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ORIGINALISM ALL THE WAY DOWN?

ORIGINALISM AND THE GOOD CONSTITUTION. By John O. McGinnis[1] & Michael B. Rappaport.[2] Cambridge, Mass.: Harvard University Press. 2013. Pp. 298, $39.95 (cloth).

Kurt T. Lash[3]

Originalism is a reformist movement in contemporary American constitutional law. Its practitioners reject modern interpretive theories such as "living constitutionalism" and call for the restoration of the foundational understanding of the text. Despite vigorous efforts to discredit the movement,[4] originalism in the twenty-first century enjoys an increasing number of scholarly advocates[5] and it occupies an essential place in the tool-box of advocates before American courts.[6] But success has its costs. As the number of self-identified originalists increase, so do disputes regarding the proper normative basis for originalism and the degree to which original understanding ought to control the resolution of contemporary legal disputes.

In their book, *Originalism and the Good Constitution*, John McGinnis and Michael Rappaport offer both a new justification for originalism and what they believe is a purer form of the theory, "original methods originalism." Advocating a "pragmatic"

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4. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).
5. For contemporary works that rely in whole or in part on originalist theory, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); JACK BALKIN, LIVING ORIGINALISM (2011); RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (updated ed., 2014); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).
6. For recent examples of judicial application of originalist theory, see both the majority and dissenting opinions in McDonald v. Chicago, 561 U.S. 3020 (2010).

justification for originalism based on the benefits of supermajoritarian decision-making, McGinnis and Rappaport insist that judges must apply the text exclusively through the use of interpretive methods in play at the time of the Founding. When judges depart from these "original methods," they (and we) lose the benefits of supermajoritarian decision-making. This is a creative and provocative approach to originalism that deserves serious attention by anyone interested in the expanding corpus of originalist theory. Even if not successful in their effort to displace what they call "constructionist originalism" (p. 8), McGinnis and Rappaport have established *methodist* originalism[7] as an important denomination in the originalist Reformation.

SUPERMAJORITARIANISM AND THE "GOOD CONSTITUTION"

Critics of originalism commonly maintain that a robust application of the theory would leave us with a government simultaneously underpowered and over-tyrannical. Originalist courts would invalidate the post-New Deal administrative state, overrule the equality jurisprudence initiated by *Brown v. Board of Education*, and abandon much, if not most, of the individual rights protections of the Warren Court. Pollution would go unregulated, the poor unprotected, and the will of the people here-and-now ignored in favor of the preferences of eighteenth century slaveholding white males. In short, the consequences of undiluted originalism would be *bad*.

McGinnis and Rappaport argue that such criticism is not only wrong, it is theoretically obtuse. Good faith judicial enforcement of the original meaning of the Constitution would result in good consequences, at least most of the time. Had courts consistently applied an originalist methodology from the country's beginning, McGinnis and Rappaport argue, we would have avoided Jim Crow, Congress would have been granted enumerated power to regulate the national economy, and individuals would have an enumerated right to sexual equality (p. 90).

Lest the reader be misled, however, McGinnis and Rappaport do not believe that it is the substance of law that makes it "good." Instead, it is the consequentialist values of stability and legal predictability that flow from a supermajoritarian

7. "Methodist" originalism is my term, but it is both less awkward than "original methods originalism" and more appropriate in light of the label imposed by the authors on "constructionist" originalism.

decisionmaking that makes law "good."[8] Supermajoritarian voting procedures ensure broad public acceptance of norms intended to remain in place for generations. Participants in such a process will likely take the long view and entrench basic protections for all citizens (including their descendants) and not just those who happen to be in power.[9] The likely result is a stable body of law that maximizes preference satisfaction among the voting citizenry. These "good" benefits will be enjoyed only if judges enforce the original textual meaning that triggered supermajoritarian support in the first place. Judges who apply non-originalist meanings and methods inevitably introduce instability and disagreement and, ultimately, place society in a worse position than would have been the case had relevant decision-makers followed and enforced the Constitution's original meaning.

