The Archival Problem in Constitutional History

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I. INTRODUCTION

"The only good Constitution," Justice Scalia often said, "is a dead Constitution." His quip neatly captures the primary impulse behind originalism. The idea was that the Constitution should be understood to mean, not what activist judges think it has come to mean today, nor what they hope it might mean tomorrow, but what it meant, as a matter of brute historical fact, when it was signed in 1787. For the facts of 1787 are in the past, and cannot be changed at the whim or the wish of the judiciary, and are thus, in the relevant sense, dead.[1]

Within the originalist camp there is ample room for further elaboration, and the debates have revolved around a number of abstract questions.

There is, first, a question about what *kind* of historical data should count in constitutional interpretation: the original *intent* of the Framers, the original *understanding* of the Ratifiers, the original *public meaning* of the constitutional text, the original *methods* of constitutional interpretation, the original expected *applications* of the Constitution, the original constitutional *practices* of the federal courts, and so on.[2]

Then there is a question about *how* these historical data, whatever they may be, should be used in constitutional deliberations. Should they be dispositive, or merely a starting point? Can they be supplemented by the Supreme Court's case law? Must they be supplemented by "constitutional constructions"[3]?

There is also a question about *why* originalism is desirable: perhaps because it constrains an activist judiciary, or promotes the rule of law, or accords with popular sovereignty, or whatever. And there is a question about *to whom* originalism applies. Is it just intended to constrain the judiciary, or does it also constrain the officials of the legislative and executive branches?

There are dozens of possible answers to these questions, and thus dozens of possible "originalisms."[4] Some are so weak that nobody has ever *not* been an originalist: others are so strong that even the most fervid originalist would recoil from the implications. (As Scalia famously said, sometimes it is necessary to be "faint-hearted."[5])

The most important variety of originalism—the variety that now dominates the field—is the "new originalism," generally associated with the name of Justice Scalia.[6] The earlier "old originalism" looked to the *original intent* of the Framers. But many critics pointed out that intentions, because they are subjective and private, are too slippery to serve as a foundation for constitutional law. Even if we restrict our attention to a single Framer such as Madison, we find that his views changed over time; they conflicted with the views of other Framers; they are frequently difficult to establish; and in any case his subjective opinions are of dubious legal authority. And what are we to do if a new diary is discovered, showing that his private views were radically different from what he said in public? The entire business of constitutional interpretation becomes dependent on the vagaries of archival research. And then there is the task

of *aggregating* Madison's views with the views of dozens of other Framers. It is now generally agreed that the theory of "original intent" is hopeless.[7]

The "new originalism" was designed to meet these objections. Instead of looking to the private intentions of the Framers, it looks to the public text of the Constitution itself—that is, to the words of the Constitution as they would have been understood in the 18th century. This approach is sometimes called "textualism," or "original public meaning originalism," or simply "new originalism." The task is to establish what the words in the Constitution meant at the time of Ratification: in Scalia's phrase, to determine the Constitution's "objectified intent."[8]

The new originalism has two large advantages over the older theory. First, the facts of original public meaning are objective, and independent of personal idiosyncrasies. The data—the text of the Constitution, and the meanings of its words—are on public display, not locked away in private correspondence. Secondly, the public text is precisely what was available to the Ratifiers. It, and not the intentions of the Framers, is what they gave their consent to in the name of "We the People." So the new originalism can claim greater democratic legitimacy than the old.

ii.

Although there are many varieties of new originalism, at its core the doctrine is committed to several theses. Larry Solum conveniently provides a list. On his view, originalism is committed to the following theses:

> *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.

> *The public meaning thesis*: Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax that characterized linguistic practices of the public and not by the intentions of the framers.
>
> *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
>
> *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (a) constitutional interpretation, which discerns the linguistic meaning of the text, and (b) constitutional construction, which determines the legal effect of the text.[9]

It should be emphasized that Solum is not providing a definition of a *single* theory, but of a *spectrum* of theories: and that the spectrum covers a wide range.

Let me say something about each of these theses, working in reverse order.

