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## ADHERENCE TO THE ORIGINAL INTENTIONS IN CONSTITUTIONAL ADJUDICATION: THREE OBJECTIONS AND RESPONSES

*Richard S. Kay\**

### I. INTRODUCTION

In a 1968 television interview, Justice Black was asked about certain unpopular constitutional decisions of the Supreme Court. "Well," he replied, "the Court didn't do it . . . . The Constitution did it."<sup>1</sup> His response nicely captures the conventional view of constitutional adjudication. According to this view, when a court finds unconstitutional the otherwise lawful action of some agency of government, it merely acts as the executor of a conclusive determination already embedded in the Constitution.<sup>2</sup> This understanding is the standard fare of school civics books.<sup>3</sup> It is the implicit assumption underlying the boast

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<sup>1</sup> Justice Black and The Bill of Rights (CBS television broadcast, Dec. 3, 1968). At another point in his answer to the same question, Justice Black said, "the Constitution-makers did it." *Id.* (emphasis supplied). This formulation is closer to the nature of original intentions adjudication discussed in this essay than is the quotation in text. See *infra* text accompanying notes 16-49.

<sup>2</sup> This is the rationale upon which the power of judicial review was originally asserted. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>3</sup> See, e.g., *Celebrating our Constitution*, Hartford Courant, Sept. 16, 1987. In this special section aimed at school children, the writers say that the Supreme Court has "the difficult job of deciding just what the Framers meant when they wrote the Constitution. The court's work is to say whether laws agree with the Constitution." *Id.* at 13. This outlook is so elementary that school books rarely do more than note that the Court has the power to invalidate a law or action that "violates some part of the Constitution." A. DAVID, *FAMOUS SUPREME COURT CASES* 6 (1979) (9th grade text). See also H. PETERSON, *THE SUPREME COURT IN AMERICA'S STORY* 19 (1975) ("The Court strikes down a law when the justices rule it violates or is against the Constitution.") (elementary school text). The official Immigration and Naturalization Service text on government for prospective citizens says that the Supreme Court's function includes the duty "to decide whether laws passed by Congress agree with the Constitution." U.S. DEPT. JUSTICE, *I.N.S., OUR GOVERNMENT* 82 (1973).

that our government is one of laws and not men.<sup>4</sup> And it is regularly expressed by the Supreme Court when exercising the power of judicial review.<sup>5</sup>

The reality, as every law student learns, is quite different. Almost from the beginning of our constitutional history, courts have invalidated government actions in the name of the Constitution, while relying on standards of decision that could not be inferred from the written Constitution itself. Most observers agree that a substantial portion of constitutional law is only tenuously connected to the Constitution of 1787-89, as amended.<sup>6</sup>

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<sup>4</sup> The same idea underlies the use of the corollary slogan—"No man is above the law"—a maxim of our government frequently cited during the Watergate affair of the early 1970s. See *United States v. Nixon*, 418 U.S. 683, 715 (1974). See generally J. DOYLE, *NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI—A BEHIND THE SCENES ACCOUNT* (1977).

<sup>5</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) in which the Supreme Court premised the legal supremacy of its constitutional judgments on its supremacy "in the exposition of the law of the Constitution." The Court also equated defiance of its orders with "war[ring] against the Constitution." *Id.*

Commentators dispute the extent to which the public and Court actually embrace the conventional model of original intentions adjudication. Some writers, favorable and unfavorable to this position, admit its prevalence. See, e.g., Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633, 635 (1983); Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 516-20 (1983); Levinson, *The Turn Toward Functionalism in Constitutional Theory*, 8 U. DAYTON L. REV. 567, 572 (1983). Other writers assert exactly the opposite, though often without specific supporting authority. Michael Perry cites to the popular press and concludes "[c]ertainly the crucial segments [of the population] are well aware [of the actual nature of Supreme Court adjudication]". M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 141 (1982). More typical are assertions of general awareness of the nature of constitutional adjudication without specific evidence. See, e.g., Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1487 (1985).

Modern polling data suggest the continuing predominance of the conventional view of constitutional adjudication, although they also show a significant minority belief to the contrary. A September 1987 Gallup Poll asked respondents whether they thought that, in interpreting the Constitution, Supreme Court justices should "apply the intentions of the original authors of the Constitution" or "their own values as well." Fifty-two percent chose just the original intentions. Forty percent thought it proper for judges to consult their own values. *A Newsweek Poll: Bork, the Court and the Issues*, NEWSWEEK, Sept. 14, 1987, at 26.

The Supreme Court has asserted consistently that its job is the application of rules made by the creators of the Constitution. This continues to be evident by its professed reliance on historical materials. See *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983); *I.N.S. v. Chadha*, 462 U.S. 919, 946-51 (1983). While separate, and often dissenting, opinions occasionally acknowledge the non-textual and non-historical nature of modern jurisprudence, see, e.g., *Miranda v. Arizona*, 384 U.S. 436, 526, 531 (1966) (White, J., dissenting), this is much rarer in the opinions of the Court. For an uneasy exception, acknowledging prior recognition of rights "that have little or no textual support in the constitutional language," see *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). See also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). This practice of the Court is some evidence of a popular understanding that assumes fidelity to the original intentions: "The way an institution advertises tells you what it thinks its customers demand." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971).

<sup>6</sup> See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); M. PERRY, *supra* note 5, at 1-2;

For a long time, constitutional lawyers failed to confront the discrepancy between the actions of the courts and the conventional justification for those actions.<sup>7</sup> In the last decade, however, scholars have taken an increasing interest in the legitimacy of constitutional adjudication. This development may be attributed, in part, to the work of Raoul Berger, whose exposition of the fourteenth amendment's legislative history argued the incompatibility of much modern constitutional adjudication with the intentions of the creators of the constitutional text.<sup>8</sup> While some of Berger's critics attempted to refute the accuracy of his historical research,<sup>9</sup> most contested its relevance. These critics questioned the conventional premise underlying Berger's book—that the proper task of judges in judicial review is limited to the application of rules expressed or implied in the written document.<sup>10</sup> Indeed, while scholars do not generally agree about the correct methodology for judicial review, there does seem to be widespread support for a process largely unrestrained by the intentions of the people who actually created the Constitution.<sup>11</sup>

We have thus arrived at a point where the academic consensus directly conflicts with the conventional understanding of judicial authority. Most proponents of contemporary constitutional scholarship would not—indeed, would scorn to—justify a constitutional judgment as Justice Black did: "The Constitution did it."

This essay will critically examine the reasons given by modern scholars for rejecting the conventional norm of judicial review—adherence to the original intentions of the Constitution's enactors. While variously phrased, their reasons may be subsumed under three general objections: 1) Adherence to the original intentions is impossible; 2) It is self-contradictory; and 3) It is wrong.

While there is some force in each of these objections, I conclude that

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Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 223-24 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975).

<sup>7</sup> This is not to say the discrepancy was entirely unnoticed. See, e.g., C. TIEDEMANN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890).

<sup>8</sup> See generally R. BERGER, *supra* note 6.

<sup>9</sup> Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

<sup>10</sup> See, e.g., the symposium on Berger's book at 6 HASTINGS CONST. L.Q. 403 (1979).

<sup>11</sup> See, e.g., Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); Symposium, *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

But see R. BERGER, *supra* note 6; Bork, *supra* note 5; Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Maltz, *Forward: The Appeal of Originalism*, 1988 UTAH L. REV. 1 (1988) [hereinafter Maltz, *Appeal*]; Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMM. 43 (1987) [hereinafter Maltz, *Constitutional Originalism*]; Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983) [hereinafter Maltz, *New Thoughts*]; Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) [hereinafter Monaghan, *Perfect*].

the first two are unconvincing and the third depends on personal judgments ultimately not susceptible to rational resolution. My objective is to provide responses to these objections and not to make a complete affirmative case for original intentions adjudication.<sup>12</sup> In the end, as discussed in section V outlining my response to the third objection,<sup>13</sup> I can no more hope to convince people whose preferences are based on values and attitudes which I do not share than they can expect to persuade me.

I also do not intend to argue that, historically, adjudicated constitutional law is in any significant way an actual reflection of the original intentions. Clearly it is not. Rather my goal is to clarify the arguments for one or another approach to constitutional adjudication as an abstract matter. Moreover, the practical consequences of accepting the propriety of original intentions adjudication may be extremely limited. The legal, social and economic impacts of judicial review cannot be wished away, nor may we want them to be. An abrupt and complete adoption of original intentions adjudication might inflict injuries that far transcend the kinds of specifically legal considerations I discuss here.<sup>14</sup> I am convinced, however, that we cannot intelligently discuss these practical matters until we have a clear sense of the underlying theoretical positions and disagreements.

## II. THE NATURE OF ORIGINAL INTENTIONS ADJUDICATION

Before discussing the objections to original intentions adjudication,<sup>15</sup> it is important to resolve a persistent ambiguity. Adherence to the conventional view of constitutional adjudication is sometimes associated with the idea that judges should be tethered to the intentions of those

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<sup>12</sup> Perhaps the firmness with which the conventional view is entrenched in our judicial history and the apparent breadth of its hold in the popular mind place the burden of persuasion on those who question it. See Berger, *New Theories of "Interpretation": The Activist Flight From The Constitution*, 47 OHIO ST. L.J. 1, 5 (1986); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 385 (1985); Maltz, *Constitutional Originalism*, *supra* note 11, at 55. Cf. Schlag, *Framer's Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 285-86 (1985) (explaining presumptive attractions of original intentions adjudication).

<sup>13</sup> See *infra* text accompanying notes 295-331.

<sup>14</sup> See R. BERGER, *supra* note 6, at 411-13; Brest, *supra* note 6, at 232; Simon, *supra* note 5, at 1527 (1985). For a discussion of the theoretical basis for constitutional *stare decisis*, see Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

<sup>15</sup> It has become difficult to cope with the proliferating labels for various schools of constitutional adjudication, such as interpretivist, textualist, originalist, and intentionalist. Each may engender an opposite by attaching the prefix, "non-". Each may be modified as strict or moderate. Explanations for most of these terms are found in Brest, *supra* note 6. The term "interpretation" has been used by people who would accord a less than controlling part to the original intentions. See, e.g., R. DWORKIN, *LAW'S EMPIRE* 51-52 (1986) (distinguishing "conversational" and "creative" interpretation); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 572 n.68 (1984) (objecting to a single "stipulated" meaning of "interpretation.") For the conventional technique that is the subject of this essay, I have chosen the term "original intentions adjudication."

who enacted the relevant constitutional provisions, and sometimes with the idea that judges should be restrained by the *text itself*, independent of the particular historical intentions of those who created it.<sup>16</sup> The model I discuss will require further elaboration, but, briefly put, it calls for judges to apply the rules of the written constitution *in the sense in which those rules were understood by the people who enacted them*. Probably the purest judicial exposition and application of this understanding can be found in Justice Sutherland's dissenting opinion in the Minnesota Mortgage Moratorium case.<sup>17</sup> He said the "aim of construction" is to "discover the meaning," that is to "ascertain and give effect to the intent of its framers and the people who adopted it."<sup>18</sup> The view discussed here, therefore, rejects the idea that judicial allegiance is owed only to the mere words of the Constitution.<sup>19</sup>

The "text-by-itself" idea does not explain the way we actually think about or treat texts of any kind, and it seems particularly unsuitable for a court that deals with authoritative legal texts. Some scholars have persuasively argued that it is impossible to deal with a "piece of language" independently of some real or presumed human intention connected with it.<sup>20</sup> Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them.<sup>21</sup>

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<sup>16</sup> The latter idea may be close to what Paul Brest calls "textualism." See Brest, *supra* note 6, at 205. For various expressions of this position, see C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 153-55 (1969); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 459-60 (1984); Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34, 43-44 (1982); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 186-87 (1981); Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 668 (1987); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809-12 (1982). Holmes put the point this way: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1898-99).

<sup>17</sup> Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting).

<sup>18</sup> *Id.* at 453.

<sup>19</sup> That is, the language of the constitution must be taken in a semantic and not solely in a syntactic sense. The "syntactic" properties of an expression refer strictly to its inspectable form. The "semantic" properties, on the other hand, refer to the objects or states of affairs designated by the expression. See Birmingham, *Holmes on 'Peerless': Raffles v. Wichelhaus and the Objective Theory of Contract*, 47 U. PITT. L. REV. 183, 194 (1985).

<sup>20</sup> See authorities cited *infra* note 21.

<sup>21</sup> See P. JUHL, *INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM* (1980); Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 727-29 (1982). These arguments have largely been directed against the "New Criticism" strain of modern literary criticism which asserts that the sole object of analysis ought to be the language of the relevant text. The *locus classicus* is Wimsatt & Beardsley, *The Intentional Fallacy*, in W. WIMSATT, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3 (1954). On the new criticism, see T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 47-53 (1983). Walter Benn Michaels has applied a contrary position, emphasizing the indispensability of reference to the author, explicitly to questions of constitutional interpretation. See Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765, 774 (1982) [hereinafter Michaels, *Fate*] ("[N]o one treats sounds or marks as words unless he or she thinks of them as speech acts expressing the intentions of some agent."); Michaels, *Response to Perry and*

It would then be a contradiction in terms to speak of "intentionless meaning."<sup>22</sup> Of course, one may assign a meaning different from the one intended by the original authors, but this merely substitutes some other hypothetical author for the historical ones.<sup>23</sup>

We do sometimes assign meaning to words by attaching to them the intention that our experience tells us is most frequently associated with them.<sup>24</sup> Usually this will yield the meaning intended by the author. But the argument that permits such an assignment in *all cases* assumes the propriety of sometimes applying a meaning other than that intended by the text's true authors. To make this substitution in interpreting a *legal* text raises an acute issue of authority because it replaces the actual lawmaker with a hypothetical normal speaker of the language. Yet we usually assume that the force that gives legal rules their authority is some pre-existing right of the lawmaker.<sup>25</sup> In legal interpretation, therefore, we are not interested in some abstract meaning of words but in the meaning of the *utterance* of those words on a particular occasion.<sup>26</sup>

The critical role of the lawmaker's intention is clear when we ex-

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*Simon*, 58 S. CAL. L. REV. 673 (1985) [hereinafter Michaels, *Response*]. Among philosophers, H. P. Grice has emphasized the essential character of reference to intentions in taking meaning from language. See Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 47 (1969).

