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# Rakove: Comment on Mathias

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# COMMENT

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Historians who pursue the ongoing quest for the original meaning of the Constitution find themselves in an awkward position vis-a-vis jurists and legal scholars who share their general concerns and interests. The entire historical enterprise rests on the premise that reliable knowledge of the past is possible. Indeed, historians who spend their waking hours immersed in the extant records of the Revolutionary era may feel that Justice Jackson overstated the point when he complained that the ideas of the founders had to be "divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[1] In this sense, the work of the historian can be said to lay an evidentiary basis for originalist interpretation. But unlike the judge or advocate whom duty compels to fix one meaning upon a particular constitutional provision, a historian can rest content with—and even revel in—the ambiguities of the record, recognizing "that behind the brevity of a given clause there once lay a spectrum of complex views and different shadings of opinion."[2] As Gordon S. Wood has recently observed, "It may be a necessary fiction for lawyers and jurists to believe in a 'correct' or 'true' interpretation of the Constitution, in order to carry on their business, but we historians have different obligations and aims"—the foremost of which is to explain why "contrasting meanings" have been attached to the Constitution not only in our own time but since the late 1780s.[3] Thus, in recovering the best evidence of what the Constitution originally meant, what its framers intended, or what their contemporaries understood they were ratifying, the historian may simultaneously challenge or even undermine critical assumptions upon which the appeal to original meaning rests.

This appeal to some pristine original meaning or intention of the Constitution seems easy and alluring enough, until one stops to

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1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

2. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, in 1 PERSPECTIVES IN AMERICAN HISTORY 281 (1984).

3. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 632-33 (3d ser. 1987).

ask what it means in practice. The professed theoretical advantages of originalism are familiar and need not be repeated here. But its utility as a theory of interpretation depends on something more than the conviction that the sovereign will of the people—even as expressed in 1788 or 1868—should "trump" the arbitrary will of a politically unaccountable judiciary. It is a necessary condition of originalism that judges and other officials possess a high degree of confidence in their ability to attain a reliable grasp of the original meaning to which they have been beseeched to defer. The great difficulty, of course, is that as soon as one asks what an appeal to original meaning means in practice, all sorts of problems arise, which in turn raise serious doubts about the normative justification for originalism.

Senator Mathias has alluded to a number of these problems in his prepared remarks. I now want to examine the objections against originalism from the vantage point of a working historian. These objections fall into two complementary but sometimes overlapping categories. The first category involves what I shall call the *technical* or *methodological* aspects of originalism; the second concerns certain *substantive* or *normative* issues that a historian cannot ignore. By the former I mean those questions of definition and evidence that arise as soon as one launches an originalist quest; by the latter, I mean to identify certain issues that require consideration of the constitution-making process itself, especially as it was first conducted in the Revolutionary era.

Scholars often use the terms "original meaning," "original intention," and "original understanding" as if they were synonymous and interchangeable. But they are not—or at least they need not be—and in distinguishing among them, we uncover some of the traps that await the unwary.

The Constitution is the literal text whose meaning we want to gloss. In a narrow and rigorous sense, the term "original meaning" should be applied to the literal wording of its many provisions. For instance, what does the language of the Constitution mean when article I talks of commerce, when article II vests something called "the executive Power" in the President, or when the first amendment speaks of an "establishment of religion"? It has often been suggested that interpreters need only construe the language of the Constitution according to some ordinary or common-sense meaning, corrected for eighteenth-century usage. Alas, as James Madison observed in *The Federalist* No. 37:

> [N]o language is so copious as to supply words and phrases

> for every complex idea, or so correct as not to include many equivocally denoting different ideas . . . . When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.[4]

It will not suffice to respond that most words and phrases of the Constitution do not require extensive exegesis, or that we know what article II means when it requires the President to be thirty-five years old. All the interesting questions arise in areas in which the meaning of the language—or the application of a term to a particular act—is not self-evident.

Meaning must thus be derived from usage, and it is here that the intentions of the framers or the understandings of the ratifiers become pertinent. The distinction is both definitional and normative. The actual language of the Constitution was the product of the debates at the Constitutional Convention, so that in speaking of the intentions of the authors one can refer to the deliberations at Philadelphia. Is it not important to know, for example, why the framers substituted "declare" for "make" when vesting the war power in Congress?[5] But since the Convention was in the position of merely proposing a text for adoption, this theory of authorial intention must be relegated to a subordinate position beneath that of the understanding of the ratifiers, whose approval alone gave legal force to the Constitution. What did the ratifiers in the state conventions think they were endorsing when they voted for the Constitution? In either case, one uses the evidence of contemporary debate to clarify the original meaning of the text. But in considering these distinctions, the originalist also learns that something more is required than a quick rifling through *The Federalist* No. 78 in search of a suitably pertinent quotation. One must consider the context within which particular issues were addressed and even the range of meanings that different commentators attached to a term.

