

ORIGINAL INTENTION AND PUBLIC MEANING IN CONSTITUTIONAL INTERPRETATION

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INTRODUCTION

There is now a standard story about the originalist approach to constitutional interpretation.¹ In the 1970s and 80s certain constitutional law scholars became concerned with what seemed to them the ungrounded jurisprudence of the United States Supreme Court. They began to articulate a theory of interpretation that stressed the obligation of the judge to apply the Constitution in its original—and therefore unchanging—sense. By this they meant the sense intended by the people who wrote and ratified it. (I say they “articulated” this view because, prior to that time, it was already the prevailing conventional, if implicit, understanding of constitutional interpretation.) A counterattack by the far more numerous academic proponents of an expansive method of judicial review challenged the practicability, even the coherence, of any attempt to recover those original intentions. The originalists, in response, redefined what they took to be the object of constitutional interpretation. They abandoned any pretension that the judge should attempt to ascertain the meaning actually intended by the constitution-makers. Rather, the aim of interpretation was to discover the “objective meaning” of the enacted text—the meaning it would have had for reasonably competent users of the language at the time of adoption. The actual mental states of the drafters and ratifiers were, in themselves,

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¹ An exemplary account is found in Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1136–48 (2003).

irrelevant. In this “new and improved” form,² originalism has (mainly) carried the day: “We are all originalists now.”³

This Article reexamines the shift from the subjective intent of the constitution-makers to the “original public meaning” of the Constitution’s words.⁴ Part I critically reviews the apparent reasons for this change. Part II clarifies the definition of original intention interpretation and shows that, in the actual course of adjudication by honest and competent judges, original intention and original public meaning interpretation should usually yield the same result. Part III isolates the limited circumstances in which these two interpretive methods might diverge, and points out the anomalies that arise when interpretation is limited to public meaning in those situations. Parts IV and V set out reasons why, even without regard to conceivable differences in result, recourse to original intentions is more consonant with the values underlying the originalist approach to interpretation. Part IV shows that reliance on public meaning distracts the interpreter from the connection between the normative force of the Constitution and the founding events, whereas recourse to the original intentions provides a link that is essential to the legitimacy of constitutional judicial review. Finally, Part V argues that original public meaning interpretation, in the hands of less careful or less rigorous judges, leads to an enlarged range of plausible outcomes, threatening to subvert the clarity and stability of constitutional meaning that is central to the constitutionalist enterprise.

I. THE FLIGHT FROM INTENTION

The idea that judicial interpretation of the Constitution should be governed by the real subjective intentions of the human beings who established it as governing law was, for a long time, so natural as to require no name. In this respect, the Constitution was interpreted the same way

² Randy Barnett, *The Misconceived Assumptions About Constitutional Assumptions*, 103 NW. U. L. REV. 615 (2009).

³ Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26.

⁴ The literature has tended to refer to the first position as one based on “original intentions” and the second on “original meaning.” The distinction is confusing because the object of both approaches is the determination of the meaning of the governing rule. For this reason I have adopted what I regard as the more helpful locution—“public meaning.” The terminology has expanded as the literature has been refined. *See, e.g.*, Kesavan & Paulsen, *supra* note 1, at 1132 (postulating an “original, objective-public-meaning textualism”).

A third term, “original understanding” is sometimes posited as a distinct form of originalist interpretation. To the extent it refers to the meaning understood by competent readers in general (I used it this way in Richard S. Kay, *Originalist Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL’Y 335 (1996)), it is identical to what I am here calling “public meaning.” To the extent that it refers especially to the understanding of the text held by the members of the ratifying conventions (or legislatures), the original understanding is identical to the original intention because the endorsements of the text by these bodies were essential parts of the enactment process.

legal texts had always been treated in common law courts. In the case of statutes, the intention of the lawmaker was the paramount consideration.⁵ Serjeant Saunders's argument in *Partridge v. Strange* (1553) is often quoted: "The words . . . are not the statute but only the image of the statute and the life of the statute rests in the minds of the expositors of the words who were the makers of the statute."⁶ The words of a statute, therefore, could never trump the known intent of the legislator. Another sixteenth-century case was explicit: "[T]he best way to construe an act of Parliament is according to the intent rather than according to the words."⁷ The same view was carried over to the American legal system and, in particular, to the interpretation of its new constitutions. Notwithstanding twentieth-century arguments to the contrary, these judicial references to intention were rarely associated with some disembodied intent implicit in the text of the enactment but with the real psychological intentions of flesh and blood lawmakers.⁸ John Marshall thought it proper to rely on "the history of the times [to know what] the mind of the Convention was directed to."⁹ Although the sources on which it has relied have changed, the Supreme Court has continued to refer to such intentions throughout its history. The intentions of the "Framers" or the "Founders" appear routinely in its opinions.¹⁰

In light of this history, it is the abandonment of intention at the end of the twentieth century that requires explanation. Two sets of reasons for this development have been offered.

The first set of reasons relies on the proposition that only the text of the Constitution acquired the status of legitimate law. Only that text, not the unexpressed or uncommunicated intentions of the drafters, was offered to

⁵ The expansive interpretation sometimes called "equitable construction" is no exception. Deviation from the apparent purpose of a law was generally justified by an assumption that the legislature's "real" intention called for the resulting interpretation. The abuse of this presumption was one reason references to the actual legislative record came into practice. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997); see also note 29 *infra*.

⁶ *Partridge v. Strange*, (1553) 75 Eng. Rep. 123, 130 (K.B.).

⁷ *Eyston v. Studd*, (1574) 75 Eng. Rep. 688, 694 (K.B.) (argument of counsel with which "the whole court" agreed).

⁸ Compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984), with Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 259–84 (1988).

⁹ *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). Robert Natelson has recently assembled compelling evidence for the controlling role of lawmakers' intentions in constitutional and statutory interpretation in the Founding era. See Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intentions*, 68 OHIO ST. L.J. 1239 (2007).

¹⁰ For examples from the 2006–2007 term, see *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (2007) (Framers); *Schriro v. Landigan*, 127 S. Ct. 1933, 1947 (2007) (Framers); *Fed. Election Comm'n v. Wis. Right to Life*, 127 S. Ct. 2652, 2674 (2007) (Framers); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2576, 2588 (2007) (concurring opinion) (Framers); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2786 n.25 (2007) (Founders); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1801 (2007) (concurring opinion) (Founders).

the country for ratification in 1787. Likewise, only the texts of amendments are proposed to and ratified by state legislatures. The same argument may be expressed as a matter of democratic legitimacy. If the force of the Constitution is its endorsement by “the people,” then, given the ratification process, only the ratified text may claim that approval. This reasoning closely parallels some of the arguments for “textualist” statutory interpretation vigorously asserted by Justice Antonin Scalia in numerous judicial opinions as well as in extrajudicial writing.¹¹

It is true that only a text is presented for ratification and, to the extent we understand ratification of the Constitution and its amendments to be the critical lawmaking act, only that process can set the relevant meaning. However, it does not follow from this fact that intentions, in general, are irrelevant. It merely directs us to a different set of intentions—those of the ratifiers. The intentions of the proposing convention of 1787 are useful only because they help us understand what the state ratifying conventions probably intended when they made the Constitution. Ratification was an intentional act and we cannot understand what it accomplished independent of what the people involved in it thought they were doing.

