

**NEW YORK
LAW SCHOOL**

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 55

Issue 4 *Media and Criminal Law: Fact, Fiction,
and Reality TV*

Article 6

January 2011

The Constitution as an Exploding Cigar and Other “Historian’s Heresies” About a Constitutional Orthodoxy

R.B. Bernstein
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Constitutional Law Commons](#), [Legal History Commons](#), [Legal Writing and Research Commons](#), and the [Legislation Commons](#)

Recommended Citation

R.B. Bernstein, *The Constitution as an Exploding Cigar and Other “Historian’s Heresies” About a Constitutional Orthodoxy*, 55 N.Y.L. SCH. L. REV. 1073 (2010-2011).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

R.B. BERNSTEIN

The Constitution as an Exploding Cigar and Other “Historian’s Heresies” About a Constitutional Orthodoxy

ABOUT THE AUTHOR: Distinguished Adjunct Professor of Law, New York Law School. This article is a revised, expanded, and annotated version of a lecture that I have given in various forms and at various places, most recently at Worcester Polytechnic Institute (WPI), in Worcester, Massachusetts, on September 16, 2010, to commemorate Constitution Day, and at New Jersey Institute of Technology (NJIT) on February 14, 2011. I thank Professor Steven C. Bullock for inviting me to WPI and presiding over my visit with collegial generosity, and also his colleagues, especially Professor Kent Rissmiller. I also thank George Athan Billias, professor emeritus of history at Clark University, and his wife, Margaret (a distinguished literary historian), for their constant encouragement and for their hospitality. I also thank Professor Gautham Rao of NJIT for inviting me to give this lecture and for all his kindness and aid connected with my visit. I thank many other friends and colleagues, including Sir Michael Howard for his generous assistance to a scholar in a distant field; Professor Charles L. Zelden of Nova Southeastern University; Professor Joanne B. Freeman of Yale University; Professor Carla Spivack of Oklahoma City University Law School (where I gave an early version of this article as a faculty presentation); Marian Angeles Ahumada Ruiz of the Center for Political and Constitutional Studies in Madrid, Spain; Nancy C. Toff and Sonia Tycko of Oxford University Press; Ronald H. Blumer and Muffie Meyer, documentary film-makers *extraordinaires*; Phillip A. Haultcoeur; Marilee B. Huntoon; Natalie C. Brown; and April Holder. I dedicate this article to my beloved friend, Marilee B. Huntoon.

I. INTRODUCTION

This article examines several consequences of the events that we commemorate each Constitution Day. “We the People of the United States” govern ourselves under a document framed by a specific group of politicians in a specific place at a specific time—the Federal Convention in Philadelphia, from May to September 1787. The document was signed on September 17, 1787, a date we have come to call Constitution Day.¹ We have extensive documentation of what went on in the Convention; as a result, we *think* we have sound, reliable guidance from the Constitution’s architects about how to interpret it properly. In light of that belief, and of the recognized need for some restraint on constitutional interpretation to prevent “freewheeling judges” from reading into the Constitution’s text whatever they want to find there, many legal scholars find comfort in our new constitutional orthodoxy: the jurisprudence of originalism.²

Long ago, I lost my faith in that orthodoxy—and the reasons that I lost my faith are rooted in my professional identity as a historian masquerading as a law professor. Historians who study the Founding Period regularly wrestle with problems of evidence and with problems of historical, political, and intellectual context that most legal scholars do not bother to consider. By contrast, especially after the recent gun-rights decisions handed down by the U.S. Supreme Court,³ we have heard various proclamations, based on the use of originalist methods in both the majority and the minority opinions in those cases, that “we are all originalists now.”⁴ I reject that claim, and I hope to show you why.

-
1. For a discussion of the Constitution’s origins in the Federal Convention of 1787, see generally RICHARD R. BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE CONSTITUTION* (2009); CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* (2002); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* (1913); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* (W.W. Norton & Co. 1987) (1966). For two studies expanding the interpretive context beyond the actual events of the Convention, see RICHARD B. BERNSTEIN WITH KYM S. RICE, *ARE WE TO BE A NATION?: THE MAKING OF THE CONSTITUTION* (1987) and JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).
 2. The literature on this topic is immense. For a summary sketch of originalism, its history, and the issues it raises, see R.B. BERNSTEIN, *THE FOUNDING FATHERS RECONSIDERED* 143–67 (2009). *See also* ALAN GIBSON, *INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDING OF THE AMERICAN REPUBLIC* (2d ed. 2010); ALAN GIBSON, *UNDERSTANDING THE FOUNDING: THE CRUCIAL QUESTIONS* (2d ed. 2010); DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005); *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990); JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* (2007).
 3. *See* *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).
 4. Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUM. EVENTS, June 27, 2008, <http://www.humanevents.com/article.php?id=27229> (“At least in terms of the Second Amendment, we are all originalists now.”).

In Part II, I address the contextual frameworks, both intellectual and technological, that shape our interpretations of the Constitution. In Part III, I discuss the “Absent Founders,” individuals who are relevant to the Constitution’s origins but are often overlooked in the search for original intent. In Part IV, I explore the consequences for originalism of rapid constitutional change during the Revolutionary Era. In Part V, I explain how the case of the exploding cigar, or examples of problems in how the Constitution operated, caused the Founders’ expectations, understandings, and intentions to blow up in their faces. Finally, in Part VI, I offer some tentative conclusions about the consequences of these historian’s heresies for the enterprise of constitutional interpretation.

First, I offer a quick explanation of what is going on in this controversy. In the Constitution, we have a text—4000 words framed by the delegates to the Federal Convention between May and September of 1787, and 4000 words of amendments added to the document between 1791 and 1992. In some cases, the Constitution’s text disposes of an issue—for example, a thirty-year-old cannot run for President because Article II of the Constitution sets the minimum age for President at thirty-five.⁵ But when we turn to other issues for which we can read words of the Constitution (and the Bill of Rights) to have a range of meanings, then we have a problem. Some examples of these issues are:

- What does it mean to “declare War”?⁶ What are the powers of the President as commander-in-chief of the armed forces of the United States? Can the President commit us to war without Congress declaring war?⁷
- What is an impeachable offense? In particular, we know what treason and bribery are, but what are “high Crimes and Misdemeanors”?⁸ Did President Bill Clinton’s conduct with Monica Lewinsky amount to “high crimes and misdemeanors” warranting his impeachment?⁹

5. U.S. CONST. art. II, § 1, cl. 4.

6. *Id.* art. I, § 8, cl. 11.

7. *See, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (discussing the Vietnam War and the role of the President and Congress in declaring war); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989) (discussing the Vietnam War and instances of Presidents committing “acts of war” without congressional authorization).

8. U.S. CONST. art. II, § 4.

9. *See generally* EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 268–74 (1999) (discussing the Clinton-Lewinsky scandal and its effect on the impeachment proceedings against President Clinton).

THE CONSTITUTION AS AN EXPLODING CIGAR

- What is “Commerce . . . among the several States”?¹⁰ How far does congressional power over interstate commerce extend?¹¹

It is in such cases, with words rich in competing meanings, that we must come up with a sound way of interpreting the Constitution. Sometimes the text’s plain meaning does not get us anywhere. At such times, we wonder what a judge will do with the text of the Constitution. Can we leash the judge so that he or she does not run all over the place, making law—by which critics of judges mean “making up law”? We trust judges with some discretion, some leeway—but how much leeway is safe and how much discretion lets unelected judges rewrite our Constitution to mean whatever they want it to mean?