Although McGinnis and Rappaport argue that the original Constitution emerged from what was primarily a supermajoritarian process (p. 62),[10] they also acknowledge supermajoritarian "failures" such as the original exclusion of blacks and women from the voting public (p. 100). These original deficiencies, however, were largely remedied through the adoption of subsequent amendments, such as the Thirteenth, Fourteenth and Fifteenth Amendments.[11] It was the federal government's failure to properly enforce these amendments that blocked the immediate good results that would have otherwise

8. *See* p. 3 ("[S]tringent supermajority rules are likely (and more likely than other methods, such as judicial fabrications) to generate good constitutional provisions.").

9. *See* p. 12 ("Wide support for a constitution helps to create the legitimacy and allegiance for the nation's fundamental law that is especially important in a pluralist country like the United States.").

10. *See also* p. 64 ("We see the greatness of the Constitution as largely the result of the supermajoritarian process that enacted it.").

11. The authors only briefly address the question of whether the ratification of the Reconstruction Amendments satisfied the authors' requirement of supermajoritarian decision-making. *See* pp. 69–70 ("While we cannot fully address this issue, we can suggest how these amendments are best understood to conform to the supermajoritarian approach."). The authors defer to the work of Akhil Amar who argues that the southern states were properly excluded from the amendment process, which, if correct, resulted in a supermajoritarian ratification by the remaining states (p. 70). Amar's analysis and conclusion have been strongly challenged by his Yale Law School colleague, Bruce Ackerman. *See* Bruce A. Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1747 n.25 (2007) (responding to Amar's formalist defense of the adoption of the Reconstruction Amendments). Given the major role these amendments play in modern constitutional law, determining whether they were adopted by way of a supermajoritarian process seems absolutely critical to the authors' argument. If they were not, then it is hard to see how the authors can maintain that we currently have a "Good Constitution" according to their own normative methods. It is somewhat disappointing that the authors leave the issue unresolved by citing only one side of a vigorous and on-going debate.

flowed from the adoption of the remedial Reconstruction Amendments (p. 110).

In support of this claim, the authors rely on a number of disputed assertions about the original meaning of the Fourteenth Amendment. For example, McGinnis and Rappaport fault the Supreme Court in *Plessy v. Ferguson* for failing to recognize that the Privileges or Immunities Clause protected the equal, if unenumerated, rights of contract (p. 110). The Supreme Court's decision in *Plessy* to uphold racial segregation, of course, is not generally criticized because it failed to enforce fundamental economic rights. Nor is there anything approaching a scholarly consensus about the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.[12] On the other hand, the authors' central point is that scholars have been too quick to assume that originalist interpretations *necessarily* lead to morally unacceptable decisions like *Plessy*. This seems entirely correct.[13]

In fact, McGinnis and Rappaport do a great job explaining the pragmatic benefits of a supermajoritarian constitutional process. Originalists of all stripes would do well studying the opening chapters of *The Good Constitution* if only to better appreciate how the actual mechanics of American constitutionalism generate important contemporary societal benefits. True, as the authors concede, welfare consequentialism is a controversial normative theory. Nevertheless, they make a persuasive case regarding the rule of law benefits that attend supermajoritarian decision-making, regardless of one's ultimate normative justification for following the original meaning of constitutional text.

COUNTERING THE CONSTRUCTIONISTS

Given the ever-growing variety of scholars embracing the general theory of originalism, it was inevitable that schools of originalism would emerge with criticisms of fellow travelers who are perceived as straying from the true path. In the case of *The Good Constitution*, the authors spend a significant portion of the book contrasting their particular brand of originalism from what

12. *Compare* BARNETT, *supra* note 5, *with* LASH, *supra* note 5.