One might well argue that from the distance of two centuries these distinctions should not be pushed too far, simply because the putative originalist needs all the help available in this enterprise. But even if we lump framers and ratifiers together, and for good measure throw in the members of the early Congresses, another

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4. THE FEDERALIST No. 37, at 236 (J. Madison) (J. Cooke ed. 1961).

5. For a general discussion on this topic, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (M. Farrand ed. 1966); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 674-77 (1972).

problem remains. This is the problem of collective intent. Intentions and understandings are states of mind, and it is far from clear whether or how one can assign any coherent intentions to groups of individuals acting with a range of purposes and expectations and reaching decisions through a process of bargaining and compromise. Is it not likely that any collective decision reflects a spectrum of intentions, expectations, and understandings that renders any interpretation problematic? And assuming that such differences do exist, what calculus does one apply to determine whose opinions deserve the greatest authority?

Insofar as collective intentions are always difficult to determine—whether the object of inquiry is a law enacted in the most recent session of Congress or a constitution adopted two centuries ago—it might be objected that the mere passage of time neither enhances nor diminishes the difficulties a scrupulous originalist would face. But the evidence from which we seek to recover meaning or intent consists, after all, of the partial and incomplete records of a distant era, when notions of legislative accountability did not extend to the accurate transcription of debates; when stenography was in its infancy; and when even James Madison's diligent efforts to leave posterity a faithful record of the debates at the Constitutional Convention amounted to more of a summary than a faithful rendition of what was said.[6] Anyone supposing that the extant evidence of the debates of 1787-1788 will bear the burden of all the questions we would ask has not seriously considered the real problems that arise when, for example, we want to determine something as vital to modern constitutional disputes as the reasons why the Convention belatedly decided to allow the President to share the authority over foreign relations that it had originally inclined toward vesting exclusively in the Senate.[7]

One cannot be a serious originalist, then, without coming to grips with the technical problems that arise as soon as one asks what an appeal to original meaning, intent, or understanding entails in practice. The consideration of these problems need not lead to a state of epistemological despair that will excuse abandoning the search for a usable original meaning as a "misconceived quest." It merely identifies the difficulties that must be taken into account if the originalist appeal is to rise beyond the depressed level of law office history to provide at the very least a responsible point of de-

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6. *See* Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 6-35 (1986).

7. *See* Rakove, *supra* note 2.

parture for contemporary constitutional adjudication.[8] Because all appeals to original intent are appeals to the evidence of the past, then, the historian can claim some expertise in identifying the problems that one must bear in mind in weighing the sources upon which our knowledge of the Constitution's formation rests.

But can historians also contribute anything of value to the substantive or normative problems of determining the weight that original intent should have in resolving what the Constitution means today? Under this general heading, three points deserve brief mention.

First, it is difficult to use the evidence of the past to sustain the claim that either the framers or ratifiers of the Constitution expected their intentions or understandings to guide or determine later efforts at interpretation. To put the point another way: the theory of original intent fails on its own terms. The irrelevance of the intentions of the framers is demonstrated not so much by their meeting behind closed doors—at a time when public access to legislative deliberations was still novel, this was not controversial—as it was by Madison's refusal to allow his notes of debates to be used for the resolution of constitutional disputes. From the mid-1790s on, it is true, Madison did argue that interpreters should strive to recover the Constitution's "true meaning as understood *by the Nation* at the time of its ratification."[9] But this position, though consistent with the theory of popular sovereignty, was itself a reaction against the interpretive excesses that Madison attributed first to Alexander Hamilton and later to John Marshall; it was not a theory of interpretation that the ratifiers of the Constitution understood they were endorsing.[10] Indeed, given that the state ratifying conventions had no

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8. Many of my thoughts about the difficulties of getting at an original meaning have obviously been influenced by my colleague's discussion in Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); but they also reflect the doubts a historian naturally feels when he sees how easily the evidence of the past can be mangled in the mills of legal reasoning. On the latter subject, see C. MILLER, THE SUPREME COURT AND THE USE OF HISTORY (Cambridge 1969); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119-58.

9. Letter from James Madison to J.G. Jackson (Dec. 27, 1821), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450 (M. Farrand ed. 1966). Madison's views are also captured in his letters to Nicholas P. Trist, Dec. 1831; and to Thomas Ritchie, Sept. 15, 1821; and his speech in the House of Representatives, Apr. 6, 1796. For a reproduction of these materials, see *id.* at 374, 447, 516.