More fundamentally, the proposition that “only the text is law” begs the question: the issue, after all is *what does the text mean?* There will be few occasions when a litigant defends an interpretation flatly at odds with any plausible meaning of the words of the text. Instead, courts deal with conflicting interpretations that are both consistent with the objective meaning of the text. There may be reasons for wanting the choice between the proffered interpretations to be made by a judge armed only with the text and a dictionary, but that preference is not logically compelled by the legal status of the text.

It is equally unclear why text alone has a more credible democratic sanction than the text understood in the sense intended by the enactors. As already mentioned, it is the ratifiers whose intentions as lawmakers are determinative with respect to the 1787–1789 Constitution. Admittedly, the process by which the delegates to those conventions were chosen does not strike modern observers as particularly democratic. But the public meaning of the constitutional language, taken apart from the ratification process, is hardly a better reflection of popular sentiment. It is true, as a matter of definition, that it is the public meaning that would have been understood by the population at large.¹² The fact that the general public might have

¹¹ See SCALIA, *supra* note 5 at 17. This position is also based on credible doubts as to the reliability of modern legislative histories and a concomitant suspicion of judicial uses of that history. See *id.* at 29–37.

¹² This seems to be what Gary Lawson and Guy Seidman assume in connecting the public meaning to “we the people.” See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 59–60 (2006). They suggest that since the legal status of the Constitution depended on the acquiescence of the “people generally,” it must mean whatever the “people” would have understood it to mean. This seems to omit a critical ingredient—popular regard for the proposal and ratification

understood the proposed text in a particular way, however, does not mean that any particular number of them *approved* of the text understood in any way. To conclude that they did would require an investigation of psychological understandings and intentions far more difficult than what has been argued to be impossible in the case of representative bodies.¹³ The fact is that, at the relevant time, the approval of the ratifying conventions was understood *to be* the approval of the people.¹⁴

The second set of explanations for the movement from original intentions to public meaning is the latter's supposed invulnerability to attacks that have been raised about the practicability of any useful inquiry into intentions. Two objections to interpretation based on the original intentions are often cited.¹⁵ I have explained elsewhere why I find neither of these objections convincing and will merely state them and provide an outline response here.¹⁶

The first objection disputes the very coherence of the idea of an intent held by a multimember body.¹⁷ According to this view, intention is a psychological state that may only be associated with an individual mind. This reasoning, however, ignores the very common fact of shared intention, the product of mutual communication of individual intentions. This is a

process. Furthermore, as will be noted below, Lawson and Sediman's hypothetical "we the people," represented by an intelligent, well-educated, and legally sophisticated reader, *id.* at 73, would have been even less representative of the population as a whole than the elected members of the Convention. In equating public meaning, gleaned from written sources with the understanding of the whole people, it is worth noting that a significant part of the relevant population was illiterate. There have been many population studies and they are necessarily imprecise but their estimates of illiteracy generally fall in a range from twenty to thirty-five percent of adult males. See F. W. Grubb, *Growth of Literacy in Colonial America: Longitudinal Patterns, Economic Models, and the Direction of Future Research*, 14 SOC. SCI. HIST. 451, 453–55 (1990). For a substantial part of the population, therefore, any presumed assent would have to have been based on some oral transmission.

¹³ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204–38 (1980).

¹⁴ The equation of the "people" and special constitutional conventions was common in the late eighteenth century. In *The Federalist No. 40*, defending the authority of the Philadelphia Convention, Madison reminded his readers that legal irregularities would become irrelevant on ratification since the plan "was to be submitted to *the people themselves*." THE FEDERALIST NO. 40, at 247 (James Madison) (C. Rossiter ed., 1961). No one, at this time, dreamed that the "people" could act other than through representative bodies of some kind. The "constitutional convention" was the device through which the people acted in their constituent capacity. In this respect it was the "epitome of the People." GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 337 (1969). There also seems little reason to carry over modern presumptions about manipulation of the legislative record inferred from a much more recent history to the original constitution-making process.

¹⁵ RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY*, 93–95 (2004); Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444–45 (2007).

¹⁶ See Kay, *supra* note 8, at 245–51, 261–84.

¹⁷ Brest, *supra* note 13, at 204. For a recent and more nuanced critical discussion of the role of shared intentions in the construction of meaning see Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

phenomenon encountered and used everyday: “We plan to go in the morning; they intend to wait until afternoon.” It is hard to imagine any kind of social environment in which this type of expression is not constantly employed and understood.

While there are aspects of constitution-making that complicate the inquiry—such as the relatively large number of individuals and the need for the concurrence of more than one group—the basic idea is still valid. Without a core of identical meaning shared by all those agreeing, the concept of decision by majority is meaningless.¹⁸ Seeking that shared meaning does not require combing through the speeches, correspondence, and diaries of each member of every necessary majority. Indeed, as discussed below, it calls for an investigation almost identical to that described by most proponents of public meaning. Mainly, we know someone’s intended meaning by examining the typical meaning attached to the words they used.¹⁹

The second objection to interpretation according to original intention alleges that, as a historical matter, the constitution-makers did not intend their own understanding of the meaning of the rules they made to bind subsequent interpreters. In a much noted article, H. Jefferson Powell assembled the evidence for this position.²⁰ He asserted that it was assumed in the Founding period (though not in the era of the Reconstruction Amendments) that legal instruments were to be construed by applying “structural methods of interpretation” to the language used without reference to “the personal intentions of the framers or anyone else.”²¹ If true, the constitution-makers seemed to have supposed their work would be subject to something very like public meaning interpretation. There is something odd about arguing against use of the original intentions by invoking an interpretation based on the original intentions. In fact, some expositions of public meaning interpretation do turn out to be based on an eviscerated kind of intent held by the relevant lawmakers to authorize whatever consequences adherence to the conventional public meaning would produce.²² In that case, interpreters that apply public meaning are conforming to the “semantic intentions” of the enactors.

¹⁸ Note that we presuppose agreement only on the central core meaning. We are more likely to encounter differences within a majority on the exact reach of a rule. In those cases we will want to know whether a particular instance was within the rule as intended by any sufficient majority. See Kay, *supra* note 8, at 248–50.

¹⁹ Richard S. Kay, *Original Intentions, Standard Meanings and the Legal Character of the Constitution*, 6 CONST. COMM. 39, 41–42 (1989).

²⁰ Powell, *supra* note 8.

²¹ *Id.* at 948.

²² See Ronald Dworkin, *Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION* 115, 119–27 (A. Gutman, ed. 1997); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430–32 (2005); see also Barnett, *supra* note 2, at 648–49 (speculating on the significance of the drafters’ decision to avoid the term “slavery” in the text); Solum, *supra* note 17, at 85–86.