13. See for example, the growing consensus that the original meaning of the Fourteenth Amendment incorporates the Bill of Rights. *See* AMAR, *supra* note 5; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987). *See also* LASH, *supra* note 5.

they label "*constructionist* originalism" (p. 139). Exemplified by the work of scholars like Randy Barnett and Jack Balkin (p. 151),[14] constructionist originalism distinguishes the discovery of constitutional meaning from the act of judicial application.[15] According to constructionists, since judges are not always able to fully determine the original meaning of a text or discern exactly how it ought to be applied to a particular legal dispute, they must often fill the gap between original meaning and current application by using a judicially constructed rule of interpretation. According to this approach, the less we know about original meaning, the more room exists for judges to fill the space with non-originalist judicial doctrine.[16]

To McGinnis and Rappaport, methods of interpretation derived by anything less that supermajoritarian decisionmaking threaten to undermine the good consequences otherwise generated by originalist methodology (p. 153). Not only is the approach problematic, to McGinnis and Rappaport it is wholly unnecessary: the same supermajoritarian process that produced constitutional text also produced a set of original methods for interpreting the text. As the authors put it:

> The constitutional enactors voted to ratify the document based on their understanding of the text and how they believed it would be interpreted by subsequent generations. Thus, modern courts should interpret the Constitution using the same interpretive methods that the enactors would have used—a process we call original methods originalism (p. 153).

To McGinnis and Rappaport, meaning and interpretive method are so closely entwined that you cannot discern the one without the other. "To embrace originalism without embracing the enactors' interpretive rules," they claim, "is like trying to decode a message using a different code than the authors of the message employed" (p. 14). This approach collapses the distinction between original textual meaning and judicial application, since the proper methods of interpretation and application are treated as part of the original "grammar" of the text. Methodism vanquishes constructionism by completely erasing the "construction zone" where non-originalist

14. *See also* BALKIN, *supra* note 5; BARNETT, *supra* note 5.

15. For a discussion of originalist theory and the distinction between interpretation and construction, see Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORD. L. REV. 453 (2013).

16. *See, e.g.*, BALKIN, *supra* note 5, at 16–19 (discussing and rejecting "original expectations originalism").

methodology might otherwise apply. This is originalism all the way down.

If all McGinnis and Rappaport were trying to do is suggest that the framers expected courts would apply *some* method of interpretation, this would seem obviously true. The historical record at the time of the Founding is full of references to various theories of textual and constitutional interpretation. The problem is, for McGinnis and Rappaport to succeed, they must prove the existence of supermajoritarian agreement on the interpretive method to be applied to each text of the Constitution. Anything less either fails the supermajoritarian requirement or leaves room for non-originalist construction. This is an enormous empirical burden and one that proves too great for McGinnis and Rappaport to carry.[17]

CONSTITUTIONS AND INTERPRETATIONS AT THE TIME OF THE FOUNDING

As historians of the period know, there were multitudinous and often contradictory methods of interpretation in play at the time of the Founding.[18] This was particularly true when it came to interpreting the new federal Constitution. The ratification debates pitted one set of interpretive methods against another as anti-federalists raised alarms and federalists attempted to put out political fires.[19] These debates continued after ratification, with one side pulling for a broad interpretation of national power, and the other calling for what became known as "strict construction" in order to maintain the remnant sovereign autonomy of the states.

Here is just one historical example. The text of Article III declares that "the judicial power shall extend . . . to

17. Arguably, McGinnis and Rappaport concede this burden. At one point, they state that "determining the meaning of language requires reference to the interpretive rules and methods that were deemed applicable to the Constitution at the time it was enacted" (p. 118). Also, "[i]t is our position that originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution" (p. 119). And again, "[o]riginal public meaning also leads to original methods because an informed and reasonable speaker of the language would have understood the Constitution to be subject to the interpretive rules applicable to such a document" (p. 121).

18. *See generally* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

19. For a fine recent discussion of the ratification debates, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010).

controversies . . . between a State and citizens of another State."[20] Depending on one's interpretive method, this text may, or may not, authorize suits for money damages brought by individual citizens against a non-consenting state. Read "liberally,"[21] the text would include all controversies between a state and a citizen of another state, including suits for money damages.[22] If, however, one were to apply the interpretive method of "strict construction,"[23] then Article III would authorize only those suits in which the state was the plaintiff or had otherwise consented to being sued. Both "liberal" and "strict" methods of interpretation had their advocates at the time of the Founding, and it is not at all clear that a supermajority expressly embraced one or the other when they adopted Article III (along with the rest of the Constitution).