In the past quarter-century, the answer we increasingly hear is that the best way to leash federal judges is to make them conform to the intentions, understandings, or meanings of the Founding Fathers as to what the Constitution meant at the time of its framing and adoption. The argument that originalists make is that history will anchor the judges, because history will give clear answers to these loaded questions, and the judges on the leash of history will never run wild again.¹²

One central purpose of this article is to declare that this well-meant remedy is no remedy at all. Rather than leashing judges, it lets them run wild in different ways, producing both bad law and bad history, while assuring us that they are doing what they are doing only because the Founding Fathers intended, understood, or meant the Constitution to let them do what they are doing.

Over the past few decades, we have seen an outpouring not only of originalist judicial opinions, from the Supreme Court on down, but also of originalist scholarship by law professors who take on the role of historian to assemble evidence for one or another reading of the Constitution based on originalist methods. This originalist scholarship or jurisprudence always sounds the same. It begins with a paragraph like this one (which I have made up out of whole cloth):

The Framers of the Constitution first considered the question of combing the hair of Senators on June 10. Roger Sherman of Connecticut stated that he “did not see the necessity of it. Senators would be able to comb their own hair as they saw fit.” James Madison of Virginia observed that “the question of combing hair was one posing critical questions of differences among the several states, and it would be prudent not to prescribe a general rule that would give offense.” Gouverneur Morris of Pennsylvania added, “In the Roman Senate, the Senators combed their own hair, but it was not so in the councils of the Athenian League.” Against this emerging consensus, Charles Pinckney of South Carolina warned, “We should not be guided merely by questions of prudence, nor fear of controversy, nor the lessons of the past. We are Americans and we must devise an American answer to this problem, or Europe will laugh

10. U.S. CONST. art. I, § 8, cl. 3.

11. See, e.g., EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936); FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

12. See Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 9–11 (1988).

at us for continuing to imitate them.” At this point, Benjamin Franklin recommended that prayers be said in the Convention. As Madison later wrote, “His proposal was respected by many but supported by none.” General Washington put the question, and the delegates agreed unanimously to drop the clause about combing Senatorial hair from the committee report. Pinckney revived the question on July 6. At that time

I exaggerate only a little. Note how my imagined paragraph paraphrases our principal source for what the Federal Convention did, James Madison’s *Notes of Debates in the Federal Convention of 1787*,¹³ presenting disinterested Framers (with a capital “F”) as articulating abstract, well-considered views. Note how it ignores the Convention’s internal politics, the disagreements among various factions, and so forth. Such accounts, presenting the Convention as a quasi-academic meeting hermetically sealed in a timeless vacuum, treat the evidence of original intent, such as it is, as scripture requiring expounding rather than as historical evidence requiring interpretation and understanding.

And let us not even begin to probe the problem of the Constitution’s status when the delegates signed it on September 17, 1787. It was only a proposal, and awaited the action of the people’s representatives in the thirteen state ratifying conventions that would meet from the fall of 1787 through the summer of 1788, with the last two, North Carolina and Rhode Island, catching up with their peers in November 1789 and May 1790, respectively.¹⁴ Ratification generated a vast polemical literature for and against the proposed Constitution, which had to wait until 1976 for documentation in a definitive scholarly edition still underway,¹⁵ and had to wait until 2010 for a comprehensive history.¹⁶

Many historians have examined the legion of evidentiary problems with originalist jurisprudence—a subject that, historians hope (with little reason for hope), will catch the attention of originalist judges and legal scholars.¹⁷ I focus instead on “historian’s heresies”—issues that illuminate the complicated relationship between history and constitutional interpretation.

First, I want to address a threshold definitional question—sorting out what originalism means to those who call themselves originalists. There are three flavors

13. 1–4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966).

14. See generally PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010); see also *infra* note 15.

15. 1–10 & 13–23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 1976–2005). Twenty-one of a projected twenty-nine volumes have been published to date. For an excellent selected edition based on *The Documentary History of the Ratification of the Constitution*, see 1–2 THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993).

16. See, e.g., MAIER, *supra* note 14.

17. For a valuable array of conflicting views, see, for example, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 2; James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986), reprinted in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 2, at 151.

of originalism.¹⁸ *Original intent* means the specific opinion and hopes of those whom we usually call the Founding Fathers—but here I call them the “Founding Guys” to counter the clouds of incense usually accompanying references to the Founding Fathers—about what they wanted the Constitution or a given constitutional provision to do.¹⁹ *Original understanding* means what the Founding Guys would say if, while they had their heads under the hood of the Constitution, you asked them what they understood the work they were doing to be; they might not have specific intentions that answer your question, but they would come up with an answer for you about how they understood the Constitution or a given constitutional provision would work. Finally, *original meaning* denotes the answer you would receive if you were to go into the streets of Philadelphia, New York, Boston, or Charleston in 1787–1788 with a copy of the Constitution in one hand and a reliable eighteenth-century dictionary in the other hand and ask a typical intelligent citizen what he thinks the Constitution or a given constitutional provision might mean. Justice Antonin Scalia, often cited as a leading originalist, puts himself in that last category, calling himself a “plain-meaning” interpreter of the Constitution, focusing on the plain meaning of the document as of the time of its framing and ratification.²⁰ But he forgets that it is highly possible for different people to reach different conclusions about the same constitutional language and what it supposedly meant more than two centuries ago—as the Founding Guys themselves discovered more than once.

This seeming digression brings me to my first historian’s heresy about the constitutional orthodoxy of originalism.

II. THE CASE OF THE MISSING CONTEXTUAL FRAMEWORKS

We know that the Founding was a long time ago, but we must look more closely at the significance of the gap separating past and present for the enterprise of interpreting the Constitution in the light of history. This question has two aspects: intellectual and technological.

A. Intellectual Context

We are all prisoners of the intellectual world in which we were born, raised, educated, and trained. We see the world through our era’s conceptual lenses. Our assumptions, values, concerns, and crises inevitably distort our perceptions of the past, and we must adjust for those biases. When examining the Constitution’s origins,

18. See RAKOVE, *supra* note 1, at 7–8.

19. For a discussion of the origins and meanings of the term “Founding Fathers,” see BERNSTEIN, *supra* note 2, at 3–11. The phrase “Founding Guys” is the coinage of professor Joanne B. Freeman of Yale University.

20. See, e.g., RALPH A. ROSSUM, *ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION passim* (2006); see also *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3* (Amy Gutmann ed., 1997) (providing an essay by Justice Scalia and various critical essays).

we must make a painful effort to understand the intellectual world of the Founding Guys—to grasp their concerns, not ours.²¹

They worried about the strengths and weaknesses of republican government—and they were haunted by specters of luxury, corruption, and other threats to civic virtue, the constellation of ideas, attitudes, and behaviors that preserved republican government. They did not trust democracy (which they defined as direct democracy, like a New England town meeting). They were all too aware that most of the world's nation-states were monarchies. They were engaged deeply with the classical world, seeing themselves as successors to the Greek democracies and Republican Rome.²² Douglass Adair, one of the greatest scholars of this period, warned:

I . . . hold[] that the experience of each of us draws a circle of wider or narrower dimensions around each of us, and that our freedom of choice and options of necessity take place within this circle. . . . [T]he “area” of experience that I have been most fascinated in for our eighteenth century friends is the realm of symbolic experience—their reading, their formal college training, etc.—which I feel structured and determined to a significant degree the physical world they saw with their eyes, or didn't see. . . . It is my own feeling that we really can't break into the eighteenth century semi-closed circle that determined their meaning and expectations when they talked about the limits and possibilities of politics and social organization.²³

Sadly, most originalist interpreters of the Constitution are unaware or heedless of Adair's concerns.

