

Jack Rakove's Rendition of Original Meaning

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Resort to original meaning—the canon that a document is to be construed to accomplish the draftsman's intention—in the process of interpretation reaches back to English law of the thirteenth century.¹ Two of England's greatest thinkers, Hobbes and Locke, demonstrated that the meaning attached by the writer to his words is the essence of communication.² Chief Justice Marshall wrote that he could cite from the common law “the most complete evidence that the *intention* is the most sacred rule of interpretation.”³ Without any mention whatsoever of the precedents or of Locke and Hobbes in his *Original Meanings*,⁴ Jack Rakove labels resort to the original intention as the “ongoing quest for the Holy Grail of original meaning,”⁵ belief in a “correct” interpretation as “a necessary fiction for lawyers,”⁶ and asserts that “the notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage.”⁷ His Stanford colleague, Thomas Grey, however, considers that resort to original intention is a tradition “of great power and compelling simplicity . . . deeply rooted in our history and in our shared principles of political legitimacy [with] equally deep roots in our formal constitutional law.”⁸ An impartial exposition of the ongoing debate called upon Rakove fairly to set forth the originalist position instead of deriding it as a “mirage” and a “quest for the Holy Grail,” the more because, as Morton Horwitz observed, “[t]here is little

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1. *Infra* text accompanying notes 29-32.

2. *See infra* notes 26 and 27 and accompanying text.

3. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167 (Gerald Gunther ed., 1969) (emphasis in original).

4. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

5. *Id.* at 10.

6. *Id.*

7. *Id.* at 6. But compare the legislative history of suffrage. *See infra* text accompanying notes 111-15.

While he seeks to discredit his opponents, his evaluation of historical data raises grave doubts about the trustworthiness of his own judgment. For example, Rakove couples Hamilton and Madison “as leading framers,” as “these two architects of the new federalism.” RAKOVE, *supra* note 4, at 16, 189. Hamilton left the Convention on June 30, visited it sporadically, and returned for the signing in September. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 115 (1966). At the Convention, Doctor William Johnson stated that Hamilton “alone . . . boldly and decisively contended for an abolition of the State Govts,” the very antithesis of federalism. 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 355 (Max Farrand ed., rev. ed. 1966) [hereinafter *RECORDS*]. At the signing, he candidly said that “[n]o man's ideas were more remote from the plan than his own were known to be . . .” 2 *id.* at 645-46.

8. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 705 (1975).

doubt that the debate over the Constitution has reached a new intensity and that the discussion has vast implications”⁹

Rakove does not bring scholarly objectivity to this debate; thus he labels as “political . . . the work of recent conservative political theorists who prefer the *framers’ ideas* of natural rights and *federalism* to the result-oriented reasoning of contemporary legal theory and its accompanying willingness to expand the authority of the federal courts at the expense of the democratic autonomy of communities and states.”¹⁰ So, to prefer the Constitution and its central federalism is political! I am a lifelong liberal who as long ago as 1942 declined to make my predilections the test of constitutionality,¹¹ a credo from which I have never wavered. Contrast Rakove’s readiness to scrap Article V, an explicit provision of the Constitution, in order to achieve his social goals; he calls upon us “to explain why morally sustainable claims of equality should be held captive to the extraordinary obstacles of Article V” rather than “to *rail* against the evils of politically unaccountable judges enlarging constitutional rights beyond the ideas and purposes of their original adopters.”¹² He would jettison the text to satisfy his social aspirations. His disdain for an express provision of the text—Article V—tells us that we must not expect him to treat the extra-textual “original meaning” seriously.

9. Ethan Bronner, *S-t-r-e-t-c-h-i-n-g the Constitution*, BOSTON GLOBE, May 8, 1988, at A27.

10. RAKOVE, *supra* note 4, at 5 (emphasis added).

11. Raoul Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942). Justice Frankfurter cautioned, “Nor should resentment against an injustice displace the controlling history in judicial construction of the Constitution.” *United States v. Lovett*, 328 U.S. 303, 323 (1946) (Frankfurter, J., concurring).

12. RAKOVE, *supra* note 4, at 367-68 (emphasis added). His commitment to “claims of equality,” even at the cost of Article V, vitiates Rakove’s disinterestedness, that hallmark of scholarship. Learned Hand declared:

You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage

LEARNED HAND, *THE SPIRIT OF LIBERTY* 138 (Irving Dilliard ed., 3d ed. 1960). “Disinterested curiosity has been the great motive power of scientific research.” J.W.N. SULLIVAN, *THE LIMITATIONS OF SCIENCE* 151 (1949).

Rakove’s “rail,” like his “quest for the Holy Grail,” is calculated to discredit the opposition, for “rail” is defined as use of “scornful, insolent or derisive language,” 2 FUNK & WAGNALLS *NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE* 2044 (1938), a style notably absent from originalist writings.

The Constitution is a legal document¹³ to be construed by time-honored rules of construction.¹⁴ As Rakove notes, “[i]ts wording bore the mark of the numerous attorneys present at Philadelphia, a group that included King, Ellsworth, Hamilton, Wilson, Morris, Paterson, Dickinson, Randolph, and Rutledge,”¹⁵ to whom may be added Martin and Madison. Although Madison was not a lawyer in the sense that he had not practiced, he had studied law “for years.”¹⁶ These were the leaders, and presumably they were aware of the rules of construction.¹⁷ Justice Story commented, “[a]re the rules of the common law to furnish the proper guide, or is every court and department to give [the Constitution] any interpretation it may please, according to its own arbitrary will?”¹⁸ Consider the companion canon to original meaning, the rule that employment of common law terms implied, as Justice Story states, that the common law definitions “are necessarily included, as much as if they stood in the text.”¹⁹ This was the common law rule, restated by Matthew Bacon’s *A New Abridgment of the Law*: “If a statute make use of a word the meaning of which is well known at the common law, the word shall be understood in the same sense it was understood at common law.”²⁰ Hence Marshall declared that if a word was understood in a certain sense “when the Constitution was framed . . . [t]he convention must have

13. Holmes insisted that “so long as the American alchemy converted great political issues into questions of law their resolution must be found in legal rather than political reasoning.” MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS* 56 (1963). Rakove regards originalism as unpromising because of the Supreme Court’s use of “law-office history.” RAKOVE, *supra* note 4, at 11. But abuse of a doctrine does not impeach its validity.

Rakove’s opus drips with condescension towards legal history, a laughable attitude in light of such giants as Frederic Maitland and Sir William Holdsworth. A divorce between historians’ and originalists’ methodology should not hastily be assumed. Two eminent twentieth-century British historians, Hugh Trevor Roper and G.R. Elton, were agreed that the essence of “historical method” is to ground “detail upon evidence and generalization upon detail.” Hugh Trevor-Roper, *Historian’s Credo* (reviewing G.R. ELTON, *THE PRACTICE OF HISTORY* (1967)), *SUNDAY TIMES* (London), Oct. 15, 1967, at 33. Lawyers are taught to collect the facts and to draw inferences therefrom that can withstand criticism.

14. Nobelist Steven Weinberg reportedly stated that some “complex phenomena, such as turbulence, or economics, or life, require their own special laws and generalizations.” JOHN HORGAN, *THE END OF SCIENCE* 75 (Addison-Wesley ed., 1996).

15. RAKOVE, *supra* note 4, at 342-43.

16. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 80 (1995).

17. Much American law came out of Matthew Bacon’s *A New Abridgment of the Law*. MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* (Henry Gwyllim et al. eds., 5th English ed. 1876) (1736); see *infra* text accompanying note 37. Justice Story stated that “Bacon’s Abridg[ment] title, Statute I. contains an excellent summary of the rules for construing statutes.” 1 JOSEPH STORY, LL.D., *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 400 n.2 (Thomas M. Cooley ed., 4th ed. 1873) (1833).

18. STORY, *supra* note 17, § 158 n.2. His contemporary, Chancellor James Kent, warned against leaving courts “a dangerous discretion . . . to roam at large in the trackless field of their own imaginations.” 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 373 (9th ed. 1858).

19. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). For additional citations, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 195 n.5 (1977).

20. 9 BACON, *supra* note 17, at 244.

used the word in that sense."²¹ How better secure the cherished "rights of Englishmen"²² than by adhering to the words in which they were enshrined? As Willard Hurst observed, "[i]f the idea of a document of superior legal authority is to have meaning, terms which have a precise, history-filled content to those who draft and adopt the document must be held to that precise meaning . . .,"²³ for example, "habeas corpus," "ex post facto."²⁴

ORIGINAL MEANING

"The rules of legal interpretation," wrote Hamilton, "are rules of *common sense* . . ."²⁵ Who better knows what the writer means than he himself? Certainly not the reader. So Locke stated:

When a man speaks to another, it is . . . [to] make known his ideas to the hearer. That then which words are the marks of are the ideas of the speaker . . . [T]his is certain, their signification, in his use of them, is limited to his ideas, and they can be signs of nothing else.²⁶

Hobbes was of the same opinion,²⁷ as was John Selden, the preeminent seventeenth-century scholar: "a Man's Writing has but one true Sense, which is that which the Author meant when he writ it."²⁸

The English courts were of the same mind, as a few examples will make clear.

(1) Chief Justice Frowicke, a fifteenth-century sage, recounted that in 1285 the judges asked the "statute makers whether a warrantie with assetz shulde be a barre, [and] they answered that it shulde. And so, in our dayes, have those that

21. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

22. RAKOVE, *supra* note 4, at 290-92.

23. Willard Hurst, *The Role of History, in SUPREME COURT AND SUPREME LAW* 75, 77 (Edmund Cahn ed., 1954). Paul Brest observed:

[S]uppose that the Constitution provided that some acts were to be performed "biweekly." At the time of the framing of the Constitution, this meant only "once every two weeks"; but modern dictionaries, bowing to pervasive misuse, now report "twice a week" (i.e., semiweekly) as an acceptable definition. To construe the provision now to mean "semiweekly" would certainly be a change of meaning (and an improper one at that).

PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 146 n.38 (1975).

24. For citations, see RAOUL BERGER, *DEATH PENALTIES* 62 (1982).

25. *THE FEDERALIST* NO. 83, at 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

26. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 204, 206 (Raymond Wilburn ed., 1947) (1690).