When the subject came up during the ratification debates, Federalists promised the state ratifying conventions that the text of Article III would not be construed to allow individual suits for money damages against the states. Alexander Hamilton, James Madison, James Iredell, Rufus King, John Marshall, and others assured the conventions that delegated power would be strictly construed to avoid just such a result.[24] Despite these assurances, in *Chisholm v. Georgia* the Supreme Court ruled 4-1 in favor of state suability.[25] The state legislatures responded to the majority opinion in *Chisholm* by quickly adopting the Eleventh Amendment, an amendment St. George Tucker described as correcting an erroneous interpretation of the Constitution.[26] John Marshall disagreed with Tucker on that point,[27] but the disagreement just illustrates the problem: perceiving the Eleventh

20. U.S. CONST. art. III, §2.

21. *See* Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 105 (Harold C. Syrett, et al., eds., 1961–87).

22. *See* Chisholm v. Georgia, 2 U.S. 419 (1793).

23. *See id.* at 429 (opinion of Iredell, J.). *See also* ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., The Lawbook Exchange 2006) (1803).

24. For a detailed discussion of Federalist assurances about strict construction of Article III, see Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1599 (2009).

25. *See Chisholm*, 2 U.S. 419 (1793).

26. *See* Lash, *supra* note 24, at 1683–85, 1685 n.569.

27. *See id*. at 1678; *see also* Cohens v. Virginia, 19 U.S. 264, 406 (1821).

Amendment as restoring or amending the original meaning of Article III depended on one's method of interpretation.

If we had clear evidence that a supermajority of the framers or ratifiers embraced one method over the other, then this would justify judicial application of that method. Unfortunately, we have nothing near this level of evidence from the extant historical materials. At most, we have broad agreement that states would retain their sovereign status following the adoption of the Constitution, and this *might* imply something like a "strict construction" approach to texts like Article III.[28] But even this point remained under significant dispute for decades—indeed, to this very day.

McGinnis and Rappaport are correct that the original framers and ratifiers likely assumed that judges would apply *some* method of interpretation in their liquidation of textual meaning.[29] But, again, this merely establishes the rather unhelpful point that the Founding generation broadly agreed that judging sometimes, in some cases, involved the application of some kind of interpretive method. For McGinnis and Rappaport to succeed, they must go beyond this general point and show that a supermajority of the framers or ratifiers embraced one or more *particular* methods of interpretation for the *particular* texts of our *particular* Constitution. Absent such evidence, a judge's choice of interpretive method will not be guided by supermajoritarian agreement, but by her normative theory of constitutional law. But this is precisely the kind of non-originalist normative choice that McGinnis and Rappaport reject.

Perhaps recognizing the impossible task of proving express ratifier reliance on specific rules of construction, McGinnis and Rappaport suggest that a supermajority of the framers and ratifiers can be presumed to have accepted the interpretive rules of common law explicated in treatises such as Blackstone's *Commentaries* (p. 135). Historical scholars of the period would never accept such a presumption. Despite the continued influence of the common law in general, and Blackstone's *Commentaries* in particular, the same generation that adopted the Constitution also challenged the uncritical acceptance of English common law. American legal theorists at the time of the Founding increasingly

28. *See* Lash, *supra* note 24, at 1685–91.

29. *See* p. 129 ("[T]here is strong evidence that the constitutional enactors would have assumed that the interpretive rules that applied to all legal documents would also apply to the Constitution. These rules were applied generally to legal documents, and it is hard to believe that they would not have been applied to the Constitution").

believed that many of the legal and interpretive rules of the common law were rooted in an ancient system of hereditary sovereigns.[30] To these reformers, many common law rules either had to be abandoned or significantly modified in a legal system based on the sovereignty of the people.