21. See generally DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS passim* (Trevor Colbourn ed., Liberty Fund, Inc. 1998) (1974); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1992); BERNSTEIN, *supra* note 1, *passim*; BERNSTEIN, *supra* note 2, at 12–114; HENRY STEELE COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* (1977) [hereinafter COMMAGER, *THE EMPIRE OF REASON*]; HENRY STEELE COMMAGER, *JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT* (1975); ROBERT A. FERGUSON, *THE AMERICAN ENLIGHTENMENT, 1750–1820* (paperback ed. 1997) [hereinafter FERGUSON, *THE AMERICAN ENLIGHTENMENT*]; ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC* (paperback ed. 2006); HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (2d ed. 2003); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (Univ. of N.C. Press 1998) (1969).

22. On the intellectual context of the origins of the Constitution, see, for example, DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* (2008); BERNSTEIN, *supra* note 1, at 111–48; BERNSTEIN, *supra* note 2, at 12–38; COMMAGER, *THE EMPIRE OF REASON*, *supra* note 21; FERGUSON, *THE AMERICAN ENLIGHTENMENT*, *supra* note 21; DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1988); MAY, *supra* note 21; MEYER REINHOLD, *CLASSICA AMERICANA: THE GREEK AND ROMAN HERITAGE IN THE UNITED STATES* (1984); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* (1994).

23. ADAIR, *supra* note 21, at xiv–xv.

B. Technological Context

Just as we are prisoners of our own intellectual world, we are prisoners of our own technological world.²⁴ Law students often must be instructed to use books and libraries rather than the Internet or online databases for research. Sometimes we find it hard to imagine a world without cellular phones or laptop computers. By contrast, in the era of the making of the Constitution, information and power could travel no faster than a man could run, a horse could gallop, or a ship could sail—and the most valuable information was set forth in books.

These facts transform our understanding not only of the world of the Founding Guys, but also of the constitutional arrangements they created for that world. For example, they had time for deliberation on such issues as war and peace. A president could not set a war in motion with a phone call or the push of a button, communicating instantaneously with a technologically advanced army, navy, and air force. As a result, our constitutional mechanisms for dealing with issues of war and peace are grounded in eighteenth-century technological assumptions that fit uncomfortably with the modern exigencies of nuclear war, global terrorism, sudden attacks requiring immediate retribution, and the like.²⁵

Further, when in *The Federalist No. 10* Madison argued that the extended republic was a bulwark against the disease of faction, he based his case on his assumption that the United States was too big for factions to combine across state lines.²⁶ In Madison's world, factions faced the same speed limits on transportation and communication that governments faced. By contrast, today's factions can easily coordinate their operations across state lines—by phone, by FedEx, or by e-mail—undermining the case for Madison's extended republic.

Finally, consider the question that plagued many of us after September 11, 2001, one that still crops up today: What would the Founding Guys have made of 9/11? My historian's answer is that they would have had a collective nervous breakdown. For example, they could not have grasped the scale of the world of 2001, which was much larger than their world. In particular, when the largest cities they knew, London and Paris, had populations of about 900,000 and 600,000, respectively, they could not imagine New York City's population today of eight million people.²⁷ Also, though they might have foreseen flying machines, they could not imagine an airliner

24. These paragraphs apply to constitutional history and law. For a broader discussion, see JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 9–11* (1950). The great legal historian James Willard Hurst first articulated the need to write the history of American law with attention to its technological context. *See id.*

25. *See generally* ELY, *supra* note 7, *passim*; *see also* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

26. *THE FEDERALIST NO. 10* (James Madison).

27. *See* John Barrell, *London and the London Corresponding Society*, in *ROMANTIC METROPOLIS: THE URBAN SCENE OF BRITISH CULTURE, 1780–1840*, at 85, 102 (James Chandler & Kevin Gilmartin eds., 2005) (detailing the urban climate of London from 1780–1840, and pointing out that the 1801 census reported a population of 900,000, with other estimates ranging from 500,000 to 1.25 million); DANIEL ROCHE, *THE PEOPLE OF PARIS: AN ESSAY ON POPULAR CULTURE IN THE 18TH CENTURY 20* (Marie Evans &

whose fuel tanks held more explosive power than the greatest armies or navies of their era could muster. Further, they could not conceive the architecture or engineering that makes structures like the World Trade Center possible. In his 1787 book *Notes on the State of Virginia*, for example, Thomas Jefferson described how he peered down from the Natural Bridge (which he owned) into the abyss about 270 feet below, remarking, “Looking down from this height about a minute, gave me a violent head ach[e].”²⁸ How could Jefferson (one of his era’s greatest architects) comprehend the 110-story World Trade Center, built with technology that was not available in his era? Nor could they imagine the horrific collision between that explosive force and that architectural marvel—let alone viewing a recorded version of that horrific event, whether as a motion picture or a videotape or a computer file played on a video display terminal. Finally, given their era’s limitations of communications technology (which meant that, even at its fastest, news could cross the Atlantic in no less than two months), how could they wrap their minds around the technology by which people around the world could witness the catastrophe of 9/11 in real time, as it happened—technology that made the world of 2001 a smaller world, in some ways, than the world of the Founding Guys?

These examples teach us that context shapes and limits what we can learn from the past, rendering woefully inadequate the context-free original-intent enterprise practiced by most jurists, legal scholars, and politicians.

III. THE CASE OF THE ABSENT FOUNDERS

Original-intent analysis focuses on a small group of self-conscious founders, those present at the creation (as delegates to the Federal Convention or to the state ratifying conventions), who grappled with the intellectual and political issues of constitution-making and constitutional design. The “usual suspects” include James Madison, Alexander Hamilton, James Wilson, Gouverneur Morris, and Charles Pinckney. That focus seems to make sense, for these individuals left us the clearest principled analyses that modern jurists apply to constitutional questions. But are they the whole story?

Two other groups of people are relevant to the Constitution’s origins but are often overlooked in the scavenger-hunt for original intent. First, there are intellectual statesmen who were *not* present at the creation of the Constitution, but who influenced it indirectly. Second, there are politicians who were neither present at the creation nor intellectual statesmen, but who significantly shaped the constitutional experiment. These are the “Absent Founders.”

Gwynne Lewis trans., 1987) (1981) (detailing the urban climate of eighteenth-century Paris and estimating a Parisian population of around 600,000 in 1789).

28. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, reprinted in THOMAS JEFFERSON: WRITINGS 123, 148 (Merrill D. Peterson ed., 1984) (1787).