<sup>22</sup> See authorities cited *supra* note 21.

<sup>23</sup> See E. HIRSCH, *VALIDITY IN INTERPRETATION* 3 (1967); Michaels, *Response*, *supra* note 21, at 678-79.

<sup>24</sup> See Dickerson, *Statutory Interpretation: A Peek Into the Mind and Will of a Legislature*, 50 IND. L.J. 206, 208 (1975) (referring to the "manifest" as opposed to "subjective" intention); Knapp & Michaels, *A Reply to Richard Rorty: What Is Pragmatism?*, 11 CRITICAL INQUIRY 466, 468-69 (1985). Cf. T. EAGLETON, *supra* note 21, at 70-71, 87. When considering statements made in the relatively distant past this identification will be between the speaker's intention and the ordinary meanings then associated with that language.

<sup>25</sup> "For, if the Framers wrote the Constitution and the text we are reading does not express their intentions but expresses instead the intentions of someone else, why is it the Constitution?" Michaels, *Fate*, *supra* note 21, at 775; see H. HART, *THE CONCEPT OF LAW* 92-96 (1961); Maltz, *Appeal*, *supra* note 11, at 17; Munzer, *Realistic Limits on Realist Interpretation*, 58 S. CAL. L. REV. 459, 472 (1985).

<sup>26</sup> See P. JUHL, *supra* note 21, at 57-58, 85-86. In fact, it is hard to imagine practical situations of any kind where we actually prefer interpreting in accordance with some standard abstract meaning to interpreting according to the speaker's intention when we have good evidence of that intention:

Arnold Isenberg has related the following incident. A foreign colleague of his would sometimes come into their office and say "Please don't make trouble" which he (Isenberg) "could easily interpret" as "Please, do not trouble yourself on my account." The example illustrates the fact that ordinarily we do not, so to speak, strictly enforce the rules of the language. That is, we do not ordinarily take a man to have *said*, or his utterance to mean, what we know or believe he did not mean (on the basis of our knowledge about the speaker, his facial expressions, gestures, what else he says, and so on), even if the rules of the language do not allow the sentence he uttered to mean what he intended to convey.

*Id.* at 107-08 (footnotes omitted) (citing Isenberg, *Some Problems of Interpretation* in *AESTHETICS AND THE THEORY OF CRITICISM* 208 (W. Callaghan ed. 1973)).

That is, in responding by word and action to language we encounter, we are usually interested in the utterance of words because we are interested in the point of the utterance. See C. ALTIERI, *ACT AND QUALITY* 81-84, 102-03 (1981). See also L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGA-*



amine an extreme example of the consequences of a "pure text" approach. In *Cernauskas v. Fletcher*,<sup>27</sup> the Supreme Court of Arkansas construed a state statute setting forth the conditions under which municipalities were authorized to vacate streets and alleys. The court was particularly concerned with whether the statute eliminated the municipal discretion granted by an earlier statute. The last section of the new statute read: "All laws and parts of laws and particularly Act 311 of the Acts of 1941 are hereby repealed."<sup>28</sup> The text itself, understood according to the ordinary use of the words employed, would give this provision an alarming sweep. The court, however, had little difficulty construing it more narrowly: "No doubt the legislature meant to repeal all laws in conflict with that act, and by error of the author or the typist, left out the usual words 'in conflict herewith,' which we will imply by necessary construction."<sup>29</sup> Why does this result seem so plainly correct when it is so patently at odds with the words of the statute itself? It is because we believe the statutory obligation does not emanate from the mere words of the provision but from the *act of legislation*, and we know the legislators did not intend to repeal all prior laws. Legal obligations arise because we recognize law-making authority vested in certain human beings.<sup>30</sup> It is to that exercise of human will in making the relevant law that we refer in statutory construction.<sup>31</sup>

We can conceive of a legal system that recognized as binding rules interpreted in some predefined conventional way whose only claim to

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TIONS 20e, 128e, 138e (G. Anscombe trans. 3d ed. 1973); Knapp & Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49, 54 (1987).

<sup>27</sup> 21 Ark. 678, 201 S.W.2d 999 (1947). The "plain words" of the statute were given a more sympathetic reading in *Poisson v. d'Avril*, 244 Ark. 478A (1968) reported in R. MEGARRY, A SECOND MISCELLANY AT LAW 185 (1973) in which the court held the repeal applied to all statutes but not to the common law which was found "too wonderful to be lightly tampered with." *Id.* at 187. The editor reports the following suspicious circumstances: The case appeared only in the advance sheets and its pages were numbered 478A-478E. It included expressions of dissent by five of the six judges sitting. Finally, consistent with its caption, it was issued on April 1. *Id.* at 189. I am grateful to my colleague, Loftus Becker, for bringing the case to my attention.

<sup>28</sup> 21 Ark. at 680, 201 S.W.2d at 1000.

<sup>29</sup> *Id.* See also Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. 179, 204-05 (1986) (arguing that the Supreme Court in *United States v. Locke*, 471 U.S. 84 (1985), erred in applying the apparent meaning in contradiction to an obviously intended meaning).

<sup>30</sup> See H. HART, *supra* note 25, at 92-96; Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 886-88 (1929-30). Law-making authority exists either by virtue of some other pre-existing rule of law or, finally, by virtue of a fundamental social and political judgment as to the source of law. See H. HART, *supra* note 25, at 103-07. The authority of constitution-makers is necessarily of this latter kind. See Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

<sup>31</sup> But cf. Moore, *supra* note 16, at 252-53 (suggesting that the text should control any contrary expression of intent). As a practical matter, the lawmaker's choice of language may make determination of his intent difficult or impossible. But, as the discussion of the *Cernauskas* case makes clear, courts can, and sometimes do, give effect to the lawmaker's intended meaning even when it conflicts with some other meaning reasonably associated with the words of the law alone.

authority is that they were found in a certain book. Similarly, we might govern ourselves by rules inferred from the entrails of sacrificed animals. But such a system has little resemblance to ours. For us, the force of law derives from the authority of the lawmaker.<sup>32</sup>

Support for the view that text alone creates legal rules might be drawn from the English practice of statutory interpretation. English judges, in construing an act of Parliament, may not seek guidance from legislative debates or other legislative material associated with its enactment.<sup>33</sup> But English courts have never suggested that the lawmaker's intent is not the critical object sought in statutory construction. The rule that the judge cannot consult legislative history merely limits the means by which that intent can be found.<sup>34</sup> English courts still adhere to the well-established maxim that a judge is to construe statutes in light of the mischief the lawmaker was attempting to correct.<sup>35</sup> Especially in earlier periods when legislative records were skimpy and unreliable, it was reasonable for judges to avoid entanglement in potentially misleading records. An English judge, however, like his American counterpart, is obliged to depart from a meaning apparent on the face of the law when, as in *Cernauskas*, such a conventional interpretation would lead to absurd consequences.<sup>36</sup> This "golden rule" of statutory construction only makes sense if we postulate a duty to adhere to a presumably rational legislature and not simply to words discovered on paper. The English rule is best understood, therefore, as a rule of administration for determining the original intentions. While it has continued to govern the

<sup>32</sup> "No one would even try to interpret the Constitution if everyone thought it had been put together by a tribe of monkeys with quills." Michaels, *Fate*, *supra* note 21, at 774. See Maltz, *New Thoughts*, *supra* note 11, at 833; Monaghan, *Perfect*, *supra* note 11, at 374-76; Perry, *supra* note 15, at 598-99.

<sup>33</sup> "The one thing which stands out beyond all question is that in a Court of Law you are not allowed to introduce observations made either by the Government or by anybody else, but the Court will only give consideration to the Statute itself." 94 PARL. DEB. 5th series, Lords, col. 232, Nov. 8, 1934 cited in F. FRANKFURTER, SOME REFLECTIONS ON THE READINGS OF STATUTES 22 (1947); see 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.02 (4th ed. 1984).

<sup>34</sup> See Dickerson, *supra* note 24, at 218.

<sup>35</sup> [The] intention [of the legislature] is to be the guide of our course in case any difficulty should arise in the construction of a particular clause . . . . [T]he construction of the statute then under consideration before them must be made, "by inquiring what was the mischief and defect against which the common law did not provide? what remedy the Parliament had appointed to cure the disease of the commonwealth? and what was the true reason of the remedy?" and the observation which follows in the Report is one that ought never to be lost sight of in any case, and is peculiarly applicable to the present, namely, "that the office of all Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." This principle of construction has always been adopted by courts of justice. Warburton v. Loveland, 2 Dow & Clark 480, 490, 496-97, [1831-32] E. R. 806, 810, 812. (Ir. Exch. Ch.) (quoting Heydon's Case, 3 Coke Reports 7 (1584)); see E. COKE, 4 INSTITUTES 330 (1809).

<sup>36</sup> See, e.g., *River Wear Commissioners v. Adamson*, 2 App. Cas. 742, 746 (H.L. 1877) (Blackburn, J.) quoted in H. HART & A. SACKS, THE LEGAL PROCESS 1144 (tent. ed. 1958); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965); A. SUTHERLAND, *supra* note 33, at § 45.12.

practice of statutory interpretation in Britain, in this country, of course, the practice has long been to the contrary.<sup>37</sup> The aim of both interpretive methods may be understood as ascertaining the intent of the lawmakers.

The arguments I have advanced thus far for interpretation based on the intent of the lawmaker, as opposed to interpretation based on some abstract meaning inferred from the text alone, apply with at least as much strength to constitutional interpretation. Unlike statutes, the authority of the Constitution does not derive from any legal authority vested in its makers. The creation of the Constitution in 1787 was not an act sanctioned by some pre-existing positive law. If anything, it was an act in defiance of the constitutional amendment procedure provided by the Articles of Confederation.<sup>38</sup> But this does not mean the Constitution's authority comes from the fact that its words are inscribed on a certain parchment located in the national archives. Its force derives from the historical and political events surrounding its creation and the regard in which those events were and continue to be held. There may be plausible theories of government and judicial review which demote the authority of both intention and text, but it is hard to see what the political rationale would be for a theory that elevates a text for reasons unrelated to the people and circumstances which created it.

In fact, explicit and direct recourse to the original intentions may be more necessary in constitutional than in statutory interpretation because erroneous interpretations of statutes are more easily corrected by the legislature. Therefore, a judge attempting to ascertain the original intentions of a constitution's drafters may feel more compelled to make a deliberate historical investigation of that intention, rather than rely on the conventional sense of the language itself.<sup>39</sup> Thus, while Canadian courts initially adopted the English rule in cases of constitutional interpretation,<sup>40</sup> under the pressure of experience, they have increasingly resorted to legislative history in constitutional cases.<sup>41</sup>

As a practical matter, an approach which relies on ordinary meanings will usually result in the same interpretation that would follow from original intentions adjudication. We expect the constitution-makers to use words according to ordinary usage at the time of enactment.<sup>42</sup> The

<sup>37</sup> See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); A. SUTHERLAND, *supra* note 33, at § 48.03.

<sup>38</sup> See Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987).

<sup>39</sup> These arguments parallel those sometimes made for a reduced force to *stare decisis* in the constitutional context. See *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

<sup>40</sup> See P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 342 (2d ed. 1985). The Constitution Act, 1867 (previously titled the British North America Act, 1867), which has provided the basis for most Canadian constitutional adjudication, was an act of the British Parliament, and courts, at first more or less naturally, applied ordinary rules of statutory construction to it. See, e.g., *Attorney-General for Ontario v. Winner*, [1954] App. Cas. 541 (P.C.).

<sup>41</sup> See, e.g., *Re Upper House*, [1980] 1 S.C.R. 54, 66-67.

<sup>42</sup> See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Green v. Biddle*, 21 U.S. (8 Wheat.)

best evidence of the enactors' intent is the language they used.<sup>43</sup> Indeed, in many cases, any other conclusion is so unlikely that an explicit reference to extrinsic evidence of intent is unnecessary.<sup>44</sup> Certainly, when most readers agree that a particular clause or phrase means one thing, the burden of persuasion ought to be on the advocate of some other meaning. Such a presumption is fully consistent with original intentions adjudication and a convenient rule of administration.<sup>45</sup>

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What I mean by original intentions adjudication should also be distinguished from two other possible versions of that idea. The first calls for adjudication to be governed by the general moral or political beliefs of the constitution-makers without regard to whether or not those beliefs were codified in the Constitution. In contrast, the model I propose only determines a usable meaning for the rules contained in the written Constitution. The intent of the constitution-makers is referred to only in connection with that enterprise.<sup>46</sup> This model is not directly concerned with the general philosophy, aspirations, and preferences held by the enactors.<sup>47</sup> These general influences should be consulted only insofar as they shed light on the intended scope of the constitutional rule in question.

The second and related variation calls for the specific questions in-

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1, 89-90 (1823). See also Dickerson, *supra* note 24, at 209 ("To assume differently is to assume that the purpose is to deceive or confuse (which, fortunately, is the rare exception)."); Grice, *Meaning*, 66 PHIL. REV. 377, 387 (1957). Cf. Brest, *supra* note 6, at 206-08 (plain meaning includes social as well as linguistic context).

<sup>43</sup> J. ELY, *DEMOCRACY AND DISTRUST* 16 (1980). See also R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 27 (1983). The force of this observation is particularly great where, as in the case of the constitutional ratifiers, we are concerned with the intentions associated with approving language chosen by other people. See *infra* text accompanying notes 85-92.