I shall not have much to say about the idea of *constitutional construction*. to observe that a great deal depends on how wide the so-called "construction zone" is permitted to be. If one thinks by analogy of the construction that has taken place since 1787 in Revolutionary-era Philadelphia, the point is perhaps evident. The area is now a national park, but almost none of the architectural structures from 1787 survives. The old State House is still there, but incorporated into the larger structure known as "Independence Hall." Most of the other architectural landmarks have either been torn down entirely, or re-built in facsimile by the Park Service. A delegate from 1787, suddenly transported to the present, would recognize almost nothing. If *that* sort of "construction" is permitted within of constitutional theory, then the departure from the intentions of Bork and Meese and Scalia seems to me too great, and it would be preferable to

find a better term for the resulting theory than “originalism.” (I of course grant that the distinction may very well have a place within originalism, and may even be inevitable: but that is a different matter. I am concerned here with a question of scale.)

The *textual constraint* thesis tells us that the historical meaning has present-day *legal* consequences. If it did not hold, then originalism would be a merely historical thesis, irrelevant to judicial deliberation.

The *public meaning* thesis is essentially a statement differentiating the “new originalism” from the “old originalism.”

So far, so good. But the first three theses seem to me ambiguously formulated, or at any rate to need further precision. It will be helpful to introduce here some additional terminology. (It also comes from Solum. In general, I find him to be the most philosophically precise of the originalist authors.) He distinguishes between *communicative content*, which he defines as “the content that the drafter intended to convey to the audience at which the text was aimed,” and *legal content*, i.e. “the content assigned to the text by relevant legal authorities, for example, by the Supreme Court when it gives the Constitution an authoritative legal construction.”

If we now look back at the first three theses, we can see that there are *four* different sorts of content that might be in question. There is the *communicative* content (1) in 1787 and (2) in 2018: and there is the *legal* content (3) in 1787 and (4) in 2018. (For simplicity, I use the date 1787 as shorthand for “the date when the relevant provision of the Constitution was adopted.” The extension to the Bill of Rights or to the Fourteenth Amendment is obvious.)

If I understand the first three theses correctly, they can be glossed with the new terminology as follows:

> *The fixation thesis*: The linguistic meaning [i.e. the 1787 *communicative* content] of the constitutional text was fixed at the time each provision was framed and ratified.
>
> *The public meaning thesis*: Constitutional meaning [I *believe* this means, the 1787 *legal* content, and not the 2018 legal content] is fixed by the understanding of the words and phrases and the grammar and syntax that characterized linguistic practices of the public and not by the intentions of the framers.
>
> *The textual constraint thesis*: The original meaning [again, I *believe* this means the 1787 *legal* content] of the text of the Constitution has legal force [i.e. 2018 *legal* content]: the text is law and not a mere symbol.

2018 *communicative* content is irrelevant (as of course it ought to be for an originalist: if the public, linguistic meanings of the words have changed since 1787, it is only the 1787 meaning that should count).

The first two theses are the crucial ones. It is they that establish the link to the facts of the 18th century, and thereby pin the Constitution to something unchanging. In particular, the fixation thesis tells us that, although the meanings of words can change over time, it is the public meanings that words possessed in 1788 that are relevant to constitutional interpretation: not what the words meant earlier or later. Without this thesis, it is hard to see what would be "original" about originalism.

It is possible to dilute each of the core principles, though at some point the question will be asked, "Why do you still call this *originalism*?" That is a question of line-drawing, and not

especially interesting. In what follows, I shall simply assume that originalism seeks to adhere more-or-less strictly to the three theses, and seeks to apply them to most of the Constitution, most of the time.

iii.

It is important to emphasize that originalism is best thought of as a means to an end. That is, Meese and Bork and Scalia and the rest do not simply wish to apply originalist methods for their own sake, or because they admire the Framers, but because they are trying to accomplish something. Specifically, they aim to restrain a certain kind of judicial behavior, whereby judges impose their own subjective political preferences on the Constitution, and on the American people. Originalism aims instead at *objectivity*, and at a set of interpretive values—certainty, truth, consensus, right answers, rigorous historical accuracy—that are independent of the subjective psychology of the judge, and that correspond to some sort of independent historical reality. Let me lump all these interpretive values together under the label "interpretive stability." We can then say: *Originalism seeks stability*. I take this to be just a less elegant formulation of Scalia's quip about dead constitutions, whose chief virtue is a kind of *rigor mortis*.