The content of the constitution-makers' intentions, however, is itself a historical fact, and Powell's evidence is far from conclusive. Indeed, recent scholarship by Robert Natelson more or less settles the case to the contrary.²³ He shows that English and American law of the Founding period regarded the intent of the lawmaker as defining the meaning of legislation. The relevant references to the use of the word "intent," moreover, unmistakably point to the subjective psychological intentions of flesh-and-blood legislators. Over and over again, common law judges attempted to discern the "true intent of the makers," the "will of the legislature," and the "meaning of the legislators."²⁴ Many of the statements Powell cited support only the narrower proposition that it was improper to refer to legislative history in the course of statutory interpretation. Natelson shows, however, that "[t]he courts were eclectic rather than restrictive in admitting evidence of intent, and on occasion they did consider legislative history."²⁵ These assumptions were evident in the process of writing and ratifying the Constitution.²⁶ James Madison was himself not always consistent on this matter. However, some years after ratification when he spoke exactly to the question of the "key to the sense of the Constitution," he insisted it could only be found "in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States."²⁷

Neither of the cited objections to interpretation according to the original intentions—that only the text has legal force and that there are insurmountable problems identifying the enactors' intentions—is persuasive. To the extent the preference for public meaning is mainly a response to them, it is, therefore, an unnecessary one.

II. DEFINING THE ORIGINAL INTENTIONS

It will be useful to clarify the definition of original intended meaning. I mean by that term the meaning that textual language had for the relevant enactors²⁸ when they approved the text in question. To inquire into that meaning is to determine the content of the rule the enactors intended to put

²³ See Natelson, *supra* note 9.

²⁴ *Id.* at 1256–57.

²⁵ *Id.* at 1259. As Natelson points out, the English rule against citation of legislative history was not adopted there until 1840. *Id.* at 1268.

²⁶ *Id.* at 1288–1305.

²⁷ Letter from James Madison to Andrew Stevenson (Mar. 26, 1826), *quoted in* 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 473, 474 (1911).

²⁸ By enactors, I mean the human beings whose approval gave the Constitution the force of law. In the case of the original establishment of the United States Constitution that means the people comprising the majorities in the nine state conventions whose ratification preceded the Constitution entering into force. With respect to the amendments that means the people comprising the majorities in the houses of Congress proposing the amendments and in the ratifying legislatures of the necessary three-quarters of the states. See Kay, *supra* note 8, at 246–48.

into effect. Therefore, although I do refer to actual subjective intentions of particular human beings, those intentions are relevant only insofar as they were directed to the content of the enacted rule. We are not interested in those intentions for any other purpose.²⁹ It follows that this kind of interpretation requires no speculation as to how the enactors, independently of the rule invoked, would have decided a particular litigated issue. We do not care, that is, what James Madison thought about birth control.³⁰

A more persistent misunderstanding involves the relevance of the enactors' expectations with respect to the particular instances that would come within the scope of the rules created. Original intentions interpretation is sometimes conflated with an interpretation tied to those expectations—including everything that the enactors thought would be included and excluding everything they thought would be excluded.³¹ But fidelity to the originally intended meaning does not logically require this result. Mark Greenberg and Harry Litman have shown that it may make perfect sense to conclude that the intended scope of a rule does not reach a case that the enactors would have thought it covered.³² They provide the example of a statute requiring the quarantine of people with contagious diseases. The fact that all of the enactors thought this rule required the quarantine of people with psoriasis would not mean it should be so applied even after it was discovered that psoriasis is not contagious.³³ It is emphatically not the case, however, that the failure to apply the rule to psoriatics runs contrary to the original intention with which we are concerned. That is because we believe that the legislature intended only to deal with the consequences of contagion and not with any other aspect of disease. To apply the rule to psoriatics would, in fact, be exactly contrary to the intentions of the legislators with respect to the operation of the rule.

²⁹ For the same reason, interpretation according to the originally intended meaning must be distinguished from the idea of “equitable construction.” Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 567 (2003). The latter notion involved judicial departures from admittedly clear statutory language in order to make the statute conform to some general idea of equity. Even these exercises were usually based on some presumed legislative intention to act fairly, although sometimes they were a far cry from a genuine inquiry into what the legislature really meant in enacting the rule in question.

³⁰ See Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 611 (2004).

³¹ See BARNETT, *supra* note 15, at 93 (“Moreover, while some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.”); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) (“When people use the term ‘original understanding’ and sometimes even ‘original meaning’ . . . they are actually talking about original expected application.”).

³² Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

³³ *Id.* at 585.

Having noted this, however, it is necessary to say that those concerned with the intended meaning are likely to be acutely interested in the applications its creators expected. Those expectations are powerful evidence of the kind of evil the provision was intended to limit or the kind of good it was intended to accomplish.³⁴ As the psoriatics' quarantine example shows, a subsequent finding that an expected application was not within the intended meaning indicates that the expectation was based on some kind of mistake, either as to the existing state of the world or as to developments in the future. By necessity, legislators, and certainly constitution-makers, deal in categories. The intentions in which we are interested are those relating to the elements that should mark an instance as inside or outside an intended category. The defining elements are fixed; the instances are not. New instances can qualify and existing ones may become disqualified as facts or our knowledge about facts change. The fluidity of the contents depends on a prior determination as to the criteria for inclusion intended by the rulemakers.

To take a familiar example, it is clear the enactors of the Constitution did not believe the infliction of capital punishment was denied to the federal government by the Eighth Amendment's prohibition of "cruel and unusual punishments."³⁵ If, as the majority on the current Supreme Court believes, the enactors of the rule intended to bar a class of punishments defined by their incompatibility with "the evolving standards of decency that mark the progress of a maturing society,"³⁶ then the death penalty might be prohibited by the rule as originally intended. If, on the other hand, we think the enactors intended a rule forbidding only punishments inflicting acute and prolonged physical pain, then execution, to the extent it can be administered without such pain, would not be "cruel and unusual" according to the originally intended meaning. Careful examination of the range of conduct that the enactors believed met the qualifying criteria is one thing—although not the only thing—that will be useful in making that determination.³⁷

³⁴ See John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007).

³⁵ U.S. CONST. amend. VIII.

³⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³⁷ This problem is analogous to that of the "level of abstraction" discussed by various commentators. My view is that the determination of the level of abstraction is properly a historical inquiry, like any other question of interpretation. Hence the inquiry, as suggested in text, centers on the original intention as to the breadth of the chosen category. See Kay, *supra* note 8, at 255 n.123; Keith Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000). As Greenberg and Litman properly point out, the expected applications of a general term do not exhaust the sources for understanding its essential characteristics. Greenberg & Litman, *supra* note 32, at 609–11, 618.

III. WHEN MEANINGS DIVERGE

Original intention and original public meaning interpretation may, in theory, produce different results when particular constitutional language is applied to a particular set of facts. The rule actually intended by the enactors may have included certain situations even if a hypothetical reader might have understood a rule that excluded them. In practice, however, this divergence will be very rare. Constitutional enactors chose words for the purpose of communicating the meaning that they wished to express. The enterprise of rulemaking is, after all, an attempt to influence the future conduct of those subject to the rules made.³⁸ It follows that public meaning will be a critical source—and sometimes the only source—for the determination of intended meaning.