For example, St. George Tucker's 1803 edition of Blackstone's *Commentaries* was a hugely successful and influential effort to "translate" the rules of English common law so that they made better sense for a people whose legal system presumed the ultimate sovereignty of the people themselves.[31] The United States was not just a new and independent legal entity, the country and its citizens had operationalized a new legal theory. The status of the government and the role of its courts were different on American soil, rendering problematic any wholesale adoption of Blackstonian common law. As historian Davison Douglas writes:

> While serving as a law professor at The College of William and Mary during the 1790s, Tucker had his students read Blackstone, but he supplemented that reading with lectures in which he analyzed the ways that law in the United States—and specifically Virginia—had departed from English legal principles as a result of the American Revolution, the Virginia Constitution, and the United States Constitution. These lectures were "the first systematic effort by any figure in American law to describe the contours of the new system created by the amended Constitution." Drawing extensively on his William and Mary lectures, Tucker's *Blackstone* included eight hundred pages of essays on a variety of legal and political topics and more than one thousand footnotes in which Tucker examined Blackstone in light of American and Virginian law. Tucker worried about the effect Blackstone's Tory sensibilities

30. For a discussion of Founding-era resistance to Blackstone and unreconstructed principles of common law, see Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POLITICS 189, 297–99 nn.565–66 (2013).

31. According to Tucker,"[T]he American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. . . . The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds . ... This memorable precedent . . . led the way to that instrument, by which the union of the confederated states has since been completed, and in which, as we shall hereafter endeavor to sh[o]w, the sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE." TUCKER, *supra* note 23, Appendix A.

> might have on his students. He thus emphasized to his students that the American Revolution and its aftermath had produced a revolution "not only in the principles of our government," but in a variety of legal principles, such as the law of inheritance, that reflected the new nation's republican values and that rendered Blackstone an unreliable guide to certain aspects of American law.[32]

St. George Tucker's "translation" of Blackstone found an eager audience. Again, according to Douglas,

> Tucker's *Blackstone,* the first major legal treatise on American law, was one of the most influential legal works of the early nineteenth century and the most comprehensive treatise on American constitutional law until around 1820. Not surprisingly, it was also one of the legal texts most frequently cited by the United States Supreme Court and relied upon by lawyers appearing before the Court during the first few decades of the nineteenth century.[33]

The point here is not that the country had completely abandoned Blackstone and the methods of the common law—the very success of Tucker's "translation" shows they had not. But that same success indicates that one cannot rely on long-standing usage at common law as a proxy for supermajoritarian-level acceptance at the time of the Founding. Although McGinnis and Rapport cite examples of historical figures who followed some common law rules (p. 136), they do not undertake a fine-grained, time-specific analysis of the common law in the United States in 1787. Had they done so, they likely would have noticed the rules were undergoing both challenge and change, to a degree fatal to any claim that the rules were so widely known and accepted that we can presume they were baked into the constitutional text.

The problem of evolving legal principles at the time of the Founding is especially salient in determining the appropriate methods for interpreting the text of the federal Constitution. At one point, McGinnis and Rappaport insist that the "the reader of the US Constitution would recognize that its meaning depends on interpretive rules that were generally deemed applicable to written constitutions of this type" (p. 124). Contra McGinnis and Rappaport, however, there *were no* other written constitutions of "this type." The very idea of a written, judicially enforceable

32. Davison Douglas, *Forward: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1113–14 (2006) (citations omitted).

33. *Id*. at 1114.

constitution was something new under the sun in post-Revolutionary America. As the theory of popular sovereignty established itself in post-Revolutionary America, the legitimacy of state constitutions adopted by anyone other than "the people themselves" came under fire, with Massachusetts being among the first to submit the document for popular ratification.[34] Even if the theory of written and enforceable state constitutions had remained static in the thirteen years between the Revolution and the Founding (which it did not), it is hard to imagine how "methods of interpretation" in such a short time could have evolved and established themselves *across every state* to such a degree as becoming part of the meaning of the federal Constitution.

The authors also maintain that the same supermajority that adopted the Constitution would have also presumed that the same methods of interpretation currently applied to state constitutions also would apply to the federal Constitution. As they put it:

> A strong case can also be made that the enactors would have assumed that many of the interpretive rules applied to state constitutions would be applied to the federal Constitution. As the use of the term *constitution* suggests, the enactors modeled the federal constitution on the preexisting state constitutions. While the federal Constitution differed in some respects from the state constitutions, these differences are more political than legal (p. 129).