This search for stability explains originalism's emphasis on historical truth, and its efforts to pin the Constitution to objective, historical fact: to history as it actually happened. The picture is: the facts of 1787 fixed the historical public meaning, and the historical meaning fixes (most of) present legal meaning. Schematically:

historical facts → historical public meaning → present legal meaning.[10]

It is important to observe that most of the academic literature on originalism has been concerned, in the above diagram, with an analysis of the arrows. The aim is to provide a theory

of how judges should make the transition from the historical facts to the legal meaning. The resulting controversies have gone deeply into questions of jurisprudence, and political philosophy, and literary interpretation, and philosophy of language. But the historical data themselves are pretty much taken for granted.

This is no accident. If the originalist project is to succeed—if it is to provide an unchanging Constitution that is truly "dead"—then the basic historical facts must themselves be easily established. Otherwise you have just exchanged one realm of subjective controversy for another. So it is tacitly assumed that the mundane activities of archival historians—the ways in which they go about finding and sifting and presenting the 18th-century data on which judges are to rely—is a matter of no significance—not, at any rate, to constitutional theory.[11]

iv.

Let us look at this matter of fixation more closely. To what, exactly, are the Constitutional meanings to be fixed? – "To the 18th-century facts, of course – to facts about words, and syntax, and the linguistic practices of the 18th-century public."

And what are those linguistic practices, exactly? – It seems that what is meant is facts about the linguistic behavior--the speech acts--of 18th-century people. That is: a blacksmith shouting to his sweetheart, a conversation in a tavern, a discourse from the pulpit, a snatch of argument heard in the street. – Are *those* the facts to which Constitutional meanings are to be pinned?

That hardly seems sustainable. Those facts about episodes of human behavior, in their totality, *do* serve to pin down the linguistic practices of the 18th-century. The problem is, they are inaccessible to us, probably forever beyond reconstruction, and to tie Constitutional

meanings to *them* is to tie Constitutional meanings to something we simply have no way of getting a grip on.

But there is an obvious retort. "Forever beyond reconstruction? Historians and linguists reconstruct facts of past linguistic usage all the time. *Of course* we can get a grip on them. We know a lot about linguistic practices of past ages."

That retort I take to be correct and conclusive. But notice what it does. It has shifted what the Constitutional meanings are pegged to. They are no longer being pegged to acts of 18th-century linguistic behavior *directly*, for that is impossible. They are pegged instead to what we *know* about those facts, which is a different matter entirely. More precisely, it seems that what the originalist must say is: *Constitutional meaning is fixed by being pegged to our best current understanding of the facts of 18th-century linguistic usage, as determined by the best and most rigorous current standards of professional historical and linguistic research.*

This is not a minor alteration, and its significance goes to the issue of stability. The facts of the 18th-century are of course fixed and stable and unchanging. They happened, and that is that. But what we *know* about the facts is something entirely different, and by no means guaranteed to be unchanging.

Of course, if it turns out that our knowledge of the Constitution has been stable since 1787 – if it has been in fact unchanging – then there is no problem. And with regard to some aspects of Constitutional history that is indeed the case. Nobody thinks the 1787 Convention occurred in Baltimore. But is it true, in general, that historical knowledge of, say, the events of the Constitutional Convention has been consistently stable over time? – A number of years ago, editing the original Wilson drafts of the Constitution, I was obliged to read all the major scholarly monographs on the Convention that had appeared since Madison's *Notes* were

published in 1840-- some 50 or 60 books. One quickly sees that there are vast differences in understanding of the events of that summer. Bancroft's Convention is not Beard's, and Beard's is not Jensen's, and Jensen's is not Bailyn's, or Beeman's, or Mary Bilder's. In fact, given a random page from any of the monographs, most historians would be able to date it to within a decade or so. The questions asked, the evidence examined, the techniques employed, the assumptions made – these things are all accurate indicators of the date of composition.