We can be confident, therefore, that the enactors at least *attempted* to draft their rules to conform to public meaning. Any divergences that show up in practice, therefore, would mark some kind of mistake by the rulemakers. Such genuine mistakes in expression, however, should occur only in exceptional circumstances. Unlike individuals, lawmaking bodies rarely speak casually or impetuously. Their decisions on the content of rules and on the best way of expressing that content inevitably take place in a multi-step process providing repeated occasions for reconsideration of the particular text. The need for agreement among the lawmakers comprising the majority at each stage often involves discussion and debate, providing further opportunities for adjusting the language chosen.³⁹

In the case of the American Constitution, these ordinary safeguards against inapt expression are likely to have been intensified by the acutely felt importance of the endeavor. Madison's discussion in the *Federalist No. 37* about the inevitable "obscurity" of linguistic expression is often cited.⁴⁰ But in that essay he never suggested that the use of words to communicate intentions was impossible. Quite the contrary: "*The use of words is to express ideas.*"⁴¹ Perfect expression was impossible, but "this unavoidable inaccuracy must be greater or lesser according to the complexity and novelty of the objects defined."⁴² The challenge in constitutional drafting was unusually daunting. With regard to the work of the Convention, however

³⁸ See Greenberg & Litman, *supra* note 32, at 583; Solum, *supra* note 17, at 5.

³⁹ See Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS IN LEGAL POSITIVISM* 249, 270 (Robert P. George ed., 1996). We can imagine a case of purposeful divergence between intended and public meaning, but only in our most speculative academic moments. There could be a kind of conspiracy by the necessary lawmakers to create a rule that appears to produce result *x* when they really intend to produce result *not-x*. I would not think it improper, in such a truly unlikely case, to conclude that the lawmakers "intent" for purposes of interpretation should be taken to be the one they intended for people to understand—not the one they hoped would take effect.

⁴⁰ THE FEDERALIST NO. 37 (James Madison), *supra* note 14.

⁴¹ *Id.* at 229 (emphasis added).

⁴² *Id.* at 229–30.

[t]he real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment.⁴³

It follows that the public meaning of the constitutional text will almost always mirror the intentions of the human beings who drafted and approved it. But in the most likely cases where something might go wrong and mismatches occur, it is hard to explain why interpreters should prefer the public meaning, which, by hypothesis, we believe the constitution-makers did *not* intend. Such divergences are likely to fall into two categories.

The first and most common will be differences with respect to the scope of the rule. The enactors may have used words that might, objectively understood, describe a somewhat broader or somewhat narrower category than the one they intended. In such a case, however, a core area of coverage will be shared by public meaning and intended meaning. Disagreement will arise at the margins. This is just the kind of situation where we are unlikely to be able to identify one objectively correct public meaning that could resolve the dispute. For example, the constitution-makers may have used the term “ex post facto” to denote only retroactive laws associated with a criminal sanction. Some competent readers of the time may have understood it to apply to retroactive laws of any kind. Depending on our attribution of legal and historical knowledge, we could easily posit hypothetical readers who would have read “ex post facto” either way.⁴⁴ It is difficult to see how one chooses among alternative public meanings in such circumstances without either an investigation or an assumption about what the lawmakers were really trying to do.

The second and less common kind of discrepancy arises in the case of the simple transcription mistake—the “scrivener’s error.” In this case, no one seems to think it proper to apply the apparent but unintended meaning. This concession is telling. How do we recognize such mistakes? Some may be apparent on the face of the text or in the context of the whole document or because, as written, the provision would lead to an absurdity. I know that “capitol punishment” means the death penalty. The “obviousness” of the error and of the “correct” meaning in such cases, however, is necessarily premised on an assumption as to what a person using this language in this situation would be understood to intend.⁴⁵

There can also be scrivener’s errors that are not apparent from a mere inspection of the text, errors that can only be detected by recourse to intended meaning. Suppose, by scrivener’s error, the promulgated text of

⁴³ *Id.* at 221–22.

⁴⁴ See Robert Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489, 507–27 (2003).

⁴⁵ See Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 980 (2004).

the Twentieth Amendment set the date of the President's inauguration as January 30 instead of January 20 and that the latter date is conceded to have been the universally shared intention of the constitution-makers.⁴⁶ This error is invisible from the text alone. To the extent that advocates of public meaning interpretation are willing to correct this error, it can be for no other reason than to effectuate the intentions of the enactors.

We see, therefore, that even in those strange cases where we think that the apparent public meaning might yield a result different from the intended meaning, there are good reasons to refer to the original intentions. It is not surprising, then, that the practitioners of public meaning originalism tend to support particular interpretations with essentially the same kind of evidence we have always associated with the search for the original intentions: the debates and proceedings of the Philadelphia Convention, the ratifying conventions, and—for amendments—congressional speeches and committee reports; the drafting history of the provision in question; and the public statements and private correspondence of prominent enactors. For instance, Randy Barnett, one of the most persuasive exponents of public meaning interpretation, defends his view of the meaning of the term “rights” in the Ninth Amendment by noting a draft bill of rights prepared by Roger Sherman, a Senator in the first Congress. Barnett places special emphasis on the fact that Sherman was a member of the Committee that drafted the Ninth Amendment: “Better historical evidence of original meaning is hard to come by.”⁴⁷ It is true that these kinds of arguments are sometimes salted with references to Samuel Johnson's dictionary, but seekers of intended meaning could quite reasonably do the same.⁴⁸

Only in the most inventive academic hypotheticals, therefore, will these two methods employ different techniques or yield different results. Still, the selection of the theoretical starting point for constitutional interpretation may have broader implications. Two sets of issues are worth considering. One is conceptual; the other is practical.

IV. THE AUTHORITY OF CONSTITUTIONAL MEANING

The central problem with the original public meaning view of constitutional interpretation is that it severs the connection between the Constitution's rules and the authority that makes us care about those rules in the first place. Constitutional interpretation is an element of the political program of constitutionalism. That program is premised on the idea that the

⁴⁶ U.S. CONST. amend. XX (“The terms of the President and Vice President shall end at noon on the 20th day of January . . .”).

⁴⁷ BARNETT, *supra* note 15, at 247.

⁴⁸ I should note Barnett's attempt to capture public meaning in connection with the designated scope of Congressional powers by analyzing the use of the words chosen for Article I of the Constitution in the *Philadelphia Gazette* from 1728 to 1800. *See id.* at 289–91, 306. These references, however, are swamped by those to more traditional legislative history.

collective institutions of a society should act according to, and within, a priori and relatively longterm rules. Such a system imparts a stability and predictability to collective action that enhances the capacity of individuals to plan and, therefore, to determine their own lives.⁴⁹ In this regard, one of the key advantages of originalist interpretation is that it makes it more likely that the rules applied will remain the same over time.

A practical constitutional system, however, will not resort to just any longterm rules. The governing rules themselves must be minimally suitable for the particular society involved.⁵⁰ One aspect of this minimum fit is the need for the *source* of the rules to be one that commands the respect of the affected population. The normative force of any legal rule is, first and foremost, the consequence of regard for the lawmaker.⁵¹ No one is obligated to follow a rule arising from the accidental arrangement of words. Similarly, I could write a constitution (a fine constitution) and publish it, but why would anyone think it had any obligatory force? Numerous colonies of the United Kingdom entered independence under “off the rack” constitutions drafted by the departing imperial power. Over time, and apart from the substantive quality of these constitutions, more and more such countries found it essential to replace them with indigenous instruments.⁵² No constitution—no posited norm of any kind—can succeed if it is not regarded as the authentic command of a legitimate lawmaker.