27. Judges are to be guided by "the final causes, for which the law was made; the knowledge of which final causes is in the legislator." THOMAS HOBBS, *LEVIATHAN* 180 (Michael Oakshott ed., Basil Blackwell 1960) (1651). "For it is not the letter, but the intendment, or meaning that is to say, the authentique interpretation of the law (which is the sense of the legislator) in which the nature of the law consisteth." *Id.* at 211-12. The Framers were familiar with Hobbes and Locke. RAKOVE, *supra* note 4, at 100.

28. *THE TABLE-TALK OF JOHN SELDEN* 10 (S.W. Singer ed., 3d ed. 1860).

were the penners [and] devisors of statutes bene the grettest lichte for expocision of statutes."²⁹

(2) Lord Chancellor Hatton said, "when the intent is proved, that must be followed . . . but whensoever there is a departure from the words to the intent, that must be well proved that there is such meaning."³⁰

(3) In his commentary on Littleton, Coke stated, "words must be subject to the intention, and not the intention to the words."³¹ And he stated in the *Magdalen College Case* that "in Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent . . . is to be observed."³²

Why does Rakove ignore the centuries-old English usage prior to adoption of the Constitution? That usage represented wisdom accumulated over the centuries. A wise judge, wrote Pocock, draws upon the "distilled knowledge of many generations of men, each decision based on the experience of those who came before and tested by the experience of those after, and it is wiser than any individual . . . can possibly be."³³ Rakove himself cites Madison: "Where the lessons of history 'are unequivocal, they ought to be conclusive and sacred."³⁴ He recognizes that "[m]eaning must be derived from usage";³⁵ that American "habits of thinking" were derived from English history.³⁶ Nowhere was this more true than in the realm of law. "[A] lot of American law," Julius Goebel

29. See A DISCOURSE UPON THE EXPOCISON & UNDERSTANDINGE OF STATUTES 151-52 (Samuel E. Thorne ed., 1942) [hereinafter A DISCOURSE].

30. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14-15 (London, Richard Tonson 1677).

31. I SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAW OF ENGLAND; OR A COMMENTARY UPON LITTLETON 36a (Garland Pub. 1979) (1628).

32. 77 Eng. Rep. 1235, 1245 (K.B. 1615). Other cases and materials are discussed in several of my articles, cited *infra* note 64.

In light of this English history, Rakove's attribution to Madison of authorship of original intention "theory" is astonishing. RAKOVE, *supra* note 4, at xvi (describing Madison as "the leading author of the theory of originalism"); see also *id.* at 342.

33. J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 35 (reissue 1987). Pocock expatiates:

Institutions which have survived . . . for a long time must be presumed to have solved innumerable more problems than the men of the present age can imagine, and experience indeed shows that the efforts of the living, even mustering their best wisdom for the purpose, to alter such institutions in the way that seems best to their own intelligence, have usually done more harm than good. The wisdom which they embody has accumulated to such a degree that no reflecting individual can in his lifetime come to the end of it, no matter how he calls philosophy and theoretical reason to his aid.

Id. at 36.

34. RAKOVE, *supra* note 4, at 153 (quoting THE FEDERALIST NO. 20, at 128 (James Madison) (Jacob E. Cooke ed., 1961)).

35. *Id.* at 8.

36. *Id.* at 194. The history of Parliament framed American constitutionalism. *Id.* at 205-09. "Colonists naturally regarded their own legislative assemblies as miniatures of the mother Parliament . . ." *Id.* at 20.

concluded, "came out of Bacon's and Viner's Abridgments."³⁷ English emphasis on effectuation of the "original intention" was summarized by Bacon in 1736³⁸ and restated by Thomas Rutherford in 1756,³⁹ in a work "well-known to the colonists."⁴⁰ Rutherford assimilated the interpretation of statutes to that of contracts and wills and stated that "[t]he end, which interpretation aims at, is to find out what was the intention of the writer."⁴¹ On the heels of the Convention, Justice James Wilson, a leading architect of the Constitution, stated, "[t]he first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it."⁴²

This reflected the ethos of the people. Jefferson Powell recounts that the English Puritans' suspicion of judges travelled to America. They feared that judges would "undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts";⁴³ that the "advantages of a known and written law would be lost if the law's meaning could be twisted by means of judicial construction";⁴⁴ and they opposed the "judges' imposition of their personal views."⁴⁵ Anti-Federalists regarded the national judiciary with "intense suspicions."⁴⁶ Moreover, the Founders had a "profound fear" of judicial discretion,⁴⁷ all of which found their way into "Brutus's" acute Anti-Federalist analysis of the judiciary article.⁴⁸ Anti-Federalist attitudes, Rakove notes, "were deeply rooted in American political culture,"⁴⁹ and their "fears were part of the original understanding of the Constitution,"⁵⁰ so that Hamilton was constrained to assure the ratifiers that of the three branches, the judiciary was "next to nothing."⁵¹ As late as 1791, Justice Wilson called on Americans to discard their "aversion and distrust" of judges.⁵²

37. Julius Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450, 455 (1954); see also *Ex parte Grossman*, 267 U.S. 87, 108 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law . . .").

38. 7 BACON, *supra* note 17, at 457-58.

39. 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 307, 309 (Philadelphia, Whitehall 1799) (1756).

40. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 12 (1975).

41. 2 RUTHERFORTH, *supra* note 39, at 302.

42. JAMES WILSON, *Of the Study of Law in the United States*, in 1 THE WORKS OF JAMES WILSON 69, 75 (Robert Green McCloskey ed., 1967).

43. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 892 (1985).

44. *Id.*

45. *Id.* at 891.

46. RAKOVE, *supra* note 4, at 148.

47. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 298 (1969).

48. RAOUL BERGER, CONGRESS V. THE SUPREME COURT 85-87 (1969).

49. RAKOVE, *supra* note 4, at 149.

50. *Id.* at 17.

51. THE FEDERALIST NO. 78, at 532 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

52. JAMES WILSON, *Of Government*, in 1 THE WORKS OF JAMES WILSON, *supra* note 42, at 284, 292-93.

Plainly the people were not as ready as Rakove to hand over their destiny to judges.

Rakove, however, prefers “an influential article” published in 1985 by Jefferson Powell, then but three years out of law school. Powell acknowledges that “[t]he central concept—the goal—of common law interpretation was indeed what the common lawyers called ‘intention,’” and that they “often sounded remarkably like contemporary intentionalists.” “There is no disagreement,” he writes, “over the proposition that the common lawyers, and most of the founders, thought that interpretation ought to subserve a document’s [that is, the draftsmen’s] ‘intent’ The *debate* instead is over what ‘intent’ is meant.” *There had been no debate* as to the meaning of intent prior to his confessedly “curious” theory that “‘intention’ was an attribute or concept attached primarily to the document itself, and not elsewhere,”⁵³ that “the basic notion of ‘intent’ [is] a product of the interpretive process rather than something locked into the text by its author.”⁵⁴ Thus, despite the common lawyers’ constant differentiation between the lawmaker’s “intention” and his words, the common lawyers, according to Powell, excluded the actual intention and sought it only in the words,⁵⁵ resembling a dog chasing its tail. Lord Chancellor Hatton’s demand for *proof* of “a *departure* from the words to the intent”⁵⁶ precludes a return to the words in search of the intent. Samuel Thorne, a noted scholar in the field, concluded that “[a]ctual intent . . . is controlling from Hengham’s day to that of Lord Nottingham (1678).”⁵⁷

Powell’s stellar exhibit to the contrary is Hamilton’s 1791 statement during the controversy over the constitutionality of a national bank. Since the Framers, by a vote of eight to three, had rejected a proposal to empower Congress to create corporations, Hamilton was driven to argue that “whatever may have been the intention . . . is to be sought for in the instrument itself.”⁵⁸ This was bare assertion, unsupported by a single citation, and in derogation of the Framers’ unmistakable will. Hamilton, moreover, was not one to stick in the bark of his own opinion if it no longer suited the occasion. Writing as *Pacificus* in 1793, he

53. H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1533, 1534, 1538 (1987) (emphasis added).

54. Powell, *supra* note 43, at 899.

55. But Powell pulls back: “[E]xisting rules of statutory construction permitted *looking beyond the text* for ‘reasonable evidence’ of its meaning, though again this ordinarily meant attempting to ‘read acts of Parliament against the background of the common law.’” RAKOVE, *supra* note 4, at 352 (emphasis added). “Beyond the text” contradicts his assertion that interpretation was confined to the text.

56. HATTON, *supra* note 30 and accompanying text (emphasis added).

57. A DISCOURSE, *supra* note 29, at 60 n.126.

58. ALEXANDER HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett et al. eds., 1965). In 1791 Hamilton pretended to find the facts confused. *Id.* But see *infra* text accompanying notes 90-93 for the facts of the bank debate.

asked “how the treaty power ‘was understood by the Convention, in framing it, and by the people in adopting it.’”⁵⁹

Powell’s unpracticed hand is betrayed by his other two citations: the first, an eighteenth-century contract treatise, stated that “[t]he law of contracts is not concerned with anyone’s ‘internal sentiments.’”⁶⁰ There, one party claimed after the fact that he had understood the terms in a special sense which, however, he had not disclosed. This was truly an undisclosed “internal sentiment,” so he was held to use the words according to their common acceptance. Powell’s second citation is of similar tenor. Chief Justice Fleming said in 1611 that the “intention and construction of words shall be taken according to the vulgar and usual sense”; Powell adds his own gloss: “not according to any particular meaning the parties may have intended.”⁶¹ Fleming referred to the sale of eighteen barrels of ale which, according to “common usage,” did not include the barrels. Since there was no proof of intent to depart from common usage, Fleming stated “the intent of the parties never was that the parties should have the barrels, but only the ale.”⁶²

That Powell was driven to dredge up such inapposite citations testifies to the hollowness of his case against original intention. As Justice Harlan observed, “the transparent failure of attempts to cast doubt on the original understanding is simply further evidence of the force of the historical record.”⁶³ All this and more was spread before Rakove in my refutation of Powell.⁶⁴ One would expect

59. RAKOVE, *supra* note 4, at 357 (quoting ALEXANDER HAMILTON, *The Defence*, in 10 PAPERS OF ALEXANDER HAMILTON, *supra* note 58, at 22). Another example of Hamilton’s change of position: he had once stated that Senate approval was necessary for removal of an appointed official. THE FEDERALIST NO. 77, at 515 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). When William Smith eited this passage, he was shocked to learn that Hamilton had changed his mind—the President alone should have this power. Smith significantly added: “He is a Candidate for the office of Secretary of Finance!” RAKOVE, *supra* note 4, at 350 (quoting William Smith, *Smith to Rutledge*, 8 S.C. HIST. MAG. 69, 70 (1968)).

