In the face of such pressures, the framework established in the Constitution itself adapts and evolves.³³ The Constitution is surely positive law, but in a special sense. The synthesis of different conceptions that describes our Constitution best—of new and old, restraint and evolution—transcends any notion of unvarying rules, forces us to recognize the organic nature of the charter in constituting an entity that needs controlled growth to survive.

The problem with originalism is obvious in this light. Originalists are not opposed to change *per se*, only to change by means other than formal amendment. They are positivists in the strict sense of the term. For them, laws—and this includes constitutions—reflect definite and discernible commands that become binding upon enactment and can be changed only through similar enactments. But it simply is not possible, or intelligent, to cramp the process of constitutional evolution this way. Many adaptations in constitutional arrangements result from subtle changes in practice, the kind of changes that often escape notice until already established. Other modifications surface to ad-

33. In describing the process as one in which there is adaptation and evolution, I do not mean to say that it is necessarily rational or predictable or even accretive. We don't know enough about the mechanisms of change to make such statements with confidence (at least I don't). Throughout this Response, when I use terms like "adapt" and "evolve," or refer to changes as "organic" and "natural," I mean only that governmental institutions develop in ways and for reasons that we cannot realistically prevent or fully control.

dress developments that were not foreseen when the Constitution was adopted, still others to cope with new practices that may not even be regulated by it. Large transformations can occur through incremental steps, none of which seems particularly controversial when taken, the net effect of which is nonetheless dramatic. Once these changes have occurred, it may not be wise (or easy) to undo them. Other institutions will have adjusted, embracing understandings and ways of operating that can be upset only at great cost.

The organic nature of the process is captured nicely in a letter written by Jefferson late in life, closing with a familiar eighteenth-century simile:

Some men look at constitutions with sanctimonious reverence, and deem them like the arc [sic] of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.³⁴

34. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 *The Writings of Thomas Jefferson* 37, 42-43 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1899). Jefferson was responding to a request for his views about calling a convention to rewrite the Virginia Constitution to eliminate gross inequalities in representation. Although speaking about a formal amendment process, what Jefferson had to say here applies equally to other forms of constitutional change.

Madison's acceptance of the same idea is revealed best in his handling of the national bank. When Hamilton first proposed a Bank of the United States in 1791, Madison vigorously disputed its constitutionality. But while nothing appears to have changed his views about the issue as an abstract matter, Madison's respect for evolving constitutional practice led him to reverse his public position. Drew McCoy explains:

. . . [T]his belief had been superseded, in effect overruled, by the force of events. Madison understood that the Bank had been scrutinized by Congress in the early 1790s before it was established, with its constitutionality openly debated; that it had operated for the subsequent twenty years with annual recognition of its existence by Congress; that it had even been extended into new states; and above all that it had received during its opera-

It does not follow that history is irrelevant to constitutional theory. On the contrary, to conceive the Constitution as a dynamic framework of evolving institutions and restraints makes history central to the interpretive enterprise. But the history that matters is not confined to the Founding, or to specific Founding moments. This is true, moreover, for any plausible theory of interpretation. Every theory must deal somehow with the tension between the positive and the normative—between practice and theory, “is” and “ought.” Different theorists handle this antinomy differently, and history can be relevant on either side of the opposition: as a means of discovering normative values or of understanding how things work. But either way, the history we consult cannot be limited to the Founding and must include subsequent developments.³⁵

This is self-evident with respect to the positive, or practical, component of analysis (whatever that is for any particular theory). Much of the original constitutional blueprint proved to be sensible, but experience has already demonstrated the need to make all sorts of alterations—everything from revising the Senate’s electoral base to abandoning impeachment in all but the most extreme cases, maintain-

tion “the entire acquiescence of all the local authorities.” As president, therefore, he acknowledged what had indisputably been, by any meaningful standard, “early, deliberate, and continued practice under the Constitution.” When he vetoed a bill to recharter a national bank in 1815, he did so explicitly on expedient, not constitutional, grounds And a year later he happily signed into law what he thought was a better bill, which created the Second Bank of the United States.

During his retirement the Bank suddenly became enmeshed once again in constitutional controversy, and Madison had to remind his countrymen—some of whom chided him for his apparent inconsistency—that precedents [meaning settled practices] must always overrule personal opinion, even that of a president. To declare a national bank unconstitutional in the 1830s, he said, was “a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention.”

Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 81 (1989).

35. Constitutional theorists also confront a related, though not quite identical, opposition between rule-of-law values and popular-sovereignty values. The problem here is to decide how much authority to give “the Dead Hand” of previous generations. As an abstract matter, it seems difficult to resist the argument for unmediated popular sovereignty: If government rests on the consent of the governed—even a fictional, constructive consent—and we are the governed, then it is our consent that matters. We should therefore be free to approve, disapprove, or remake the Constitution as we choose, without impediments that favor the choices of an earlier age. Among other possible defects, experience suggests that such a system may be unstable. Hence, we give presumptive validity to existing law in part to inject stability, order, and reliability into the system, in part to sustain a proper balance between ordinary and constitutional politics. See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *Fordham L. Rev.* 1611 (1997). Questions about how strong this presumption should be, and of what it should consist, are answered differently by different theorists, relying on historical evidence in different ways.

ing a huge standing army while all but eliminating state militias, rendering the Electoral College impotent, building an administrative state, and vastly expanding the powers of the federal government and the office of the Presidency (to name but a few of the more obvious developments). What we have seen, in other words, is an irresistible process of constitutional metamorphosis: by amendment, by legislation, by judicial decision, by custom and usage, or through the exercise of bureaucratic discretion. Moreover, as noted above, these reforms were cumulative; each new arrangement induced further adjustments (which may or may not have been self-conscious) and altered the baseline for subsequent developments.