Gary Lawson and Guy Seidman have suggested that it is possible, indeed logical, to deal with constitutional meaning apart from the nature of the constitution-making events: “[O]ne would need to know the Constitution’s meaning before deciding whether it has any authority.”⁵³ As just noted, no constitution can maintain practical force if its content is sufficiently incompatible with important social needs and values. In that

⁴⁹ Quite obviously I am only assuming, not defending, these “constitutionalist” virtues. I have explicated them more fully elsewhere. See Richard S. Kay, *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16 (Larry Alexander ed., 1998). Their defense is a political, not a logical or a legal endeavor. There are other important values that such constitutionalism does not serve, and to which it may even be an obstacle. For someone who finds those other values primary, the uses to be made of a written constitution and the role of constitutional judges are likely to be markedly different. See Mitchell N. Berman, *Originalism is Bunk* 45–57 (Dec. 30, 2007), available at <http://ssrn.com/abstract=1078933>.

⁵⁰ See BARNETT, *supra* note 15, at 109; Richard S. Kay, *Constitutional Chrononomy*, 13 *RATIO JURIS* 31 (2000).

⁵¹ I put to the side the possibility of common law rules that are understood not as the result of self-conscious judicial lawmaking but as an inference from some preexisting and immemorial source, some “brooding omnipresence.” There is no reason to think that historical references to this idea of common law always presumed the complete absence of an intentional lawmaker. And, to the extent that anyone still believes in such a source, it has little relevance to law inferred from a text. See Richard S. Kay, *Judicial Policy-Making and the Peculiar Function of Law*, 26 *U. QUEENSLAND L.J.* 237 (2008).

⁵² See KENNETH WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* 89–113 (1960).

⁵³ Lawson & Seidman, *supra* note 12, at 68.

sense, it is true that meaning must be anterior to authority. But it does not follow that the historical process of lawmaking is irrelevant to the question of authority, at least in the long term. Before even pausing to consider the substantive acceptability of a set of rules, people need to know something about how those rules came into existence—who created them and under what circumstances. Thus, we must first ask whether or not the enactors were proper constitution-makers. Only *then* do we ask whether we can live with these rules. In making this second inquiry, we will necessarily consider the meaning that the presumptively legitimate lawmakers intended to impart to the text.

In American constitutional history, the legitimating source of the Constitution is settled. The Constitution is binding because it is the expression of the will of “the people.”⁵⁴ The constituent authority of the people was universally acknowledged at the end of the eighteenth century by both proponents and opponents of the proposed constitution.⁵⁵ It was, for example, the basis from which its advocates dismissed objections about the illegality of the constitution-making process.⁵⁶ The founding generation regarded the approval of the ratifying conventions as effecting the approval of the people. James Wilson, who articulated the sovereign authority of the people more clearly than anyone at the time, emphasized the capacity of elected members of the conventions to act for the people. Speaking of the Pennsylvania ratifying convention, Wilson noted:

[T]he distinct characters, in which the members of that convention acted, [were] distinctly marked. “We the delegates of the people of the commonwealth of Pennsylvania, in general convention assembled, do, in the name and by the authority of the same people, and for ourselves, assent to and ratify the foregoing constitution for the United States of America.”⁵⁷

⁵⁴ I do not mean that one cannot hypothesize some other aspect of the Constitution that might be regarded as giving it authority. See BARNETT, *supra* note 15, at 32–52. But it seems beyond dispute that, *in fact*, it is the attribution to “the people” that has dominated American rhetoric about its legitimacy.

⁵⁵ See, e.g., THE FEDERALIST NO. 40 (James Madison), *supra* note 14, at 251–53; John DeWitt, Essay III (Nov. 5 1787), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 311, 312 (R. Ketcham ed., 1986). For Anti-Federalists, however, the relevant “peoples” were those of individual states. THE FEDERALIST NO. 39 (James Madison), *supra* note 14, at 243. For a prescient worry about a contrary interpretation of the reference to “the People” in the new Preamble, see Brutus, Essay XII (Feb. 7, 1788), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra*, at 298, 300.

⁵⁶ See Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 134–36 (1984).

⁵⁷ JAMES WILSON, 1 LECTURES ON LAW IN THE WORKS OF JAMES WILSON 176 (James DeWitt Andrews ed., 1896) (quoting Pennsylvania ratifying convention). On the conventions as surrogates of the people, see WOOD, *supra* note 14, at 276–343. Every ratifying convention, in fact, purported to speak for the “people” of their respective states. The instruments are collected at Avalon Project—18th Century Documents: 1700–1799, http://avalon.law.yale.edu/subject_menus/18th.asp (last visited Feb. 21, 2008).

It is true that the *continuing* authority of the Constitution depends on current attitudes towards both its content and the process by which it was created and amended.⁵⁸ Certainly the population today might have serious doubts about the ratifying conventions' right to speak for "the people" in light of the restricted franchise of the time and doubts, perhaps, about the adequacy of indirect democracy for questions of this magnitude. Nonetheless, it seems undeniable that contemporary attachment to the Constitution derives, in substantial part, from respect for acts of constitution-making that were undertaken by the actual people who wrote and ratified it and a conviction that those acts were exercises of the ultimate constituent authority of "the people." Popular celebrations of the Constitution still overflow with references to "we the people."⁵⁹ More remarkably, perhaps, legal scholars continue to place considerable emphasis on the Constitution as the act of "we the people."⁶⁰

The critical point, however, is not the plausibility of the claim that the Constitution is the work of the people in any particular sense. It is, rather, that the United States Constitution, like any other piece of legislation, derives its force from regard for the circumstances of its enactment. Those circumstances may be compelling because they embody what is thought to be the will of the people. Or they may be thought to incorporate special safeguards that filter out unsound decisions.⁶¹ Or they may be perceived as eliciting the judgments of the wisest members of society or the holiest. (The authority of the new democratic constitution of Bhutan has been attributed to the influence of the king who initiated and supervised its drafting and adoption.)⁶² To be an effective governing text there must be

⁵⁸ See Kay, *supra* note 50, at 39–42, 43.

⁵⁹ An elementary school curriculum captures the prevailing idea:

In 1787, the Framers wrote and signed the Constitution. The Preamble to the Constitution says that "We the People of the United States do ordain (give official approval) and establish (accept) this Constitution for the United States of America." This means that the Constitution was approved by the people of the United States and that they agreed to live under the government it created. Each generation of Americans—including yours—must give its approval or consent to live under the government created by the Constitution.

CTR. FOR CIVIC EDUC., CONSTITUTION DAY 4 (2005), available at <http://ftpciviced.org/lessons/download.php?file=byrd5to6scrn.pdf>.

⁶⁰ See, e.g., MICHAEL PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 15–19 (1999); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Lawson & Seidman, *supra* note 12, at 68.

⁶¹ See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007). McGinnis and Rappaport's emphasis on the virtues of supermajoritarian lawmaking only makes sense if the resulting rules are given the meaning actually intended by the necessary majority. See John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism* 48 (Northwestern Pub. Law Research Paper No. 08-05, 2008), available at <http://ssrn.com/abstract=1109247> ("Under the supermajority approach, the Constitution should be interpreted as its enactors would have interpreted it.")