Several things can be said in reply. It might be said that historical knowledge is cumulative, that we are constantly discovering new evidence, and this new evidence, over time, brings us closer to the truth of what happened. That is of course correct. New documents are discovered, or the context of old documents is newly assessed. But the effect of these discoveries is not always to promote the originalist's ideal of stability. Sometimes the new evidence not only adds to things that had long been regarded as settled knowledge, but overturns them altogether.

Or it might be said that historians are gradually becoming more sophisticated in their techniques, more sophisticated about the questions they ask, and they are gradually converging on better methods for understanding the past. But here, too, the evidence seems to point the other way. Bailyn's methods in the 1960s were in certain respects a conscious repudiation of the Progressive historiography, the social analysis, that had been dominant for the previous fifty years, and constituted a return to the 19th century methods of George Bancroft. There is not much stability here, either.

Or again, it might be said that a disagreement over questions of history is at least a disagreement about what actually happened, and not a disagreement about subjective political preference: if judges are to disagree, it is better that they disagree about the one thing rather than the other. There is something to be said for this argument, and I do not dispute that political

disagreement is in important ways different from historical disagreement. But it is impossible to write American political or constitutional history without *some* conception of what is important and what is not, of what American exceptionalism consists in, of what the deepest commitments of the nation are, of what has promoted them and what has set them back – and those conceptions in turn influence the questions you ask, the evidence you gather, the methods you choose, and the conclusions you reach. Bancroft's historical accomplishment cannot be so easily separated from his commitment to nationalist American democracy – somebody once said that "every page of his *History* voted for Andrew Jackson" – and Beard's iconoclastic history of the Convention similarly cannot be separated from the Progressive politics of the *Lochner* era. If stability is the goal, it is far from clear that historical arguments settle down more readily than political ones.[12]

I hope the basic point is now clear. The originalist wishes for a stable, "dead" Constitution, and death is to be acquired by pinning the Constitution, like a chloroformed butterfly, to the facts of the 18th century. But you cannot pin the Constitution to the facts *directly*: at most you can pin it to the best current historical *knowledge* of the facts. But historical knowledge is not dead. It is just as "living," just a subject to evil Lucian, just as vulnerable to the vagaries of subjective psychology, as the common-law Constitution. All we have done, it seems, is replace a living Constitution with living history.

v.

There is a further objection that can be raised at this point. If the legal meaning of the Constitution is fixed by the linguistic practices of the 18th century, then why should it be *judges* who decide what the Constitution means? Judges, after all, are not typically trained either in

history or in linguistics: and if the best current understanding is what we seek, then why should we not defer to the experts?

It is a familiar charge (by historians) that judges, when they engage in historical discussion, fall into something called "law-office history." This charge makes it sound as though when a judge like Justice Scalia writes an originalist opinion, he is trying to do the same thing as an historian, only doing it badly. But the situation is more complicated than that. The professional imperatives for lawyers and for historians are quite different. In fact, they are almost opposites, so that what counts as a virtue for the one can be nearly a vice for the other. To take only the most obvious contrasts: professional historians seek *novelty*. The idea is to say something both true and *fresh* about the past, to see it in a new light. Simply reiterating what everybody already knows is not a path to career advancement, and younger historians in particular tend over-claim their own originality. Judges, in contrast, are supposed to "follow the law" – and that means avoiding as much as possible the appearance of excessive novelty. So we find Cardozo claiming (as he often did) that his most dramatic innovations were just a simple application of the common-law precedents. (The same phenomenon, by the way, exists in other cultures, and the Roman jurists persistently assure us that they are just following the *mos maiorum* – "the customs of our ancestors." In other words, theoretically they presented themselves as originalists, even as they built an entirely novel body of legal rules, without precedent in the ancient world. This is one of the things that makes legal history both so fascinating and so difficult: unlike politicians or diplomats or artists who are eager to tell you, not only what they have accomplished, but much more than what they have accomplished, the lawyers are always hiding the ball.)

But it is not just novelty. The judge, looking to the past, seeks clarity, a sharp and uncontroversial solution to a legal problem. The historian, in contrast, seeks nuance, as full a view as possible of the historical complexities, and the more the merrier. The judge would like to say that the past dictates a single clear answer: the historian would prefer that there be several.