<sup>44</sup> It is this common sense idea that underlies the well known "plain meaning rule" whereby recourse to extrinsic evidence of legislative intent is proper only where the text of the statute betrays an ambiguity. See A. SUTHERLAND, *supra* note 33, at § 46.01. But see *Harrison v. Northern Trust Co.*, 317 U.S. 476, 476-79 (1943) (legislative history may be consulted no matter how clear the words of the statutes appear).

<sup>45</sup> See the discussion of the English rule of statutory interpretation *supra* text accompanying notes 34-37.

<sup>46</sup> The relevant intentions are those of the human beings whose assent was necessary to give the Constitution the force of law. See *infra* text accompanying notes 82-102. I generally will refer to these people as "constitution-makers" or "enactors."

<sup>47</sup> Why should anyone with common sense wish to equate an author's textual meaning with all the meanings he happened to entertain when he wrote? Some of these he had no intention of conveying by his words. Any author knows that written verbal utterances can convey only verbal meanings—that is to say, meanings which can be conveyed to others by the words he uses . . . . It betrays a totally inadequate conception of verbal meaning to equate it with what the author "has in mind." The only question that can relevantly be at issue is whether the *verbal* meaning which an author intends is accessible to the interpreter of his text.

E. HIRSCH, *supra* note 23, at 17-18. See P. JUHL, *supra* note 21, at 14; Maltz, *Constitutional Originalism*, *supra* note 11, at 49.

volved in constitutional litigation to be decided in the way the framers would decide them if they could somehow be asked the questions.<sup>48</sup> My approach is quite different from such a hypothetical seance. It does not involve some intention relating to the decision of a particular case. It is, rather, an approach as to the proper method of applying the enacted constitutional rule to the regulation of specific controversies. The constitution-makers' preferences are relevant only insofar as they tell us what the constitution-makers *did* when they made that rule. The judge should ask what the constitution-makers intended to effect in enacting the Constitution.<sup>49</sup>

### III. FIRST OBJECTION: IT'S IMPOSSIBLE

The first objection to original intentions adjudication—that it is impossible—is divisible into two somewhat different arguments. The first and more extreme argument asserts that it is conceptually impossible to ascertain the lawmaker's original intentions in such a way as to make them applicable to real instances of constitutional adjudication. The second argument concedes the theoretical possibility of discovering and using the relevant intentions, but claims that, as a practical matter, the difficulties associated with that enterprise will frustrate any application to actual cases. The considerations bearing on both arguments overlap and the response to one may well be appropriate in dealing with the other. Nevertheless, sufficient distinctions exist to justify treating them separately.

#### A. *It's Really Impossible*

The objection that original intentions adjudication is really impossible is founded on an extreme and general proposition about the capacity of human beings to communicate a determinate meaning through the medium of language. The argument suggests that because linguistic communication is impossible, it is futile for judges to attempt to learn the intentions of the constitution-makers by studying what they said or what other people said about them.

Some legal scholars have taken positions similar to this by adopting the views of writers in the fields of philosophy and literary criticism.<sup>50</sup> In particular, some writers have attempted to apply post-structuralist or

<sup>48</sup> See Bennett, *supra* note 16, at 472; Schauer, *supra* note 16, at 809.

<sup>49</sup> See M. Oakshott, *The Rule of Law* in *ON HISTORY AND OTHER ESSAYS* 117, 146 (1983); Maltz, *Appeal*, *supra* note 11, at 30; Perry, *supra* note 15, at 599. Thus, the fact that an enactor favored a provision because he received a bribe is irrelevant to his intent with respect to the effect of the rule. Similarly, the fact that he voted for a provision because he wanted to benefit a particular interest would not convert a rule intended to operate in a certain manner into a general injunction to benefit the party he wanted to favor. See Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 783 (1987).

<sup>50</sup> See, e.g., Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58

deconstructionist literary theory to the law.<sup>51</sup> It would be wrong to lump together scholars whose work is in some respects very different, but it seems possible to identify some of the notions identified with these schools that appear to have influenced legal writers who find original intentions adjudication unsupportable.

The main idea that emerges from the legal reading of such scholarship is that no text is so simple and clear as to admit of any permanent, single, correct meaning. Various reasons underly this conclusion. Some critics argue that every text, particularly if dependent on metaphor, is sufficiently complex to contain the converse of any and every suggested meaning.<sup>52</sup> Such contradictions become apparent if the text is exposed to sufficiently careful analysis.<sup>53</sup> Other critics emphasize that variability of meaning is a necessary consequence of the multiplicity of readers. Every act of interpretation is a shared enterprise between the text (and its author) and the reader. The consequences of that enterprise depend not only on what the text contains but on the outlook, expectations, and preconceptions of the reader.<sup>54</sup> Interpretation must, therefore, vary from

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S. CAL. L. REV. 35 (1985); Levinson, *Law As Literature*, 60 TEX. L. REV. 373 (1982); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

<sup>51</sup> An introduction to such theories may be found in T. EAGLETON, *supra* note 21, at 133-39.

<sup>52</sup> See *id.*; Poster, *Interpreting Texts: Some New Directions*, 58 S. CAL. L. REV. 15, 16-17 (1985).

<sup>53</sup> See F. KERMODE, *THE ART OF TELLING: ESSAYS ON FICTION* 202 (1983) ("[T]he deconstructionists mean to tell you what a text is saying in spite of itself."); C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 48-49 (1982); Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L.J. 331, 332, n.6 (1986); Searle, *The World Turned Upside Down* (Book Review), N.Y. Rev. of Books, Oct. 27, 1983, at 74.

<sup>54</sup> See S. FISH, *IS THERE A TEXT IN THIS CLASS?* 112-46 (1980) (Fish qualifies his understanding of the reader's contribution to meaning in later essays in the same book).

The variability of meaning according to reader is also an important theme in the work of Hans-Georg Gadamer. See, e.g., H. GADAMER, *TRUTH AND METHOD* 304 (1975):

[A]ll reading involves application, so that a person reading a text is himself part of the meaning he apprehends. He belongs to the text that he is reading. It will always happen that the line of meaning that is revealed to him as he reads it necessarily breaks off in an open indefiniteness. He can, indeed he must, accept the fact that future generations will understand differently what he has read in the text.

See also *id.* at 263-65, 271-72. Gadamer also insists, however, on a critical but still partial role for the author in shaping the reader's understanding. That understanding is further constrained by a tradition of which both text and reader are a part. See *id.* at 267-74. See also Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985). On the role of the reader, see also, R. DWORKIN, *supra* note 15, at 57-58; F. KERMODE, *supra* note 53, at 203; R. PALMER, *HERMENEUTICS* 51 (1969); Brest, *supra* note 6, at 221-22 (discussing Gadamer); Patterson, *Interpretation in Law—Toward A Reconstruction of the Current Debate*, 29 VILL. L. REV. 671, 681 (1983-84) (describing "nihilist" tendencies in modern literary criticism); Peller, *supra* note 50, at 1172-74.

The two features of modern criticism discussed in the text naturally interrelate as it is the availability of multiple meanings which gives room for the subjective preconceptions of individual readers to assert themselves. See Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 823-24 (1985).

reader to reader, from era to era or from group to group.<sup>55</sup> These properties of interpretation are not the result of mere defects in particular communications or interpretation; rather, they inhere in the very nature of linguistic expression. Every text is indeterminate. Original intentions adjudication, which instructs judges to inquire into the intended meaning of certain historical expressions, necessarily falters because not only is the constitutional text indeterminate but the statements of and about the creators of that text are also indeterminate. The historical investigation that such an approach demands will only lead to deeper and deeper levels of obscurity.

These assertions are not convincing. In the first place, even if they are apt descriptions of literary interpretation, it does not necessarily follow that they equally illuminate legal interpretation.<sup>56</sup> In the second place, there are very serious doubts whether these theories plausibly reconstruct our use of language in general.

The experiences of interpreting legal and literary texts differ substantially. Legal and literary texts are created for quite different purposes and exhibit those differences; the reasons for reading legal rules diverge markedly from the reasons for reading fiction or poetry; different kinds of people have been associated with the explication of legal and literary writings. These differences reinforce each other. It is, therefore, unlikely that the theories and claims of literary criticism can be transferred to questions of legal interpretation without significant qualifications.

For example, there is more pressure upon judges and lawyers to come up with the one "best" interpretation of a text than there is on literary critics. To be successful, a practitioner of literary criticism must discover new and interesting readings of literary texts. A poem's value may be multiplied indefinitely as new ways to look at and learn from it are developed. The same poem may appeal to different people in different ways or to the same person in several ways. The satisfaction we derive from literature may be enhanced, not diminished, by multiple and even contradictory interpretations.<sup>57</sup> Indeed, in the literary context, the very word "interpretation" sometimes incorporates this idea of multiple meanings in a way quite different from legal interpretation. Such interpretation may be analogous to what we mean when we refer to the "in-

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<sup>55</sup> See S. FISH, *supra* note 54, at 275 ("[Words] always and only mean one thing, although that one thing is not always the same."); Hoy, *supra* note 54, at 138-39 (discussing Gadamer).

<sup>56</sup> This is not to say that these approaches have not been seriously applied to non-literary texts. There have been particularly noteworthy attempts to "deconstruct" the writings of philosophers. See C. NORRIS, *THE DECONSTRUCTIVE TURN* (1983).

<sup>57</sup> Wallace Stevens said that "a poem consists of all the constructions that can be placed upon it." M. BATES, *WALLACE STEVENS: A MYTHOLOGY OF SELF* 128 (1985) (quoting Wallace Stevens); see J. POCKOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 6-7 (1971); Hoy, *supra* note 54, at 167-69 (distinguishing limitations on literary and other forms of interpretation).

terpretation" of a musical composition. In that case, a performer's "interpretation" of a composer's work depends on the idiosyncratic rather than the common elements of his performance.<sup>58</sup>

In contrast, the value of multiple interpretations of legal texts is far more controversial. There is a conventional wisdom about permitting a rule of law to "keep pace with the times," suggesting the utility of changing meanings.<sup>59</sup> But there is an equally powerful tradition of seeing a legal rule as having only one "correct" interpretation. This position is based on the idea that the law exists, in part, to influence human behavior in predictable ways. The idea of multiple interpretations of legal rules is plainly at war with this widely held view of the function of law<sup>60</sup> because it creates uncertainty as to what the law requires and allows. Thus lawyers and judges have traditionally been much more concerned with arriving at a single valid interpretation<sup>61</sup> than their literary counterparts. Consequently, as a matter of fact, legal interpreters feel far greater constraints in the process of interpretation and may perceive far fewer permissible readings. They may find themselves—in terms Owen Fiss has borrowed from Stanley Fish—members of a specialized "interpretive community," a community that severely limits the subjective preconceptions they bring to a text.<sup>62</sup>

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<sup>58</sup> See E. HIRSCH, *supra* note 23, at 112 (discussing Betti's distinction between re-cognitive (historical and literary), presentational (musical and dramatic) and normative (legal and biblical) types of textual interpretation). Jerome Frank compared musical and statutory interpretation in an article that ignored the differences discussed in the above text. See Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947). It is possible to think of a musical work as a kind of charter of permissions and restrictions governing the acts of the performer. Looking at it that way makes the interpretation much more like legal interpretation. See Crutchfield, *Opera and The Constitution*, N.Y. Times, Sept. 24, 1987, at C22, col. 3. My thinking on the relationship between musical and legal interpretation has been clarified in useful discussions with my colleagues, Hugh Macgill and Carol Weisbrod.

<sup>59</sup> See *infra* text accompanying notes 309-13. E.D. Hirsch, who is conspicuously identified with the advocacy of literary interpretation based on discovering an author's intention, took the position that the need for adaptability over time of documents like the Constitution argues against "re-cognitive" constitutional interpretation which requires reconstruction of the intention of the author. See E. HIRSCH, *supra* note 23, at 123-25. His views on this question seem to have altered somewhat since then. See Hirsch, *Meaning and Significance Reinterpreted*, 11 CRITICAL INQUIRY 202, 218-19 (1984).

<sup>60</sup> See Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 434 (1986); Stone, *Introduction: Interpreting the Symposium*, 58 S. CAL. L. REV. 1, 5 (1985). For a discussion of practical problems involved with abandoning the idea of a single valid meaning in adjudication, see Hoy, *supra* note 54, at 167-69; Levinson, *supra* note 50, at 401 n.117 (quoting Richard Rorty: "I confess that I tremble at the thought of Barthian readings in law schools . . . ." Letter from Rorty to Sanford Levinson (Apr. 28, 1981) (copy on file with *Texas Law Review*)).

<sup>61</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 80-130, 279-90 (1978); R. PALMER, *supra* note 54, at 56-60 (discussing the influence on Betti's theory of interpretation of the fact that he approached the subject as a historian of law).

<sup>62</sup> See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744-47 (1982); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1333-34 (1984).



Thus, the argument that determinate interpretations of legal texts is impossible because every text has unlimited possibilities and every reader irrepressible eccentricities may be theoretically true, but it has little relevance to the actual choices encountered in adjudication. Indeed, some literary critics and philosophers have made clear that their observations pertain only to the possibilities inherent in language and are not suggestions as to what actual readers do or ought to do in concrete situations.<sup>63</sup>

A second argument against the use of these theories of indeterminacy is more general. They are highly controversial among scholars of philosophy and literary criticism. I have already referred to those writers

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<sup>63</sup> Deconstruction neither denies nor really affects the commonsense view that language exists to communicate meaning. It *suspends* that view for its own specific purpose of seeing what happens when the writs of convention no longer run.

Scepticism in philosophy has always borne this ambiguous relation to the 'natural' or commonsense attitude. Its proponents have never pretended that life could be conducted in a practical way if everyone acted consistently on sceptical assumptions. What would such 'consistency' amount to, indeed, if one denied the very bases of reason and logical coherence? This is not to say that the sceptics' questions are trivial or totally misconceived. They are—as I have tried to show with Derrida—questions that present themselves *compulsively* as soon as one abandons the commonsense position. But language continues to communicate, as life goes on, despite all the problems thrown up by sceptical thought.