THE CONSTITUTION AS AN EXPLODING CIGAR

John Adams and Thomas Jefferson exemplify the first category.²⁹ Neither was a delegate to the Convention, for both were diplomats 3000 miles from the scene of action—Adams as American Minister to Great Britain, Jefferson as American Minister to France—but both men exerted a variety of indirect influences on the making of the Constitution. First, they sent their ideas across the Atlantic by letter and by publication. Jefferson's *Notes on the State of Virginia* exerted indirect influence on the making of the Constitution during ratification, and Jefferson's letters helped to shape James Madison's thinking on the need for a bill of rights as he entered the First Congress.³⁰ So, too, the first volume of John Adams's *A Defence of the Constitutions of Government* was republished in Philadelphia on the eve of the Convention; some observers, such as Adams's friend Benjamin Rush, argued that the book guided the delegates' approach to constitutional design.³¹ Second, the work and comments of both men on their respective state constitutions enriched the intellectual mulch from which the U.S. Constitution arose. John Adams was principal draftsman of the Massachusetts Constitution of 1780, a key model for the U.S. Constitution of 1787;³² Thomas Jefferson's penetrating critique of the Virginia Constitution of 1776,

29. For works discussing John Adams, see, for example, GILBERT CHINARD, *HONEST JOHN ADAMS* (Peter Smith 1976) (1933); JOHN FERLING, *JOHN ADAMS: A LIFE* (1992); JAMES GRANT, *JOHN ADAMS: PARTY OF ONE* (2005); ZOLTÁN HARASZTI, *JOHN ADAMS & THE PROPHETS OF PROGRESS* (1952); JOHN R. HOWE, JR., *THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS* (1966); PETER SHAW, *THE CHARACTER OF JOHN ADAMS* (1976); C. BRADLEY THOMPSON, *JOHN ADAMS & THE SPIRIT OF LIBERTY* (1998). See also R.B. Bernstein, "Let Us Dare to Read, Think, Speak, and Write": *John Adams's Use of Reading as Political and Constitutional Armory*, in *THE LIBRARIES, LEADERSHIP, AND LEGACY OF JOHN ADAMS AND THOMAS JEFFERSON* 81 (Robert C. Baron & Conrad Edick Wright eds., 2010).

For works discussing Thomas Jefferson, see, for example, R.B. BERNSTEIN, *THOMAS JEFFERSON* (2003); *JEFFERSONIAN LEGACIES* (Peter S. Onuf ed., 1993); 1 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN* (1948); 2 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON AND THE RIGHTS OF MAN* (1951); 3 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON AND THE ORDEAL OF LIBERTY* (1962); 4 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805* (1970); 5 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: FIRST TERM 1805–1809* (1974); 6 DUMAS MALONE, *JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO* (1981); PETER S. ONUF, *JEFFERSONIAN LEGACIES* (Peter S. Onuf ed., 1993); PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000) [hereinafter ONUF, *JEFFERSON'S EMPIRE*]; PETER S. ONUF, *THE MIND OF THOMAS JEFFERSON* (2007); MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* (1970).

For the correspondence between Jefferson and Adams during and immediately after the Convention, see 1 *THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 163–238* (Lester J. Cappon ed., 1959); MERRILL D. PETERSON, *ADAMS AND JEFFERSON: A REVOLUTIONARY DIALOGUE* (1976).

30. See generally 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE OF THOMAS JEFFERSON AND JAMES MADISON, 1776–1826*, at 516–637 (James Morton Smith ed., 1995) (providing a collection of the correspondence between Jefferson and Madison regarding the framing and adoption of the U.S. Constitution and the Bill of Rights). For discussions of the friendship and intellectual and political partnership between Jefferson and Madison, see LANCE BANNING, *JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING* (1995); ANDREW BURSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* (2010); ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* (1950).

31. See THOMPSON, *supra* note 29, at 251–55.

32. See *id.* at xiii, 276–77; see also HOWE, *supra* note 29, at 67, 83, 85, 88, 90, 94–96; 8 *THE ADAMS PAPERS: PAPERS OF JOHN ADAMS 228–71* (Richard Alan Ryerson et al. eds., 1989) (containing documents,

recounted in *Notes on the State of Virginia*, as well as his eloquent and powerful meditations on constitutional problems and solutions in his private letters, helped to shape the thinking of Madison and other framers.³³ Third, both men's ordeals as American diplomats helped convince them that the United States needed a stronger government to protect its interests in the world, and both men wrote home making powerful arguments to that effect.³⁴ In sum, both men qualify as Absent Founders.

Aaron Burr exemplifies the second category.³⁵ Burr played no role in the movement to call the Federal Convention, or in the Convention, or in the struggle for ratification. He did not serve in the New York ratifying convention, refusing even to be a candidate, and he wrote nothing, public or private, in the "paper war" over the Constitution. Burr's silence on the issues of the day was so conspicuous that his contemporaries, especially Alexander Hamilton, suspected that Burr lacked any views on his era's great political questions; he seemed interested only in the political fortunes of Aaron Burr.³⁶ Nonetheless, in four ways (and maybe five), Burr shaped the evolution of the constitutional system.³⁷

First, in 1796 and 1800, Burr devised a partisan alliance foreshadowing the modern political party. His role in creating the first Republican Party was pivotal in the election of 1800, reconfiguring American views of presidential politics and of the legitimacy of party politics in the constitutional system.³⁸

Second, the electoral deadlock of 1800–1801, in which Burr played a central part, showed that the Constitution required repair. The constitutional monument of the electoral crisis of 1800 is the Twelfth Amendment, which retooled the Electoral College by separating voting for President and Vice President and by revising the

including the Massachusetts Constitution, with annotation and commentary); Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 PROC. OF THE AM. ANTIQUARIAN Soc'Y 317 (1981).

33. See JEFFERSON, *supra* note 28, at 121–25 (containing Jefferson's critique of the 1776 Virginia Constitution); see also DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 55–88 (1994). Madison cited Jefferson and quoted at length from *Notes on the State of Virginia* in *THE FEDERALIST* No. 48 (James Madison).

34. See generally THOMPSON, *supra* note 29, at 40–41, 79–87 (discussing Adams's advocacy of constitutional reform); HARASZTI, *supra* note 29; HOWE, *supra* note 29, at 67; WOOD, *supra* note 21, at 567–92; see also MAYER, *supra* note 33, at 91–99 (discussing Jefferson's somewhat more ambivalent and conflicted advocacy of constitutional reform).