This assertion is even more problematic than the assumed reliance on Blackstonian common law. If we know anything about the rules of interpretation in play at the time of the Founding, we know that the proponents of the Constitution *rejected* this very argument. As Federalists repeatedly pointed out, the structure and theory of the federal Constitution fundamentally differed from that informing the constitutions of the several states.[35] The

34. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 339–41 (1969).

35. The distinction between proper interpretation of state constitutions and the federal constitution was key to justifying the omission of a Bill of Rights from the original proposed Constitution. Where the interpretation of state constitutions presumed unenumerated police powers (thus the need for express restrictions in the form of a Bill of Rights), the federal Constitution operated under an assumed reservation of non-delegated powers (thus no need to protect subjects not expressly placed in the hands of the national government). As James Wilson explained in his famous Statehouse Speech, "It will be proper . . . to mark the leading discrimination between the state constitutions and the Constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question,

provisions of state constitutions presumed a government of general (unenumerated) power. Limiting the powers of such governments required particular restrictions such as those found in a written Declaration of Rights. Absent such restrictions, state governments were presumed to have power to enact any legislation that furthered the health, welfare, or morals of the community.

The federal Constitution, on the other hand, reflected a very different theory of constitutional power. When anti-federalists objected to the omission of a Declaration (or Bill) of Rights, the Federalists denied that any such Bill was necessary: the federal Constitution was *not* the same kind of legal document as state constitutions and it required different rules of constitutional interpretation. Powers were presumed retained unless expressly delegated. As no power over speech or fundamental rights had been delegated, there was no need to expressly deny such powers through the addition of an enumerated list of retained rights. Indeed, adding a Bill of Rights created the *danger* that the federal Constitution would be interpreted the same way as state constitutions, allowing federal authority to fill in any area not placed expressly off-limits by a Bill of Rights.[36] Although

respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved. . . . In truth then, the proposed system possesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject -- nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent." James Wilson, *Speech in the State House Yard* (Oct. 6, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (Merrill Jensen ed., 1976). Wilson's Statehouse Speech and his explanation regarding the omission of the Bill of Rights were extremely influential during the ratification debates. *See* MAIER, RATIFICATION, *supra* note 19, at 77–82.

36. Wilson's distinction between interpretation of state and federal constitutions was repeated by other federalists throughout the ratification debates. *See* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 140–41 (1827) (reporting the remarks of Archibald Maclaine before the North Carolina convention on July 28, 1788) ("[T]he powers of Congress are expressly defined; and the very definition of them is as valid and efficacious a check as a bill of rights could be, without the dangerous implication of a bill of rights. The powers of Congress are limited and enumerated. . . . It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them."); *id.* at 142 (reporting the statement of Samuel Johnston before the North Carolina convention on July 22, 1788) ("A bill of rights may be necessary in a monarchical government, whose powers are undefined. . . .The Congress cannot assume any other powers than those expressly given them."). As James Iredell explained in the North Carolina Ratifying

McGinnis and Rappaport point to the dispute over the Bill of Rights as evidence that there *were* agreed upon methods of interpretation (p. 127), that particular debate illustrates why we cannot assume that a supermajority of the Founders believed that the interpretative methods applicable to the state constitutions also applied to the federal Constitution.

Even more problematically, the debate over the Bill of Rights brings into sharp relief the fact that there *were no* pre-existing methods of interpretation applicable to a "federal" Constitution—no such constitution had ever existed. The American experiment with constitutionally entrenched federalism brought forth something new under the sun, and it required the development of new legal principles to deal with the inevitable competing claims of state and national governments. There simply was nothing in the annals of English common law, or even American state constitutional law, that provided methodological guidance to courts faced with a politically entrenched division of sovereign authority.[37]

This lack of historical interpretive models left the Founding generation to their own devices in constructing the proper rules of constitutional interpretation. Not surprisingly, nationalists such as Alexander Hamilton and John Marshall insisted that the federal Constitution should be interpreted in a manner that best advanced the perceived needs of a single national People. This approach encouraged a broad interpretation of national power in order to avoid unanticipated "gaps" in regulatory authority—gaps that could not be filled by the people themselves (since they

Convention, "Thus a bill of rights might operate as a snare rather than a protection. If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous." *Id*. at 149.