60. Powell, *supra* note 43, at 895 (quoting 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 373 (London 1790)).

61. *Id.* at 894 (quoting *Hewet v. Painter*, 80 Eng. Rep. 864, 865 (K.B. 1611)).

62. *Id.*

63. *Oregon v. Mitchell*, 400 U.S. 112, 200 (1970) (Harlan, J., dissenting). The French savant, Raymond Aron, wrote that a proposition “justifies itself by the falseness of the beliefs that oppose it.” Raymond Aron, *Pensées*, N.Y. TIMES, Oct. 23, 1983, at E19. In the First Congress Fisher Ames said, “nearly as good conclusions may be drawn from the refutations of an argument as from any other proof. For it is well said, that *destructio unius est generatio alterius*.” 1 ANNALS OF THE CONGRESS OF THE UNITED STATES: THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 539 (Joseph Gales ed., 2d ed. 1834) [hereinafter ANNALS OF THE CONGRESS].

64. Raoul Berger, “Original Intention” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Raoul Berger, *The Founders’ Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); see also Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993).

Powell acknowledges that “it is natural, inevitable, and appropriate that we should look to the founders for enlightenment.” H. Jefferson Powell, *How Does the Constitution Structure Government? The Founders’ Views*, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 13, 15 (Burke Marshall ed., 1987).

that Rakove, who prides himself on the special virtues of historians, would have weighed Powell's novel, confessedly "curious" theory in light of my criticism. That is standard scientific practice. When a scientist floats a new theory, his fellows test it before approving it. Rakove himself notes that a historical approach "requires us to assess the probative value of any piece of evidence."⁶⁵ That Rakove swallowed Powell whole without such assessment testifies to the mindset of a partisan. Nor has Powell, to my knowledge, ever attempted to rehabilitate his citations. His "curious" usage was implicitly repudiated by the House of Lords in *Pepper v. Hart*.⁶⁶ There, Lord Browne-Wilkinson, with whom most of his brethren concurred, asked, why "should the courts blind themselves to a clear indication of what Parliament intended in using those words"; and answered, "we are much more likely to find the intention of Parliament [in its debates] than anywhere else."⁶⁷

In the second of his "powerful criticisms" of originalism, Rakove questions the "capacity of originalist forays to yield the definitive conclusions that the advocates of this theory claim to find."⁶⁸ He would not rely on "snatches of debate" from the Convention but opts rather for a "more complicated inquiry,"⁶⁹ for he believes that we cannot "convert expressions of individual opinion on particular provisions into collective understandings."⁷⁰ A "collective understanding" is best manifested by a vote. But Rakove himself does not weave his tale out of such votes but from a stream of "individual opinions" which illuminate them. Then too, when a number of "individual opinions" concur while the listeners are silent it may be assumed that the individuals speak for them. In every assembly a few speakers take the lead. In a considerable number of cases the votes recorded in the Journal of the Convention confirm such concurrences. Rakove's logic posits that *no* evidence is preferable to such concurrences, thereby favoring unbridled judicial discretion.

According to Rakove, originalism asks how the language "*would have been understood* at the time" of its adoption.⁷¹ As an originalist since 1942,⁷² I disclaim any reliance on prophecy or mind-reading. Originalists do not speculate about how the Founders "*would have*" construed their handiwork; we rely rather on what they *actually understood*, on their accompanying explanations of what their words mean and are intended to accomplish. Once uttered, such statements have a life of their own, independent of what the draftsmen "*would have understood*." For Willard Hurst, the terms to which the Framers attached clear meaning were no more alterable than the common law words of established

65. RAKOVE, *supra* note 4, at 12. "[H]onest verification . . . is the very essence of science . . ." SULLIVAN, *supra* note 12, at 164.

66. 1993 App. Cas. 593 (H.L. 1992).

67. *Id.* at 635.

68. RAKOVE, *supra* note 4, at xv.

69. *Id.* at xiv.

70. *Id.* at 134.

71. *Id.* at 340 (emphasis added) (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990)).

72. See Berger, *supra* note 11.

meaning.⁷³ Common sense dictates no less. Why should common law practice, external to a particular case, weigh more heavily than the writer's explanation of what his words mean? A few examples should suffice to show that originalism can yield "definitive conclusions" and disclose what the Framers actually meant.

(1) By Article II § 2 of the Constitution, the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." Over the years the Executive has maintained that Senate participation is limited to consent to a completed treaty. The records show, however, that the Senate was to participate in *making* the treaty. As late as August 6, the Committee on Detail draft provided that "the Senate . . . shall have the power to make treaties."⁷⁴ During the debate Madison observed that "the President should [also] be an agent in Treaties."⁷⁵ Hamilton explained in *The Federalist No. 75* that "the joint possession of . . . power . . . by the president and the senate would afford a greater prospect of security, than the separate possession of it by either of them."⁷⁶ In the New York Ratification Convention, Hamilton stated that the Senate, "together with the President, are to manage all our concerns with foreign nations."⁷⁷ In Pennsylvania, James Wilson said, "nor is there any doubt but the Senate and President possess the power of making [treaties]."⁷⁸ There were no contrary expressions. Is *no* evidence to be preferred so that Rakove may "revel in . . . the ambiguities of the evidentiary record"⁷⁹

73. Willard Hurst, *The Process of Constitutional Construction*, in SUPREME COURT AND SUPREME LAW 55, 57 (Edmund Cahn, ed., 1954).

74. 2 RECORDS, *supra* note 7, at 183.

75. *Id.* at 392.

76. THE FEDERALIST NO. 75, at 488 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

77. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 306 (Jonathan Elliot ed., 1941 reproduction of 2d ed. 1836) [hereinafter DEBATES ON ADOPTION].

78. *Id.* at 506. Rakove notes that "Madison and other framers 'certainly knew what they . . . intended' at Philadelphia when they defended the treaty power in the state conventions." RAKOVE, *supra* note 4, at 359 (quoting 5 ANNALS OF CONGRESS, *supra* note 63, at 523). But he argues that in the debate on the Jay Treaty, "they had never answered objections to the treaty clause with [Madison's] theory." *Id.* An omission in a partisan political struggle to cite one or another theory does not alter the facts.

Hamilton's spokesman [William Smith] "appeal[ed] to the general sense of the whole Nation at the time the Constitution was formed," noting that through these "contemporaneous expositions," formed "when the subject was viewed only in relation to the abstract power, and not to a particular [intensely unpopular] Treaty, we should come at the truth."

Id. (quoting 5 ANNALS OF CONGRESS, *supra* note 63, at 495). Rakove would dispose of such statements because they were motivated by considerations of partisan advantage. He does not, however, disqualify partisan advantage when it favors his position. Would he maintain that President Washington's appeal to the Journal of the Convention—to show that the House was not included in the treaty-making process—was equally "heated . . . by faction"? *Id.* at 349.

79. *Id.* at 9. Thus, Rakove adverts to a "deeper conceptual ambiguity about the nature of statehood itself. What, after all, was a state," *id.* at 166, a question which the Founders did not pause to ask. The thirteen colonies had existed as entities with more or less defined territorial boundaries and with instrumentalities of government, for example, assemblies. As Rakove

(2) The evidence for the legitimacy of judicial review is even more voluminous. In 1914 Edward Corwin summed up: "That the members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it cannot be reasonably doubted."⁸⁰ After enumerating those who contemplated judicial review, Corwin stated:

True these are only seventeen names out of a possible fifty-five, but let it be considered whose names they are. They designate fully three-fourths of the leaders of the Convention. . . . On no other feature of the Constitution with reference to which there has been any considerable debate is the view of the Convention itself better attested.⁸¹

Similar views were expressed in the ratification conventions. In Virginia, Marshall declared that if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void."⁸² Marshall was joined by his Virginia colleagues, George Nicholas,⁸³ George Mason,⁸⁴ Edmund Randolph,⁸⁵ James Madison,⁸⁶ and even Patrick Henry.⁸⁷ Similar views were expressed by Oliver Ellsworth in Connecticut⁸⁸ and James Wilson in Pennsylvania.⁸⁹ Now the Constitution does not explicitly provide for judicial review. Are we better off regarding it as a naked arrogation rather than as within the Framers' contemplation?

(3) The Convention records show unmistakably that it *rejected* a proposal to empower Congress to grant charters of incorporation. As Rakove points out, Madison's "motion at the Convention to grant Congress a power of incorporation obviously presumed that such authority did not yet exist elsewhere in the Constitution (a position that Wilson, no strict constructionist, seems to endorse)."⁹⁰ Incorporation of a bank had been wrapped in controversy in Pennsylvania and New York, and it was feared that such a proposal would excite prejudice and possibly defeat adoption of the Constitution. Even when reduced to corporations to build canals, the proposal was defeated by a vote of eight to

himself said, "A new condition demanded a new name." *Id.* The colonies had functioned as societies and continued to do so without a hitch. James Bryce observed that "the Americans had no theory of the state, and felt no need for one, being content, like the English, to base their constitutional ideas upon law and history." JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 1210 (Liberty Classics ed. 1995) (1888). To fall into a brown study about the nature of statehood under the circumstances is to engage in pretentious punditry.

80. EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 10 (Peter Smith 1963) (1914).

81. *Id.* at 11-13; see also BERGER, *supra* note 48, at 47-119.

82. 3 *DEBATES ON ADOPTION*, *supra* note 77, at 553.

83. 3 *id.* at 443.

84. 3 *id.* at 523.

85. 3 *id.* at 570.

86. 3 *id.* at 532.

87. 3 *id.* at 540-41.

88. 2 *id.* at 196.

89. 2 *id.* at 445-46.