⁶² See Interview with Jigme Y. Thinley, Prime Minister of Bhutan (Sept. 25, 2008), available at http://www.cfr.org/publication/17331/bhutans_road_to_democracy.html.

something about the manner of its production that commends it to those expected to submit to it.⁶³ “No one would even try to interpret the Constitution if everyone thought it had been put together by a tribe of monkeys with quills.”⁶⁴

We must consider the idea of interpretation based on an “objectified” public meaning in this light. According to exponents of that approach it is “not a theory of anyone’s intent or intention. Nor is it a theory of anyone-in-particular’s understanding. Nor is it a theory of the collective intention of a particular body of people, or of a society as a whole.”⁶⁵ Philosophers of language have long recognized (under various names) the proposition that words can have a standard meaning independent of the communicative purpose of the person who uttered them on a particular occasion.⁶⁶ This is not quite the same thing as saying that words can have meanings that do not relate to *any* kind of intention. Necessarily, the inference of meaning from language posits the language as an utterance of some kind of intelligence. The difference between intended and public meaning is that, in the case of the former, we proceed on the assumption that this was a historical human intelligence. In the latter case it is a hypothesized intelligence, constructed according to some statistical estimate of the intentions that speakers of the language most frequently have—or had—in uttering those words.⁶⁷

In the context of constitutional interpretation, the puzzle is why anyone would find a constitution imbued with that denatured meaning—one worked out without considering the real historical circumstances of the text’s creation—to have normative force. The hypothetical reasonable person—and in particular the hypothetical reasonable speaker or reader of the language—has, no doubt, an important role to play in various legal contexts. But it is hard to discern reasons for granting the right to make law, constitutional or otherwise, to what is, by agreement, a fictional person.⁶⁸ We should accord no more respect to the legislative judgments of

⁶³ It is therefore inadequate, in this respect, to posit the authority of the Constitution as a “brute fact” from which no interpretive implications follow. See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 643–45 (2008). The Constitution’s authority may be a fact, but it is hardly a “brute” or an inexplicable fact. It is the consequence of particular historical and political events and decisions. That kind of fact has plain interpretive significance.

⁶⁴ Walter Benn Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 743, 774 (1982). I do not mean it is impossible to attribute a meaning to such a text based on the conventional use of the words and sentences one finds in it. See Lawrence Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123 (2007). One might find it pleasant or amusing to do so. But, for reasons to be discussed, no one would want to employ such a text as a guide to action.

⁶⁵ Kesavan & Paulsen, *supra* note 1, at 1132.

⁶⁶ See, e.g., H. P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957). For a thorough explication of this idea in the context of constitutional interpretation, see Solum, *supra* note 17.

⁶⁷ See Whittington, *supra* note 30, at 610–11.

⁶⁸ The problem is actually most acute when we are talking about the creation of a constitution. We might imagine a case where a constitutional rule would require the interpretation of statutes according to

such a person than to the legal code of Tralfamadore. To do otherwise is more or less equivalent to recognizing a “Constitution . . . put together by a tribe of monkeys with quills.”⁶⁹

V. THE CONSTRUCTION OF PUBLIC MEANING

The essential problem with interpretation of the Constitution based on public meaning is its detachment from the legitimizing authority of the act of constitution-making. Beyond this central difficulty, the public meaning model presents certain risks that may make it unattractive even as a practical matter. That is because it allows for multiple plausible interpretations of constitutional provisions, undermining the critical constitutionalist values of clarity and certainty in constitutional limits.

There is some irony in this conclusion because one of the advertised virtues of public meaning is its relative accessibility. By definition, the public meaning of a rule is the one apparent to a competent speaker of the language from a mere inspection of the text. The intention of the enacting body, on the other hand, is hidden in the minds of its members and, only slightly less obscurely, in its public records and other historical material. Justice Scalia thus likened the application of intended meaning to a Roman emperor’s publication of laws on the invisible tops of columns.⁷⁰ This reasoning, however, is based on a case that is highly unlikely to occur, one where there are two entirely discrete meanings, one intended and undisclosed, the other unintended but clear and knowable. In a case like that, there might be reasons, grounded in constitutionalist values, for preferring the unintended but clear meaning. Even then, we would be sacrificing one essential attribute of constitutionalism—legitimacy—for the other—certainty. In truth, for reasons already discussed, the risk of this kind of contradiction actually emerging from a deliberative process of lawmaking is negligible.

The more likely litigated case will be one where public and intended meaning overlap so that the constitutional issue will be the precise scope of regulation. In this situation, however, it is highly improbable that one party will be in a position to make a persuasive case that only it is relying on the real public meaning. Put another way, the actual contested cases will be those in which there is more than one public meaning. A court rigorously adhering to a public meaning interpretation will have to find some way—

public meaning. The sense of such a rule would turn on a balance of its benefits, such as accessibility, judicial economy, and the injury it would work on the democratic legitimacy of statutory law. But when we consider how to understand the Constitution—something which is not itself the product of any legally authorized lawmaking process—the preference for a hypothetical, truly mindless lawmaker is inexplicable. See Kay, *Standard Meanings*, *supra* note 19, at 39; Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 104–119 (1989).

⁶⁹ Michaels, *supra* note 64, at 774.

⁷⁰ SCALIA, *supra* note 5, at 17. Scalia refers to Nero but the story is usually told about Caligula. 1 WILLIAM BLACKSTONE, COMMENTARIES *46.

apart from considering the intended meaning—to decide which of two proffered meanings is more probably the *correct* public meaning.⁷¹ But, unlike intended meaning, there is no “fact of the matter”—no “real” public meaning. Public meaning is, quite explicitly, an artificial construct. The qualifying criteria, as we shall see, depend on assumptions about how some chosen hypothetical speaker of the language would apprehend the text at issue. Even in theory there is no “right answer,” and by extension, in practice, there will be no “better answer.”

Under Section 9 of Article I, the United States may not grant a “title of nobility.”⁷² May Congress award to favored citizens a nonhereditary membership in a “Society of Merit”? Perhaps, in the late eighteenth century, “title of nobility” had an accepted meaning in ordinary—or educated or political—discourse that included or excluded this instance. But, on its face, like the Ex Post Facto Clause, this looks like just the kind of expression (the Constitution is strewn with similar ones) that a mere examination of ordinary usage, by itself, is unlikely to illuminate with sufficient precision to decide particular disputed questions.⁷³ If we extend the inquiry to the originally intended meaning, on the other hand, we will have more to investigate. We will need to consider why the enactors were interested in limiting this power and we will properly consult whatever sources may shed light on the character of that historical decision—debates, correspondence, treatises, and so forth. In doing so, the ultimate question is not about language but about a particular constituent act. The scope or meaning of that act may be a difficult and inexact inquiry, but there *was* an intention about this text and a raft of information about what that intention might have been. An interpreter ought to be able to arrive at a “better,” if still uncertain, judgment about whether the enactors understood themselves to be prohibiting this kind of action. It is true that proponents of public meaning do not hesitate to cite the same kind of information on the ground that what the enactors meant by a certain term in the course of enacting it illuminates the public meaning. With respect, this seems a strained characterization of the relevance of this evidence.

⁷¹ See Nelson, *supra* note 29, at 560.

⁷² An identical limitation on the states is provided in Section 10. Certain extremist domestic groups have argued that use of “esquire” after a lawyer’s name is a “title of nobility.” They cite not Article I but the almost-adopted “thirteenth amendment” of 1810 that would have stripped citizenship from anyone accepting such a title. See Jol A. Silversmith, “*The Missing Thirteenth Amendment*”: *Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577 (1999). The rare references to the “titles of nobility” clause in the Supreme Court mainly concern advantages associated with birth. See, e.g., *Matthews v. Lucas*, 427 U.S. 495, 520 n.3 (1976) (Stevens, J., dissenting). An argument for “revitalizing” the title of nobility limitation, in a way that would extend it to nonhereditary status is attempted in Richard Delgado, *Inequality from the Top: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984).