37. As James Madison explained, "It has been too much the case in expounding the Constitution of the U.S. that its meaning has been sought not in its peculiar and unprecedented modifications of Power; but by viewing it, some through the medium of a simple Govt. others thru' that of a mere League of Govts. It is neither the one nor the other; but essentially different from both. It must consequently be its own interpreter. No other Government can furnish a key to its true character. Other Government present an individual & indivisible sovereignty. The Constitution of the U.S. divides the sovereignty; the portion surrendered by the States, composing the federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere." James Madison to Nicholas P. Trist (Feb. 15, 1830), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 239 (Philip B. Kurland & Ralph P. Lerner eds. 1987).

lacked any politically operational existence outside of convention) and which might soon make of the Constitution an unhelpful if "splendid bauble." As Hamilton put it in his 1791 defense of the proposed national bank:

> [T]he powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence, etc. ought to be construed liberally, in advancement of the public good. This rule does not depend on the particular form of a government or on the particular demarkation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity that there must, of necessity be great latitude of discretion in the selection and application of those means. Hence consequently, the necessity and propriety of exercising the authorities intrusted to a government, on principles of liberal construction.[38]

Notice that Hamilton's method of "liberal construction" is derived from a theory of constitutional government in general, not from the U.S. Constitution in particular. According to Hamilton, all constitutions should be liberally construed in order to cover all possible contingencies and best advance the public good. And however broadly state constitutions were construed, the federal constitution should receive at least as broad a construction (if not more so) because of all "the variety and extent of public exigencies, a far greater proportion of which, and far more critical kind, are objects of national, than of State administration."[39] Here, Hamilton leaves behind his pre-ratification argument in the *Federalist Papers* that the theory of the federal Constitution required a far more circumscribed interpretation of power than that afforded to state constitutions.[40]

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38. Alexander Hamilton, *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank*, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 95, 98–99 (M. St. Clair Clarke & D.A. Hall eds., Gales & Seaton 1832).

39. *Id*. at 99.

40. Prior to ratification of the Constitution, Hamilton had written:

> But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is that both of them contain all which, in relation to their objects, is

If anything, Hamilton now tilts towards the idea that the federal Constitution ought to be construed more broadly than state constitutions.

Washington's Attorney General Edmund Randolph rejected Hamilton's method of interpretation on the grounds that it failed to account for the particular context of the United States Constitution. According to Randolph:

> Governments having no written constitution may, perhaps, claim a latitude of power not always easy to be determined. Those which have written constitutions are circumscribed by a just interpretation of the words contained in them. Nay, farther; a legislature, instituted even by a written constitution, but without a special demarkation of powers, may, perhaps, be presumed to be left at large, as to all authority which is communicable by the people . . . Essentially otherwise is the condition of a legislature whose powers are described. An example of the former is in the State Legislatures; of the latter, in the Legislature of the Federal Government, the characteristic of which has been confessed by Congress, in the twelfth amendment, to be, that it claims no powers which are not delegated to it. . . . [W]hen we compare the modes of construing a State and the Federal constitution, we are admonished to be stricter with regard to the latter, because there is a greater danger of error in defining partial, than general powers.[41]

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reasonably to be desired.

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights. THE FEDERALIST NO. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed.,1961).

41. Edmund Randolph, *Opinion of Edmund Randolph, Attorney General of the United States, to President Washington*, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA, *supra* note 38, at 86–87.