The actual framework of government today is thus radically different, and incredibly more complex, than it was at the outset. That being so, it would be irresponsible to consult only the Framers' understanding to learn how government, or any part of it, can be expected to function now. I would not ignore the Founding. It obviously helps, in understanding the shape of things, to have a reasonably accurate picture of where they started. But whatever answers the original design holds may be inappropriate today. We need to study subsequent developments, to get a sense of the inevitable growth, if we want a confident picture of how things are likely to work in our world. Government is not a static abstraction; it consists of real institutions that have been operating for a long time, and we need to understand how these work and how they came to look as they do to understand them properly. The Founding is a starting place, not a fixed reference point.

This is no less true for the normative component of constitutional analysis. To the extent history is relevant on this score (again something that differs for different theorists) we still need to look beyond the Founding. For values do not operate in the abstract any more than people or institutions; *Erie* is no less rightly decided than *Jones & Laughlin* just because it turned on a change in how we think about law rather than a change in material circumstances.³⁶ The point seems banal but needs to be stated: For all practical purposes, values exist only in relation to other values and to the contexts that give them meaning. Evolution in our beliefs and understandings is as inevitable, and so as

36. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). A cornerstone of the modern federal system, *Erie* held that *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was unconstitutional insofar as it authorized federal courts to make their own determinations of common law in diversity cases. Yet *Swift* was consistent with how the common law was understood when the Constitution was adopted, and it was unquestionably constitutional when it was decided (which is why we didn't hear state's righters at the time howling about federal usurpation). See Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365, 1400-10 (1997); Roger C. Cramton et al., *Conflict of Laws* 591-93 (5th ed. 1993). Was the Court wrong to overrule *Swift*? Of course not: However much sense *Swift* may once have made, the change in legal philosophy reflected in the emergence of Austinian positivism made it an unhealthy anomaly that needed to be overruled.

relevant, as evolution in our practices. The two are, indeed, inseparable. Don Herzog's discussion of the point in a political theory context is equally applicable to law:

Recall some old pragmatist images: our knowledge is a web of beliefs, without foundations in incorrigible sense-data or Cartesian axioms, and we make progress by revising it piecemeal; at any moment we can doubt any part of the web, but it makes no sense to try to doubt all of our beliefs at once; we always confront anomalies, puzzles, and contradictions which create strains, pushing us to revise and innovate, to articulate new beliefs that will solve our problems; we are then in the epistemic position of sailors rebuilding their boat while at sea. Perhaps these images haven't aged well, but I take them to be exactly right as far as they go. They provide the most incisive picture we have of justification and the growth of knowledge. . . .

. . . [T]he piecemeal revisions are always revisions of our beliefs. But the social world isn't simply given, isn't invariant or natural. It is instead very much what we make it, our own collective construction. I want then to widen the relevant web that we're trying to make more coherent, to think of it not just as a web of beliefs but as a web of beliefs and practices. We confront anomalies within our beliefs, within our practices, and most important in the relationships between the two. And our goal is always to make the broader web of beliefs and practices as coherent as we can. . . .

The plight of social [and, one might add, legal] actors, or if you like their opportunity, is then clear. They inherit an ongoing ensemble of social practices and concepts and categories: they no more start from scratch here than they do in gaining empirical knowledge. They learn what have already been defined as their problems, and the terms of political debate as they currently stand. And they can expect new problems, thrown up by social change and the development of new arguments.³⁷

The point is reminiscent of the concept known to economists and game theorists as path dependence. History matters because we are never writing on a clean slate. The course we took to get where we are has inescapably shaped what we know, what we believe, and what we do—and so what we need to understand to make intelligent choices about where to go from here. To assume that values articulated at the Founding should apply unchanged is to overlook the ways in which those values—as instantiated in practices and embedded in other values and other practices—may themselves have changed.³⁸

37. Don Herzog, *Happy Slaves: A Critique of Consent Theory* 22-23 (1989); see also Nelson, *supra* note 10, at 1266-67 (quoting Ludwig Wittgenstein, *On Certainty* 60e (1969)); Lessig, *supra* note 36, at 1367-86 (discussing the problem of interpretation as translation in a changing world).

38. Consider an analogy to, of all people, Freud. Freud's early work maintains that particular events in infancy and early childhood profoundly shape our personality and continue to operate in an essentially unmediated fashion throughout our adult

Note that I say “may” have changed. My argument is not that the Founding is irrelevant or that its lessons are all necessarily obsolete today. My point is that the Founding (or any founding, for that matter) is merely a starting position, without automatically privileged status either as a descriptive matter or as a normative matter. Starting positions are, of course, terribly important as a practical matter. They set the initial direction, and they leave traces that are felt everywhere. Nor should we assume that just because subsequent developments can change the context and meaning of particular values or practices, that they have done so. On many scores, the original understanding (as best we can determine it) may still make sense. But we cannot know until we have examined what happened after. Subsequent history is essential to determine what our Constitution has become and to decide what it should continue becoming.