C. NORRIS, *supra* note 53, at 128. One writer has claimed that certain American versions of deconstruction that deny "the existence of anything but discourse" or affirm "a realm of pure difference in which all meaning and identity dissolves" are "a travesty of Derrida's own work." T. EAGLETON, *supra* note 21, at 148.

In addition to theories of literary interpretation, recent discussions have drawn on the parallels found in Biblical interpretation. On its face, this presents a more apt analogy because the text to be interpreted, unlike most literary texts, is normally consulted in its normative and imperative aspects. It is presumed to be the source of rules binding on human conduct. See Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2-3 (1984); Perry, *supra* note 15, at 561-62; Hoy, *supra* note 54, at 167. Some writers reject the propriety of original intentions adjudication citing modern theories of biblical interpretation that incorporate experience, tradition, interpretive history, and so forth. See Gare, *supra* note 50, at 120-34; Perry, *supra* note 15, at 557-61. Cf. Grey, *supra* at 10-13, 21-25.

Of course, there are other views on Biblical interpretation that are at least as well-established and that stress the duty of the interpreter to discover the original intention of the writer of the Biblical text:

[T]he heart of biblical study should lie in an attempt to understand what the texts meant as they were originally written by a specific person (or group), directed toward a specific group of persons, in a specific setting, to speak to the needs of those people in that setting. In short, what did the texts originally mean?

J. EFIRD, *HOW TO INTERPRET THE BIBLE* vi (1984); see Thomas, *Issues of Biblical Interpretation*, 58 S. CAL. L. REV. 29, 30-34 (1985); Goodrich, *supra* note 53, at 342; see also H. FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH AND NINETEENTH CENTURY HERMENEUTICS* 42, 77-79, 90, 107-08 (1974).

The issues in biblical interpretation are quite similar to those in legal interpretation, although the stakes in the former may be much higher than in the latter. But biblical interpretation offers a special problem of identification of the correct author, as it can be seen to involve both a divine and human one. The methods of ascertaining the divine intention may not coincide with those for discovering the human ones. See H. FREI, *supra* at 73-74. Biblical interpretation, therefore, can be informative but hardly dispositive of the questions of legal interpretation.

Interestingly, Max Radin thought recourse to the author's intention was sensible in literature and theology but not in law. See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866-67 (1929-30).

who find the very idea of intentionless meaning to be incoherent.<sup>64</sup> Other critics, most prominently E.D. Hirsch, do not go so far but argue, nonetheless, that interpretation directed at ascertaining the intention of a text's author is both possible and desirable. Hirsch premises his argument, in part, on the need for a single, stable, valid interpretation and on the need to separate textual interpretation from judgments regarding the text's merits and its significance in particular times and circumstances. His theory thus focuses on the same concerns as legal interpretation.<sup>65</sup> The extreme position is also inconsistent with the work of some twentieth-century philosophers of language, notably Wittgenstein and Austin, who understood language as part of the means employed by individuals to accomplish their objectives.<sup>66</sup> Our job in trying to understand language is to discern those objectives. We can accomplish this only by participating in, or investigating, the system of conventions people use in a given time and place and by considering the likelihood of various objectives in light of the particular circumstances in which language is used—that is, by considering the “context” of the particular utterance.<sup>67</sup>

It would be, therefore, a great mistake to assume that non-legal disciplines have somehow “discovered” something about interpretation, and that when that discovery is applied to law, original intentions adjudica-

<sup>64</sup> See P. JUHL, *supra* note 21; Knapp & Michaels, *supra* note 21; Michaels, *Fate*, *supra* note 21; Michaels, *Response*, *supra* note 21.

<sup>65</sup> See generally E. HIRSCH, *supra* note 23; Hirsch, *The Politics of Theories of Interpretation*, in *THE POLITICS OF INTERPRETATION* 320 (W. Mitchell ed. 1983). See also McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 OKLA. CITY U.L. REV. 1 (1982).

<sup>66</sup> For Wittgenstein, in his later writing, meaning was not some inherent relationship between words and their referents but a consequence of the successful execution of linguistic practice in social life. See L. WITTGENSTEIN, *supra* note 26, at 137e:

491. Not: “Without language we could not communicate with one another”—but for sure: without language we cannot influence other people in such-and-such ways; cannot build roads and machines, etc..[sic] And also: without the use of speech and writing people could not communicate.

See also *id.* at 20e, 128e (Nos. 43, 432); S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* 73-79 (1982); T. MORAWETZ, *WITTGENSTEIN AND KNOWLEDGE* 58 (1978).

Austin distinguished between those aspects of speech which merely express a meaning (locutionary force) and those which look to the achievement of results (illocutionary force). This instrumental aspect of language is, perhaps, most explicit in the legal context and Austin relied substantially on the experience of the law. See J. AUSTIN, *HOW TO DO THINGS WITH WORDS* 99-121 (1975). This aspect of legal language also provides an ordinarily apparent context which facilitates inference of the original intention and which further distinguishes legal from literary interpretation. See T. EAGLETON, *supra* note 21, at 88, 113-14 (for a discussion of literary interpretation); see also A. KENNY, *FREEWILL AND RESPONSIBILITY* 11-12 (1978); Kavka, *Wittgenstein and Political Theory*, 26 STAN. L. REV. 1455, 1460-62 (1974); Patterson, *supra* note 54, at 682-87; Searle, *Reiterating the Differences: A Reply to Derrida*, 1 GLYPH 198, 202 (1977).

<sup>67</sup> See T. MORAWETZ, *supra* note 66, at 58-61; Graff, “Keep Off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 408-10 (1982). Our interest in the context of an utterance is further evidence of the fact that our concern in interpretation is ordinarily with the writer's or speaker's intention. See P. JUHL, *supra* note 21, at 90-99.

tion is seen to be impossible. When considering the possibilities and techniques of interpretation in philosophy and literature, as in law, we find no accepted conclusions, only controversies.<sup>68</sup> In each area we must decide which view is suitable in light of the experience and needs of the enterprise.

The most glaring problem with the extreme position that interpretation according to original intentions is impossible, when applied to the use of language in general, is that it is wildly counterintuitive. It is inconsistent with the way people carry on their lives every day. We all confidently proceed on the assumption that we are capable of communicating through words a single determinate intention and that we are capable of understanding the single, determinate intentions of others. Most of the time our confidence is well-founded. We arrive at the right place for the right meetings at more or less the right time. We read and discuss articles with the impression that we are talking about the same thing. We stop at stop signs, file our tax returns, and obey subpoenas. All these commonplace experiences testify powerfully against the claim that the inference of a determinate meaning from a sequence of words uttered in a particular context is essentially, and always, impossible.<sup>69</sup> Put another way, even if it were true that multiple contradictory meanings were buried in every text, and that every reader and reading injects a potential subjectivity in interpretation, people can and do ignore some of the possible meanings and suppress their personal idiosyncrasies in both speaking and understanding.<sup>70</sup> This selectivity is exercised in a sufficiently uniform pattern so as to create our familiar medium of communication.<sup>71</sup> Of course, such behavior is not inevitable and there may be truly unsuccessful attempts to communicate. In some cases usage will be so eccentric or context so inaccessible that attempts at a single interpretation will be fruitless.<sup>72</sup> But to refute the extreme position under discussion, it is only necessary that this not always be the case—the common experiences mentioned above make this obvious.

The most telling response to this objection is simply that no one really believes it, not even the writers who make the objection. If they did, they would not use language to advance the argument. These "impossibility" theories amount to what John Finnis has called "operation-

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<sup>68</sup> See Miller, *A Rhetoric of Law* (Book Review), 52 U. CHI. L. REV. 247, 255-56 (1985).

<sup>69</sup> See C. ALTIERI, *supra* note 26, at 40; Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404-15 (1985).

<sup>70</sup> See Hirsch, *supra* note 65, at 326.

<sup>71</sup> See S. KRIPKE, *supra* note 66, at 91-98. Such uniformity of response defines what Fish calls "interpretive communities." See S. FISH, *supra* note 54, at 170-73. The deconstructive strategy calls attention to this artificial suppression of one set of possibilities and "privileging" of another. See Balkin, *supra* note 49, at 764.

<sup>72</sup> That is, we may not be able to discover the circumstances surrounding a particular utterance. See E. HIRSCH, *supra* note 23, at 18-19; Graff, *supra* note 67, at 408-10. I argue below this is unlikely to be the case with most constitutional language. See *infra* text accompanying notes 112-13.

ally self-refuting propositions"—those that "are inevitably falsified by any assertion of them."<sup>73</sup> The point is put strikingly in the following passage from a Chinese philosopher:

To hold that all speech is perverse is not permissible. If the speech of the man who says so is permissible, then all speech is not perverse since there it is permissible. But if his speech is not permissible, then it is wrong to take it as being correct.<sup>74</sup>

### B. *It's Too Hard*

The more moderate form of the impossibility objection to original intentions adjudication—It's too hard—appears much more plausible. It concedes that language is sometimes capable of communicating a speaker's or writer's intentions, but holds that interpretation of the American Constitution creates peculiar problems which make the relevant original intentions inaccessible.

Under this objection, two features of constitutional interpretation are ordinarily emphasized. First, it is argued that because the original intentions involved are not the intentions of individuals, but of law-making bodies (that is, Congress, legislatures, and constitutional conventions) the distilling of a *single* intention is virtually impossible.<sup>75</sup> Second, it is argued that the distance in time between the constitutional utterances and the attempts at understanding is now so great that it is extremely difficult to discover the original intentions.<sup>76</sup> The intervening time also brings forth new problems not addressed by the enactors.

Before addressing these criticisms, it is necessary to explain precisely what original intentions adjudication requires of judges in the context of actual litigation. No judge is ever required to answer the abstract question: "What did the enactors intend by the phrase 'due process of law'?" Rather, judges must decide in a specific case whether or not, given the original intentions of the constitution-makers, a particular governmental action deprives someone of liberty or property without due process of law. The difference between the two questions is critically important. It is much easier to answer the second than the first because the alternatives are binary. The question can and can only be answered "yes" or "no,"

<sup>73</sup> J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 74 (1980). A number of writers have made this observation. David Hoy has written that "[a] theory of interpretation concluding that undecidability is inevitable is by *reductio* shown to be wrong. Since it could not decide the truth-values of its own claims, it could not exclude contradictory principles, and thus refutes itself." Hoy, *supra* note 54, at 171. In a similar vein, M.H. Abrams has called this form of objection "suicidal." Abrams, *How To Do Things With Texts*, 1979 *PARTISAN REV.* 566, 568, 587; C. NORRIS, *supra* note 53, at 126; Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 *GEO. L.J.* 89, 101 (1984); Patterson, *supra* note 54, at 689; Schauer, *supra* note 69, at 417.

<sup>74</sup> J. POCOCK, *supra* note 57, at 59 (quoting "a later disciple of Mo Tzu").

<sup>75</sup> See *infra* text accompanying notes 82-102.

<sup>76</sup> See *infra* text accompanying notes 103-13.

and since the judge must give some answer, it follows that he need not answer with certainty. All he needs to do is decide which of the two possible answers in that case is *more likely* correct.<sup>77</sup>

Defining the judge's task as that of choosing which of two outcomes is more likely consistent with original intentions is particularly important in light of criticisms that stress the impossibility of ascertaining those intentions with sufficient certainty.<sup>78</sup> It is true that we can never know the original intentions with certainty, but then we can never know any speaker's or writer's intent with certainty. Nevertheless, it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent.<sup>79</sup> Of course confidence in these judgments will be different in different situations, but one answer will almost always appear better than the other.<sup>80</sup> Indeed, one of the two possible responses may be obviously incorrect because, while it is theoretically possible that the lawmakers held such an intention, the available historical evidence will be overwhelmingly against it.<sup>81</sup>

<sup>77</sup> This discussion is premised on the assumption that original intentions adjudication requires decision-making based *exclusively* on an interpretation of the Constitution intended by its creators. Given that assumption, the better answer will always be the one that more closely conforms to those intentions. One could adopt a model that requires some minimum level of confidence in the preferred alternative in order to justify holding a governmental action unconstitutional. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). But to adopt this latter model is to introduce an element—here, the stipulated presumption of constitutionality—that cannot itself be justified by the original intentions.

<sup>78</sup> See, e.g., Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1240-43 (1984). Cf. Schauer, *supra* note 69, at 437 n.99 ("It is currently fashionable to make sport of the ability to determine original intent with any degree of certainty.").

<sup>79</sup> It is a logical mistake to confuse the impossibility of certainty in understanding with the impossibility of understanding. It is a similar, though more subtle, mistake to identify knowledge with certainty. A good many disciplines do not pretend to certainty, and the more sophisticated the methodology of the discipline, the less likely that its goal will be defined as certainty of knowledge. Since genuine certainty in interpretation is impossible, the aim of the discipline must be to reach a consensus, on the basis of what is known, that correct interpretation has *probably* been achieved. The issue is not whether certainty is accessible to the interpreter but whether the author's intended meaning is accessible to him.

E. HIRSCH, *supra* note 23, at 17; see also *id.* at 173-80; C. ALTIERI, *supra* note 26, at 50, 226-28; R. EPSTEIN, *supra* note 43, at 27. The idea that original intentions adjudication requires only a probability judgment is a somewhat more specific statement of the view that judges interpreting the Constitution should "do the best they can" notwithstanding the absence of certainty. See, e.g., Maltz, *New Thoughts*, *supra* note 11, at 813; Perry, *supra* note 15, at 601. On the other hand, Paul Brest states, "It seems peculiar, to say the least, that the legitimacy of a current doctrine should turn on the historian's judgment that it seems 'more likely than not,' or even 'rather likely,' that the adopters intended it some one or two centuries ago." Brest, *supra* note 6, at 222.

<sup>80</sup> It is possible that in some cases the probabilities will balance exactly or that there will be no evidence either way. See *infra* text accompanying notes 115-30.