Randolph placed the U. S. Constitution in a particular historical context, having been brought into being by pre-existing state governments of general police powers and agreed to only because the national government would be one of limited *particular* powers. Not all constitutions were alike, and different constitutions called for different methods and rules of interpretation. Hamilton was simply wrong (or purposefully obtuse) to suggest that the methods of interpreting state Constitutions also applied to the historically unique federal Constitution. Nor was this post-hoc spin: Randolph made the same point during the Virginia Ratifying Convention:

> Now is there not a demonstrable difference between the principle of the State Government and the General Government? There is not a word said in the state government of the powers given to it, because they are general. But in the general Constitution, its powers are enumerated. Is it not then fairly deducible, that it has no power but what is expressly given it? For if its powers were to be general, an enumeration would be needless.[42]

James Madison agreed with Randolph that the peculiar circumstances giving rise to the federal Constitution called for different interpretations of federal and state constitutional powers. According to Madison, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[43] Similarly, in a speech delivered prior to the adoption of the Bill of Rights, Madison reminded the House of Representatives that the ratifiers were promised a narrow construction of federal constitutional power—a "rule of construction" arising out of the nature of the document itself.[44]

The competing interpretive strategies of Founders like Hamilton and Madison famously clashed in the debates over the Bank of the United States. Faced with disagreeing advisors, President Washington chose Hamilton over Madison. The former General, of course, shared the nationalist instincts of military colleagues like Hamilton and Marshall, and later sided with them

42. Edmund Randolph, *Edmund Randolph in the Virginia Ratifying Convention (June 17, 1788)*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1348 (John Kaminsk, Gaspare Salidino, et al. eds., 1993).

43. THE FEDERALIST NO. 45, *supra* note 40, at 292.

44. JAMES MADISON, *Speech Opposing the Bank of the United States (June 8, 1789)*, *in* JAMES MADISON: WRITINGS 482, 489 (Jack N. Rakove ed., 1999).

in support of federal power to pass the Alien and Sedition Acts.[45] Rejected by an electorate convinced they had overplayed their regulatory hand, the Federalists lost control of the political branches in the elections of 1800. This left the judiciary the last redoubt for Founding-era nationalism and John Marshall made the most of it with decisions like *McCulloch v. Maryland*[46] and *Gibbons v. Ogden*.[47] What we tend to forget, however, is how controversial those decisions were when first handed down. James Madison, for example, rejected Marshall's reasoning in *McCulloch v. Maryland*,[48] and the Chief Justice found himself having to defend his opinion in a series of anonymous essays.[49]

This is not to suggest that one side or the other in the Bank debate had the better interpretive theory—at least not here.[50] Instead, this brief sketch of Founding-era interpretive debates is meant to illustrate how problematic it is to assert, as do McGinnis and Rappapport, that supermajoritarian agreement on "original interpretive methods" can fully close the gap between textual meaning and judicial construction.

CONCLUSION

Originalism and the Good Constitution is an excellent book that both defends originalism (properly done) and presents a wealth of evidence indicating that sometimes and in some ways legal texts originally were read through the lens of interpretive methodology. This alone makes for a valuable contribution to legal historical literature. What the authors fail to recognize, however, is that the proper methods of constitutional interpretation were not only under-resolved at the time of the Founding, they were the subject of heated and on-going debate. McGinnis and Rappaport have given us good reason to strive for supermajoritarian agreement whenever possible, and good reason to preserve that agreement until it is superseded by another

45. For a discussion of George Washington's role in disseminating defenses of the Alien and Sedition Acts, see Kurt Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435 (2007).

46. McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819).

47. Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824).

48. JAMES MADISON, *Detached Memoranda*, *in* JAMES MADISON: WRITINGS, *supra* note 44, at 745, 754–56.

49. *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).

50. *But see* KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009) (presenting historical evidence strongly suggesting that Madison had the more accurate understanding of the original meaning of federal power).

"speaking of the people." Methodism cannot, however, give us agreement where none existed. Different founders proposed different methods of constitutional construction, each reflecting a different normative theory of the new federal Constitution.[51] This dispute cannot be resolved by fiat application of interpretive methodology or recourse to an anachronistic reliance on the common law; it requires the application of normative theory. This is not the result of a temporary gap in our historical knowledge. It is history itself that tells us that originalism cannot go all the way down.

51. No doubt, some theories were more in step with the ratifiers' understanding than others. In fact, I believe it may be possible to establish something like original supermajoritarian acceptance of normative political theories such as popular sovereignty. But even so, the implications this would have for proper interpretation of the Constitution depends on the application of normative theory (in this case, popular sovereignty), and not an application of original textual meaning.