This inquiry is necessarily grounded in the present. Our problem, to reiterate Herzog’s point, is to make the best sense we can of the “web of beliefs and practices” we have inherited.³⁹ The task, in this sense, is no different from that of an interpreter in 1789. But whereas his present consisted of the text as understood and applied in his day, ours consists of the text as understood and applied today. It is foolish to think that our present could or should mean the text as understood and applied in his day, but to say that in no way makes the process of interpretation “vacuously open-textured.”⁴⁰ It is exactly as objective (or subjective) and grounded (or ungrounded) today as it was then. It’s just that to understand today’s text properly, we need to consider where it started and how it has already changed. An interpreter in 1789 confronted ambiguities and gaps and had to deal with these by making the best sense he could of the text as a whole. An interpreter today faces the same sorts of ambiguities and gaps. But where these are found, and what they look like, may be different because the context has been changed, not least by the ways in which these earlier problems were handled.

lives (until exposed and dealt with through the psychoanalytic method). See Sigmund Freud, *New Introductory Lectures on Psychoanalysis* (1965); Richard Wollheim, *Sigmund Freud 151-66* (1971). Key here is the assumption that these early inclinations are unaffected by what happens later—that they shape later experiences but are not shaped by them. This particular aspect of Freud’s theory is no longer generally accepted. It is now generally understood that, as powerful as these early experiences are, they may themselves be reshaped by later experiences. Our adult responses are more than manifestations of neuroses ingrained in infancy; they reflect our infant experiences as ameliorated or reshaped by childhood, adolescence, and maturity. See Erik H. Erikson, *Childhood and Society* 48-108, 247-74 (2d ed. 1963). So, too, law and legal institutions.

39. See Herzog, *supra* note 37, at 23.

40. Rakove, *Fidelity Through History*, *supra* note 2, at 1609.

III. READING THE EVIDENCE

Any argument that sketches this broad a conception of the Constitution begs a huge number of questions: not only whether it makes sense, but also how it can be converted into a practical method of interpretation, its ramifications for an assortment of particular issues, and so on. For present purposes, I want to focus on the implications for reading history, and, in particular, for reading sources from the Founding period. This is not unimportant. The question of what evidence is relevant in interpreting the Constitution, and how that evidence should be evaluated, is a legal one—an obvious point that has significant consequences for what and how we read, but one that is routinely ignored by both historians and legal theorists. The materiality and probative value of different sources depends on the theory of interpretation.

Rakove offers an incisive summary of evidentiary problems that supposedly confront an originalist. Whereas a historian naturally assumes “that [the intent of] the Framers of the Constitution would be a more reliable guide to its original meaning than the understandings . . . of the Ratifiers,” he observes that “the legal theory of originalism necessarily prefers Ratifier-understanding as the more powerful source of interpretive authority.”⁴¹ But two formidable difficulties complicate this approach. First, the evidence is “ragged and uneven”:⁴² Records of the ratifying conventions are “highly selective and abbreviated—often for partisan reasons—or simply inadequate,”⁴³ and the larger public discussion is too unfocused and consists as much of “silly lampooning squibs and jingle-jangle verses” as serious discussion.⁴⁴ Second, and more important, because “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,” it is “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.”⁴⁵

A. *Framers Versus Ratifiers*

Before showing how these difficulties are diminished if we conceptualize the Constitution along the lines suggested in part II, I need to make a few observations about Rakove’s critique of originalism. One question comes immediately to mind: If Rakove is right about the

41. *Id.* at 1601.

42. *Id.* at 1602.

43. *Id.*

44. *Id.* (quoting Bernard Bailyn, *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* 229-30 (1990) [hereinafter *Bailyn, Faces of Revolution*]).

45. *Id.* at 1603, 1604.

legal theory of originalism favoring Ratifier-understanding, then why does so much originalist scholarship concentrate so disproportionately on what was said in Philadelphia?⁴⁶ Indeed, why is so much of Rakove's own book, which he offers as "a general model of how originalist inquiries might be conducted,"⁴⁷ devoted to the minutiae of those debates? If Ratifier-understanding is what matters, one would think the Federal Convention irrelevant, since almost everything that happened there was kept secret (except the final product, of course). The Convention should matter only insofar as its proceedings were made public and played a role in the subsequent debate over ratification. But the Framers were generally pretty good about keeping their pledge of secrecy, with the notorious but relatively harmless exception of Luther Martin,⁴⁸ and very little of the Philadelphia debates leaked.

The records of the Federal Convention might help to improve our comprehension of how the Ratifiers understood the Constitution. Used for this purpose, the deliberations in Philadelphia would be pertinent more for their general sense than their details—to get a better feel for how contemporaries used words and what their terms of art meant. In addition, the Federal Convention debates might improve our understanding of ratification to the extent the Framers anticipated objections that would be raised in the subsequent campaign. But these are limited uses, and they do not justify the sort of thing most originalists do, like dissecting early drafts to show how a semi-colon snuck in by the Committee on Style was deleted, or how a structure hazily discernible in the final version of Article III is more clearly present in a preliminary draft. Knowing such details undoubtedly affects one's choice among competing interpretations, which is precisely why originalists ought to ignore them, for they were unknown to contemporaries.

Maybe all the effort spent parsing details of the Philadelphia debates means that Rakove has the legal theory wrong, and originalists care more about Framer-intent than Ratifier-understanding. If so, they have a problem, for Rakove seems clearly right on the merits. He quotes Madison in 1796 saying: "As the instrument came from [the Federal Convention] 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

46. It's worth recalling in this regard that Charles A. Lofgren's article, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77 (1988), on which Rakove places so much reliance, was targeted not merely at H. Jefferson Powell, but more broadly at all "the disputants in the current fray" over interpreting the Constitution, who, Lofgren points out, "overwhelmingly focus on 'framer intent' to the exclusion of 'ratifier intent.'" *Id.* at 77 & n.3.

47. Rakove, *Original Meanings*, *supra* note 31, at xiv.

48. 15 *The Documentary History of the Ratification of the Constitution* 146-50 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter *Documentary History*] (discussing Martin's *Genuine Information* I).