⁷³ On the finite quality of the evidence for public meaning, see Solum, *supra* note 17, at 69–75.

This problem is acute in connection with the often addressed question of the “level of abstraction” that should be attributed to certain constitutional language. Take the much debated Privileges or Immunities Clause of the Fourteenth Amendment.⁷⁴ Without entering into the merits of the question, let us assume that the enactors either intended to protect a relatively narrow category of rights—say the rights specified in the Civil Rights Act of 1866—the rights to contract and own property and to the benefits of the criminal justice system—or some broader set of rights, including perhaps political rights, rights to education, or natural rights. The volume of evidence on the social and political history that led to the enactment of the Fourteenth Amendment is vast and the inferences to draw from that evidence may be sharply disputed. But we know that serious investigators have been able to draw (and to dispute) good-faith conclusions on the question of what the enactors were doing in specifying this protection. Considered apart from that history, the phrase “privileges or immunities” simply does not specify one or another level of generality. No amount of philological exertion will change that.

It follows that public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions.⁷⁵ The discovery of indeterminacies in otherwise originalist interpretation has been the “little gap” through which a broad range of judicial choice has been perceived.⁷⁶ The search for the understanding of the competent English speaker of 1787–1789 bears all the risks associated with the process of positing the behavior of the “reasonable person” in numerous common law doctrines. The perfect objectivity of that fictional character must be compromised the moment we inject him or her into a real factual context. We need to endow the reasonable person with some particular characteristics of time, place, and status. In defining our reasonable eighteenth-century speaker of English, we must make some choices as to education, region, vocation and the information he or she possessed concerning the costs and risks of any particular rule. Inevitably,

⁷⁴ U.S. CONST. amend. XIV, § 1, cl. 2.

⁷⁵ My own view, which I will not defend here, is that, in light of the original intentions of the constitution-makers as to the nature of constitutional rules, there will be a better answer to every litigated question of constitutional interpretation. See Kay, *supra* note 8, at 255–57.

⁷⁶ “At this little gap every man’s liberty may in time go out.” 3 COMMONS DEBATES 97 (Apr. 26, 1628) (Robert C. Johnson et al. eds., 1977) (statement of John Selden). On indeterminacy in originalist interpretation, see MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS* 55–57, 95–102 (1998); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENTIONS AND JUDICIAL REVIEW* 171–74 (1999). The absence of determinate meaning has been explicitly linked to the practice of “constitutional construction” whereby interpreters are obliged to extend the binding force of the Constitution beyond its linguistic meaning. See Solum, *supra* note 17, at 51–55, 85–86; see also BARNETT, *supra* note 15, at 118–25. Keith Whittington—from whom these writers have adopted the term—seems to me to use it in a considerably different way, emphasizing the discretion the written Constitution allows the political branches to develop practices on matters of constitutional significance. See WHITTINGTON, *supra*, at 7–13, 172–73.

the “awkwardness of the awkward man, the poverty of the poor man, the stupidity of the dunce, as well as the skill of the expert, along with the special knowledge of the specialist and the numerous other qualities of the person involved, are all considered”⁷⁷ These choices may make a difference in the resulting interpretation. There is no a priori way to decide just where to stop our elaboration. And, of course, it would not be surprising if a judicial interpreter were to hit upon a reasonable speaker who might view the relevant language as supporting a rule that the interpreter thinks a proper constitution ought to have.⁷⁸

In fact, in the literature of public meaning originalism, we find a range of descriptions of that hypothetical speaker or reader. Robert Bork simply points to “the public of that time.”⁷⁹ Justice Scalia adds a minor qualification when he writes of “intelligent and informed people of the time.”⁸⁰ Randy Barnett calls for adherence to “the objective meaning that would be understood by a reasonable person in the relevant community of discourse.”⁸¹ Gary Lawson initially posited “the ordinary meanings that the Constitution’s words, read in linguistic, structural and historical context, had at the time of the document’s origin.”⁸² More recently, he and Guy Seidman have provided a far more elaborate description of the hypothetical person whose understanding should control the Constitution’s meaning:

This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.⁸³

This kind of definition may be taken in two directions. To the extent we are interested in people who were fluent in language, conversant with the historical and constitutional discourse of the time, and fully familiar with the issues at stake in any particular act of constitution-making, we seem to have constructed a person who pretty much exemplifies the real enactors. For example, in discussing the relevance of the published debates

⁷⁷ Leon Green, *The Negligence Issue*, 37 YALE L.J. 1029, 1043 (1928).

⁷⁸ In contrast, Justice Scalia finds fault with the *original intentions* approach by positing a judge who assumes that “your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.” SCALIA, *supra* note 5, at 18. Of course, any judge, using any method of interpretation, may be captured by his or her inclinations. But the fact that there really were historical intentions, while the understanding of the hypothetical competent speaker of English is an academic construction, certainly seems to indicate that there is a greater likelihood of lapse in adhering to the latter.

⁷⁹ ROBERT BORK, *THE TEMPTING OF AMERICA* 144 (1997).

⁸⁰ SCALIA, *supra* note 5, at 38.

⁸¹ Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999).

⁸² Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON L. REV. 21, 22 (1988).

⁸³ Lawson & Seidman, *supra* note 12, at 73.

of the state ratifying conventions, Vasan Kesavan and Michael Stokes Paulsen say, “[I]t matters not what any (much less all) of the Ratifiers actually *intended* or *understood*, but what the hypothetical reasonably well-informed Ratifier would have objectively understood the legal text to mean with all of the relevant information in hand.”⁸⁴ Reducing the reasonable person to the reasonably well-informed *ratifier* with all the relevant evidence in hand more or less collapses the difference between intended and public meaning.

The more serious risk associated with the malleability of the hypothetical reader, however, is the latitude it provides for interpretations that may deviate from any plausible estimate of the original intentions. As noted, such qualifiers as “reasonable,” “intelligent,” or “well-informed” may tend to produce a hypothetical reader who would understand the constitutional language in a way congenial to the aspirations of whatever interpreter is charged with conjuring up that reader.⁸⁵ The temptations will be especially strong in connection with the broadly worded rights provisions that have been invoked to support so many of the most controversial interpretations of the Constitution. It will not be difficult to discover a suitable hypothetical reader to take the words in their widest sense. There will be no need, in that case, for serious consideration of evidence that a far narrower category of protected conduct may have been intended by the actual people whose agreement made the Constitution law.⁸⁶

A more or less natural derivative of this kind of reasoning is Jack Balkin’s recent examination of the public meaning interpretation of the Fourteenth Amendment, in which he concludes that state limitations on the performance of abortions infringe the rights created by the amendment’s Privileges or Immunities and Equal Protection Clauses.⁸⁷ Balkin’s interpretive approach is actually not entirely clear. At one point, he states

⁸⁴ Kesavan & Paulsen, *supra* note 1, at 1162. The authors go on to emphasize that the documentary history of the conventions is too fragmentary to provide a reliable source for inferring actual intent. *See id.* at 1162–64. Like all investigations of historical intention, the state of the evidence may make for greater or lesser confidence in the conclusions drawn from it. The other “objective meaning” evidence they cite, for reasons already discussed, would also provide sound supplementary evidence of the probable intentions.