35. For works discussing Burr, see generally NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* (2007); MILTON LOMASK, *AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT 1756–1805* (1979); MILTON LOMASK, *AARON BURR: THE CONSPIRACY AND YEARS OF EXILE 1805–1836* (1982); 1 JAMES PARTON, *THE LIFE AND TIMES OF AARON BURR* (Houghton, Mifflin & Co. 1893) (1857); 2 JAMES PARTON, *THE LIFE AND TIMES OF AARON BURR* (Ellen Willis Eldridge Parton 1892) (1857); 1–2 *POLITICAL PAPERS AND CORRESPONDENCE OF AARON BURR* (Mary-Jo Kline & Joanne Wood Ryan eds., 1983). For a summary treatment, see Richard B. Bernstein, *Aaron Burr*, in *NEW YORK AND THE UNION* 575 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

36. See JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 206–07 (2001).

37. The following paragraphs draw on my analysis in Bernstein, *supra* note 35, *passim*.

38. See FREEMAN, *supra* note 36, at 199–261.

THE CONSTITUTION AS AN EXPLODING CIGAR

system that would decide contested elections should the Electoral College fail to generate a clear winner.³⁹

Third, in 1804–1805, Vice President Burr presided over the Senate’s impeachment trial of Justice Samuel Chase. Having studied such British impeachment precedents as the impeachment of Warren Hastings, Burr conducted the Senate’s trial as a fair, impartial judicial proceeding—a precedent that has shaped all later American impeachment trials.⁴⁰

Fourth, in 1807, as the most prominent American ever tried for treason, Burr, as both defendant and one of his own defense lawyers, helped to vindicate the Constitution’s narrow, precise definition of the crime of treason and helped to create a key precedent for judicial review of claims of executive privilege.⁴¹

Fifth (though this is a matter of speculation), by killing Alexander Hamilton, Burr deprived us of a generation of lawyers whom Hamilton would have trained and would have absorbed Hamilton’s brand of energetic nationalist constitutionalism. We can only speculate about the difference that these lawyers would have made in the development of the U.S. Constitution in the 1820s, 1830s, and 1840s.⁴²

In sum, though not a conventional founder, Aaron Burr is a pivotal figure in the Constitution’s development. He drops out of the record, however, if we cling to the blinkered originalist approach to the Constitution’s origins, focusing only on the self-conscious intellectual statesmen who were framers or ratifiers.

IV. THE CASE OF THE FAST-CHANGING CONSTITUTIONS

James Madison was born in Virginia in 1751, a subject of King George II, living under the unwritten British Constitution and Virginia’s colonial charter. In 1776, the colonial system gave way to the Second Continental Congress and the Virginia convention, which wrote the state’s 1776 Constitution. In 1781, the adoption of the Articles of Confederation gave the United States a new form of government. In

39. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 675–77 (1996). For works discussing the Twelfth Amendment and the Electoral College, see generally RICHARD B. BERNSTEIN WITH JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 59–65 (1993); TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804* (1994).

40. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 500 & n.8 (1992). For a discussion of Burr’s role as presiding officer in the Senate’s impeachment trial of Justice Samuel Chase, see *ISENBERG*, *supra* note 35, at 272–79.

41. See *United States v. Burr*, 25 F. Cas. 187 (C.C.D. 1807) (No. 14,694) (review of presidential claim of executive privilege in response to subpoena duces tecum); 1 *PARTON*, *supra* note 35, at 460 (discussing Burr’s role as the leader of the defense team). For discussions of Burr’s travails that culminated in his 1807 trial for treason, see *ISENBERG*, *supra* note 35, at 271–366; BUCKNER F. MELTON, JR., *AARON BURR: CONSPIRACY TO TREASON passim* (2002).

42. For discussions of the legal education in the era of Alexander Hamilton, see generally *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* (Michael H. Hoeflich ed., 1988); 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* (Steve Sheppard ed., 1999).

1788–1789, the U.S. Constitution replaced the Articles of Confederation. Finally, in 1830, the aged Madison was a leading delegate to the Virginia constitutional convention that replaced the state’s 1776 Constitution. In his lifetime, Madison saw three Virginia governments and four American governments.⁴³

Madison was not alone. Every American in the Revolutionary and Founding Periods lived under the unwritten British Constitution and three different forms of American government in the span of twenty years, and under at least two, and in some cases three or four, colonial and state governments during that time.⁴⁴ Americans did not see this rapidity of constitutional change as unusual, though Madison found it troubling, for he wanted a constitutional system to last long enough for people to become loyal to it.⁴⁵ Even so, neither Madison nor his colleagues foresaw that the Constitution they framed in 1787 would last so long; in his final years in the mid-1830s, Madison struggled to reconcile the differences between “the conflicting values and demands” of “an enlightened world in which reason was enjoined to discipline the unsettling effects of passion” (the culture in which he helped to frame and adopt the Constitution in 1787–1788) and “a . . . world of romantic democracy in which passionate individualism threatened to overwhelm all restraints of custom, tradition, and history.”⁴⁶ His struggle epitomized the problems of seeking to guide in a turbulent present a constitution framed in a very different past. It is no wonder that he quipped in 1831, with wry sadness, “Having outlived so many of my contemporaries, I ought not to forget that I may be thought to have outlived myself.”⁴⁷ The rapidity of constitutional change in the era of the Constitution’s origins raises difficult questions for those who would apply originalist methods to problems arising in the Constitution’s third century because they wrongly assume that the framers and ratifiers of the Constitution created and adopted that document in full confidence that it would continue as the nation’s fundamental law for centuries to come.

One further point deserves mention, as it links the issue of rapid constitutional change with that of intellectual context. The Founding Guys saw as the greatest challenge facing them the idea, long a part of the conventional wisdom of Atlantic civilization, that a republic was mortal—that for a variety of reasons, most having to do with diseases (such as factionalism) that plagued republics throughout history, republican governments tended to collapse, succeeded either by tyranny or by a period of anarchy followed by tyranny. The historian of political thought J.G.A. Pocock memorably labeled the moment when a republic confronted its own mortality as “the

43. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* *passim* (1989).

44. For the record of American constitutional experiments at state and national levels, see generally 1–7 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* *passim* (Francis Newton Thorpe ed., 1909).

45. See *THE FEDERALIST* No. 49 (James Madison).

46. MCCOY, *supra* note 43, at xv.

47. 9 *THE WRITINGS OF JAMES MADISON: 1819–1836*, at 460 (Gaillard Hunt ed., 1910).

THE CONSTITUTION AS AN EXPLODING CIGAR

Machiavellian moment.”⁴⁸ Recognition of this truth by a wide variety of leading figures among the Founding Guys suggests that they recognized that even the best constitution would not last long without periodic revision and recourse to first principles. To cite one example, in his now-famous closing speech to the Federal Convention on September 17, 1787, Benjamin Franklin addressed the mortality of republics and their susceptibility to failure:

In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe farther that this is likely to be well administered for a course of years, and can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.⁴⁹

Given this shared view of the fragility of republican government and constitutions, it is highly unlikely that any of the framers or ratifiers of the proposed Constitution thought that the document would still be in effect as the fundamental law of the United States more than two hundred years after its framing and adoption, challenging a core presumption of originalism.

V. THE CASE OF THE EXPLODING CONSTITUTIONAL CIGAR

The practical joke of the exploding cigar used to be familiar to everyone from the popularity of old Warner Brothers cartoons—but that image has a serious connotation when applied to the Constitution’s origins. In the Constitution’s first decade, the process of putting it into effect and the way it worked once it was put into effect repeatedly raised problems that the framers and ratifiers did not anticipate; problems that cast a new and disturbing light on some of their most cherished ideas and expectations; problems that revealed a range of not-easily-reconciled understandings of how the document should work; problems that caused their expectations, understandings, and intentions about the Constitution to blow up in their faces like an exploding cigar. Consider the following examples.

In the spring of 1789, as the House of Representatives worked on bills creating the new general government’s executive departments, they confronted the issue of who has the power to remove executive officials—a question that the Federal Convention never addressed.⁵⁰ In the complex and thorny debate that ensued, as many as seven distinct positions emerged:

48. See POCOCK, *supra* note 21, *passim*.

49. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 641–43 (providing Benjamin Franklin’s September 17, 1787, speech as transcribed in James Madison’s *Notes of Debates in the Federal Convention of 1787*).