90. RAKOVE, *supra* note 4, at 355.

three;⁹¹ this cannot be dismissed as a “mirage” or some fugitive remarks. Subsequently Abraham Baldwin reminded Justice Wilson (both were present at the debate) that the proposal “to erect corporations . . . was, on debate, struck out”;⁹² “Wilson agreed to the fact.”⁹³

(4) What does “commerce” mean,⁹⁴ asks Rakove, and indicates that what is called for is “an intense analysis of key words.”⁹⁵ Apart from consulting contemporary usage and dictionaries, such analysis can verge on crystal gazing. Let me steer him instead to the original understanding which, after all, is the subject of his book. References in the debates were almost exclusively concerned with *foreign* commerce (the exchange of goods), as the few examples cited by Rakove confirm.⁹⁶ The sole reference to what we term “interstate” commerce was prevention of exactions by one state from another for the right of passage. Thus, Madison states, “it would be unjust to the States whose produce was exported by their neighbors, to leave it subject to be taxed by the latter.”⁹⁷ Wilson “dwelt on the injustice and impolicy of leaving N. Jersey, Connecticut &c any longer subject to the exactions of their commercial neighbors.”⁹⁸ Madison reiterated that “the best guard against . . . [this abuse] was the right in the Genl. Government to regulate trade between State and State.”⁹⁹ Sherman stated that the “oppression of the uncommercial States was guarded against by the power to regulate trade between the States.”¹⁰⁰ And Oliver Ellsworth said that the “power of regulating trade between the States will protect them against each other.”¹⁰¹ Jefferson reflected the Founders’ views when he stated in 1791 that “the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a state . . . which remains exclusively subject with its own legislature; but to its external commerce only.”¹⁰² In his retirement, Madison recalled that:

[A]mong the several States [the textual terms] . . . grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the

91. 2 RECORDS, *supra* note 7, at 616. Rakove dismisses this history because “Madison did not claim that this tidbit of history was conclusive in itself.” RAKOVE, *supra* note 4, at 352. By this logic original intention is not to be given effect unless the speaker paused to testify that it should!

92. 3 RECORDS, *supra* note 7, at 375.

93. *Id.* at 376.

94. RAKOVE, *supra* note 4, at 8.

95. *Id.* at 11.

96. *See id.* at 28, 40. “From the beginning, the foreign trade of the United States was near the core of its foreign policy.” LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 69 (1972).

97. 2 RECORDS, *supra* note 7, at 306.

98. *Id.* at 307.

99. *Id.* at 588-89.

100. *Id.* at 308.

101. *Id.* at 359-60.

102. Thomas Jefferson, *Opinion on the Constitutionality of the Bank*, in *DOCUMENTS OF AMERICAN HISTORY* 158, 159 (Henry Steele Commager ed., 7th ed. 1963) (ellipsis in Commager edition).

States themselves, rather than as a power to be used for the positive purposes of the General Government.¹⁰³

(5) Perhaps the most striking example of the definitive conclusions that originalism has uncovered is offered by the Fourteenth Amendment, to which Rakove gives the barest mention, although it has become a mini-constitution and engenders the bulk of constitutional litigation. First, some background.

Powell observed that the people viewed the Jeffersonian “revolution of 1800” as their “endorsement” of original intention.¹⁰⁴ In 1838, the Supreme Court declared that the construction “must necessarily depend on the words of the [C]onstitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states . . . to which the Court has always resorted in construing the Constitution.”¹⁰⁵ “By the outbreak of the Civil War,” Powell states, “intentionalism in the modern sense reigned supreme.”¹⁰⁶

The Framers of the Fourteenth Amendment were aware of this practice. Senator Charles Sumner, who sought to give the widest reach to the Amendment, said that if the meaning of the Constitution “in any place was open to doubt, or if words are used which seemed to have no fixed signification [for example, “equal protection,]” we cannot err if we turn to the framers; and their authority increases in proportion to the evidence they have left on the question.”¹⁰⁷ John Farnsworth, who sat in the 1866 Congress, said of the Amendment in 1871, “Let us see what was understood to be its meaning at the time of its adoption by Congress.”¹⁰⁸ James Garfield, a fellow framer, likewise rejected an interpretation that went “far beyond the intent and meaning of those who . . . amended the Constitution.”¹⁰⁹ A unanimous Senate Judiciary Committee Report, signed in 1872 by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments, declared that:

In construing the Constitution we are compelled to give it such an interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it

A construction which should give [a] phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they

103. Letter from Madison to J.C. Cabell (Feb. 13, 1829), in 3 RECORDS, *supra* note 7, at 478.

104. Powell, *supra* note 43, at 934. In his Inaugural Address, President Jefferson pledged to administer the Constitution “according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated . . . it.” 4 DEBATES ON ADOPTION, *supra* note 77, at 446 (emphasis omitted).

105. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838); *see also* *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854).

106. Powell, *supra* note 43, at 947.

107. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

108. CONG. GLOBE, 42d Cong., 1st Sess. 115 (1871), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES 506 (Alfred Avins ed., 1967) [hereinafter DEBATES ON RECONSTRUCTION].

109. *Id.* at 152, *reprinted in* DEBATES ON RECONSTRUCTION, *supra* note 108, at 528.

adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all the commentators on the Constitution, and in all judicial expositions of that instrument . . .¹¹⁰

Clearly the Reconstruction framers meant their explanations to govern.

Rakove would be hard put to maintain that evidence with respect to suffrage and segregation is too indefinite to ascertain. Justice Harlan considered that the one man-one vote doctrine flew "in the face of irrefutable and still unanswered history to the contrary."¹¹¹ Let two confirmatory items suffice. Senator Jacob Howard, to whom it fell to explain the Amendment, stated: "We know very well that the States retain the power . . . of regulating the right of suffrage in the States. . . . [T]he theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it . . ."¹¹² The unanimous Report of the Joint Committee on Reconstruction doubted that "the States would consent to surrender a power they had always exercised," and therefore thought it best "to leave the whole question with the people of each State."¹¹³ Were there any doubt, it would be dispelled by the Fifteenth Amendment, designed to fill the "gap."¹¹⁴ Rakove might well ponder Justice Harlan's stern reproof: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."¹¹⁵

As regards segregation, Michael McConnell has documented the prevalence of segregated schools in the North, and the last ditch resistance to abolition of the practice.¹¹⁶ Congress had permitted segregated schools in the District of Columbia,¹¹⁷ over which it had plenary jurisdiction; Senator Sumner vainly

110. S. REP. NO. 21, at 2 (1872), *reprinted in* DEBATES ON RECONSTRUCTION, *supra* note 108, at 571. Writing in 1939, tenBroek said that the Court "has insisted with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument." Jacobus tenBroek, *Use by the Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939).

111. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). The one man-one vote rulings rest "on the view that the courts are authorized to step in when injustices exist and other institutions fail to act. This is a dangerous—and I think illegitimate—prescription for judicial action." Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U. L.Q. 817, 825.

112. CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866), *reprinted in* DEBATES ON RECONSTRUCTION, *supra* note 108, at 237.

113. S. REP. NO. 112, at 8 (1866), *reprinted in* DEBATES ON RECONSTRUCTION, *supra* note 108, at 94.

114. Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 321-23 (1979).

115. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting in part).

116. Michael McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947 (1995).

117. 2 RICHARD KLUGER, *SIMPLE JUSTICE* 646 (1976).

fought “to abolish segregated Negro schools in the District.”¹¹⁸ A Congress which refused to abolish segregation in the District of Columbia was altogether unlikely to compel the States to outlaw it. That was confirmed by the assurance of James Wilson, chairman of the House Judiciary Committee, that the Civil Rights Act of 1866 did not require that all children “shall attend the same schools.”¹¹⁹ As late as 1875 the Civil Rights Act lowered the bar to segregation on railroads and in theaters, but Congress refused to ban segregated schools.¹²⁰ My demonstration in 1977 that segregation was left untouched by the Amendment met with all but universal condemnation; Paul Brest labeled me a racist. With the passage of time, however, some twenty to thirty commentators, including Ronald Dworkin, Richard Posner, and Lawrence Tribe, concur in my conclusion.¹²¹

FEDERALISM

Whether the States preceded the Union, Rakove asserts, “offered an enticing avenue of escape” from the “task of disentangling the nuances of federalism,”¹²² thus tarring the opposition with escapism and transforming the central constitutional fact into another opportunity to “revel in . . . ambiguit[y].”¹²³ The Federalists, however, preferred “to rest their [case] . . . on simpler grounds.”¹²⁴ Rakove acknowledges that the “states *clearly preceded the Union* in point of time,” that they were the “natural successors to the thirteen colonies.”¹²⁵ But he beclouds the issue: “If the *persistence* of the states was a given, their *status* was not,” because “fractious pressures” left their “authority and autonomy vulnerable to attack.”¹²⁶ That something might affect a State in the future in no wise affects its status as an independent State at the adoption. So much for “nuance.”

118. Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1085 (1956).

119. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866), reprinted in DEBATES ON RECONSTRUCTION, *supra* note 108, at 163.

120. See generally McConnell, *supra* note 116.

121. *Id.* at 952.

122. RAKOVE, *supra* note 4, at 163.

123. *Id.* at 9.

124. *Id.* at 188.

125. *Id.* at 163 (emphasis added). Earlier, Rakove had considered that the States were “a creation of the Continental Congress which preceded them in time and brought them into being.” JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 173 n.* (1979) (quoting Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1057, 1057 (1974)). Now, he confirms that: “[t]he Confederation that Congress proposed in November 1777 was a compact among thirteen autonomous states,” RAKOVE, *supra* note 4, at 100, and that “[t]he existence of the [S]tates was simply a given fact of American governance, and it confronted the framers at every stage of their deliberations.” *Id.* at 162. For detailed confirmation, see RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 21-47 (1987).