<sup>81</sup> See Sherry, *supra* note 73, at 100. Cf. Toulmin, *The Construal of Reality: Criticism in Modern and Postmodern Science*, in THE POLITICS OF INTERPRETATION 99, 109-10 (W. Mitchell ed. 1983). Some constitutional scholars have concluded that the claim that the fourteenth amendment reaches most forms of gender discrimination is in this category. See Maltz, *New Thoughts*, *supra*

Thus, we can be uncertain about the intended meaning of a constitutional provision at the same time we are convinced that it is not consistent with one of the two contesting positions in a lawsuit. And, given that we have only two options, that conviction will decide the case.

There is nothing extraordinary in making important decisions this way. Almost every decision we make and action we take is based on a judgment of probabilities, often as to the probable intended meaning of what we read or hear. To insist on certainty would lead to paralysis. In asking judges to make decisions in this way we demand nothing more or less than the same kinds of decisions everyone makes everyday.

1. *The Problem of Multiple Intentions.*—Having clarified my approach to the actual demands of original intentions adjudication, it is now possible to turn to the two problems with ascertaining original intentions asserted by critics. The first problem concerns the difficulty of discerning a single intention when there are multiple constitution-makers.<sup>82</sup>

In one sense this argument is a variant of the more extreme claim discussed above. To speak of an intention is to speak of a human mind. A joint intention cannot be the simple analog of an individual intention because we cannot easily conceive of a joint or group mind.<sup>83</sup> But intent can be attributed to a group without positing the idea of a group mind. When we speak of such an intention we usually mean that each member of the group holds an identical individual intention. If a husband and wife discuss and settle on a list of invitations to a dinner party it seems perfectly proper to say that they have "an intention" about who their guests will be. This phenomenon would only be impossible if the couple could not articulate and communicate their intentions to each other in a way that let each one know those intentions coincided. I have already discussed why I believe such communication is not only possible but common.<sup>84</sup>

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note 11, at 813; Perry, *supra* note 15, at 601. Thomas McAfee uses this approach to conclude that the interpretation of the "privileges or immunities" clause of the fourteenth amendment was misinterpreted in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). McAfee, *Constitutional Interpretation—The Use and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 281, 287-88 (1986). Frederick Schauer has made a similar point. See Schauer, *supra* note 69, at 414-20. He is primarily concerned, however, with the way in which language alone excludes many cases. For the reasons discussed, *supra* text accompanying notes 16-44, I think the examples Schauer gives involve tacit assumptions about lawmakers' intentions. Schauer also suggests that judgments about historical intent will often be easier than is sometimes assumed. See Schauer, *supra* note 69, at 436-37.

<sup>82</sup> See R. DWORKIN, *supra* note 15, at 315-21; Brennan, *supra* note 60, at 435; Brest, *supra* note 6, at 212-13; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 480-81, 487-88 (1981); Radin, *supra* note 63, at 870-71; Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 772-80 (1983); Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507 (1982).

<sup>83</sup> See R. DWORKIN, *supra* note 15, at 335-36.

<sup>84</sup> See *supra* notes 64-71.

Nevertheless, ascertaining the intention of a group is more complicated than discovering the intention of a single person. Many individuals in different capacities were involved in making the Constitution. In investigating the original intentions of these individuals, one problem lies in identifying those people whose coincident intentions created the relevant original intent. This problem is two-fold. First, every constitutional provision is the product of consideration and approval by different groups; therefore, we must identify which groups should be counted in defining the original intention. Second, within a specific group, there will be a variety of individual intentions and we will have to decide whose intentions define the intention of the group. Each of these aspects will be considered in turn.

a. *Which groups?*—In answering the first question, it is useful to recall the reason for being concerned with intention in the first place. The “plain meaning” of the *Cernauskas* statute could not control because it did not represent the will of the lawmaker. Recourse to intention is necessary because only certain people have the authority to make law. Thus, in constitutional law, we must identify which groups could, by their approval, give the Constitution the sanction of law.

It is necessary at this point to distinguish between the original Constitution of 1787 and subsequent amendments. We ordinarily treat amendments as law because they were created in accordance with Article V. An amendment becomes law when it is ratified by the legislatures of three-fourths of the States. The intentions of these legislatures is, thus, essential. But knowing those intentions is not sufficient. According to Article V, state legislatures may only ratify amendments that have been proposed by Congress with a two-thirds majority in each House. Thus, the Senate and House of Representatives are indispensable actors in the law-making process. In sum, constitutional amendments require identical intentions in the two Houses of Congress and in thirty-eight state legislatures.<sup>85</sup>

When we consider the Constitution of 1787, of course, there is no governing law analogous to Article V that informs us who must agree before the Constitution acquires the force of law.<sup>86</sup> The Constitution was a clean break with prior existing law.<sup>87</sup> This does not mean, however, that we have no idea whose judgments and approval gave the Constitution authority. Like any supreme law, the legal character of the Consti-

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<sup>85</sup> For the sake of simplicity, I am ignoring the alternate procedures for proposal and ratification provided in Article V. Ratification by state conventions has been used only for the twenty-first amendment repealing the eighteenth. Proposal by a national convention, called by petition of the state legislatures, has never occurred. The methodological questions on discerning intent would be the same.

<sup>86</sup> The ratification procedure specified in Article VII does not meet this description since it could have no greater legal status than the rest of the Constitution.

<sup>87</sup> See Kay, *supra* note 38.

tution will depend on political beliefs and attitudes in a society about who has the final right to make law.<sup>88</sup> This is a complex matter I have addressed at some length elsewhere.<sup>89</sup> It is sufficient here to note that the authority of the Constitution is conventionally and popularly premised on the understanding that it was the work of "the People" in their original, sovereign capacity.<sup>90</sup> Actually, the role of "the People" was played by the special ratifying conventions in the individual states. The drafters at the Philadelphia Convention could claim no such mandate from "the people." Some supporters of the Constitution went so far as to disparage the importance of the Convention, except insofar as it was able to place a proposal before the state conventions.<sup>91</sup> The inquiry into original intent, therefore, should focus on the intentions of the various ratifying bodies who possessed the constituent authority.

With regard to both the body of the Constitution and its amendments, then, the only valid original intentions will be those held in common by a number of legislative bodies. This conclusion raises an obvious problem: What if we discover that, though they approved the same texts, different groups held different intentions so that no single intention can be applied to a particular question of interpretation? I will return to this question shortly.<sup>92</sup>

b. *Which individuals within groups?*—The very same problem arises in answering the second question. Once we have found the authoritative groups, we must find a single intention for each group. Which individuals' intentions in, say, the Senate or in the Virginia Ratifying Convention should be considered?

The reasoning employed above can be applied to this problem. We wish to obtain the group intention because we deem it capable of establishing an authoritative rule. A given body acts when some number of its members agree to act. In the ordinary course that number is a majority. In the case of the Houses of Congress proposing amendments it is—by virtue of prior governing law—a two-thirds majority. The intention of the body, therefore, is embodied in the shared intentions of the appropriate majority of its members.

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<sup>88</sup> This point has been explicated most effectively in H.L.A. Hart's theory of the rule of recognition. See H. HART, *supra* note 25, at 104-14.

<sup>89</sup> See Kay *supra* note 30; Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111 (1984).

<sup>90</sup> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American Fabric has been erected . . . This original and supreme will organizes the government, and assigns, to different departments, their respective powers.

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

<sup>91</sup> See 1 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787* 295 (remarks of A. Hamilton), 253 (remarks of J. Wilson) (1966); *THE FEDERALIST* No. 40 at 247-48 (J. Madison) (C. Rossiter ed. 1961); see also *infra* text accompanying notes 242-45 (concerning the views of Madison).

<sup>92</sup> See *infra* text accompanying notes 93-100.



One consequence of this reasoning is that only the intentions of those voting in favor of the constitutional provision at issue will be relevant. The intentions of dissenters may be useful in illuminating the intention of the proponents, but they are not a part of the authoritative intention. Dissenters neither contributed nor were necessary to the event which made the text law and, for reasons already discussed, our concern is with the intentions of the lawmakers. Proper inquiry, therefore, is restricted to the members of the majority.

As we saw earlier when there were numerous law-making bodies, however, there may be more than one intention in the majority that approves the very same act of legislation. The difficulty will be even greater here because the number of potential intentions will be larger. When we multiply the number of possible intentions in a legislature by the number of possible intentions among legislative bodies the task of determining one original intention might appear hopeless.

c. *Summing different intentions.*—The possibility of multiple, varying intentions is not, however, fatal to the enterprise of original intentions adjudication. The difficulty is intractable only if there are multiple and totally *contradictory* intentions. This could happen if, for example, a constitutional provision was created with some constitution-makers intending it to mean *X* and only *X*, while other constitution-makers intended it to mean not-*X* and only not-*X*. Such contradiction is extremely unlikely, however, because though the intentions involved are held by different people, those intentions are associated with the adoption of identical language. The use of the same language suggests a common core of meaning shared by all.<sup>93</sup> Any different intentions are, therefore, likely to be overlapping not contradictory. Thus, if an ordinance prohibits "vehicles in the park," it is safe to assume that all of the enactors intended it apply to ordinary automobiles.<sup>94</sup> Similarly, in a constitutional context, probably all of the enactors of the fifth and fourteenth amendments understood that incarceration would be a deprivation of liberty requiring due process of law. The differences in intention will arise in cases beyond the obvious situations suggested by the language, as that language was ordinarily used and understood. Where there is disagreement it will be with respect to the outer reach or scope of the rule. To use the terminology of some modern philosophers of language, these differences will be attributable to the vagueness, not the ambiguity, of the words adopted.<sup>95</sup>

Originally, I stated the problem in this section to be the combination

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<sup>93</sup> See H. HART, *supra* note 25, at 121-26; Perry, *supra* note 15, at 601.

<sup>94</sup> See H. HART, *supra* note 25, at 125; Brest, *supra* note 6, at 209-13.

<sup>95</sup> See W. QUINE, WORD AND OBJECT 125-34 (1960); Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619, 626-32, 646-47 (1964). A similar point specifically relating to constitutional interpretation is made in Maltz, *Appeal*, *supra* note 11, at 30-31.

of disparate intentions into one authoritative intention of the group with authority to make law. But, given the kind of differences likely to occur, we should be able to accumulate enough *identical* intentions to compose an authoritative lawmaker. By discerning the language's central paradigm, we can define an area of application that was intended by virtually all the relevant individuals who together constitute the lawmaker. As we move out from this core idea to somewhat less obvious applications, we can expect to find fewer individuals who intend the law to extend so far. Still, as long as it is probable that a necessary law-making majority shared a particular understanding it will be appropriate to so interpret the provision. This approach, therefore, requires the judge to ask whether the challenged action falls within a meaning intended by an authoritative lawmaker. Idiosyncratic meanings held by individuals within the majority (or by individual law-making bodies) falling outside that shared, core intention will not have the force of law because they lack such an authoritative source. They may be ignored for the same reasons that we ignore the intentions of the dissenters.<sup>96</sup>

This argument assumes that individuals do not employ the same words to mean entirely opposite things, especially in circumstances where they discuss and debate the meaning of those words before adopting them. Therefore, there will almost always be some core meaning that reflects the intentions of the constitution-makers. This is true even when there is no controlling intention with respect to other, fringe meanings.

It is conceivable that a legislative majority could adopt a measure even though no lawmaking majority shared an intention regarding its application to any case. This would occur when no central, uncontroversial core of meaning existed. This would be true, for example, if some enactors thought the term "natural born citizen" in Article II's presidential qualifications referred to place of birth while others thought it referred to those not born by Caesarean section,<sup>97</sup> and there was no majority for either view. In such a case, it would not be possible to accumulate enough identical intentions to arrive at one authoritative law-making intention. Without such an intention, the provision could not make law. Functionally, it would be a case of "intentionless meaning" and should have no more claim to our allegiance than a document "put together by a tribe of monkeys with quills."<sup>98</sup> It would be legal gibberish. As the very example shows, however, it is hard to believe such totally contradictory intentions are common.<sup>99</sup> More often shared

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<sup>96</sup> See Perry, *supra* note 15, at 601.

<sup>97</sup> See J. ELY, *supra* note 43, at 13.

<sup>98</sup> Michaels, *supra* note 21, at 774.

<sup>99</sup> In addition to ambiguity (different meanings at the core) and vagueness (different meanings at the fringe), there is a third possible arrangement of intentions. This third possibility would arise if there were two different but related paradigm cases. While this seems more likely than ambiguity, it makes little difference to the analysis suggested here. If intentions as to coverage overlap, we can

intentions may be narrow and the area of possible but unintended meanings consequently broad. Then the effect of the constitutional rule would be similarly restricted. In the areas of application where no law-making majority agreement exists, there would be no relevant constitutional rule.<sup>100</sup>

Because, as outlined, the task of ascertaining and summing individual and institutional intentions appears extraordinarily difficult, it is useful to recall the very limited questions about intention that a judge must answer in constitutional adjudication. It is true that the determination of a shared intention calls for judgments about the psychological states of people long dead, but it will rarely be necessary to investigate these things directly. The concern is simply which of two contesting interpretations is more likely consistent with the original intention. The answer will often be presumptively clear from the language the constitution-makers chose. Beyond that, it will be enough in most cases to learn what people, at the time, *generally* meant when they used certain language and what people involved in the process of enactment thought was at issue. A presumption that the majority adopting a measure shared that intention is reasonable unless evidence to the contrary is adduced.<sup>101</sup>

In fact, a great deal of information is available on these matters, as anyone who has researched such questions will attest. Numerous sources, both general and particular, are available. Legislative debates, committee reports, contemporary commentary, preliminary votes, earlier and subsequent statements of the participants, biographies, and other legislation can all be examined. Separate inquiries into the beliefs of each actor will almost always be unnecessary. Such research often turns up information that will allow us to speak with some assurance about the things that were probably within the shared core meaning *and* what could not have been part of those necessary shared intentions.<sup>102</sup>

There will, of course, be instances of relative uncertainty, but, for the reasons already stated, such uncertainty does not undermine the pro-

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still look for a majority intention on the particular action at issue. If one cannot be found, then no authoritative constitutional rule would exist.