50. For discussions of the removal-power debate of 1789, see JAMES HART, THE AMERICAN PRESIDENCY IN ACTION 1789, at 155–214 (1948); RAKOVE, *supra* note 1, at 347–50; CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 140–65 (Liberty Fund Inc. 2010) (1922); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 20–25 (Macmillan Co. 1967) (1948). The House of Representatives debates of May 19, 1789, and June 13–22, 1789, are easily found

First, the only way to remove an executive official is by impeachment.⁵¹ Second, the President may remove the official because the Constitution does not bar him from doing so and does not give the Senate a role in removals.⁵² Third, the President has the power to remove an executive official because removal is an “inherently executive” power.⁵³ Fourth, the President has the power to remove executive officials because the Constitution makes him responsible for their conduct.⁵⁴ Fifth, if the official is to be named by the President with the advice and consent of the Senate, he must be removed with the advice and consent of the Senate.⁵⁵ Sixth, Congress has the power to grant the President the removal power as part of its power over federal offices and officials’ terms.⁵⁶ Seventh, Congress has freedom to act on removals rooted in the “necessary and proper” clause of the Constitution.⁵⁷

After extensive debate, Congress chose the third position (a position endorsed by Representative James Madison), but the issue arose again in 1868⁵⁸ and then in the 1920s⁵⁹ and the 1930s;⁶⁰ in fact, in 1868 that issue was at the core of the impeachment of President Andrew Johnson.⁶¹

In the summer of 1789, the Senate had to define the phrase “the advice and consent of the Senate” in the context of making treaties. President George Washington came to the Senate to present in person his proposed terms for a treaty with the Creek Indians, seeking the Senators’ “advice and consent.”⁶² The Senators were dismayed by what Pennsylvania Senator William Maclay called the President’s attempt to “over awe the timid and neutral part of the Senate.”⁶³ Maclay asked Washington to leave the draft terms for the Senate to discuss, so that they could send him their answer, and the rest of the Senate followed his lead. As Maclay wrote in his diary, Washington “started up in a Violent fret,” and, growling, “This defeats

in the superb modern edition, 10–11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 726–40, 842–1036 (Charlene Bangs Bickford et al. eds., 1992). See also *infra* note 51.

51. GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 35 (1997).

52. *Id.*

53. *Id.* at 35–36.

54. *Id.* at 36.

55. *Id.*

56. *Id.*

57. *Id.*

58. See MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 160–66 (1973).

59. See *Myers v. United States*, 272 U.S. 52 (1926).

60. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

61. See BENEDICT, *supra* note 58, at 160–66.

62. U.S. CONST. art. II, § 2, cl. 2; WILLIAM MACLAY, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES (1789–1791), reprinted in 9 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 50, at 128–30.

63. See MACLAY, *supra* note 62, at 130.

every purpose of my coming here,” stalked out of the Senate Chamber.⁶⁴ President Washington, who sat through the entire Convention, had his view of what “advice and consent” meant, but the Senators, eleven of whom also had been delegates in Philadelphia in 1787, had a different understanding in mind.⁶⁵

In the fall of 1789, Congress created the Treasury Department. They required the Secretary of the Treasury to prepare reports on the public credit at the command of Congress, thinking that this duty would keep the secretary under the congressional thumb. Instead, Alexander Hamilton used his reports on the public credit to set the agenda of American politics, in the process shifting the initiative of policy-making from Congress to the executive branch—which is not what most of the Constitution’s framers and ratifiers expected.⁶⁶

My favorite example is the Electoral College.⁶⁷ The Constitution’s framers expected the Electoral College only to thin the herd of presidential candidates, with the House of Representatives picking the President and Vice President from the top three.⁶⁸ George Mason of Virginia predicted that this would happen in nineteen out of twenty elections.⁶⁹ It did not work out that way.

In 1789, the Electoral College made George Washington its unanimous first choice for President, giving John Adams as Vice President a plurality of thirty-four out of sixty-nine electoral votes. In 1792, the Electoral College again made Washington its unanimous first choice, with Adams receiving seventy-seven votes, doing better than he had in 1789. In 1796, the first contested presidential election, Adams narrowly but decisively beat Thomas Jefferson, seventy-one to sixty-eight. By

64. *Id.*

65. For our only first-hand account, see MACLAY, *supra* note 62. For biographical information on Maclay, see generally FREEMAN, *supra* note 36, at 11–61. The eleven Senators who served in the Federal Convention were: Oliver Ellsworth and William Samuel Johnson of Connecticut, Richard Bassett and George Read of Delaware, William Few of Georgia, Caleb Strong of Massachusetts, John Langdon of New Hampshire, William Paterson of New Jersey, Rufus King of New York, Robert Morris of Pennsylvania, and Pierce Butler of South Carolina. *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1986); Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1766–69 (2006).

66. See generally CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* (1964). These three reports are conveniently found in *ALEXANDER HAMILTON: WRITINGS* 531–74, 575–612, 647–734 (Joanne B. Freeman ed., 2001).

67. For a discussion of the the origins and early workings of the Electoral College, see KURODA, *supra* note 39, at 7–15. For the leading critique, see GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* (2004). For the leading defense, see JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975) and JUDITH A. BEST, *THE CHOICE OF THE PEOPLE? DEBATING THE ELECTORAL COLLEGE* (1996).

68. See U.S. CONST. art. II, § 1, cl. 3; William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 151–56 (1996).

69. EDWARDS, *supra* note 67, at 86 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 500).

1800, the Electoral College had picked the President and Vice President three times out of three, with no need to turn to Congress.⁷⁰

In 1800, Thomas Jefferson and Aaron Burr tied in the Electoral College with seventy-three votes apiece, a result requiring the House to pick the President,⁷¹ a step that George Mason had predicted in 1787 would happen nineteen times out of twenty. By 1800, however, Americans had grown so used to the Electoral College picking the President and Vice President that the deadlock between Jefferson and Burr provoked a crisis. Backers of Jefferson insisted not merely that Burr defer to their hero, but that he declare himself unworthy of the Presidency by comparison with Jefferson. This demand nettled Burr, who knew that the premise of the Electoral College was that the electors vote for two men, each qualified to be President; Burr also deemed himself, as a Revolutionary War hero and an experienced and able politician, to be at least as fit for the Presidency as Jefferson was. Federalist members of the lame-duck House, seeking a way to stymie Jefferson, hoped to strike a deal with Burr, who was at least willing to listen to any reasonable offer from people who were treating him with respect. Hearing rumors that the House might thwart the people's will (though there were no popular-vote totals to document this view) by choosing Burr (the Republicans' choice for Vice President) instead of Jefferson (the Republicans' choice for President), Governor James Monroe of Virginia and Governor Thomas McKean of Pennsylvania each threatened to march his state's militia to Washington unless the House elected Jefferson—which it did, finally, on the thirty-sixth ballot.⁷² This traumatic crisis produced the Twelfth Amendment, which separated the choice of President from that of Vice President and thus avoided a repeat of the deadlock of 1800.