And then there is the matter of professional training. Lawyers read cases and treatises and master techniques of legal analysis: historians spend years mastering the monographs of earlier scholars, learn about the principles of historiography, and eventually are turned loose on the documentary sources. So it is not surprising that the approaches should be very different.

The contrast is evident if we look at the originalist opinions of Justice Scalia and Justice Thomas. They routinely cite 18th-century dictionaries, and the *Federalist*, and some early treatises, and perhaps the words of some of the more prominent Founders. They employ scarcely any historical sources that were not readily available to John Marshall, and, for all the talk about the "public meaning" of the Constitution, it is striking that they make essentially no use of the principal scholarly resource: the *Documentary History of the Ratification of the Constitution*, now nearing completion in its thirtieth volume.[13] That is where a historian would start. And the Justices engage only sporadically with the secondary literature.

So there is a difference of approach, and the question is: Can it be justified? If the Constitutional inquiry is to be into the facts of the Constitutional past, then why is the judges' method to be preferred to the historians'? – And here it seems to me that there are only two possible answers: either that it is not to be preferred, or that there is some *principled* reason to extrude the historians: perhaps because their specialized knowledge is not needed, or not appropriate, or whatever.

I do not know to what extent Scalia's "new originalism" was consciously designed to answer this question, but his shift away from original *intent* and to original public *meaning* certainly provides a plausible starting point for an answer. Whatever novelties the historian may discover about material culture or gender relations – or even whatever new manuscripts may come to light – such discoveries are hardly likely to change our understanding of the meanings of 18th-century *words*. Those meanings are public, and accessible, and meant to be understood by the general public. Refined historical knowledge is not required to understand *those* facts, and it is here that we can expect to find stability.

Scalia's precise formulation of his doctrine is worth quoting. He rejects the theories of original *subjective* intent, and says that instead we are to seek the “objectified intent” of the Constitution. And how do we do that? Scalia’s compact answer is that we are to look to “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.” I think we can glimpse here a second argument for the extrusion of historians. Scalia is proposing a familiar sort of legal technique – a "reasonable person test" – and moreover suggesting that it be applied alongside the *corpus juris*. The *corpus juris* is technical law, expert law, and contains the sort of materials lawyers are trained to understand (and that historians, typically, unless they have been to law school, are not). So to determine the "objectified intent," we are not to make a general inquiry into 18th-century newspapers, but a more restricted inquiry, limited to legal sources and legal techniques. The question I wish to examine in the rest of this paper is the extent to which this position is sustainable.

II. THREE BASKETS

I begin with an observation. Most of the literature on originalist interpretation is highly abstract, and treats the Constitutional text is homogeneous – that is, as though it is a string of words and clauses, each of which is to be analyzed in the same way. (Solum's statement of the four principles of originalism is an example.) It seems to me that some distinctions are in order, and I wish to sort the clauses of the Constitution into three baskets. I imagine most people will agree which clauses should go into which basket: I do not care if there are borderline cases, or about the so-called paradoxes of higher-order vagueness, or bizarre law-school hypotheticals. This is only intended to be a rough sort.

A. BASKET A

The first basket – Basket A – contains those clauses whose meaning is uncontested and solidly established and beyond reasonable question. There is to be a single Supreme Court, and a single President. Congress is divided into two chambers, called the Senate and the House of Representatives. The vice president is the President of the Senate. No one is eligible to be President who has not reached the age of 35 years. These provisions were clear in 1787, and they are clear now, and they have been clear at every date in between.

For these clauses, originalism, in any of its guises, seems to me unchallengeable, and Scalia's test exactly the right one to apply: To figure out the meaning of the text, look to the reasonable person of 1787. That rules out interpreting the numerals to be in any other number-system than base 10, or interpreting *years* to be anything other than *terrestrial* years, or the like. (You can of course make up annoying hypotheticals – somebody born on an airplane flying over an international border on February 29 – but their practical importance is nil.)