<sup>100</sup> The absence of an applicable express rule does not necessarily render the result of adjudication indeterminate. See *infra* text accompanying notes 124-30.

Ronald Dworkin doubts whether "an intention" can be held even by individual legislators. He asks whether the intended meaning should be what the legislator hoped for or what he expected would be followed. He notes, for example, the case where a legislator assents, for political reasons, to legislation he dislikes. In that case, the legislator might hope for a narrow construction while expecting a broad one. See R. DWORKIN, *supra* note 15, at 322-24. Of course, this problem only arises by focusing on this one artificial and idiosyncratic case. For most legislators hopes and expectations will coincide. Ordinarily, these sincere legislators will be sufficiently numerous to make an authoritative lawmaker and Dworkin's hypocrite may be disregarded. Even where that is not the case, it does not distort the notion of legislative intention to say that a legislator who adopts a measure he expects to have a certain effect intends those effects to eventuate.

<sup>101</sup> See Dickerson, *supra* note 24, at 210-11.

<sup>102</sup> See Landis, *supra* note 30, at 888-89; Comment, *The Privileges or Immunities Clause of the*

ject. It is sufficient for a judge, in light of the evidence, to decide whether it is more probable than not that a particular act was within the shared area of agreement. In making that judgment, it is unimportant that we do not know the eccentric and unexpressed intentions of some of the constitution-makers. What we do know will usually be sufficient to show that such views were not widely enough held to change our conclusions about the scope of the constitutional provision intended by an enacting majority.

2. *The Problem of Historical Understanding.*—Another argument against original intentions adjudication suggests that it is very difficult, if not impossible, to understand intentions formed and expressed a very long time ago.<sup>103</sup> As with the multiple intentions problem, this argument is in some ways a restatement of the more extreme claim discussed above—that communication of an intended meaning through language is inherently impossible. This claim is based on a “fatal” gap between the moment of expression and the moment of understanding. But all interpretation—contemporary as well as ancient—is historical in this sense. And, if it is conceded that some immediate communication is possible, then the difficulty is not different in kind simply because the time between speaking and listening or writing and reading is changed from minutes or days to decades or centuries.<sup>104</sup>

Of course, because our capacity to learn intentions is to some degree a function of what we know about the speaker and about the circumstances in which he speaks, the process of discovering the intention behind language becomes more difficult as the intervening period becomes longer.<sup>105</sup> In constitutional adjudication, the task of seeking the original intentions involves an attempt to recreate the perspectives of the consti-

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*Fourteenth Amendment: The Original Intent*, 79 NW. U.L. REV. 142, 147-48 (1984) (positing an “impressionistic majority model” of original intentions.)

This is not to deny that the written records of the proceedings which must be considered are often unreliable. James Hutson has recently presented evidence that many of the standard sources consulted in connection with the adoption of the Constitution are seriously suspect. See Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record* 65 TEX. L. REV. 1 (1980). But this does not mean that the records, read intelligently, carefully, and often skeptically provide no useful information on the original intentions. Indeed, the admirable work of scholars like Hutson enable an increasingly sensitive and accurate evaluation of those records. See, e.g., J. HUTSON, SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 (1987).

<sup>103</sup> See Brennan, *supra* note 60, at 435; Powell, *supra* note 16, at 673-74; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

<sup>104</sup> See E. HIRSCH, *supra* note 23, at 256 (“For it is merely arbitrary . . . to hold that a meaning fifty years old is ontologically alien while one three years or three minutes old is not.”); E. HIRSCH, *THE AIMS OF INTERPRETATION* 27 (1976) (noting the similarity of the “historical” and “psychological” versions of hermeneutical skepticism.)

<sup>105</sup> See E. HIRSCH, *supra* note 23, at 44; C. MILLER, *supra* note 16, at 156-58; Nickel, *Uneasiness About Easy Cases*, 58 S. CAL. L. REV. 477, 482-83 (1985).

tution-makers—their values, their needs, and even what we would consider their misconceptions. Our world is drastically different from theirs. Both the way we use language and the things we use language about have changed substantially. These differences, some critics suggest, render improbable any claim that we can capture those intentions.<sup>106</sup>

..... The very breadth of this claim makes it implausible. It is essentially an attack on the possibility and validity of historical investigation. While some students of history deny the possibility of objectively correct historical conclusions,<sup>107</sup> the contrary view is also widely and firmly held.<sup>108</sup> Indeed, the force of the latter position is strengthened by the fact that history is a well-established discipline to which thousands of sensible people have devoted and continue to devote their energy and intelligence. These scholars proceed on the assumption that, with varying degrees of effort, it is possible to ascertain and adopt the viewpoint of another person, even if that other person is remote in place, culture or time.

This understanding is accomplished by consciously suppressing our contemporary preconceptions and values, and attempting to reconstruct those of our subject.<sup>109</sup> We need not know everything about that other consciousness, only those aspects which illumine the intended meaning

<sup>106</sup> See Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984); Peller, *supra* note 50, at 1173-74. But see Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1020 (1981).

<sup>107</sup> See C. BECKER, DETACHMENT AND THE WRITING OF HISTORY: ESSAYS AND LETTERS OF CARL L. BECKER 54-57 (1958); C. NORRIS, *supra* note 53, at 78. Hayden White, who might be associated with this position, does not appear to be as much concerned with historical judgments on the occurrence of discrete events as with the inevitable subjectivity of any attempt at historical narrative. See H. WHITE, TROPICS OF DISCOURSE 55-57, 67, 107 (1978); White, *The Politics of Historical Interpretation: Discipline and De-Sublimation* in THE POLITICS OF INTERPRETATION 119, 129 (W. Mitchell ed. 1983).

<sup>108</sup> See R. COLLINGWOOD, THE IDEA OF HISTORY 217-28 (1946); Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1246-49 (1986). This is no less true with respect to intellectual history. J.G.A. Pocock emphasizes the historian's primary concern "with what *eigentlich* [actually] happened or—the special form which this takes in the history of thought—what *eigentlich* [actually] was meant." J. POCKOCK, *supra* note 57, at 6.

<sup>109</sup> Some scholars, of course, regard such observations—and indeed, the whole enterprise of intellectual history—as unverifiable "impressionistic" history and hold that we can never know how other people think or thought. That seems to me to violate common sense (in the twentieth-century signification of those words, not in the eighteenth), for we think in the patterns of others as a matter of daily routine. College students, for example, frequently encounter professors who teach from points of view that the students do not share and when that happens, students in pursuit of grades are usually able and willing to write the essays and give the answers that the teacher wants to hear. What is involved is this: thinking takes place in symbolic codes or languages, and we can learn to think in languages that are not native to us, whether these be Latin, music, mathematics, legalese, or eighteenth-century English.

F. McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION x-xi (1985). Cf. S. FISH, *supra* note 54, at 314-15. Hirsch puts the point concisely: "It is within the capacity of every individual to imagine himself other than he is, to realize in himself another human or cultural possibility." E. HIRSCH, *supra* note 104, at 47. A useful discussion of the possibilities and limits of historical understanding is found in A. DANTO, NARRATION AND KNOWLEDGE 285-97, 334-41 (1985).

of a particular utterance.<sup>110</sup> Of course, we can never identify completely with another person but this is true of contemporary as well as historical interpretation. Nonetheless, attempts to do so have yielded results that provisionally, at least, we have found both satisfactory and useful.<sup>111</sup>

Attempts to discover the intentions behind historical acts and expressions, therefore, do not seem inherently fruitless. And, among historical questions, those concerning the drafting and ratification of the United States Constitution are by no means the hardest. The problems may be significant but they are not insurmountable. This is not an inquiry into the intentions of the lawmakers of ancient Sumeria. While we may be separated from our predecessors in many ways, we also have many things in common.<sup>112</sup> Not the least of these is the use of the same, if considerably altered, language.<sup>113</sup> Moreover, the enactors and their contemporaries left us a great deal of written information about the problems with which they were concerned and the solutions they would have found acceptable or unacceptable. We are similar enough to the people of those times that we can intelligently investigate how things appeared to them and what they thought they were doing when they created constitutional rules now at issue.

Finally, as I noted when considering the problem of multiple intentions, original intentions adjudication only calls for decisions regarding which of two proposed interpretations is more likely to be consistent with those original intentions. In most cases, it should be possible to recapture enough of the past to make that choice.

3. *The Probabilities in Balance.*—The discussion thus far has omitted one significant possibility. A judge, after considering the evidence of the relevant intentions, could decide that neither of the contesting propositions about the original intention is more likely than the other—that is, he might conclude that the evidence exactly balances.<sup>114</sup> In such cases, we might have a supplemental rule that, for example, places the burden of proof on the party claiming that constitutional rules have been

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<sup>110</sup> See E. HIRSCH, *supra* note 23, at 242-43.

<sup>111</sup> See *id.* at 256-57; J. POCOCK, *supra* note 57, at 37-38; Michaels, *Is There a Politics of Interpretation?* in *THE POLITICS OF INTERPRETATION* 335, 340 (W. Mitchell ed. 1983).

<sup>112</sup> Put another way, "the paradigm-structure ha[s] remained sufficiently stable over the intervening centuries for this to be possible." J. POCOCK, *supra* note 57, at 29-30. See Graff, *supra* note 67, at 410; E. HIRSCH, *supra* note 104, at 39. *But see, e.g.,* Tushnet, *supra* note 103, at 799-800.

<sup>113</sup> We are [able to understand what a literary work means] because an immense store of cumulative evidence provides assurance that the authors of literary texts belonged to the linguistic community into which we were later born, and so shared our skill, and the consensual regularities on which that skill depends, with some divergencies—which we have a variety of clues for detecting—which are the result both of the slow change of communal regularities in time and of the limited innovations which can be introduced by the individual author.

Abrams, *supra* note 73, at 587.

<sup>114</sup> See Powell, *supra* note 16, at 688-89.

violated.<sup>115</sup> But unless such a rule itself could be inferred from the original intentions of the enactors, this would result in cases being decided on grounds independent of the original intentions. There may exist, therefore, certain cases in which original intentions adjudication will yield no answer.

In practice, however, these "ties" will be exceedingly rare.<sup>116</sup> This is because the available information about the creators of the constitutional rules is so plentiful. Given the usual denseness of the historical record, a competent person is unlikely to come across many cases where the evidence that the original intentions did and the evidence that it did not extend to the act in question is precisely equal.<sup>117</sup> The strength of an interpreter's convictions may depend on the relative strength of the two cases, but he will almost always be able to say that one is better than the other.

It may be objected, however, that one kind of tie may be quite common. That is in a case where no evidence exists either way concerning whether a given act was or was not within the intended scope of a constitutional provision—a 0-0 tie. Some commentators argue that such cases are common because most actions challenged as unconstitutional were unimagined by the enactors, at least in the particular circumstances in which they now occur.<sup>118</sup> Today, the objects of constitutional litigation are, or relate to, scientific and technological assumptions, political practices, economic relationships, and social arrangements of which the enactors were ignorant.<sup>119</sup>

It does not follow, however, that because the enactors did not know of the existence of a specific act or practice that they, therefore, had no intention concerning it in creating a constitutional provision. Those intentions often related to categories of action rather than to particular people or instances of conduct.<sup>120</sup> Indeed, this is the ordinary assumption we make about a legislator's intent. For example, the enactor of a rule setting the speed limit at 55 miles per hour knows nothing about the particular vehicles or people who might violate the rule, but we have little difficulty agreeing that he really intended to punish them. "Thus it is possible," E.D. Hirsch notes, "to will an *et cetera* without in the least

<sup>115</sup> See, e.g., *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935) (heavy burden of proof rests on party claiming unconstitutionality of statutes); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827) (same).

<sup>116</sup> I have borrowed this term as well as the general character of the response from R. DWORKIN, *supra* note 61, at 285-87 (1977); Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 30 (1978), although he uses it in a very different argument.

<sup>117</sup> See Toulmin, *supra* note 81, at 107.

<sup>118</sup> See Brest, *supra* note 6, at 220-21; Chemerinsky, *supra* note 78, at 1242.

<sup>119</sup> See Chemerinsky, *supra* note 78, at 1242 ("for example, it is absurd to try to find the Framers' intent concerning the regulation of the broadcast media . . .").

<sup>120</sup> See Bennett, *supra* note 16, at 464; Dickerson, *supra* note 24, at 215; McAfee, *supra* note 81, at 289-90.

being aware of all these individual members that belong to it.”<sup>121</sup> To fail to apply a rule that was intended to cover a *category* of acts to an instance falling within that category would, itself, be unfaithful to the original intentions.

Therefore, nothing more than consulting the original intentions is required to conclude, for example, that the ban on “cruel and unusual punishment” prohibits the use of an electric as well as a manual thumb-screw. A similar application of original intent is involved in bringing the use of electronic eavesdropping devices within the scope of the Fourth Amendment rule regulating “searches.”<sup>122</sup> The latter determination will be controversial only to the extent we suspect that the enactors may have intended the relevant category to have a different definition. This is, itself, a question of intention and can be investigated in just the same way as any other such question: Based on the evidence available, was the scope of the category intended to include the particular thing at issue?<sup>123</sup>

Nevertheless, some things may fall outside the categories established by the constitution-makers only because they are so different from those the enactors knew about. In such cases, we cannot assume they made any provision for them at all.<sup>124</sup> But do such cases really result in a 0-0 tie with original intentions adjudication providing no solution? I believe the Constitution, as intended by its creators, provides a decision on constitutionality for every possible action no matter how different it is from the things and circumstances the constitution-makers had in mind. Implicit in the Constitution are “back-up rules” which cover all things not provided for in the explicit rules. It must be stressed these back-up rules are *not* new constructs created in order to make original intentions adju-

<sup>121</sup> See E. HIRSCH, *supra* note 23, at 49. Hirsch notes the particular importance of this capability with respect to legal interpretation. See *id.* at 124-25. In a later article he makes clear that this, in no way, breaks the critical link to the original intention. See Hirsch, *supra* note 59, at 214-15, 218-19.