Conventions."⁴⁹ That Madison said this is not why it is persuasive (at least not alone). But Madison's argument reflects what Americans from his time forward have always understood to be the source of the Constitution's authority, *viz.*, its democratic pedigree. Whether or not this supports modes of amendment outside those specified in Article V, it explains why the Convention was not treated by contemporaries, and should not be treated by us, as a lawmaking body. James Wilson had it exactly right in Philadelphia when, responding to John Lansing's and William Patterson's challenges to the power of the Convention, he declared himself free "to *propose any thing*" because he was "authorized to *conclude nothing*."⁵⁰ Wilson elaborated at the Pennsylvania ratification convention:

[T]he late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of men. By their FIAT, it will become of value and authority; without it, it will never receive the character of authenticity and power.⁵¹

To treat the intent of the Framers as authoritative is like relying on the understanding of the law clerk who drafted an opinion, the speech writer who wrote the President's State of the Union Address, or the lobbyist who was solicited by a member of Congress to formulate proposed legislation. Theirs are not the lawmaking voices.

One fact gives me pause here—the fact, emphasized by Rakove, that state ratifying conventions were asked to vote on the Constitution as a whole, without engaging in what we normally think of as the main business of lawmakers (*i.e.*, making law). For Rakove, this fact is significant because he believes that it renders a clause-by-clause historical approach to interpreting the Constitution impossible.⁵² But his conclusion rests on a misperception about the rules of legal interpreta-

49. James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), in 6 *The Writings of James Madison* 263, 272 (Gaillard Hunt ed., 1906). This was not a new position for Madison, who made the same point in *The Federalist* No. 40, responding to charges that the Convention had exceeded its mandate:

It is time now to recollect, that the powers were merely advisory and recommendatory; that they were so meant by the States, and so understood by the Convention; and that the latter have accordingly planned and proposed a Constitution, which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.

The Federalist No. 40, at 263-64 (James Madison) (Jacob E. Cooke ed., 1961).

50. 1 *The Records of the Federal Convention of 1787*, at 249, 253 (Max Farrand ed., 1937) [hereinafter *Records*] (Madison's notes, June 16, 1787).

51. 2 *Documentary History, supra* note 48, at 483-84 (speech by Wilson in the Pennsylvania ratification convention, Dec. 4, 1787).

52. See Rakove, *Fidelity Through History, supra* note 2, at 1607-08.

tion. As with any omnibus legislation, there is no need to disaggregate the final outcome into majorities for each particular provision or to ask whether shifting coalitions favored different provisions for different reasons. From the legal perspective, a proposal becomes law if the proper number of designated voters or lawmakers agree to it. Some of the proposal's supporters—perhaps even a majority—may disfavor particular provisions (justifying their support on the ground that, all things considered, the proposed law's desirable features outweigh its drawbacks). But their vote for the proposal as a whole makes even the features they dislike law; that they supported some parts only because they were attracted to others, and not because they found them independently desirable, is legally irrelevant.

If our theory of interpretation makes the lawmakers' intent relevant, we need to know what they understood each provision to mean, whether or not they would have supported it independently. Debate in most of the state conventions, including every state in which ratification was seriously contested, was conducted clause by clause.⁵³ So we know essentially as much about how these clauses were understood as we would have known if separate votes had been taken on each. What we know may still be too little or too unfocused to draw firm conclusions, but the fact that the final vote was conducted on an all-or-nothing basis does not itself complicate the interpretive process.

To be sure, Ratifiers who thought they were limited to voting for or against the Constitution as a whole may have made different arguments from those they would have offered had they been able to vote on each clause separately. Supporters of the Constitution, for example, may have felt constrained to downplay the scope or significance of controversial clauses in a way that would have been less true had individual provisions been severable. This reflects the truism that the content of debate is influenced by the structure of the decisionmaking process.

While not uninteresting, the point is inconsequential from a legal perspective. Originalism is based on positivism—the idea that law is a command from the lawmakers. This is why the lawmakers' intent matters at all. But the "intent" that counts is not some secretly hoped for, subjective desire. It is the expressions of understanding made in the formal lawmaking process. That lawmakers may have expressed their understanding differently under a different rule of decision is thus simply beside the point. From the law's perspective, statements

53. See *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Patrick T. Conley & John P. Kaminski eds., 1988) [hereinafter *The Constitution and the States*] (describing the process of ratification in each state).

made in the ratification conventions—for whatever strategic or tactical reasons—are constitutive of the legally relevant “intent.”⁵⁴

While I disagree with Rakove’s assumption that the all-or-nothing nature of the ratification decision makes originalism implausible, this fact could be potentially significant for a different reason in thinking about the relevance of the Federal Convention. I argued above that these debates should have relatively little importance to a judge or lawyer, since the ratifying conventions were the actual lawmakers. A nation could, however, plausibly divide lawmaking responsibility between two bodies: one empowered to formulate legislation, the other to accept or reject it. James Harrington proposed this structure for his legislature in *The Commonwealth of Oceana*,⁵⁵ a work familiar to American revolutionaries (some of whom occasionally toyed with similar ideas). If we conceptualize the drafting and ratifying of the Constitution this way—with the Philadelphia Convention in the role of Harrington’s senate and the state ratifying conventions as his house of representatives—my earlier analogies to law clerks and speech writers are inapposite. The Convention, on this view, is more like one house in a bicameral legislature, with authority at least co-equal to that of the ratifying conventions. If lawmakers’ intentions are relevant, then, the opinions of the Framers would have to be included right alongside those of the Ratifiers.