There is an ambiguity that needs to be cleared up. It concerns the *scope* of originalism, and is related to the issue I mentioned earlier about the size of the "construction zone." Keith Whittington gives a succinct statement of originalism, essentially the same as Solum's:

> The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.[14]

Let us focus on those last three words: "in most circumstances." That expression can mean three things. It might mean (1) most *constitutional questions* that arise in the real world. It is vital to see that Basket A covers an enormous amount. The conditions for presidential eligibility already settle some 300 million individual questions, and place the matter, for all practical purposes, beyond controversy. Likewise, the basic structures of the federal government are laid down without ambiguity, with admirable clarity. It seems to me, in fact, that most basic constitutional questions are either settled directly by the text of the Constitution, or that a method for answering the question is specified, again without ambiguity. That is a remarkable accomplishment.

The phrase might also mean (2) most of the *text* of the Constitution. That claim seems to me plausible. The phrase "due process" is only two words, but has generated a disproportionate amount of constitutional law. Most of the document is not so troublesome. But this matter seems relatively unimportant.

Or, (3) the phrase might mean: most constitutional *cases* litigated in the courts. That claim, as applied to Basket A, is quite clearly false. Lawyers and judges possess a natural “casebook bias”: a tendency to focus on the litigation that makes its way to divided Supreme

Court. Those constitutional cases are important, but (I would argue) not nearly as important as the questions Basket A places beyond reasonable dispute. If *those* structural matters fell apart, that would be the end of the Republic. But the very fact that a case makes its way to the Supreme Court means that there plausible arguments on both sides. With very few exceptions (*Dred Scott* is the only one I can think of) the case could come out either way without catastrophe. The aim of the Constitution, in other words, was to set up a lasting framework of government, to settle the basic institutional structures, and to make those things stable: and that it has accomplished. The aim was not to answer in advance every possible question that one day might arise. That is what courts are for.

B. BASKET B

My second basket contains the clauses of the Constitution where we know, as a matter of established historical fact, that there was disagreement already in 1878.

I begin with a famous example: the exchange of memoranda between Thomas Jefferson and Alexander Hamilton concerning the constitutionality of a national bank. In December, 1790, Hamilton, Washington's Secretary of the Treasury, had submitted to Congress his *Report on a National Bank.*[15] Washington thereupon asked Jefferson (the Secretary of State) for a formal opinion on the constitutionality of Hamilton's proposal. Jefferson's memorandum argued that the Bank could not be justified under the textual grant of power to spend for "the general welfare." He then turned to the other possible textual justification:

> The second general phrase [that could justify the Bank] is, 'to make all laws *necessary* and proper for carrying into execution the enumerated powers.' But

> they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.
>
> It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are '*necessary*,' not those which are merely 'convenient' for effecting the enumerated powers. If such latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.[16]

Hamilton responded rapidly with a memorandum of his own. He observed that "there is a *radical* source of error in [Jefferson's] reasoning," and continued:

> It is essential to being of the National government, that so erroneous a conception of the meaning of the word *necessary*, should be exploded.
>
> It is certain, neither the grammatical, nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful, requisite, incidental, useful*, or *conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended are understood, then that the interests of the government or person require, or will be promoted, by the doing of this or that

> thing. The imagination can be at no loss for exemplifications of the use of the word in this sense….
>
> To understand the word as the Secretary of State does, would be to depart from its obvious & popular sense, and to give it a *restrictive* operation; an idea never before entertained. It would be to give the same force as if the word *absolutely* or *indispensibly* had been prefixed to it.
>
> Such a construction would beget endless uncertainty & embarrassment. The cases must be palpable & extreme in which it could be pronounced with certainty, that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory.[17]

Observe that Hamilton and Jefferson are both concerned to interpret specific provisions of the Constitutional text, and that Hamilton casts this disagreement explicitly as a disagreement about the *meaning* of the words "necessary and proper." Hamilton and Jefferson were of course masters of the English language, highly literate, sensitive to nuances of linguistic usage, and, moreover, writing when the Constitution was not yet four years old. The injunction, "Look to the original public meaning of the text" is of little assistance here, since the original public meaning is (as Hamilton says) precisely what they disagree about.