10. My views are generally in accord with those expressed in Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). I note in passing, however, that in a forthcoming article in *Constitutional Commentary* the expert originalist Charles Lofgren argues rather effectively that Powell either misuses or ignores significant evidence of the extent to which a concept of "ratifier intent" (or what I have called under-

choice but to approve or reject the proposed Constitution *in toto*, it is difficult to see how such a position or consequence could ever be attributed to their actions—even if one lays aside all the evidentiary issues that have been suggested already.

A second set of substantive problems stems more directly from the theory of popular sovereignty. Time and again, the current apostles of originalism have contrasted the capricious constitutional engineering of a politically unaccountable judiciary with the Constitution's own expectation that major constitutional change could be effectuated through the amendment process of article V, which alone could bestow on such change the majestic imprimatur of the people. The critical problem with this theory is that it is very difficult to understand why later generations should feel any obligation to defer to the popular sovereignty of the limited electorate of the late eighteenth century. Arguably, it would be more convenient to use the amendment process to overturn judicial interpretations that the people found truly objectionable.

Was the theory of popular sovereignty originally intended or understood to establish limits—in the form of public opinion as expressed at the time of adoption—on the interpretation of the Constitution? Again, it is difficult to trace such a view to the actual moment of the founding. In its original form the idea of popular sovereignty had two other uses. First, it provided a necessary fiction that the Federalists, following the lead of James Wilson, could turn against the expected objection that the new system would create the much feared political monster, *imperium in imperio*.[11] Arguing that the people were the ultimate source of the powers delegated to both federal and state governments thus allowed the Federalists to maintain that the Constitution did not violate the unitary nature of sovereignty.[12] Second, and more importantly, popular sovereignty provided a basis for elevating the new charter of national government to at least the same juridical status as the state constitutions, thus establishing a claim, through the supremacy clause, for the superiority of the federal constitution and laws over the interfering pretensions of the states. Indeed, the literal thrust of the supremacy

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standing) as a limitation on interpretive license was taken seriously as early as the 1790s. But again—to push my point to its logical (or absurd) conclusion—if the appeal to original meaning rests on the theory that popular sovereignty trumps judicial discretion, is it not necessary to trace the existence of a belief in the binding character of "ratifier intent" back to the literal moment of ratification?

11. This phrase translates as "a state within a state."

12. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1767-1787, at 524-32 (1969).

clause was to invite, or obligate, state judges to invoke the higher authority of the federal constitution and the fiction of a national, popular sovereignty against the arguably more democratic expressions of popular sovereignty embodied in state constitutions and laws. The principal thrust of Hamilton's defense of judicial review in *The Federalist* No. 78, it should be recalled, was to couple the idea of a Constitution resting on an original exercise of popular sovereignty with the lifetime tenure of the federal judiciary to explain why judicial independence "is equally requisite to guard the constitution and the rights of individuals"[13] from violation by legislative majorities.

But perhaps the single most important reservation or objection a historian can raise against the originalist belief is that it is false to the experience of the founding period itself. The tendency to treat the framers as the all-knowing architects of our system of government is as venerable as the Constitution itself. We can trace its first and in many ways most powerful expression to Benjamin Franklin's concluding speech at the Constitutional Convention, when he expressed his astonishment at "find[ing] this system approaching so near to perfection as it does."[14] Madison echoed much the same opinion in *The Federalist* No. 37, when, after detailing all the obstacles the Convention had faced, he declared that "[t]he real wonder is, that so many difficulties should have been surmounted; and surmounted with a unanimity almost as unprecedented as it must have been unexpected."[15] But Franklin spoke in part to convince the three dissenters still present at Philadelphia to sign the finished Constitution; Madison wrote not only to secure its ratification but also to deter the movement for a second Convention to remedy the defects of the first before the Constitution took effect. The efforts to understand what the Constitution meant did not end, however, when the Convention adjourned in September 1787, when the Constitution was ratified in 1788, or when the new government was organized and the Bill of Rights drafted in 1789. The framers and ratifiers of 1787-1788 were simply the first participants in a process of interpretation that began contemporaneously with the adoption of the Constitution and has gone on continuously since then. Had the framers thought that their task required nothing more than the application of certain hackneyed maxims of government to the

13. THE FEDERALIST No. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961).

14. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642 (M. Farrand ed. 1966).

15. THE FEDERALIST No. 37, at 238 (J. Madison) (J. Cooke ed. 1961).

American situation, we would not find their accomplishments nearly as engaging as they appear in our historical memory. It was instead their sense of experimentation, novelty, and creativity—and thus of uncertainty about results and consequences—that best explains why we find their enterprise so engaging. This same creativity undermines the logic of freezing one special moment of history and endowing it with a magical significance that those active at the time would have been more than a little reluctant to claim for it.

How this self-conscious awareness of the novelty of what the framers were doing can be squared with the idea that the meaning of the Constitution was never more truly understood than at the moment of its founding, is a problem that the appeal to originalism has yet to pose, much less answer.