Nevertheless, this characterization of the ratification process is historically insupportable. For David Hume’s critique of Harrington was also familiar to Americans of the Founding era. The flaw, Hume explained, is that Harrington’s structure gives an aristocratic voice too much power by enabling it to keep issues from ever being considered by the people. The legislature of *Oceana* thus fails to provide “a sufficient security for liberty, or the redress of grievances.”⁵⁶ Harrington’s

54. Hence, in construing ordinary legislation, we confine ourselves to evidence in the formal legislative history, and we do not dismiss the legislative debate based on whether a bill could be amended on the floor. Note, by the way, how this understanding casts doubt on some sources relied on by originalist scholars and judges, a point discussed more fully *infra* at note 76. Note, too, how Rakove’s argument rests implicitly on the assumption that expressions of understanding that would have been made under a decision rule permitting clause-by-clause votes are somehow “truer” than those made under a rule requiring a vote on the Constitution as a whole. The fact is that these expressions are merely different—unless there is some normative reason to prefer one decision rule to the other.

55. See James Harrington, *The Commonwealth of Oceana and A System of Politics* (J.G.A. Pocock ed., 1992) (1656).

56. David Hume, *Idea of a Perfect Commonwealth*, in *Essays: Moral, Political, and Literary* 512, 515 (Eugene F. Miller ed., rev. ed. 1987) (1777). Hume elaborated:

[T]he senate have not only a negative upon the people, but, what is of much greater consequence, their negative goes before the votes of the people. Were the King’s negative of the same nature in the ENGLISH constitution, and could he prevent any bill from coming into parliament, he would be an absolute monarch. As his negative follows the votes of the houses, it is of little consequence: Such a difference is there in the manner of placing the

system smacked too much of oligarchy even for the elitist Founders. Hence, as Edmund Morgan has observed, although Harrington had substantial influence in America, "his deliberating senate and yes-or-no house of representatives was perhaps the least successful of his proposals."⁵⁷ Not surprisingly, there is no evidence to support the idea that Americans thought they had adopted anything like this structure for drafting and ratifying a new Constitution.⁵⁸

Rakove is, of course, right that the ratifying conventions all eventually agreed to accept the Constitution in its entirety, limiting their proposed amendments to recommendations (and, in the case of New York, "explanations").⁵⁹ They did not do this, however, because they thought they could do nothing else. Rather, pivotal Ratifiers in each state were persuaded that to ratify conditionally was tantamount to voting either to dissolve the Union or to be left out of it. Believing that, as a practical matter, they faced a choice between the Constitution as proposed and disunion, a majority in each state agreed to ratify the new Constitution and work for amendments afterwards.

To survey all the evidence on this point would take far too much time for this already-too-long comment; a few highlights should suffice to establish the proposition. A political highjacking in Pennsylvania, together with quick and overwhelming affirmations in Delaware, New Jersey, Georgia, and Connecticut, left Massachusetts as the first real test of the proposed Constitution.⁶⁰ And it is here that the question of amendments was first raised. While at least one delegate challenged the power of the state convention to propose amendments,⁶¹ no one else seems to have shared his concern. On the contrary, as Michael Allen Gillespie explains in his perceptive essay on ratification in Mas-

same thing. When a popular bill has been debated in parliament, is brought to maturity, all its conveniences and inconveniences, weighed and balanced; if afterwards it be presented for the royal assent, few princes will venture to reject the unanimous desire of the people. But could the King crush a disagreeable bill in embryo . . . the BRITISH government would have no balance, nor would grievances ever be redressed . . .

Id.

57. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 86 (1988).

58. One reason is that most Americans expected the Constitutional Convention merely to devise amendments to the Articles of Confederation for Congress to propose to the states, though rumors that the delegates would do more than this were widely circulated before and during the Convention. See John K. Alexander, *The Selling of the Constitutional Convention: A History of News Coverage* 57, 75, 126, 137-38 (1990).

59. 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution 327-31 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter *Debates in the Several State Conventions*] (New York ratification).

60. See *The Constitution and the States*, *supra* note 53, at 21-130; *Ratifying the Constitution* 29-167 (Michael A. Gillespie & Michael Lienesch eds., 1989).

61. 2 Debates in the Several State Conventions, *supra* note 59, at 125 (statement of Dr. Taylor).

sachusetts, the state had a "tradition of conditional amendments,"⁶² having allowed them in approving the 1780 state constitution (whose ratification procedures provided a model for the Federal Convention).⁶³ At that time, Samuel Adams told the convention "it is your undoubted *right*, either to propose such alterations and amendments as you shall judge proper, or to give it your sanction in its present form, or totally reject it."⁶⁴

Nevertheless, when John Hancock raised the idea of proposing amendments to the Federal Constitution, it was with an explicit provision that these were only recommendations.⁶⁵ The conventional wisdom long held that this idea of "recommendatory amendments" was concocted by Federalists and supported by Hancock and Samuel Adams out of vanity or for crass political reasons (in the case of Hancock, a suggestion that he might be President if Virginia failed to ratify or after Washington left office; in the case of Adams, pressure from his artisan supporters).⁶⁶ Gillespie rejects this thesis, arguing that Hancock and Adams played the role of moderate conciliators and decided against conditional ratification for more statesmanlike reasons.⁶⁷ More recently, William Riker has suggested that Gillespie overstated his counter-thesis. In Riker's view, Hancock and Adams supported recommendatory amendments because, with this proposal on the table, they genuinely favored the new Constitution, but the initiative came from Federalists seeking to broaden their coalition.⁶⁸ Either way, these moderate "crypto-Federalists" became persuaded that recommendatory amendments provided an acceptable compromise between adopting or rejecting the Constitution as it was.