If we turn for help to the public debates in the *Documentary History of the Ratification* we are left scarcely better off. We find, in fact, precisely the same disagreement. The phrase "necessary and proper" was a significant point of contention. The Anti-Federalists predicted that it would be used to establish a tyrannical national government: the Federalists assured them that no such thing was intended. Were the Federalists speaking in good faith? Did the Anti-

Federalists believe them? Perhaps not; but even to ask those questions is to complicate the analysis of the original meaning of the Necessary and Proper Clause.[18]

Nor is it of much use to be told, "Ask how a *reasonable person* would have understood the words during the ratification debates." That only gives rise to a stalemate. Hamilton and Washington were on one side of the argument: Jefferson and Madison were on the other. Is the Reasonable Ratifier a Hamiltonian or a Jeffersonian? If a Hamiltonian, than are we to conclude that Jefferson (and Madison, and a string of others) were *unreasonable*? More broadly: Is the Reasonable Ratifier from the North or the South? A Federalist or an Anti-Federalist? From a large state, or a small state? Engaged in shipping, or in manufactures, or in agriculture?

Matters are not much improved if we attribute to the Reasonable Ratifier a full knowledge of "the *corpus juris*." What, exactly *is* that? And why the definite article? As late as 1783, when cataloguing his library, Jefferson classified the statutes of Massachusetts and Connecticut with Barbados and Bermuda: to him, they were all "foreign law."[19] Is the *corpus juris* some amalgam of the American legal systems? Do Coke and Blackstone belong to the *corpus juris*? What about such civilians (frequently invoked by the Founders) as Beccaria, or Montesquieu, or Grotius?

Originalism has some well-known devices for dealing with such gaps in the historical record. One device is to leave the decision to the elected branches.[20] That has the merit of taking the decision out of the hands of an "activist judiciary." But in this case, that would mean leaving to Congress the power to decide how far the powers of Congress extend, which is a position *neither* Jefferson *nor* Hamilton would endorse.[21]

A second device is the device of the "reasonable person."

The crucial point to notice is that, at least in this sort of case, that device also abandons the fixation thesis, but does so covertly. The originalist would like to be able to say, "Look to the 18th-century *facts*: they are dead, and unchanging." But the Reasonable Ratifier is not a fact of 18th-century history, and corresponds to no actual human being. What the 18th century gives us is a vehement, chaotic disagreement, with intelligent people on both sides: the Reasonable Ratifier is a fiction.

Plainly we have a choice in how to develop this fiction. We can assign to the Reasonable Ratifier the views of (1) Jefferson, or (2) Hamilton, or (3) both, or (4) neither. If we choose either of the first two options, then we are taking sides, and no longer simply following historical facts: in other words, we have violated the letter and the spirit of originalism. If we choose (3), then the views of the Reasonable Ratifier are inconsistent; and, if (4), then his views are not able to give us any guidance. In either case we have abandoned the thesis of textual constraint.

But there is a deeper problem here. It concerns the word "reasonable." Is the standard of reasonableness our own, or that of the 18th century? If "reasonable" simply means, "believed by the overwhelming majority of ratifiers," then, as a statistical matter, the overwhelming majority of the ratifiers believed in the reasonableness of slavery: that it was reasonable to execute criminals convicted of the "crime without a name": that it was reasonable to crop the ears of convicted criminals: that Africans were inferior to whites: that women had no place in political society.

A third device, available to deal with objections like these, is to invoke the concept of "constitutional construction": that is, to say that the courts (or the courts in conjunction with the political branches) need to engage in "interstitial" lawmaking. That is a plausible position, and in situations like this one perhaps unavoidable. The "constitutional constructionists" would say that,

when we are engaged in interstitial lawmaking, we are free to follow our own standards of reasonableness. But it has the drawback of abandoning the connection to the historical facts of 1787, at least for the portions of constitutional law that fall within the “construction zone.”

It might be said that this exchange of memoranda is a very special case—a sharp and well-documented disagreement between two of the most prominent Founders about Constitutional fundamentals. That is certainly correct, and I do not claim that all, or most, or even much of the Constitution provoked such well-documented controversy. The well-known debates between Federalists and Anti-Federalists, although they were at times vehement and fill many volumes, are the most obvious example. But they were in fact limited to a small range of issues, many of which faded almost as soon as the Constitution was ratified.