126. RAKOVE, *supra* note 4, at 168 (emphasis in original). Rakove proves himself an “ingenious theorist” who, in Madison’s words, would bestow on the Constitution an “abstract view . . . planned in his closet or in his imagination.” *Id.*

Rakove affirms that for Wilson “the states and nation emerged simultaneously,” that Wilson was “the better historian . . . for his understanding of the concurrent origin of the Union and the States.”¹²⁷ Not alone is this contradicted by his own admission,¹²⁸ but it falls afoul of the massive historical facts to the contrary.¹²⁹ More than the temporal priority was at stake; this was not a school boy race to be first to reach the goal. The incontrovertible prior existence of the States enabled them to preserve their authority, to call a national union into being (for example, “the Continental Congress had to be created *de novo*”),¹³⁰ to limit the jurisdiction they surrendered for national purposes, and to *retain* the vast jurisdiction they did not delegate.¹³¹ As Herbert Wechsler observed, “[f]ederalism was the means and price of formation of the Union [The Founders] preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice.”¹³²

Rakove trivializes the work of the Convention by viewing it as “a process of bargaining and compromise” rather than an “advanced seminar in constitutional theory.”¹³³ Compromise of conflicting interests is the genius of democratic government. What captured the admiration of the world was the means whereby they were resolved. But “[t]he Constitution is more than a mere bundle of compromises. It is a document that articulates a theory of politics under which the governed have consented to live.”¹³⁴ The Convention affords a glimpse of theory in the making, and the product richly justifies Madison’s boast that the Constitution marked an advance in the science of politics.

Historians, Rakove tells us, search for “underlying beliefs.”¹³⁵ One such, which he recognizes, was the American “localist bias.”¹³⁶ For “most Americans indeed

127. *Id.* at 163; *cf. supra* note 125.

128. *See supra* text accompanying note 125.

129. *See infra* text accompanying notes 146-58.

130. RAKOVE, *supra* note 4, at 163.

131. Chief Justice Marshall alluded to “that immense mass of legislation . . . not surrendered to the general government.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

132. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Wechsler echoed Walter Bagehot: Americans “altogether retained what . . . they could not help, the sovereignty of the separate States Doubtless the framers of the Constitution had no choice in the matter.” NORMAN ST. JOHN STEVAS, WALTER BAGEHOT 358-59 (1950). Today, States’ rights are in ill repute, but Henry Adams concluded, “The doctrine of states’ rights was in itself a sound and true doctrine; as a starting point of American history and constitutional law there is no other which will bear a moment’s examination” HENRY ADAMS, JOHN RANDOLPH 273 (Boston, Houghton, Mifflin & Co. 1882). Writing to General Robert E. Lee after the Civil War, Lord Acton described the preservation of the States as “the redemption of democracy.” ROBERT SPEAIGHT, THE LIFE OF HILAIRE BELLOC 132 (1957).

133. RAKOVE, *supra* note 4, at 15.

134. GARY L. McDOWELL, THE CONSTITUTION AND CONSTITUTIONAL THEORY 13 (1985).

135. RAKOVE, *supra* note 4, at 95.

136. *Id.* at 302. Madison wrote in 1788 that “‘a spirit of locality’ permeated American politics.” WOOD, *supra* note 47, at 195. Bagehot observed, “[a]t the beginning of every league the separate States are the old governments which attract and keep the love and loyalty of the people; the Federal Government is a useful thing, but new and unattractive.” STEVAS, *supra* note 132, at 359. Seeking to account for Southern sentiment during the Civil War, Nathaniel

national politics mattered little"; they "directed their concerns towards local and state issues."¹³⁷ The vast distances that separated the inhabitants played no small part in fostering their attachment to their own States. When William Houston was sent from Georgia to the Continental Congress in 1785, he "thought of himself as leaving his 'country' to go to 'a strange land amongst Strangers.'"¹³⁸ Madison, who had adventured from Virginia to Princeton, New Jersey, said, "[o]f the affairs of Georgia I know as little as those of Kamskatska."¹³⁹ Distance and parochialism bred suspicion. Pierce Butler asked at the Convention, "Will a man throw afloat his property & confide it to a govt. a thousand miles distant?"¹⁴⁰ In South Carolina, James Lincoln declaimed that adoption of the Constitution meant a surrender of self-government to "a set of men who live one thousand miles distant from you."¹⁴¹ Local government in the colonies and their successor States was the familiar; the new system was distrusted "because it would [remain] remote and not so immediately subject to control."¹⁴² Local government, it was felt, would be more controllable by the people than the federal government, because "it could be kept under closer observation."¹⁴³ Small wonder that Washington wrote midway through the Convention that "independent sovereignty is so ardently contended for . . . the local views of each State . . . will not yield to a more enlarged scale of politicks."¹⁴⁴

This was evinced from the beginning. On July 2, 1776, Richard Henry Lee proffered a resolution in the Continental Congress, "That these United Colonies are . . . free and independent States That a *plan of confederation be prepared* and transmitted to the respective Colonies for their consideration and approbation."¹⁴⁵ Lee's Resolution was followed by the Declaration of Independence. Jefferson's original title, "A Declaration by the Representatives of the United States of America, in General Congress Assembled," was changed by the Congress to "The Unanimous Declaration of the thirteen united States," and the signatories subscribed separately on behalf of the individual States.¹⁴⁶ On November 15, 1777, the Congress recommended the Articles of Confederation to the States. Reciting that the members acted as the "delegates of the States

Hawthorne wrote, "We inevitably limit to our own State . . . that sentiment of physical love for the soil . . ." Nathaniel Hawthorne, *Henry James*, in *THE SHOCK OF RECOGNITION* 427, 561 (Edmund Wilson ed., 1943).

137. RAKOVE, *supra* note 4, at 28-29.

138. CARL VAN DOREN, *THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES* 45 (1948).

139. *Id.* at 15.

140. 1 RECORDS, *supra* note 7, at 173.

141. 4 DEBATES ON ADOPTION, *supra* note 77, at 313.

142. BENJAMIN FLETCHER WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1787*, at 55 (1958).

143. Cecelia M. Kenyon, *Introduction* to *THE ANTIFEDERALISTS* at lxxxvi (Cecelia M. Kenyon ed., 1966).

144. 3 RECORDS, *supra* note 7, at 51.

145. *Resolution for Independence*, in *DOCUMENTS OF AMERICAN HISTORY* 100, 100 (Henry Steele Commager ed., 6th ed. 1958) (emphasis added) [hereinafter DOCUMENTS].

146. SAUL K. PADOVER, *JEFFERSON* 61 (1942); *see also* *THE DECLARATION OF INDEPENDENCE*, *reprinted in* *DOCUMENTS*, *supra* note 145, at 100, 102.

affixed to our Names,"¹⁴⁷ it provided by Article II that "Each State retains its sovereignty, freedom and independence"¹⁴⁸ except as expressly delegated to the United States. Article III provided that "The said States hereby severally enter a firm league of friendship with each other, for their common defence":¹⁴⁹ a *league*, not a nation. The draftsmen recited that they acted "in the name and in behalf of our respective constituents," not of the collective people of the whole country; and they signed the "part & behalf of the State of New Hampshire," and in like fashion for each of the other twelve States.¹⁵⁰ Similar expressions are exhibited in the Treaty of Peace, September 3, 1783 with Great Britain.¹⁵¹

At the Convention, Gunning Bedford stated, "[t]hat all the States at present are equally sovereign and independent, has been asserted from every quarter of this House."¹⁵² Elsewhere I have collected compendious documentation to the same effect.¹⁵³ It remains to note that the Constitution itself was signed by the delegates on behalf of the individual States; Madison underscored in *The Federalist No. 39* that "ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States . . ."¹⁵⁴ This bespeaks a compact,¹⁵⁵ and whatever the effect of *force majeure* at Appomattox, it could not erase the antecedent facts.¹⁵⁶ In sum, as Rakove recognizes:

147. THE ARTICLES OF CONFEDERATION, *reprinted in* DOCUMENTS, *supra* note 145, at 111.

148. *Id.*

149. *Id.*

150. *Id.* at 115-16.

151. By Article I, Britain "acknowledged the said United States, viz. New Hampshire, Massachusetts," and so down the roster, to be "sovereign and independent States," and provided by Article V that British subjects could freely go to "any of the thirteen United States." Treaty of Peace with Great Britain (Sept. 3, 1783), *reprinted in* DOCUMENTS, *supra* note 145, at 117, 119.

152. 1 RECORDS, *supra* note 7, at 500.

153. BERGER, *supra* note 125, at 27-30.

154. THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961).

155. "Compact" imagery "dominated American thinking." RAKOVE, *supra* note 4, at 320. Early in the Convention Madison said:

[A]s far as the articles of Union [Constitution] were to be considered a Treaty only of a particular sort, among the Governments of Independent States, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from the whole obligation. For these reasons . . . it is indispensable that the New Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.

1 RECORDS, *supra* note 7, at 122-23.

156. The past, Chief Justice Marshall wrote, "cannot be recalled by the most absolute power." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *see also* *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

Rakove writes in a footnote: "[T]heorists argued that the states that had been the parties to the original compact retained a sovereign right to reverse their decision." Rakove asserts, "Amazingly enough, vestiges of that debate are still heard today. See Raoul Berger, *Federalism: The Founders' Design* (1987)." RAKOVE, *supra* note 4, at 372 n.12. Nowhere have I ever defended secession. To demonstrate the irrefutable fact that there was a compact is to be true

The existence of the states was simply a given fact of American governance, and it confronted the framers at every stage of their deliberations. . . . [T]he framers [that is, some Federalists,] had to accommodate . . . the stubborn realities of law, politics, and history that worked to preserve the residual authority of the states¹⁵⁷

Thereby Rakove's recognition renders meaningless his distinction between the State's priority and its "status."

Rakove would resurrect the long-buried maxim *imperium in imperio*—there cannot be two sovereigns ruling in a common territory. Madison disputed the axiom, and maintained that "the people were in fact, the fountain of all power."¹⁵⁸ Wilson declared that "the supreme power . . . resides in the PEOPLE, as the fountain of government."¹⁵⁹ Elsewhere, Wilson wrote, "They can distribute one portion to . . . State governments [and] another proportion to the government of the United States."¹⁶⁰ Hamilton observed that the notion "[t]hat two supreme powers cannot act together, is false. They are inconsistent only when they are aimed . . . at one indivisible object."¹⁶¹ "Echoing Wilson and Hamilton," Rakove notes, Madison stated that "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."¹⁶² Rakove, however, concludes that Wilson "used popular sovereignty to subvert the maxim of *imperium in imperio*."¹⁶³ This is the nadir of activist respect for the will of the people: it must yield to a maxim!¹⁶⁴

STATE AND FEDERAL JURISDICTION

It proved to be difficult, Rakove notes, to enlarge "the responsibilities of national government much beyond those that the Continental Congress already possessed."¹⁶⁵ The Convention, he observes, was "concerned less with

to Ranke's injunction to tell it as it was. It is Rakove who would rewrite history to conform to his predilections.