Hancock and Adams were, to begin, both persuaded that the Articles of Confederation weren't working and that the central government needed to be strengthened. The proposed Constitution was far from perfect in their view—Adams, in particular, made known his opinion that the Framers had gone too far⁶⁹—but it was still better than the existing system. Hancock and Adams were also persuaded that a conditional ratification was equivalent to voting the Constitu-

62. Michael A. Gillespie, *Massachusetts: Creating Consensus, in Ratifying the Constitution* 138, 153 (Michael A. Gillespie & Michael Lienesch eds., 1989).

63. See Rakove, *Original Meanings*, *supra* note 31, at 96-102.

64. Gillespie, *supra* note 62, at 153.

65. 2 Debates in the Several State Conventions, *supra* note 59, at 123 (directing readers to 1 Debates in the Several State Conventions, *supra* note 59, at 322-23).

66. See Robert Middlekauff, *The Glorious Cause: The American Revolution 1763-1789*, at 662-63 (1982); Clinton Rossiter, *1787: The Grand Convention* 287-88 (1966).

67. Gillespie, *supra* note 62, at 144-58.

68. William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* 183-208 (Randall L. Calvert et al. eds., 1996).

69. See Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 14 *Documentary History*, *supra* note 48, at 333; 15 *Documentary History*, *supra* note 48, at 289-91 (reports of the Boston Tradesmen Meeting of Jan. 8-9, 1788).

tion down. Different states were likely to have different objections, requiring a second convention to sort these out. Yet it was far from clear that such a strategy could be successfully executed. States that had already ratified would have to repeal their resolutions, and they and other states would have to agree to send delegates to a new convention. Unlike the first convention, this one would not be permitted to work in secret. Many of the delegates would be hamstrung by instructions, and all would be subject to constant and close scrutiny. Under such circumstances, the problem could not be solved as it had been solved for the Massachusetts state constitution, by finding that the Constitution had, in the aggregate, been adopted after all. Indeed, it was unlikely that a second convention would be able to reach any agreement or consensus.

By ratifying with recommendatory amendments only, the failing Articles could be replaced while putting the new government under considerable pressure to make immediate changes. This pressure could be increased, moreover, if similar recommendations were made by the remaining states. These arguments, together with Hancock's and Adams's prestige, were just enough to eke out a narrow victory in Massachusetts.⁷⁰

After Massachusetts, the question of amendments could no longer be avoided, and every remaining state except Maryland ratified with proposed amendments. In several of these states, the question whether to make the amendments conditional or recommendatory was thoroughly debated. All eventually voted to ratify without conditions, though at first North Carolina declined to vote on the Constitution and Rhode Island waited several more years to accept it. In none of these states did the final decision take this form because of a perceived lack of power. In each, tactical considerations like those that moved Hancock and Adams appear also to have persuaded enough delegates to obtain ratification.

The issue of prior or subsequent amendments received its most thorough airing in Virginia. The fact that eight states had already ratified and the belief that the Union would collapse if Virginia did not follow were repeatedly voiced as grounds against conditional ratification. "Will the States which have adopted the Constitution, rescind their adopting resolutions?" asked Francis Corbin. "The loss of the Union, Sir, must be the result of a pertinacious demand of precedent conditions."⁷¹ Edmund Randolph, who spent much time pondering the question, and whose decision to support the Constitution after having refused to sign it in Philadelphia was critical in obtaining ratification, echoed this sentiment:

70. See *The Constitution and the States*, *supra* note 53, at 124-27; Gillespie, *supra* note 62, at 158-61.

71. 9 *Documentary History*, *supra* note 48, at 1015 (speech by Corbin on June 7, 1788).

I have considered this subject deliberately; wearied myself in endeavoring to find a possibility of preserving the Union, without our unconditional ratification, but, Sir, in vain; I find no other means. I ask myself a variety of questions applicable to the adopting States, and I conclude, will they repent <of> what they have done? Will they acknowledge themselves in an error? Or, will they recede to gratify Virginia? My prediction is, that they will not. Shall we stand by ourselves, and be severed from the Union if amendments cannot be had? I have every reason for determining within myself, that our rejection must dissolve the Union; and that that dissolution will destroy our political happiness.⁷²

James Madison concurred, adding some perspicuous observations about why a second convention would likely fail:

Suppose eight States only should ratify it, and Virginia should propose certain alterations, as the previous condition of her accession. If they should be disposed to accede to her proposition, which is the most favorable conclusion, the difficulty attending it will be immense. Every State, which has decided it, must take up the subject again. They must not only have the mortification of acknowledging that they had done wrong, but the difficulty of having a reconsideration of it among the people, and appointing new Conventions to deliberate upon it. They must attend to *all* the amendments, which may be dictated by as great a diversity of political opinions, as there are local attachments. When brought together in one Assembly they must go through, and accede to every one of the amendments. The Gentlemen who within this House have thought proper to propose previous amendments, have brought no less than forty amendments—a bill of rights which contains twenty amendments, and twenty other alterations, some of which are improper and inadmissible. Will not every State think herself equally entitled to propose as many amendments? And suppose them to be contradictory, I leave it to this Convention, whether it be probable that they can agree, or agree to any thing but the plan on the table;—or whether greater difficulties will not be encountered, than were experienced in the progress of the formation of this Constitution.⁷³

The Federalists' success in persuading representatives of every state to ratify the Constitution unconditionally is proof of their superb political skills,⁷⁴ but little else. It does not imply doubts about the

72. *Id.* at 973 (speech by Randolph on June 6, 1788). Randolph's argument is particularly noteworthy given his proposal at the Federal Convention to have the Constitution itself provide for the state ratifying conventions to propose amendments for consideration at a second general convention. 2 Records, *supra* note 50, at 622, 631 (Madison's notes, Sept. 15, 1787). This deliberate, and rather obvious, effort to ensure the Constitution's defeat was rejected by a unanimous vote of the states. *Id.* at 633.