<sup>122</sup> See *Katz v. United States*, 389 U.S. 347, 352-53 (1967). This kind of determination is sometimes described as an application of a constitutional rule to “analogous” cases. See Grano, *supra* note 11, at 61-75.

<sup>123</sup> Some writers have called this a question of whether the constitution-makers held “abstract” as opposed to “concrete” intentions. See Dworkin, *supra* note 82, at 490-91; Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 547 (1982); Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 506-07 (1985). As the method outlined in the text indicates, I do not think it is ever necessary to make this choice *in general*. Rather, the appropriate level of abstraction will emerge in the course of determining the reach of the original intentions with respect to particular challenged acts. The extreme form of the argument, based on a very broad intention, is that the constitution-makers intended that their own intentions should not govern decisions of individual cases. This is discussed *infra* in Section IV.

<sup>124</sup> Richard Epstein thinks acceptance of a categorical approach is inconsistent with a finding that new things cannot be subsumed in the existing provisions by “principled adjudication.” See R. EPSTEIN, *supra* note 43, at 28-29. But this seems to me no more than a historical question about the scope of the categories created. For the reasons suggested in the text, it is not unreasonable to believe that the enactors left some things to be decided according to the allocation of governmental power adopted and not by express constitutional rules.



dication feasible.<sup>125</sup> Rather, they are legitimate inferences from the enactment of the constitutional text. They are an inherent part of what the constitution-makers did when they created the Constitution.

These back-up rules are a necessary consequence of the federal system of granted and residual powers established by the Constitution. The Constitution created a national government against a background of pre-existing states. That government exists *only* by virtue of the enactment of the Constitution. Therefore, we must find in the Constitution all of its features and all of its powers. There is nowhere else to look. Consequently, any action of the federal government not traceable to the enumerated institutions and powers is an exercise of power not granted to it and is contrary to the Constitution. Any truly *new* thing done by the federal government is unauthorized and therefore void.<sup>126</sup>

On the other hand, the United States Constitution was enacted on the assumption that the existing states would continue to exist. The states necessarily derived their governmental institutions and powers from sources outside the new Constitution. Therefore, the absence of a reference to a state power is not equivalent to a lack of authorization. The Constitution declares itself to be and was, no doubt, intended to be supreme over the states, but only insofar as it specifically limited state powers. Any truly *new* thing done by a state must be outside of those prohibitions, and must, therefore, be constitutional.<sup>127</sup>

This conclusion is itself an interpretation of the Constitution. It is, therefore, subject to rebuttal by persuasive historical evidence to the contrary. The case for it, however, is very strong. The constitution-makers differed among themselves about the appropriate scope of the powers of the new national government, but there is no serious evidence that these powers (whatever their extent) were not entirely granted by the new con-

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<sup>125</sup> Compare Dworkin, *supra* note 82, at 487.

<sup>126</sup> *Carter v. Carter Coal*, 298 U.S. 238, 291 (1936). See Grano, *supra* note 11, at 4. With respect to the federal government, the Constitution operates as a complete grant of power, not as a mere limitation. See *In re Appeal of Norwalk St. Ry.*, 69 Conn. 576, 587, 37 A. 1080, 1083 (1897).

<sup>127</sup> See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248-49 (1833) (Constitution essentially a definition of federal, not state powers); Maltz, *Appeal*, *supra* note 11, at 12. Of course, a state constitution might define a grant of powers for the state government in the same way the United States Constitution does for the federal government. See *In re Appeal of Norwalk St. Ry.*, 69 Conn. 576, 591-93, 37 A. 1080, 1085 (1897) (state constitution an exclusive grant of power not a limitation of pre-existing powers). I understand that the Supreme Court's construction of the grants of power to the federal government, especially that regulating commerce, have vastly expanded the scope of national authority and substantially abridged the powers of the states. See 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 178-79, 237-38 (1963); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 232-44 (1978). Whether this is faithful to the original intentions is highly doubtful. But, as I stated at the outset, I am not concerned here with reconciling original intentions adjudication with the actual case law. And, in any event, even such judicial developments are not necessarily inconsistent with the point in text, since, rightly or wrongly, they assimilate the new national powers upheld to the powers granted in the text. Similarly, restrictions on state power are traced to an implicit withdrawal of such powers in the Constitution.

stitution or that state power was altered except insofar as affirmatively limited by the Constitution.<sup>128</sup> The Tenth Amendment makes this explicit. The Civil War amendments significantly altered the constitutional allocation of national and state powers by enlarging federal legislative authority and especially by placing new and broad limits on state power. But it did not alter the underlying scheme of granted and residuary powers.<sup>129</sup> Debate about power in the federal system, therefore, must turn on what the Constitution gave to the federal government and what it took away from the States. So long as that is true, there is an answer to the validity of every new thing. There are no omitted cases.<sup>130</sup>

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My conclusion, therefore, is that original intentions adjudication, as defined and elaborated here, is not impossible. The implications of this response, however, should not be exaggerated. Adherence to the original intentions is neither theoretically impossible nor so practically difficult that attempts at it are futile. This is not to say that it will always be an obvious or easy technique. Sometimes it will be easy, but in many cases it will require an intense, thorough, and sensitive assimilation of much historical information.<sup>131</sup>

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<sup>128</sup> See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938) quoting *Baltimore & Ohio R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting); *THE FEDERALIST* No. 39 at 245 (J. Madison) (C. Rossiter ed. 1961); R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 65-66 (1987) (surveying statements in the Philadelphia and ratifying conventions on the effect of enumeration of federal powers); H. WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 50-54 (1961) (arguing that "[n]ational action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity . . ."). See generally Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 48 *REV. POL.* 166 (1986). Recent scholarship has also persuasively argued that Madison, often thought to represent an extreme nationalist position at the convention, held a consistently firm view that the sphere of substantive federal power should be strictly limited. Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism* in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 162, 169-74 (R. Beeman, S. Botwin & E. Carter eds. 1987); Banning, *The Hamiltonian Madison: A Reconsideration*, 92 *VA. MAG. HIST. & BIO.* 3 (1984).

<sup>129</sup> See Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 *SUP. CT. REV.* 39, 47-50.

<sup>130</sup> I, thus, do not find very meaningful Michael Perry's distinction between the exercise of judicial powers that are contra-constitutional (in conflict with the constitutional text) and those that are merely extra-constitutional (going beyond the constitutional text). As originally intended, the text forbids both extra-constitutional exercises of federal power and extra-constitutional restrictions on the states. Cf. M. PERRY, *supra* note 5, at ix; Alexander, *Painting Without the Numbers: Non-Interpretive Judicial Review*, 8 *U. DAYTON L. REV.* 447, 457-58 (1983). Perry has subsequently recognized this possibility. See Perry, *Judicial Activism*, 7 *HARV. J.L. & PUB. POL'Y* 69, 73 (1984).

<sup>131</sup> For an interesting example and discussion of the difficulties of original intentions adjudication in the context of state constitutional law, see Weisbrod, *On Evidences and Intentions: "The More Proof, The More Doubt"*, 18 *CONN. L. REV.* 803 (1986). See also Hutson, *supra* note 102 (emphasizing the difficulties in assessing the accuracy of the records associated with the adoption of the Constitution).

Such an examination may not always yield certain conclusions, but that uncertainty does not make original intentions adjudication unworkable. The suggestion of unworkability stems from the implicit but erroneous assumption that because the results of original intentions adjudication are not completely certain, they must be completely indeterminate.<sup>132</sup> This is a non-sequitur.<sup>133</sup> The good faith application of original intentions will resolve many cases in ways which are relatively free from doubt.<sup>134</sup> Moreover, this methodology contemplates a continuing process of investigation in case after case by honest and intelligent judges looking at the same or increasing amounts of evidence and who share the same notion of the nature of their task. In a context requiring reasoned opinions and permitting criticism and debate from within and without, such a process is likely to lead toward increased agreement on questions of constitutional interpretation.<sup>135</sup> In particular, original intentions adjudication will lead to rules that are as stable, objective, and impersonal as human beings can manage when dealing with a source which can be regarded as authoritative.<sup>136</sup> Original intentions adjudication may not achieve these goals perfectly, but to conclude that it is, therefore, useless "is like saying that as a perfectly aseptic environment is impossible, one

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<sup>132</sup> See, e.g., Chemerinsky, *supra* note 78, at 1248 ("[T]he search for determinacy is misguided, because constitutional cases arise only when the meaning of the Constitution is unclear and there is no determinate solution to the constitutional questions.").

<sup>133</sup> See Graff, *supra* note 67, at 410; Grey, *supra* note 63, at 16-17 ("complexity and controversy do not add up to ineffability.").

<sup>134</sup> See Schauer, *supra* note 69, at 422-23, 436-37; *supra* note 78 and accompanying text. With respect to the analogous question of the certainty of language in light of some uncertain applications, Frederick Schauer gives the following example: "The existence of potentially or actually vague applications of language no more compels a conclusion that language is useless than the existence of a debatably bald man renders useless the observation that Yul Brynner is clearly bald and Ronald Reagan is clearly not . . ." *Id.* at 423. Cf. Epstein, *The Pitfalls of Interpretivism*, 7 HARV. J.L. & PUB. POL'Y 101, 103 (1984):

The community of readers may understand what "bald" means, and yet will have genuine difficulty at the margins in deciding whether Richard A. Posner is bald. (It's close.) But that doesn't mean that the term itself is subject to the kind of inscrutable philosophical difficulty which renders it worthless for most of man or womankind.

<sup>135</sup> See Toulmin, *supra* note 81, at 107. Stanley Fish agrees that members of a common interpretative community will inevitably come to an agreement on the one thing that words mean, but "that one thing is not always the same." S. FISH, *supra* note 54, at 275. By this he means that the governing assumptions of every interpretive community are subject to change. For reasons discussed in the text, for such a change to undermine the possibility of agreement over time on a stable, correct interpretation would require that the change be so fundamental as to preclude the process of a conscious reference to the interpretive presuppositions of a different period.

<sup>136</sup> See *infra* text accompanying notes 303-04. It is possible, of course, to establish rules of adjudication that are objective in the sense that they eliminate any factors which depend on the personal tastes and values of the adjudicator. "[D]ecisionmaking . . . may be conceived as 'objective' without necessarily being obedient to authority." Bennett, *supra* note 44, at 475. This kind of objectivity can be achieved with a roulette wheel. Original intentions adjudication is premised on a requirement that judicial power be subordinated to a legitimate source of law-making power. See *supra* text accompanying notes 26-33.

might as well conduct surgery in a sewer."<sup>137</sup> When honestly applied, original intentions adjudication seems to reduce the influence of the personal and idiosyncratic aspects of a judge's personality or ideology more than do alternative theories that rely on ill-defined standards of one kind or another.<sup>138</sup> Such rule-governed adjudication may or may not be appealing,<sup>139</sup> but, for the reasons suggested, it is possible.

#### IV. SECOND OBJECTION: IT'S SELF-CONTRADICTORY

The second principal objection to original intentions adjudication is that the enactors themselves did not want their intentions to govern judicial exposition on the lawfulness of certain governmental action. Proponents of this argument suggest that the constitution-makers intended judges to look elsewhere for guides to decision and (depending on the proponent) wanted judges to possess varying degrees of discretion.<sup>140</sup>

One response to this objection is that it is largely irrelevant. It is not illogical to argue that judges should restrict themselves to the original intentions of the constitution-makers even if the constitution-makers themselves thought otherwise. As I will argue in the next section, in the final analysis, a choice of approaches to constitutional adjudication necessarily rests on non-legal considerations as to the best way to structure and operate a government and legal system.<sup>141</sup> A good case can be made that the best arrangement demands subordination of government actions to a historical, impersonal set of rules, even if those rules were created by people who did not share our judgment about the utility of rule-following in general.<sup>142</sup>

The objection, therefore, presupposes the propriety of adhering to the original intentions at least as strongly as the model of adjudication I have outlined<sup>143</sup> since (adopting the useful distinction employed by Paul Brest) it assumes submission to both the substantive and interpretive intentions of the enactors.<sup>144</sup> That is, the claimed contradiction only emerges if all the following propositions hold true: 1) We are bound in

<sup>137</sup> C. GEERTZ, *THE INTERPRETATION OF CULTURES* 30 (1973) (attributed to Robert Solow). I am indebted to Carol Weisbrod for this reference. See also C. ALTIERI, *supra* note 26, at 226-28; Searle, *supra* note 53, at 78-79.

<sup>138</sup> See J. ELY, *supra* note 43, at 43-72. See generally Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

<sup>139</sup> See *infra* text accompanying notes 273-331.

<sup>140</sup> See R. DWORKIN, *supra* note 116, at 131-49; J. ELY, *supra* note 43, at 11-41. Thus this objection may be a variant of the first in that it becomes impossible to limit constitutional rules to those intended by the constitution-makers.

<sup>141</sup> See *infra* discussion in Section V.

<sup>142</sup> See R. DWORKIN, *supra* note 15, at 497; Maltz, *Appeal*, *supra* note 11, at 28.

<sup>143</sup> See M. PERRY, *supra* note 5, at 71.