157. RAKOVE, *supra* note 4, at 162 (emphasis added). The conservatives were political realists and had to compromise with the political reality of actual state sovereignty. See MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 24 (1940).

158. RAKOVE, *supra* note 4, at 105 (quoting 2 RECORDS, *supra* note 7, at 476).

159. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-88, at 316 (John Bach McMaster & Frederick D. Stone eds., The Historical Society of Pennsylvania 1888).

160. *Id.* at 302. The maxim that "all Government originates from the people" was "widely accepted by almost every one." WOOD, *supra* note 47, at 330.

161. 2 DEBATES ON ADOPTION, *supra* note 77, at 355-56; see also RAKOVE, *supra* note 4, at 190.

162. RAKOVE, *supra* note 4, at 200 (quoting THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961)).

163. *Id.* at 190.

164. As further evidence of Rakove's flawed judgment, consider an incident he recounts. A fellow political scientist had written flatteringly to him and "earns [his] profound thanks for this sentence: 'If according to Madison, Tocqueville, Rakove . . .'" *Id.* at 277 n.99. In publishing his "profound thanks" he intimates that ranking him with Madison is his just due.

165. *Id.* at 178.

broadening the objects of national government than with guaranteeing that it would possess the powers necessary to secure its ends,"¹⁶⁶ for example, the execution of existing powers. As a result, Rakove comments, "the new Union was only marginally less of a confederation than the one [under the Articles of Confederation] it had replaced."¹⁶⁷ Let us now consider the two spheres of authority that emerged.

The Committee of Detail's report to the Convention embraced "little more than matters of foreign relations and general commerce [and] most framers agreed . . . that national lawmaking would remain modest."¹⁶⁸ At the Convention, Rufus King observed that "[t]he most numerous objects of legislation belong to the States. Those of the Natl. Legislature were but few."¹⁶⁹ As Wilson later observed, "War, Commerce & Revenue were the great objects of the Genl. Government."¹⁷⁰ Roughly speaking, the federal domain was external (foreign affairs), that of the States internal (domestic affairs). Some have complained of the absence of "neat boundaries,"¹⁷¹ but that, Justice Holmes labeled "the tyro's question: Where are you going to draw the line?—as if all life were not the marking of grades between black and white,"¹⁷² even though, as Marshall earlier underscored, the intervening imperceptible shades of gray "perplex the understanding."¹⁷³ The distinction between foreign and domestic affairs, between growing wheat and importing it, is not nearly as perplexing. Wilson's test is eminently practical: "Whenever an object occurs, to the direction of which no state is competent, the management of it must, of necessity, belong to the United States"¹⁷⁴ Thus wild geese, here today and gone tomorrow, are in no State's jurisdiction, so it falls to the federal government to regulate their migration.

Specifically, Roger Sherman stated in the Convention, "The objects of the Union . . . were few: 1. Defense agst. foreign danger. 2. agst. internal disputes & a resort to force. 3. Treaties with foreign nations[.] 4[.] regulating foreign commerce, & drawing revenue from it. . . . All other matters . . . would be much better in the hands of the States."¹⁷⁵ Variations on this theme are scattered through *The Federalist*. The federal jurisdiction, said Madison in No. 39, "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."¹⁷⁶ In No. 45 he amplified: the federal powers "will be exercised principally on external objects, as war, peace, negotiation and foreign commerce The powers reserved to

166. *Id.* at 179.

167. *Id.* at 177.

168. *Id.* at 179.

169. *Id.* (quoting 2 RECORDS, *supra* note 7, at 198).

170. *Id.* (quoting 2 RECORDS, *supra* note 7, at 275).

171. Martin Shapiro, *American Federalism*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 359, 360, 367 (Ronald K.L. Collins ed., 1980); ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISTS AND THE CONSTITUTION 50 (1964).

172. 1 HOLMES-LASKI LETTERS 331 (Mark DeWolfe Howe ed., 1953).

173. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441 (1827).

174. MASON, *supra* note 171, at 12 (quoting 1 THE WORKS OF JAMES WILSON 565 (James DeWitt Andrews ed., 1896)).

175. 1 RECORDS, *supra* note 7, at 133.

176. THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

the several states will extend to all the objects, which . . . concern the . . . internal order . . . of the State."¹⁷⁷ Hamilton put it succinctly: the Constitution "is merely intended to regulate the general political interests of the nation," not to regulate "every species of personal and private concerns."¹⁷⁸ In No. 32 Hamilton stated that "the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] exclusively delegated to the United States."¹⁷⁹ In the upshot, the Framers left "the powers of state government largely intact."¹⁸⁰

It cannot be unduly emphasized that, as Madison stated in No. 39, the States are "no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere."¹⁸¹ And Hamilton explained in the New York Ratification convention that "[t]he laws of the United States are supreme, as to all their . . . constitutional objects: the laws of the States are supreme in the same way."¹⁸² Note Hamilton's words in No. 33: the Constitution "expressly confines this [federal] supremacy to laws made pursuant to the Constitution."¹⁸³ All this was aptly summarized by James Bryce: "The federal government clearly was sovereign only for certain purposes, i.e., only so far as it had received specific powers from the Constitution. These powers did not, and in a strict legal construction do not now, abrogate the supremacy of the states [in their reserved sphere]."¹⁸⁴

Madison considered that "[t]he end of constitutional interpretation was . . . to preserve the equilibrium among institutions that the Constitution intended to establish."¹⁸⁵ And he emphasized that "[i]t is of great importance, as well of indispensable obligation, that the constitutional boundary between [the Union and the States] should be impartially maintained."¹⁸⁶ One of Rakove's egregious oversights is the disastrous effect that the Court, which he would further aggrandize, has had on federalism. "Throughout our history," wrote Philip Kurland, "the Supreme Court has consistently acted as a centripetal force favoring, at almost every chance, the national authority over that of the states. It made substantial contributions to the ultimate demise of federalism."¹⁸⁷ Every

177. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); see also MERRILL PETERSON, THOMAS JEFFERSON AND THE NEW NATION 627 (1970): "The true theory of our Constitution is . . . that the states are independent as to everything within themselves, and united as to everything respecting foreign nations."

178. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

179. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

180. RAKOVE, *supra* note 4, at 317.

181. THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

182. 2 DEBATES ON ADOPTION, *supra* note 77, at 356.

183. THE FEDERALIST NO. 33, at 207 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

184. BRYCE, *supra* note 79, at 375.

185. RAKOVE, *supra* note 4, at 345 (emphasis added); see also BRYCE, *supra* note 79, at 1496.

186. Letter from James Madison to Judge Roane (May 6, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217 (New York, R. Worthington 1884) (1865).

187. PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 156-57 (1978).

extension of federal jurisdiction correspondingly diminishes that of the States. Richard Posner wrote: "apply the Bill of Rights to the states . . . and you weaken the states tremendously by handing over control of large areas of public policy to . . . judges."¹⁸⁸ As with his quest for "equality," cost what it may, so one may conjecture that Rakove welcomes the judicial incorporation of the Bill of Rights in the Fourteenth Amendment.¹⁸⁹ Alpheus Mason, however, noted that Justice Brandeis "foreshadowed sharp differences of later years with the New Dealers whose headlong drive for national power threaten[s] . . . to destroy the greatest bulwark of liberty—federalism."¹⁹⁰

RATIFIERS AND FRAMERS

To deflate reliance on the Framers, Rakove trots out Madison's statement during the Jay Treaty debate: "As the instrument came from [the Framers] it was . . . nothing but a dead letter, until life and validity were breathed into it" by the Ratifiers.¹⁹¹ Foreign affairs had become "the chief source of partisan conflict" and the Jay Treaty aroused "a storm of protest."¹⁹² Opponents argued that the Treaty required the approval of the House.¹⁹³ President Washington, however, cited the Journal of the Convention for its rejection of such participation, confirmed in several Ratification conventions.¹⁹⁴ Madison himself discounted remarks that were "heated or disturbed by faction."¹⁹⁵ Strange indeed is Rakove's citation, for his opus is largely composed of citations to the Framers, all but inescapably, for most of the Constitution's provisions were not discussed by the Ratifiers.¹⁹⁶ Rakove acknowledges that "[n]o author can stray far from a heavy reliance on Madison's Notes of debates";¹⁹⁷ that the "deliberations of the Convention [are] the . . . most salient set of sources for the original meaning of the Constitution";¹⁹⁸ that "theirs were the only intentions that in any literal sense affected the composition and substance of the Constitution";¹⁹⁹ that they possess "a unique authority that later interpretations can never equal";²⁰⁰ and that they provide the "best historical evidence of what the Constitution meant to its adopters and thus explaining why it was adopted . . . [giving] the originating

188. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 195 (1985).

189. *But see* RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989).

190. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 558 (1946).

191. RAKOVE, *supra* note 4, at 17.

192. *Id.* at 357.

193. *Id.* "[B]y 1796 the politics of opposition had placed Madison in a position he had never expected to occupy, [that is,] the powers of the House had . . . to be extended." *Id.* at 364.

194. *Id.* at 360; *see also* 2 *DEBATES ON ADOPTION*, *supra* note 77, at 506; 3 *DEBATES ON ADOPTION*, *supra* note 77, at 509.

195. RAKOVE, *supra* note 4, at 349.

196. "Without [Madison's] notes of debates, it would be nearly impossible to frame more than a bare bones account of how the Constitution took shape." *Id.* at 4.

197. *Id.* at 13.

198. *Id.*

199. *Id.*

200. *Id.* at 149.

source its supreme authority, and therefore crucial to ascertaining legally binding meanings for later interpreters.²⁰¹ To shut our eyes to such crucial evidence would be supreme folly. Of course, the Ratifiers were the more authoritative spokesmen where their views differed from those of the Framers.