73. 10 Documentary History, *supra* note 48, at 1500 (speech by Madison on June 24, 1788).

74. Anyone who doubts this need only read William Riker's splendid analysis of the Federalist campaign to be convinced. See Riker, *supra* note 68.

power of the state ratifying conventions to propose amendments or otherwise act as sovereign lawmaking bodies. Nor does it provide any reason for us to disagree with Madison that the proceedings in Philadelphia should “never be regarded as the oracular guide in the expounding of the Constitution.”⁷⁵

B. *The Search for Meaning*

This still leaves the other problems Rakove identified with respect to evidence from the ratification campaign: Records of the state conventions are incomplete, and the public discussion is too uneven and unfocused to draw firm conclusions about the meaning of particular clauses of the Constitution. I agree with Rakove that these difficulties restrict our ability to engage in originalist interpretation. But (as I tried to suggest in part II) originalism is not the only way to use history in interpreting the Constitution. Viewing the Constitution as an evolving framework makes history central to the interpretive enterprise, since it requires us to evaluate a historically unfolding process. But it does so in a way that ameliorates the evidentiary problems highlighted by Rakove.

Uncertainty is a problem for originalism because originalism looks to the Founding for definite answers. Just what kind of answers depends on what questions are being asked, something that differs from theorist to theorist. A strict originalist is looking for precise rules to govern particular situations. Other theorists (who may not consider themselves originalists but who share with originalism the idea of a privileged Founding) may be searching for something more general—concepts or principles to be tested against a theory of justice, or translated to present circumstances, or synthesized with other values. But all these theories treat the Founding as a reference point of some sort against which later developments are measured. The historical task is to recover something—a decision, idea, value, belief, whatever—generated at this special moment in time. And because the process of recovery is uncertain (for the reasons explained by Rakove), so too are our interpretive conclusions.

These difficulties inhere in any theory that treats the Constitution as positive law in the usual sense of the term. To whatever extent and in whatever way we view the Founding as fixing something, to that extent it dictates to us, and to that extent we have a problem. But if we view the Constitution as positive law in the special sense described in part II—that is, as establishing a framework of evolving institutions and restraints—the Founding loses this dictatorial cast. Rather than a fixed reference point against which to test later developments, it is merely the place to begin trying to understand how the text regulates

75. James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), in 6 *The Writings of James Madison*, *supra* note 49, at 263, 272.

our complex institutional arrangements. Whether the Founding is controlling, on this view, does not inhere in its status as the event that created the Constitution, but rather depends on what practices and beliefs have subsequently developed.

This understanding has significant implications for how we read the historical record. Most important, it relieves us of the burden of searching for definite answers. The object is not to recover specific past decisions that bind us or need to be assimilated, but simply to make the best sense we can of the Founders' government as part of the process of understanding its evolution into ours. If the historical record is clear enough to yield definite answers to some questions, so much the better. But we do not need definite answers, because we aren't looking to the Founding necessarily to conclude anything, and because we have the whole rest of our history with which to supplement what it reveals. Moreover, the uncertainties, questions, and misgivings of the Founders are as important to this inquiry as their determined truths. Fidelity "to history" as Rakove describes it is thus essential to, not in tension with, the project of maintaining fidelity "through history."

There are other implications as well. If we conceive the Constitution as an evolving framework, what matters about the Founding is not what a few pivotal figures hoped or thought the Constitution would be, but what they and everyone else who participated in the adoption and implementation of the Constitution actually made of it. Rather than looking for prescriptive directions in the subjective understandings of important leaders, we need to recapture the broader political culture of the founding era and reconstruct how the Constitution operated within that culture.⁷⁶ The focus needs at once to be

76. Scholarship about the Founding tends to focus on the ideas, arguments, and views of a few men—men whose understandings hardly represent those of the larger public (not even the portion allowed to participate in ratification), and whose actions once the government was up and running were often inconsistent with their previously expressed views. Still more curious, scholars give as much weight to private exchanges among these men as to their public declarations—not merely to help clarify what was said in public, but as equally authoritative evidence. I refer not only to the general preference for the Philadelphia deliberations over those of the state ratifying conventions, but also to the importance attributed to private correspondence among the Madisons, Hamiltons, and Jeffersons of the day. In part, the explanation is undoubtedly that it is easier to work with these materials. But as or more important, I suspect, is the assumption—implicit in any sort of originalist conception—that our object is to understand the subjective intent of those who enacted rules we must obey.

Note how exceptional these tendencies are even on the assumption that what matters is the intent of the lawmakers. When it comes to ordinary legislation, for example, we don't scrutinize the back room discussions that took place between legislative staff and lobbyists, even though this is where the actual drafting was done. And we certainly don't examine the private correspondence of the bill's chief sponsors. Nor do we look beyond public debates when it comes to interpreting amendments to the Constitution (except for the Bill of Rights, which is treated as part of the original Constitution). The use of evidence from the Founding era is thus both unusual and, within the terms of originalist discourse, difficult to justify.

broader in scope and oriented more toward how beliefs and understandings were realized in practice.