Another “exploding cigar” arose not during the Founding Period but in modern times. The Constitution assigns the Chief Justice of the United States the duty of presiding over the impeachment trial of a President. The Constitution assigns the Vice President the duty of presiding over impeachment trials of federal judges or other executive-branch officials—a clear deduction from the Vice President's duties

70. See *Historical Election Results*, NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/electoral-college/votes/index.html> (last visited Mar. 27, 2011).

71. There is a vast and still-growing literature on the presidential election of 1800; the most useful treatments of the subject are SUSAN DUNN, *JEFFERSON'S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004); FREEMAN, *supra* note 36, at 199–261; EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2007); ONUF, *JEFFERSON'S EMPIRE*, *supra* note 29, at 80–108; *THE REVOLUTION OF 1800: DEMOCRACY, RACE, & THE NEW REPUBLIC* (James Horn, Jan Ellen Lewis & Peter S. Onuf eds., 2002); BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800* (2000). Older works include FRANK VAN DER LINDEN, *THE TURNING POINT: JEFFERSON'S BATTLE FOR THE PRESIDENCY* (Fulcrum Publ'g 2000) (1962); DANIEL SISSON, *THE AMERICAN REVOLUTION OF 1800* (1974). The latest addition to the literature as of the writing of this article is JAMES ROGER SHARP, *THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE* (2010).

72. See *THE REVOLUTION OF 1800: DEMOCRACY, RACE, & THE NEW REPUBLIC*, *supra* note 71, at 75, 87–88; see also works cited *supra* note 71.

as defined by the Constitution.⁷³ But who presides over the impeachment trial of a Vice President of the United States? The answer is—the Vice President of the United States. The Constitution’s framers may have intended to have the Chief Justice preside over impeachment trials for Presidents *and* Vice Presidents, once they finished their last-minute addition of the Vice Presidency to the Constitution, but they never made the needed change.⁷⁴

In the summer of 1973, then-Vice President Spiro T. Agnew was indicted for bribery and corruption for his actions beginning when he was county executive of Baltimore County and continuing through his service as governor of Maryland and Vice President. Agnew desperately sought to have the House impeach him as a way to forestall his prosecution, but the House leadership, prodded by then-House Majority Leader Thomas P. “Tip” O’Neill, refused to go ahead with an impeachment. (The leadership realized that an Agnew inquiry would interfere with the ongoing inquiry into impeaching President Richard Nixon, which would mean not only that the Nixon inquiry would indefinitely delay Agnew’s impeachment, but also that, were Nixon to be impeached, Agnew would become President.)⁷⁵ Facing not just indictment but almost certain conviction after the House turned down his bid to be impeached instead of indicted, Agnew pleaded no contest to the indictment and resigned his office, making way for Nixon to nominate, and both Houses to confirm, a new Vice President under the Twenty-Fifth Amendment. Gerald R. Ford, the former House Minority Leader, eventually succeeded Nixon as President when Nixon resigned in 1974.⁷⁶ There is no evidence that Agnew realized that he might be able to preside over his own impeachment trial, and it is blessedly unclear what he might have done with that presiding role had he taken the chance to exercise it.

In 2006–2008, demands arose that then-Vice President Dick Cheney be impeached.⁷⁷ Given Cheney’s novel and interesting views of constitutional questions, it is even more unclear what Cheney might have done had he been impeached and then learned he had a chance to preside over his own Senate impeachment trial.⁷⁸ Heaven grant, given the growing importance of the Vice Presidency,⁷⁹ that we never face another such problem.

73. U.S. CONST. art. I, § 3, cl. 4 (general duty of Vice President to preside); *id.* art. I, § 3, cl. 6 (Chief Justice presiding over impeachment trials in Senate).

74. See Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 75–76 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

75. See generally JIMMY BRESLIN, *HOW THE GOOD GUYS FINALLY WON: NOTES FROM AN IMPEACHMENT SUMMER* (1975) (examining the political dealings surrounding the Watergate scandal).

76. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* 117–62 (1992) (1976).

77. See, e.g., Bruce Fein, *Impeach Cheney: The Vice President Has Run Utterly Amok and Must Be Stopped*, SLATE (June 27, 2007, 5:06 PM), <http://www.slate.com/id/2169292/>.

78. See generally BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* (expanded paperback ed. 2009).

79. See Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 374–89 (2008); *The Role of the Modern Vice President*, CENTERPOINT (Woodrow Wilson Int’l Ctr. for

VI. SOME TENTATIVE CONCLUSIONS

Each of these case studies represents a failure of insight, a failure of foresight, or an instance in which those who made the Constitution fell prey to the “law of unintended consequences.”⁸⁰ These examples are difficult to square with the self-conscious, virtually omniscient founders at the core of originalist analysis.

Where do these “historian’s heresies” leave originalist jurisprudence? First, they teach that theorists who make history central to their theoretical enterprise run the risk that historians will find their work wanting as history. Some theorists respond dismissively, “That doesn’t matter, because I’m not doing history.” These theorists fail to grasp that, when they invoke history, their theory is only as sound as the history on which they build. Building on bad history is like building on sand.

Using history this way is nothing new in Anglo-American constitutional thought. John Phillip Reid of New York University Law School has identified a form of argument, “forensic history,” that was central to constitutional controversies in England and America throughout the seventeenth and eighteenth centuries. In forensic history, the disputants may cite historical examples, invoke historical precedents, and draw conclusions about the “lessons” that history may teach, but they are not doing history at all—rather, they are making legal arguments.⁸¹

Given forensic history’s long and honorable pedigree, why do historians object when lawyers and judges engage in the modern American version—originalist jurisprudence? The reason is simple, and yet not apparent on the surface. The historical and legal professions have diverged since the time that Reid studied in his work on forensic history. Today, a distinct historical profession exists, with its own approaches to identifying, testing, and using historical evidence, and to making and substantiating historical arguments.⁸² What historians do is profoundly different

Scholars, D.C.), June 2007, http://www.wilsoncenter.org/index.cfm?fuseaction=news.item&news_id=239308.

80. This term was coined by the eminent historian of science and sociologist Robert K. Merton. *See* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 897 (1936). For a discussion of this phrase’s origins, see the discussion in BERNSTEIN, *supra* note 2, at 209 n.96.

81. *See generally* John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 193–223 (1993).

Historical adjudication is too convenient to be banished from decision writing. We should acknowledge that lawyers and judges can use history in a variety of ways and that not every exercise of historical jurisprudence deserves to be dismissed as law office history.

According to the academic canons of the historical method, there is no need to consider instances of the proper use of history either to prove a fact or to establish a point of law—if such instances can be found. Instead, attention should be given to a species of history that does not meet the canons of historians’ history, but for centuries has made legitimate contributions to Anglo-American law, especially to Anglo-American constitutional law. It is forensic history.

Id. at 205.

82. *See, e.g.*, JOHN BURROW, *A HISTORY OF HISTORIES: EPICS, CHRONICLES, AND INQUIRIES FROM HERODOTUS AND THUCYDIDES TO THE TWENTIETH CENTURY* (2008); JOHN HIGHAM, *HISTORY: PROFESSIONAL SCHOLARSHIP IN AMERICA* (John Hopkins Univ. Press updated paperback ed. 1989)

THE CONSTITUTION AS AN EXPLODING CIGAR

from what lawyers do—not least because historians are willing to run the risk that their work will explode their initial assumptions about what they will find, whereas lawyers nearly always find what they expect to find and prove what they expect to prove. As Reid himself has noted, forensic history “does not meet the canons of historians’ history.”⁸³ When lawyers or jurists or legal scholars proclaim, “History teaches this,” or “History commands that,” they inevitably blur or erase the line in the public mind dividing historians’ history from forensic history, producing a dangerous confusion about what history can and cannot do—whether or not they specifically intend that result.