Actually Madison did not bar the door to the Framers' records; he considered them "presumptive evidence of the general understanding at the time of the language used";²⁰² he said that the meaning of the Constitution would be found "in the proceedings of the Convention, the contemporary expositions, and, above all, in the ratifying conventions of the States."²⁰³ Madison, Mason, and Davie, who were delegates to the Convention and to the Ratification conventions, explained some of the provisions to the Ratifiers.²⁰⁴ Earlier, I collected a number of Madison citations to the Framers.²⁰⁵ Abraham Baldwin, Charles Pinckney, Caleb Strong, and Pierce Butler, Framers all, referred to discussions in the Convention.²⁰⁶ Rakove notes that "[i]ndividual framers were often asked [in the Ratification conventions] why the Convention had acted in one way or had declined to act in another," and he cites a number of such references.²⁰⁷ What principal would feel barred from asking his agent to explain the provisions of a document that he had been asked to prepare? Indeed, Rakove affirms that the Framers' intentions "were the only intentions that in any literal sense, affected the composition and substance of the Constitution."²⁰⁸

MISCELLANEOUS RAKOVE VIEWS

The "real issue," Williard Hurst emphasized forty years ago, "is who makes the policy choices . . . judges or the combination of legislatures and electorate that makes constitutional amendments."²⁰⁹ Rakove cautions, however, that "rigid adherence to the ideas of the framers . . . would convert the Constitution into a brittle shell incapable of adaptation to all the changes that distinguish the present from the past."²¹⁰ Not for him a "fixed" Constitution changeable only by amendment; he protests against being "held captive to the extraordinary obstacles of Article V."²¹¹ So he relies on "adaptation" by judges. Thus he chides us for "rail[ing] against the evils of politically unaccountable judges enlarging constitutional rights beyond the ideas and purposes of their original adopters,"²¹²

201. *Id.* at 149-50 (emphasis omitted).

202. LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 17 (1988).

203. *Id.* at 5.

204. For citations, see Raoul Berger, *Original Intent and Leonard Levy*, 42 *RUTGERS L. REV.* 255, 260 n.38 (1989).

205. Raoul Berger, *Original Intent in Historical Perspective*, 54 *GEO. WASH. L. REV.* 296, 327-28 (1986).

206. For citations, see Berger, *supra* note 204, at 261 n.41.

207. RAKOVE, *supra* note 4, at 16, 115, 155, 191, 319.

208. *Id.* at 13.

209. Willard Hurst, *Discussion, in SUPREME COURT AND SUPREME LAW*, *supra* note 23, at 75.

210. RAKOVE, *supra* note 4, at xiii.

211. *Id.* at 368.

212. *Id.* at 367-68.

this in the name of bringing “rigor” to constitutional analysis.²¹³ Bluntly, he would confide revision of the Constitution to judges. In halcyon days the Supreme Court rejected the notion that the Constitution may be “amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.”²¹⁴

Would-be “adaptors” have cited Marshall’s “it is a constitution we are expounding . . . to be adapted to the various crises of human affairs.”²¹⁵ But he explained that his remark in *McCulloch v. Maryland* was merely addressed to a proper means for execution of expressly granted powers, and flatly denied, again and again, that his remark contained “the most distant allusion to any extension by construction of the powers of congress,”²¹⁶ adding that the judiciary’s power cannot warrant “the assertion of a right to change that instrument.”²¹⁷ The Court never has explicitly laid claim to the revisionary power which current academicians would press upon it. Justice Black, a redoubtable liberal, dismissed “rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times,”²¹⁸ emphasizing that the Framers provided for change by Article V, whereby the people reserved unto themselves the power to change the Constitution. Nevertheless, academicians halloo on the Court to ever more “adaptation” to effectuate their social aspirations.²¹⁹ I share those aspirations, but my paramount allegiance is to the integrity of the Constitution. Justly does Judge Frank Easterbrook ask, “[i]f the document no longer binds us in some respects, why does it govern in others?”²²⁰ “Why,” asked Marshall, “does a judge swear to discharge his duties agreeably to the constitution . . . if that constitution forms no rule for his government?”²²¹ Rakove’s partiality for government by judiciary should be considered in light of Paul Freund’s observation: “It would be a

213. *Id.* Rakove would bring to “constitutional interpretation a rigor it often lacks.” *Id.* at 11. He stresses the “value of thinking rigorously.” *Id.* at 8.

214. *McPherson v. Blaker*, 146 U.S. 1, 36 (1892); see also *Ullmann v. United States*, 350 U.S. 422, 428 (1950).

215. Quoted by Chief Justice Hughes in *Home Bldg. Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442-43 (1934) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis in original)).

216. JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 185 (Gerald Gunther ed., 1969) (emphasis added).

217. *Id.* at 209.

218. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting). Gerald Gunther rejected the view that courts are authorized to step in when injustice exists and other institutions fail to act. Gunther, *supra* note 111. A power that cannot be delegated to another branch cannot be assumed by it.

219. Thus Erwin Chemerinsky applauds the “constitutional changes wrought by the modern Court,” but deplores its many “wrong turns and missed opportunities.” Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1144 (1992); see also Lawrence B. Solum, *Foreword: History, Fable and Constitutional Interpretation*, 25 LOY. L.A. L. REV. 1135, 1136 (1992).

220. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 368 (1992). Madison stated in the Convention that “it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence.” 2 RECORDS, *supra* note 7, at 92-93.

221. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

morally poor country indeed that was obliged to look to any group of nine wise men for ultimate moral light and leading, much less a group limited to men drawn from one profession, even that of law."²²² Platonic guardians were not for Learned Hand.

FIXED CONSTITUTION

The logic for a fixed Constitution was cogently put by Philip Kurland:

The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change.²²³

Ours, Marshall declared, is a government of limited powers; "that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"²²⁴ And he declared, "[i]n framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also."²²⁵ From this it follows, as Justice Story concluded, that the Constitution is "to have a fixed, uniform, permanent construction[; it] should not be dependent upon the passions of parties at particular times, but the same yesterday, to-day and forever."²²⁶ Adoption had been vigorously opposed by the Anti-Federalists, and the Federalists prevailed on the basis of assurances that Anti-Federalist fears

222. PAUL A. FREUND, *ON LAW AND JUSTICE* 35 (1968). Activist Arthur Miller considers that the Justices have not been prepared "for the task of constitutional interpretation." Arthur S. Miller, *The Elusive Search for Values in Constitutional Interpretations*, 6 HASTINGS CONST. L.Q. 487, 500 (1979). Few have "the broad-gauged approach and knowledge," Miller adds, essential to "search for and identify the values that should be sought in constitutional adjudication." *Id.* at 507.

223. KURLAND, *supra* note 187, at 7.

224. *Marbury*, 5 U.S. at 176.

225. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 355 (1827).

226. 1 STORY, *supra* note 17, § 426; *see also* *Hawke v. Smith*, 253 U.S. 221, 227 (1920); *South Carolina v. United States*, 199 U.S. 437, 448-49 (1905); 1 THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 123-24 (Walter Carrington ed., 8th ed. 1927).

were groundless.²²⁷ To repudiate such representations,²²⁸ said Justice Story, is to perpetrate a fraud on the American people.²²⁹

Rakove, however, levels a “powerful criticism” of originalism: it is fundamentally “anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors.”²³⁰ This has the merit of novelty; hitherto proponents of judicial review have uneasily noted that it was undemocratic because it took momentous decisions from the people and placed them in judges, who are unelected, unaccountable and irremovable.²³¹ “Present generations” are not barred from amending the Constitution; judges are.

Our system of government is founded on “the consent of the governed.”²³² The terms of that consent are spelled out in the Constitution; the people, averred James Iredell, one of the ablest Founders, “have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other.”²³³ Rakove would substitute that “other” without giving the people an opportunity to determine whether they share his preference. Under our system a law remains in effect until it is repealed. The judge (much less the academician), wrote Learned Hand, “has no right to divination of public opinion which run counter to its last formal expressions.”²³⁴ Every amendment to the Constitution testifies that except as so altered, the people remain satisfied with the Constitution. With Mark Tushnet, I prefer the view that “we are indeed better

227. “Anti-Federalist fears were part of the original understanding of the Constitution [T]hey influenced the arguments that were made in its support” RAKOVE, *supra* note 4, at 17. For example, *The Federalist No. 78* patently was designed to counter “Brutus’s” penetrating analysis of the judiciary Article. THE FEDERALIST NO. 78 (Alexander Hamilton).

228. RAKOVE, *supra* note 4, at 343, notes the “arguments most likely to influence the course of ratification.”

229. 2 STORY, *supra* note 17, § 1084. “If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?” *Id.*

230. RAKOVE, *supra* note 4, at xv n.*.

231. Cass R. Sunstein, *Earl Warren Is Dead*, NEW REPUBLIC, May 13, 1996, at 35, 37. Sunstein observes that the people have a “right to democratic government . . . and judicial use of abstract moral principles may well intrude on [that] right.” *Id.* Justice Frankfurter explained that “[t]he reason why from the beginning even the narrow judicial authority to nullify legislation had been viewed with a jealous eye in that it serves to prevent the full play of the democratic process.” *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 650 (1943) (Frankfurter, J., dissenting). For elaboration of this view, see Henry Steele Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417 (1943). With Leonard Levy, I agree that Eugene Rostow has failed to meet Commager. See Leonard W. Levy, *Judicial Review, History, and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 24 (Leonard W. Levy ed., 1967); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

232. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), reprinted in DOCUMENTS, *supra* note 145, at 100.

233. 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1857).

234. HAND, *supra* note 12, at 14.

off being bound by the dead hand of the past than being subjected to the whims of wilfull judges trying to make the Constitution live."²³⁵

Judge Frank Easterbrook points out that "Constitutional interpretation . . . is a process of holding actual government within certain bounds."²³⁶ Hamilton stated in *The Federalist No. 78* that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they be bound down by strict rules which serve to define and point out their duty in every particular case."²³⁷ This was designed to allay the "profound fear" of judicial discretion.²³⁸ Originalism was not a scholastic exercise; it served as a brake on judicial revision of written documents. If, wrote Earl Maltz, "intent is irrelevant and the text ambiguous, courts are left with no constitutional source that defines the limits of their authority."²³⁹ Richard Kay explained:

To implement real limits on government the judges must have reference to standards which are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are [sic] set at their creation. Recourse to "the intention of the framers" in judicial review, therefore, can be understood as indispensable to realizing the idea of government limited by law.²⁴⁰

Very different is Rakove's explanation of why "appeals to the original meaning of the Constitution . . . still play a conspicuous role in our political and legal discourse [T]he imperatives of law-office history . . . promise some tangible advantage."²⁴¹ This comes with ill grace from one who confesses that he "like[s] originalist arguments when the weight of the evidence seems to support the

235. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787 (1983).