A more important example occurs in the opening words of the text, which declare one of the principal goals of the Constitution to be a "more perfect union." This is not technical language: it is addressed to the general public. “But what does it mean?”—In the minds of the nationalists (notably James Wilson, who helped draft the language, and, as a distinguished classicist, well understood the Latin root *perficere*) the hope was no doubt to consolidate a permanent national union. But it is clear that if the nationalists had spelled it out explicitly – if they had used, say, the words "irrevocable union" – the Constitution would never have been ratified. Under no circumstances would South Carolina have given up its right to secede. Perhaps no state would have. Ratification was a close enough thing as it was: the language of the Preamble was chosen, most likely deliberately, to paper over a deep disagreement that eventually exploded into civil war. The words, that is, were chosen to mean different things to different people: and so it makes no sense simply to stare at them and ask, "What do they mean?" Nor does the device of the reasonable person carry us very far. If we are talking historical fact, it *does*

make sense to ask how a "reasonable South Carolinian" or a "reasonable Pennsylvanian," or a "reasonable nationalist" might have understood those words. But a reasonable *American, tout court*? Or a reasonable *person, sans phrase*? There is no such thing, and if you are asking questions like that, you are no longer talking about historical fact, but doing something else.[22]

C. BASKET THREE

Let us briefly take stock. I have been sorting the clauses of the Constitution into three baskets. The first two baskets contain the clauses for which we have stable historical knowledge. That is, we know the facts, and know that there is essentially no chance that future historical discoveries will change our minds. In the first basket go the clauses about which there has never been any controversy. Phrases like "35 years of age" or the specification of the bicameral structure of Congress do not employ technical language: they were written to be understood by the average citizen, and by the average ratifier, and by the drafters themselves: they have no ambiguity, and there has always been a consensus about their meaning. That first basket, I said, contains the most important parts of the Constitution, and for those parts originalism seems to me undeniably correct.

In the second basket go the cases where we know, and the people of 1787 knew, that there was sharp disagreement over their meaning. Sometimes the disagreement was explicit (as with Hamilton and Jefferson), sometimes it was merely latent (as with the "more perfect union"), but it has always been known that there was disagreement. For those cases, the injunctions "just look to the public communicative content of the text" or "just ask how a reasonable person would have understood the words" seem to me unhelpful, and something like constitutional

construction to be in order. I would prefer to say that originalism fails, rather than to incorporate construction into originalism: but not much turns on that preference.

I come now to the third basket. It contains clauses where we are not certain how they were understood in 1787. We are puzzled, and further historical work seems in order. A great deal of the technical legal language of the Constitution falls into this basket. I wish to discuss here an example I owe to James Pfander: the Exceptions and Regulations Clause of Article III. Here is the text:

> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Obviously any adult speaker of English knows, in a general sense, what "exceptions" and "regulations" are. But that is not the issue. We are concerned with the Exceptions and Regulations Clause as a legal *terminus technicus*, and in particular with the question, Would this clause, in 1787, have been understood by the Ratifiers to permit Congress to strip the Court of its supervisory jurisdiction over the federal courts? That is a question about background assumptions – about, *inter alia*, the relationship between legislative and judicial power, and, more generally, about the 18th-century understanding of separation of powers. It is only by exploring those matters in adequate detail that we can hope to make progress on the question with which we started.

To the members of the Seminar:

The remainder of the piece can be swiftly summarized. I consider several possible ways of trying to limit the inquiry about the Exceptions and Regulations Clause "just to the words,"

but come down strongly in favor instead of the sort of wide-ranging historical inquiry Prof. Pfander engages in. For this last basket, I argue that the only reasonable approach is to do what the historians do: that is, to immerse yourself in the legal world of the 18th century, to read the scholarly monographs, to go perhaps to the archives, and so on. And you have to be prepared for the possibility that the archival evidence may simply run dry. I conclude with a description of the current state of our archival knowledge in constitutional legal history, which seems to me much less secure than is commonly supposed. The concluding section will be ready shortly, and is mostly quite straightforward, without so many distinctions as in the earlier parts of the paper.]