This is the lesson taught by Gordon S. Wood of Brown University, whose first book, *The Creation of the American Republic, 1776–1787*, is a modern classic that many constitutional theorists read without quite understanding it.⁸⁴ In 1987, Wood took part in a symposium on his book in the *William and Mary Quarterly* as part of that journal’s commemoration of the Constitution’s bicentennial.⁸⁵ Here is an excerpt from Wood’s wise reflections on this question:

When confronted with these contrasting meanings of the Constitution, historians, it seems to me, are not supposed to decide which was more “correct” or more “true.” Our task is rather to explain the reasons for these contrasting meanings and why each side should have given to the Constitution the meaning it did. There was not in 1787–1788—and today there is still not—one “correct” or “true” meaning of the Constitution. The Constitution means whatever we want it to mean. Of course, we cannot attribute any meaning we want and expect to get away with it. We have to convince others of our “true” interpretation, and if we can convince enough people that that is the “true” interpretation, then so it becomes. That is how the culture changes. It may be a necessary fiction for lawyers and jurists to believe in a “correct” or “true” meaning of the Constitution in order to carry on their business, but we historians have different obligations and aims.⁸⁶

Military history also faces this problem, as the eminent military historian Sir Michael Howard has pointed out. In his 1981 inaugural lecture as Regius Professor of History at Oxford University,⁸⁷ Howard recalled that, as a young scholar, he gave a talk to a group of staff officers on a historical episode, only to have one brilliant officer demand irritably, “But what were its *Lessons*?”⁸⁸ That question illuminates the challenge of being a military historian, who (like a constitutional historian) studies

(1965); PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988).

83. Reid, *supra* note 81, at 205.

84. See WOOD, *supra* note 21.

85. Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628 (1987).

86. *Id.* at 632–33.

87. Michael Howard, *The Lessons of History*, 15 THE HISTORY TEACHER 489 (1982), *reprinted in* MICHAEL HOWARD, *THE LESSONS OF HISTORY* 10 (1991) (internal quotation marks omitted).

88. *Id.* at 10.

the past as a series of unique events and experiences not capable of being repeated, taking place in a world fundamentally different from our own. Like lawyers and judges, military officers seek from history a set of easily understood and easily applied lessons. Howard's advice should guide those wrestling with history as they interpret the Constitution:

[T]he first lesson that historians are entitled to teach is the austere one: not to generalize from false premises based on inadequate evidence. The second is no more comforting: the past is a foreign country; there is very little we can say about it until we have learned its language and understood its assumptions; and in deriving conclusions about the processes which occurred in it and applying them to our own day we must be very careful indeed.⁸⁹

I should add that recently I had the good fortune to get in touch with Sir Michael Howard via e-mail, and I described the parallels between military historians and constitutional historians. He wrote in reply:

We both have to interpret what was meant by people in the past who may have used the same words as we do, but whose culture and mind-set, although superficially similar to our own, was in fact rather alien, and who were propounding solutions to problems quite different from those which we have to face. But as I understand it, your position is even more complex than mine, in that you have to deal with a school of thought that maintains that, having discovered what the Founding Fathers actually meant by what they wrote, we have to apply that intention unaltered to our contemporary conditions irrespective of changing circumstances. I don't think one could find today any general who insisted on applying Napoleonic tactics on a battlefield dominated by enemy air-power!⁹⁰

That we ought to be careful in using the past does not mean that we cannot use it at all, or that we cannot derive useful lessons from it. This is the position of Professor Jack N. Rakove of Stanford University, winner of the Pulitzer Prize in History for his 1996 book *Original Meanings: Politics and Ideas in the Making of the Constitution*. Though Rakove has long fought the excesses and absurdities of originalism, he does not reject the enterprise altogether. By contrast to strong originalists such as the late Raoul Berger, the late Justice Hugo L. Black, and the still-living Justices Antonin Scalia and Clarence Thomas, Rakove's work has inspired an interpretative position that other scholars call "weak originalism."⁹¹ On this view, we should give evidence of the Constitution's origins persuasive but not dispositive value, for two reasons. First, after looking at the constitutional text that we seek to interpret, we ought next to address that text's origins (including both the document's

89. *Id.* at 13; see also 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 8 (1888) ("[T]he chief practical use of history is to deliver us from plausible historical analogies . . .").

90. E-mail from Sir Michael Howard, Regius Professor Emeritus, Oxford Univ., to author (Apr. 7, 2010, 05:49 AM) (on file with the *New York Law School Law Review*).

91. See, e.g., Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1627–28 (1997).

THE CONSTITUTION AS AN EXPLODING CIGAR

framing and its ratification).⁹² Second, because the framers were among the most learned, intelligent, shrewd, and perceptive minds in American history, we should learn from their wisdom.⁹³

Weak originalism implies another important point: though we may start with the framers and ratifiers, we should not stop with them; in fact, they themselves would counsel us not to stop there. In the spring of 1790, in his first grand-jury charge, Chief Justice John Jay addressed the momentous events in constitution-making in which he had taken part:

The Institution of General and State Governments, their respective Conveniences and Defects in Practice, and the subsequent Alterations made in some of them, have operated as useful Experiments, and conspired to promote our Advancement in this interesting Science. It is pleasing to observe that the present national Government already affords advantages, which the preceding one proved too feeble and ill constructed to produce. How far it may be still distant from the Degree of Perfection to which it may possibly be carried Time only can decide. It is a Consolation to reflect that the good Sense of the People will be enabled by Experience to discover and correct its Imperfections; especially while they continue to retain a proper Confidence in themselves, and avoid those Jealousies and Dissentions which prevent Improvements often springing from the worst Designs frequently frustrate the best Measures.⁹⁴

So, too, Jefferson advised a correspondent in 1816 about the proper way to think about the Virginia Constitution of 1776:

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

92. See Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORDHAM L. REV.* 1587 (1997).

93. See *id.*

94. John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), in 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800*, at 25, 26 (Maeva Marcus et al. eds., 1989).

to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.⁹⁵

In sum, we have seen that, in many cases, attempts to seek guidance from the history of the making of the Constitution are unavailing—whether because we rip out of context ideas of the Constitution’s framers or ratifiers, or because we apply their ideas to issues and problems that they could not have foreseen, forgetting that—like us—they could not predict the future.

When we contemplate that record, we should recall what the constitutional theorist and historian Alexander Bickel of Yale Law School wrote in his book *The Least Dangerous Branch*: “No answer is what the wrong question begets.”⁹⁶ To Bickel’s sage counsel I add the advice of the great fictional private investigator Sam Spade from John Huston’s film of *The Maltese Falcon*: “Let’s do something right for a change.”⁹⁷

95. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 28, at 1395, 1401.

96. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (Yale Univ. Press 2d ed. 1986) (1962).

97. *THE MALTESE FALCON* at 01:02:35 (Warner Bros. 1941).