This change in focus should alter the historical inquiry in subtle but important ways. The same four categories of evidence discussed by Rakove—records of the Philadelphia Convention; records of the ratification campaign; intellectual influences; and the Founders' political history and experience—remain important. But what we look for in reading this evidence, and the importance we assign to different aspects of it, are somewhat different.

To begin, this understanding provides another reason to emphasize the ratification debates over the Federal Convention: not because the Ratifiers prescribed rules we must recover and apply, but because the ratification campaign offers a much broader range of contemporary opinion than the debates in Philadelphia. The records of the Federal Convention are relevant, of course, because so many of its participants were important figures in setting up and running the new government. But they did not govern alone, and the choices they made were reshaped by the people with whom they worked and even more by the people whom they governed. It is this larger public perception that is relevant to the project of interpretation and needs to be recovered.

It follows, among other things, that in examining the campaign for ratification, the “squibs, parodies, wildly fantastic predictions, and demagogic rhetoric” that originalists find so distracting ought to be as interesting to us as *The Federalist* and other “more serious analyses.”⁷⁷ Our goal is to gauge the prevalent public understandings that shaped

Not that the private thoughts and correspondence of participants in the Founding aren't important. Some of the most fascinating and enlightening scholarship on the American Revolution is in this vein. But it looks at the inner psyche of a John Adams, Thomas Hutchinson, or Jonathan Mayhew to understand something about the general sense and sensibilities of the people who made the Revolution. Hence, we are just as interested in the Harbottle Dorrs of the world and in the wealth of information provided by social historians about the lives of ordinary citizens. See, e.g., *Colonial British America: Essays in the New History of the Early Modern Era* (Jack P. Greene & J.R. Pole eds., 1984) (analyzing the social, cultural, and economic norms of pre-Revolutionary America); Bernard Bailyn, *The Index and Commentaries of Harbottle Dorr*, reprinted in Bernard Bailyn, *Faces of Revolution*, *supra* note 44, at 85 (describing the records and notes of an ordinary shopkeeper). When it comes to the Founding, the analysis of papers and correspondence changes. Rather than look at these to understand something about the broader political culture, we mine them for authoritative statements about the law (without even noting that private exchanges are an inappropriate place to find such statements). A search for specific answers supersedes the exploration of contemporary understandings and sentiments. One telling piece of evidence in this respect is the tendency to confine close study to leading proponents of the Constitution. Anti-Federalist thought is examined, but mostly to improve our understanding of Federalist responses, which remain authoritative. And no one pays attention to the crucial middle—to people like John Hancock, Sam Adams, and Abraham Clark, who saw both sides and were genuinely conflicted, and whose support ultimately made ratification possible.

77. Rakove, *Fidelity Through History*, *supra* note 2, at 1600-01.

the Constitution in practice, not to divine the superior intentions of an American Lycurgus or Solon. The thoughts of the men who did the most important labor are obviously crucial, but no more so than the views of those whom they had to persuade and satisfy, those whose fears they had to allay, those whose objections needed to be silenced or muted, and those with whom they shared the task of governing. Doggerel may not help a modern scholar much in understanding the ideas of the small group of leading statesmen, but it is invaluable in understanding how their ideas were comprehended by contemporaries.

In addition, as Rakove himself suggests, his final category of contextual evidence—the “habits, attitudes, lessons, and concerns that Americans derived from their own political experiences”—ought to be regarded as very important.⁷⁸ Indeed, this evidence strikes me as considerably more important than knowing which philosophers the Founders read. In shaping whether, and how, Americans thought the national government could be restrained if it exceeded the limits imposed in the Constitution, which seems more likely to have been important: Harrington or the American Revolution?⁷⁹ Not that intellectual influences aren’t important; they obviously matter a lot, not least in shaping the categories people use to make sense of their world. But then we need to examine the influences that shaped popular political culture more than to reconstruct James Madison’s personal philosophy in detail. To understand how the Founding generation understood its Constitution, *Cato’s Letters* are surely more important than Thomas Reid.⁸⁰

There is, finally, a fifth category of evidence that Rakove does not even mention but that may be the most important of all—namely, evidence from the early years of the Washington Administration. The administrations after Washington are important too. The whole point of my argument, after all, is that what we have made of the Constitution in practice matters more than what the Founders thought it would or should be. But, as noted above, starting positions tend to be especially significant, and decisions made during the first years of the Republic were particularly influential in shaping what came later.

Indeed, I would go farther and say that we should not separate what the Founders said in debating the Constitution from what they did in implementing it. The usual practice, consistent with the originalist underpinnings of most constitutional theory, is to limit “the Founding” to the period during which the Constitution was debated and ratified.

78. *Id.* at 1599.

79. My vote is for the Revolution. See Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1515-20 (1994).

80. Cf. Daniel W. Howe, *The Political Psychology of The Federalist*, 44 *Wm. & Mary Q.* 485 (1987) (arguing that Reid’s philosophy of faculty psychology was an important part of Madison’s thinking).

If evidence of early practice is relevant at all, it is only because it sometimes helps clarify what the Framers or Ratifiers may have thought at the earlier time. But ratification is the focus, and it is the document as ratified that controls.

But why should the document “as ratified” control? What was debated was just an abstraction. The real “Founding” took place when the Founders attempted to turn that abstraction into something real. It is only where ideas confront reality that we learn what the Constitution is or ever has been. It was the Founders’ choices in putting their ideas to work that shaped the course of American government. And it was the choices of their successors, starting where the Founders left off, that made the Constitution what it is today. It is this Constitution that ought to provide the positive law baseline for any theory of constitutional interpretation.