⁸⁵ *See* Alexander & Prakash, *supra* note 45, at 971.

⁸⁶ *See* Barnett, *supra* note 2, at 32–40 (discussing Lysander Spooner’s conclusion that the antebellum Constitution would properly be interpreted as prohibiting slavery if “a single honest man” understood it that way). While the expansion of narrowly intended rights or powers in the case of apparently broad language is the more common issue, the same problem may arise when the language of a right appears, on its face, to be narrower than the range of activity most probably intended to be protected. Such might be the case with the application of the First Amendment to written correspondence. *See* SCALIA, *supra* note 5, at 37–38. William Michael Treanor has recently shown that a principal concentration on “close reading” of constitutional language can lead an interpreter to stray far from what turns out to be the intended meaning. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

⁸⁷ Balkin, *supra* note 31, at 311–36.

the inquiry to be “what the people who drafted the text were trying to achieve in choosing the words they chose,” something (apart from the reference to “drafting”) very much like the method of original intentions I have described.⁸⁸ His historical evidence, moreover, appears to place almost exclusive reliance on statements made by enactors about what they meant by the language they were using.⁸⁹

In a subsequent explanation, however, he makes clear that his reasoning is “the logical consequence[] of the turn to original [public] meaning.”⁹⁰ By concentrating on the linguistic meaning of the broadly worded phrases of the text—sundered from the participants’ actual understanding of what that text was to effect—he concludes that much of the Constitution consists of “textual commitments [that] are abstract and . . . principles that underlie them that are also abstract.”⁹¹ Although the underlying principles are said to emerge from an examination of the historical circumstances of enactment, they “do not have to have been specifically intended by anyone.”⁹² On the question of the proper level of abstraction to attribute to a constitutional rule, he argues that it is wrong to “focus[] on psychology and not on what the text enacts.”⁹³

The potential of this method of interpretation is amply demonstrated by Balkin’s application. For him, the Equal Protection Clause is founded on general “principles against class legislation, caste legislation and subordinating legislation.”⁹⁴ After a brief review of nineteenth- and twentieth-century legal and social developments, he concludes that “laws that . . . help maintain the unequal and subordinate status of women in society” create prima facie constitutional violations.⁹⁵ The Privileges or Immunities Clause is read to entrench rights that “achieved a special status as fundamental” when “lots of different majorities agree[d] that these rights deserve protection.”⁹⁶ “The list of such rights,” moreover, “might change over time as social and political movements . . . convince their fellow citizens that these rights are indeed important.”⁹⁷ While the right of

⁸⁸ *Id.* at 303; *see also id.* (asking what the “adopters” “sought to endorse” in making the rule).

⁸⁹ *Id.* at 313–15. Strictly as a matter of historical proof, Balkin’s base of evidence is decidedly slender, citing little beyond Jacob Howard’s speech in the Senate introducing the amendment. *See id.*

⁹⁰ Balkin, *supra* note 15, at 443.

⁹¹ Balkin, *supra* note 31, at 316.

⁹² Balkin, *supra* note 15, at 489.

⁹³ *Id.* at 494. Absent this explanation, Balkin’s first formulation might be understood as another variant of the view, already discussed, that the enactors subjectively intended that the application of the Constitution would be influenced by new values in a kind of common law process of reasoning. *See* Dworkin, *supra* note 22, at 121–23; Powell, *supra* note 8, at 948. In that case my differences with Balkin are simply about the historical facts of the Founders’ “interpretive intentions.”

⁹⁴ Balkin, *supra* note 31, at 319–20.

⁹⁵ *Id.* at 324.

⁹⁶ *Id.* at 330.

⁹⁷ *Id.*

abortion choice may not have reached that level of consensus by the time of *Roe v. Wade*⁹⁸ in 1973, changing public attitudes made it a privilege or immunity in the following decades.

This kind of reasoning proves Balkin's contention that his version of "original [public] meaning originalism . . . is actually a form of living constitutionalism."⁹⁹ The Constitution, in this view

is a continuing project that each generation takes on. It is a great work that spans many lifetimes, a vibrant multi-generational undertaking, in which succeeding generations pledge faith in the constitutional project and exercise fidelity to the Constitution by making the Constitution their own.¹⁰⁰

It is no wonder public meaning interpretation has been called an "originalism for non-originalists."¹⁰¹

I do not mean, of course, that adoption of the original public meaning approach necessarily leads to this elastic kind of constitutional interpretation. But relying on an artificial concept instead of on an actual historical event inevitably enlarges the field of such imaginative reconstructions. It is worth considering that different commentators have rationally applied the public meaning approach to reach starkly different pictures of the Constitution.¹⁰² Interpreters committed to ascertaining the genuine intentions of a collection of real human beings will also sharply disagree. But those disagreements are based on the production and examination of evidence. Such interpreters are barred from dismissing such evidence as mere "psychology," irrelevant to the meaning inferred by the fictional reasonable reader. On the other hand, as already noted, the more the seekers of public meaning deduce that meaning from the fact that it was embraced by the real constitution-makers, the more they turn out to be relying on intended meaning under another name.

CONCLUSION

The academic debate on constitutional interpretation has, in recent years, sometimes taken on a highly technical tone, and I expect this Article is no exception. It is therefore worth stepping back to recall what, at bottom, this discussion is about. The ultimate question is how a society, committed to the idea of constitutionalism, organizes itself and understands itself. Such a society values the security of a defined state, one with known

⁹⁸ 410 U.S. 113 (1973).

⁹⁹ Balkin, *supra* note 15, at 449.

¹⁰⁰ Balkin, *supra* note 31, at 303.

¹⁰¹ Barnett, *supra* note 81.

¹⁰² Besides Balkin, see, for example, BARNETT, *supra* note 15; Steven G. Calabresi, *Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311 (2000); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

powers and known limits. A constitution can provide that security only if those charged with administering it are ready, when necessary, to suspend their own deeply held values and preferences. They are required to submit on particular occasions to general rules, to a government of laws, not men. While we can see the sense of this in the long run, at a moment of decision the benefits may be far from obvious. Constitutional restraint in these circumstances depends critically on a shared regard for the constitution itself. That is why it seems indispensable to see the constitution as more than a collection of words, the sense of which is to be worked out from impersonal sources. It will need, rather, to be perceived as the work of real human beings who possessed qualities—legitimacy, intelligence, wisdom, skill, and sensitivity—that make us ready to defer to their judgment long after they have concluded their work.¹⁰³

¹⁰³ I speak here of “a constitution” and not necessarily of the Constitution of the United States. Besides respect for the process of constitution-making it is necessary that the substance of the rules created in a constitution remain at least acceptable in the relevant society at the time they must be applied. Whether the 1787–1789 Constitution, as amended, faithfully applied, is in fact acceptable in 2008 is for me a genuine question. The values of constitutional government that underpin my views on interpretation presuppose a politically workable—not a politically ideal—constitution. But no constitution will be suitable for every circumstance for time and eternity. See Kay, *supra* note 50, at 41–47.