236. Frank H. Easterbrook, *The Influence of Judicial Review on Constitutional Theory, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS*, *supra* note 64, at 172.

237. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

238. WOOD, *supra* note 47, at 298. RAKOVE, *supra* note 4, at 305, notes the "traditional bias against judges," and against "judicial discretion in interpreting the law."

239. Earl M. Maltz, *Federalism and the Fourteenth Amendment: A Comment on "Democracy and Distrust"*, 42 OHIO ST. L.J. 209, 210 (1981). Lawrence Church, who is unsympathetic to originalism, recognizes that if judges "are not bound by the intent of the founders . . . then there may be no limits at all to their power." W. Lawrence Church, *History and the Constitutional Role of the Courts*, 1990 WIS. L. REV. 1071, 1087-88.

240. Richard S. Kay, Book Review, 10 CONN. L. REV. 801, 805-06 (1978) (reviewing RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977)) (footnotes omitted). Sunstein regards the "impulse toward originalism in constitutional law . . . as a way of limiting judicial discretion and increasing the potential effect of moral and political deliberation in democratic arenas." Sunstein, *supra* note 231, at 37. I would add that judicial discretion is limited by age-old rules of construction. See THE FEDERALIST NO. 78, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); KENT, *supra* note 18; STORY, *supra* note 17, § 155 n.2. As a practical matter, resort to original intention "avoids uncertainty and arbitrariness and promotes predictability and consistent application." J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 928-29 (1988) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

241. RAKOVE, *supra* note 4, at 366.

constitutional outcome I favor."²⁴² Our discourse is in the field of scholarship, not of lawyers bent on winning cases.²⁴³ In that field, Paul Brest pleaded with his fellow activists "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good,"²⁴⁴ of which Rakove's commitment to "equality" even at the cost of Article V is an example. Scholars, Rakove piously intones, "can at least be bounded . . . by the canons of scholarship."²⁴⁵ A basic canon is fidelity to the facts even when they run counter to our social aspirations. In the midst of the heated debate about Darwinism, Thomas Huxley declared, "[m]y colleagues have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it, however it may jar against their inclinations."²⁴⁶

What is the alternative to originalism? Justice Scalia considers it a grave defect of the nonoriginalists that they have been unable to agree upon an alternative theory. "Surely," he observes, "there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another . . . [I]t is hard to discern any emerging consensus as to what this might be."²⁴⁷ That understates the discordance. Earl Maltz considers that "the premises from which the various commentators proceed vary so widely that the achievement of consensus is likely to be impossible."²⁴⁸ Paul Brest, himself a nonoriginalist, concluded that "no defensible criteria exist" whereby to assess "value-oriented

242. *Id.* at xv n.*. Rakove prefers "claims of equality" to compliance with Article V. *Id.* at 368. This is advocacy of a cause. Peter Gay, the eminent historian, observed that one who approaches empirical data by way of a preconceived theoretical bias is a poor historian. See HISTORIANS AT WORK (Peter Gay & Victor G. Wexler eds., 1975).

243. Alfred Kelly, a historian, not a lawyer, recorded that he was retained in the desegregation case to file a historical brief for the NAACP. Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956). He: manipulated history in the best tradition [?] of American advocacy, carefully marshalling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible.

Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 116, 144. To my mind, Kelly aptly described Rakove's own course.

244. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981). Commenting on some aspects of appeals to original intention during the Jay Treaty debate, RAKOVE, *supra* note 4, at 365, asserts that they were dictated "by considerations of partisan advantage." Appeals to the text of the Constitution may be open to the same objection.

245. RAKOVE, *supra* note 4, at 21.

246. THOMAS H. HUXLEY, EVIDENCE AS TO MAN'S PLACE IN NATURE (1863), *quoted in* HOMER W. SMITH, MAN AND HIS GODS 372 (1953). The historian has "a special obligation to sobriety and fidelity to the record." C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 87 (1960).

247. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

248. Earl M. Maltz, *Murder in the Cathedral—The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623, 623 (1983).

constitutional adjudication."²⁴⁹ According to Michael Perry, activists have not come up with "a defensible nonoriginalist conception of constitutional text, interpretation and judicial role."²⁵⁰ A dispassionate Canadian observer, Allan Hutchinson, commented that "American scholars struggle to offer some theoretically valid account of the jurisprudential enterprise [They are] energized by a growing sense of desperation."²⁵¹ Not an inkling of this state of nonoriginalist theorizing appears in Rakove's sunny rhetorical sky.

In closing Rakove asks why we seek "to recover . . . original meanings," and suggests two answers, the first of which is noted in the footnote below.²⁵² Let me consider the second: was the Framers' vision of popular government more profound than our own? I would not rest originalism on the wisdom of the Founders, though we could not muster their like today. Originalists consider, in Rakove's words, that "the original meaning of the Constitution is binding because it represents the highest exercise of popular sovereignty possible within the constitutional system."²⁵³ The people then *consented* to be governed under its terms,²⁵⁴ reserving unto themselves the power to change them. As Hamilton stated in *The Federalist No. 78*: "Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act."²⁵⁵ If the Constitution is alterable at the pleasure of the legislature or the Court, then, as Chief Justice Marshall declared, "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."²⁵⁶

249. Brest, *supra* note 244, at 1065. In *The Federalist No. 38*, Madison admonished critics that before discarding a proposed remedy they ought "at least agree among themselves on some other remedy to be substituted." THE FEDERALIST NO. 38, at 243 (James Madison) (Jacob E. Cooke ed., 1961).

If "the Supreme Court's purpose is to establish justice without reference to the original intent of the framers, then what remains to circumscribe judicial power? Berger's critics have given singularly unsatisfactory answers to this question." Donald P. Kommers, *Role of the Supreme Court*, 1978 REV. POL. 409, 413 (reviewing RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977)).

250. Michael J. Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 602 (1985).

251. Allan C. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701, 701 (1985).

252. RAKOVE, *supra* note 4, at 368. Rakove suggests two possible reasons in the form of questions. The first is, do "we truly believe that language can only mean now what it meant then?" *Id.* That the terms of the Constitution must have a fixed meaning has been shown *supra* text accompanying notes 223-39. Jefferson regarded the "limits" of the Constitution as meant to "Bind [our delegates] down from mischief by the chains of the Constitution." 4 DEBATES ON ADOPTION, *supra* note 77, at 543. Rakove would transform those chains into ropes of sand with the object of turning over our destiny to the judiciary.

253. RAKOVE, *supra* note 4, at 340.

254. See *supra* text accompanying note 232.

255. THE FEDERALIST NO. 78, at 527-38 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

256. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Rakove cannot bring himself squarely to challenge the "assumption," as did Paul Brest, that judges are "bound by the text or original understanding of the Constitution."²⁵⁷ He overlooks what the Massachusetts House perceived in 1768, that the government, which derives its authority from the Constitution, cannot "overleap" its bounds "without subverting its own foundation."²⁵⁸ More simply, if judges are not bound by the Constitution, they cannot bind us.²⁵⁹ Hamilton, for whom the constitutional scheme ran counter to his desire, yet referred in *The Federalist No. 25* to "that sacred reverence, which ought to be maintained in the breasts of rulers towards the constitution."²⁶⁰ The complaints of Rakove and his ilk are not shared by the people. Even the free-wheeling Paul Brest noted that for the people, "the written Constitution lies at the core of the American 'civil religion.'"²⁶¹ The crowning answer to "why original meaning" is that of Madison, meditating in his retirement:²⁶² "if the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."²⁶³

Rakove, it is quite clear, approves "the result-oriented reasoning of contemporary legal theory and its accompanying willingness to expand the authority of federal courts at the expense of democratic autonomy of communities and states."²⁶⁴ Illustrative is his refusal to be held captive by the amending procedure of Article V in his quest for claims of equality. Mine, to

257. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224 (1980).

258. Letter of the Massachusetts House to Lord Camden, in DOCUMENTS OF AMERICAN HISTORY 65 (Henry Steele Commager ed., 7th ed. 1963). Madison stated in the Convention that "[i]t would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence." 2 RECORDS, *supra* note 7, at 92-93.

259. See *supra* text accompanying note 220.

260. THE FEDERALIST NO. 25, at 163 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

261. Brest, *supra* note 257, at 234 (footnote omitted). Justice, then Professor, Hans Linde, wrote, "[t]his whole enterprise of constitutional law rests, after all, on the premise that the nation cares about its Constitution, not about its courts." Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 256 (1972).

262. The weight to be attached to this distillation of his experience is attested by Justice Story, a dedicated nationalist:

Venerable, as he now is, from age and character, and absolved from all those political connections which may influence the judgment and mislead the mind, he speaks from his retirement in a voice which cannot be disregarded, when it instructs us by its profound reasoning, or admonishes us of our dangers by its searching appeals.

1 STORY, *supra* note 17, § 396.

263. Letter from James Madison to Henry Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 186, at 441. To the voice of Madison may be added that of Washington in his Farewell Address: "let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." 35 THE WRITINGS OF GEORGE WASHINGTON 214, 229 (John C. Fitzpatrick ed., 1940) (citations omitted).

264. RAKOVE, *supra* note 4, at 5 (footnote omitted).

borrow from him, has been “the historian’s old-fashioned and perhaps naïve desire to get the story right for its own sake.”²⁶⁵ When Rakove, for instance, ignores the seven-hundred-year long Anglo-American resort to the original intention, the story is skewed, not “right,” a poor way to supply “rigor” to constitutional interpretation.

Nearly twenty years ago, Max, now Lord, Beloff, an Oxford emeritus, wrote in a review of my *Government by Judiciary* in the London Times, “The quite extraordinary contortions that have gone into proving the contrary [nonoriginalist view] make sad reading for those impressed by the high quality of American legal-historical scholarship.”²⁶⁶ Rakove has added another sorry chapter to such “scholarship.”

265. *Id.* at 22.

266. Max Beloff, *Arbiters of America’s Destiny*, TIMES HIGHER EDUC. SUPPLEMENT (London), Apr. 7, 1978, at 11.