<sup>144</sup> See Brest, *supra* note 6, at 215-16. Cf. Weisberg, *Text Into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 980 (1986) (authors' theories of interpretation are appropriate elements in interpreting those authors' writings).

constitutional adjudication *only* by rules deriving from the original intentions so that 2) we are bound by *both* the constitution-makers' interpretive intentions *and* their substantive intentions and 3) the constitution-makers interpretive intention requires departures from their substantive intentions. Original intentions adjudication might be perfectly plausible without incorporating these elements but I will take them to be essential for the balance of this section.<sup>145</sup> Given this formulation of the objection, I propose to focus on the third proposition. But that reduces to a mere question of historical fact: What did the constitution-makers intend with respect to the effect of their own intentions? What were the enactors' interpretive intentions?<sup>146</sup> This, too, should be amenable to the ordinary techniques of historical investigation, with the same difficulties and possibilities as questions of substantive intention. Both kinds of inquiry require judgments based on an examination of the evidence of what the enactors said and did.<sup>147</sup>

This claim about the original interpretive intention can be observed in two different manifestations. The first suggests that the constitution-makers wanted some constitutional judgments formulated on entirely extra-constitutional bases.<sup>148</sup> The second supposes that the enactors wanted subsequent decisionmakers to stay within the boundaries created by the constitution-makers, but that those boundaries were so broadly conceived that they were not intended to require a particular result in a particular case.<sup>149</sup> Both variations boil down to an assertion of historical

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<sup>145</sup> A really thoroughgoing form of original intentions adjudication might subordinate the substantive to the interpretive intentions. Then if the enactors held both a substantive intention as to the scope of a certain provision and an interpretive intention that the substantive intention ought not to govern a judge ought not to apply that substantive intention. But such a version of original intentions adjudication is harder to reconcile with the non-legal justifications discussed *infra* in Section V. I, therefore, deal with the objection by questioning the factual premise about the enactors' interpretive intentions.

<sup>146</sup> See M. PERRY, *supra* note 5, at 70-71; Tushnet, *supra* note 103, at 791.

<sup>147</sup> Such referential interpretation remains historically bounded and has a right to be considered historically correct whenever the intention-to-refer has dominated historically over the literal contents of mind, and therefore has made those literal contents provisional and allegorical.

Hirsch, *Past Intentions and Present Meanings*, 33 *ESSAYS IN CRITICISM* 79, 96 (1983).

<sup>148</sup> See *infra* text accompanying notes 164-209 discussing the arguments of John Hart Ely. Ely's further argument in favor of applying standards that reinforce representative government seems to be based, at least in part, on the goodness of democratic decisionmaking, independent of its endorsement by the Constitution. See Kay, *Book Review*, 13 *CONN. L. REV.* 203 (1980).

<sup>149</sup> The distinction between "abstract" and "concrete" intentions is made in Dworkin, *supra* note 123, at 547; Dworkin, *supra* note 82, at 488-97. See also Richards, *supra* note 123, at 507-09. It is true, as Dworkin points out, that the enactors probably held both types of intentions and there is no logical objection to later political actors basing their decisions on one or the other without referring to interpretive intentions in making that choice. See *supra* text accompanying note 144; Dworkin, *supra* note 82, at 490-95. But at this point we have presumed the controlling relevance of the interpretive intentions and those intentions will tell us whether the abstract or concrete substantive intentions were intended to govern. It is implausible to suppose that the constitution-makers intended a rule to cover only a narrow category of actions they had in mind and that they also intended judges

fact—that the constitution-makers did not intend to set down binding rules of decision for a substantial number of constitutional cases, contemplating instead decisions according to standards not of their own making.<sup>150</sup>

Unfortunately, little serious historical research has focused on the question of interpretive intentions. Many commentators who have argued that the enactors intended reference to external and independent sources of decision have merely asserted that the framers “must have” held this kind of intention.<sup>151</sup> What research has been done on the point is far from conclusive. Moreover, it is possible that the enactors had different interpretive intentions for different provisions.<sup>152</sup> Finally, like the questions of substantive intent already discussed, any answer will have to be based on a balancing of probabilities.

I have not researched this issue sufficiently to entitle me to venture a firm opinion on this question. My conclusion is, therefore, provisional. Based on my general understanding of the evidence, however, I think it is difficult to ascribe to the enactors an intention not to restrict constitutional adjudication to the rules of the written Constitution in the senses they understood them.

One critical fact suggests a presumption that the constitution-makers of 1787-89 would not favor a legal regime in which the judges consulted extra-constitutional factors in reviewing the validity of acts of the government. It is well known that the enactors were suspicious of governmental power.<sup>153</sup> Their remedy to minimize the risks of governmental abuse was the creation of explicit rules for exercising public power.<sup>154</sup> Those rules were to emanate from a source superior to the governmental

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to reach other related actions outside that category. Of course, the initial decision to follow the original interpretive intentions with respect to this question must be defended on non-legal criteria. See Dworkin, *supra* note 82, at 498; *infra* text accompanying notes 296-300.

<sup>150</sup> This is true only on the assumption, discussed *supra* note 149, that the original interpretive intention should govern. Otherwise the objection is not about the incoherence of original intentions adjudication, but about its wisdom. That objection is discussed in Section V.

<sup>151</sup> See, e.g., Chemerinsky, *supra* note 78, at 1243; Leedes, *A Critique of Illegitimate Non-Interpretism*, 8 U. DAYTON L. REV. 533, 547 (1983); Richards, *supra* note 123, at 507-09; Schlag, *supra* note 12, at 300-02. This argument is often accompanied by a citation to Chief Justice Marshall's famous remarks in *McCulloch v. Maryland* that “we must never forget, that it is a constitution we are expounding . . .” 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>152</sup> One variation of original intentions adjudication would hold that the interpretative intent of only the 1787 enactors was controlling. Under this view the lawmakers of the amendments would be acting under delegated power granting only the authority to make rules which would be interpreted and applied in a way approved by the delegators. For the purposes of this essay it is unnecessary to consider in detail the various forms which original intentions adjudication might take. See Maltz, *Appeal*, *supra* note 11, at 27.

<sup>153</sup> See THE FEDERALIST No. 41, at 255-56 (J. Madison) (C. Rossiter ed. 1961); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 135, 410-11 (1969); Berger, *Lawmaking vs. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171, 211-14 (1984).

<sup>154</sup> The existence of a legal document means that someone has taken the trouble to put the sense of some agreement or set of instructions in writing. The normal point of doing this—and

officials to be controlled.<sup>155</sup> It would be most peculiar if the enactors created these rules with an intention that they were not to be employed in exercising that control. It is unlikely they would have debated, argued, planned, and denounced the particular rules proposed if they believed they could not understand the effect of the rules, or that their understanding of the rules would not define the limits of legitimate governmental authority.<sup>156</sup>

This conclusion is confirmed by the constitution-makers insistence on a *written* constitution. The enactors understood that to write down the constitutional rules was to *fix* them—a result impossible if, in the future, the rules could be altered by referring to changing factors outside the Constitution itself.<sup>157</sup> Similarly, there would be no reason to fix the rules if the words used could be applied in any sense they might bear—that is, without reference to the sense in which the enactors employed them.<sup>158</sup>

Those fixed rules, moreover, had for the enactors a peculiar potency because they expressed the “original and supreme” will of the people.<sup>159</sup> It was universally understood that the approval of the people was the political sanction which gave the Constitution its force. Of course, to the extent that the Constitution was law only because it proceeded from the people or their appropriate surrogates, it followed that the content of the legal rule must be what “the people” intended.<sup>160</sup> This idea that the

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here legal practice builds on presuppositions taken from ordinary life in a literate culture—is to make relatively definite and explicit what otherwise would be relatively indefinite and tacit.

Grey, *supra* note 63, at 14.

<sup>155</sup> See THE FEDERALIST No. 78, at 467-68 (A. Hamilton) (C. Rossiter ed. 1961).

<sup>156</sup> One historian has described the ratification debates as “a dispute between contending social interests over a question no less vital than the future of republican government in America and the world.” Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1795*, 31 WM. & MARY Q. 167, 167 (1974).

<sup>157</sup> See R. BERGER, *supra* note 6, at 291.

<sup>158</sup> Almost any word sequence can, under the conventions of language, legitimately represent more than one complex of meaning. A word sequence means nothing in particular until somebody either means something by it or understands something from it . . . . One proof that the conventions of language can sponsor different meanings from the same sequence of words resides in the fact that interpreters can and do disagree. When these disagreements occur, how are they to be resolved? Under the theory of semantic autonomy they cannot be resolved, since the meaning is not what the author meant, but “what the poem means to different sensitive readers.”

E. HIRSCH, *supra* note 23, at 4 (quoting T. S. Eliot).

<sup>159</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>160</sup> The theme that only the approval of the people would ultimately sanction the Constitution is ubiquitous in the discussions at the time of the Constitution's ratification. James Wilson, a member of the Philadelphia Convention, an early Justice of the Supreme Court, and one of the first national authorities on constitutional law, wrote:

From [the people's] authority the Constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it?

Wilson, *Lectures on Law*, in THE WORKS OF JAMES WILSON 304 (McCloskey ed. 1967); see THE

Constitution is the fixed command of the sovereign people is hard to reconcile with the suggestion that the constitution-makers foresaw as proper any interpretation not based on their original intentions.<sup>161</sup>

Two kinds of arguments have been made that, regardless of this guiding attitude, the constitution-makers must have contemplated an ongoing redefinition of the rules. The first, best argued by John Hart Ely, relies on certain provisions of the constitutional text that he claims are most plausibly understood as "an invitation to look beyond their four corners."<sup>162</sup> The second, suggested in a recent article by H. Jefferson Powell,<sup>163</sup> is premised on the enactors' general understanding of statutory construction, a process that he asserts did not include reference to the intentions of legislators.

### A. Open-Ended Provisions

Almost no one doubts that the constitution-makers wanted their intentions for the constitutional rules to govern at least some cases. When the Constitution sets forth specific structural details of government, most people agree that the enactors intended their express intentions to govern. This would be true, for example, where the constitution requires a minimum age for various offices,<sup>164</sup> or where it specifies the date on which Congress should convene.<sup>165</sup> But, it is argued, that same inference is not as plausible when we are interpreting the non-specific "majestic

FEDERALIST No. 78, at 467-68 (A. Hamilton) (C. Rossiter ed. 1961). See generally Kay, *supra* note 89, at 133-36. Of course the form in which the "people" convened was the somewhat imperfect one of the *ad hoc* constitutional convention. See also G. WOOD, *supra* note 153, at 89.

<sup>161</sup> Chief Justice Marshall captured both aspects of this idea when he stated:

The exercise of this original right [of the people to establish a Constitution] is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

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

<sup>162</sup> J. ELY, *supra* note 43, at 13.

<sup>163</sup> See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

<sup>164</sup> See U.S. CONST. art. I, § 1 (age requirement for representative); art. I, § 3 (age requirement for senator); art. II, § 1 (age requirement for president).

<sup>165</sup> See U.S. CONST. art. I, § 4; Carter, *supra* note 54, at 854; Maltz, *New Thoughts*, *supra* note 11, at 833. Of course, even these kinds of provisions could be interpreted so that they would not restrict judges to the specific intentions they appear to embody. See, e.g., Easterbrook, *supra* note 106, at 90:

Does thirty-five [referring to the age requirement for President] denote a number of revolutions of the Earth around the Sun, or was it designed as a percentage of the average lifespan (so today the President must be forty-five)? Or could the language conceivably denote some number of years after puberty (so today one could be President at thirty)?

A subsequent speaker at the same symposium commented on the usefulness of such analysis:

When [Easterbrook] gave the alternate constructions of . . . "thirty-five years" . . . people in the audience laughed. The reason they laughed is they recognized that he was now engaged not in the ordinary discourse of how we find meaning, but rather in the law professor's game of how it is when we have a statute which says thirty-five years we can make it look obscure, thereby demonstrating not the silliness of the founders, but of your own imagination and intelligence.

Epstein, *supra* note 134, at 101-02.



generalities"<sup>166</sup> of the Constitution, such as freedom of speech, obligation of contract, due process or equal protection. It is argued that the choice of such broad terms indicates an intent not to limit the application of the provision to the particular substantive intentions of the enactors.<sup>167</sup> Proponents of this argument assert that the enactors chose such language exactly because they understood that the Constitution would have to be applied over time in unknown circumstances and they, therefore, determined to permit decisional flexibility.<sup>168</sup>

The existence of broad terms in the Constitution does seem to be good evidence of an abstract original intention or one which directs us to values outside the Constitution. But it is mere evidence. It must be reconciled with contrary evidence, including the commitment to a government limited by pre-existing law.<sup>169</sup> The constitution-makers may have used broad language to express narrow, concrete intentions.<sup>170</sup> What appear to us to be general terms may, in fact, have been used as specific terms of art,<sup>171</sup> or they may just have been inapt words chosen carelessly. If that turns out to be the case—if that is our best judgment of the original intentions and we, by hypothesis, are now committed to following those intentions—we would be unjustified in ignoring them simply because the enactors were less than clear.<sup>172</sup> The point was best made by Holmes when he said, "It is not an adequate discharge of duty for courts

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<sup>166</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966).

<sup>167</sup> See Dworkin, *supra* note 82, at 494 ("It is highly implausible that people who believe their own opinions about what counts as equality or justice should be followed, even if these beliefs are wrong, would use only the general language of equality and justice in framing their commands."); Carter, *supra* note 54, at 864; Richards, *supra* note 123, at 507. For a general discussion of these "two-clause" theories of the Constitution, see C. MILLER, *supra* note 16, at 162-67. These theories are criticized in Monaghan, *Perfect*, *supra* note 11, at 361-67.

<sup>168</sup> See *supra* note 151 (quotation from *McCulloch v. Maryland*); H. HART, *supra* note 25, at 124-27; E. HIRSCH, *supra* note 23, at 124-25; Hirsch, *supra* note 59, at 223.

<sup>169</sup> See *supra* text accompanying notes 153-61; *infra* text accompanying notes 274-93 (regarding the attitudes of the constitution-makers toward judicial power).

<sup>170</sup> This is the conclusion of Raoul Berger about the terms of the fourteenth amendment. See generally R. BERGER, *supra* note 6.

<sup>171</sup> See *id.* at 20-36, 193-220 (discussing the meaning of "privileges or immunities" and "due process"). The same phenomenon continues today. For example, English jurisprudence frequently uses a concept called the requirement of "natural justice," which denotes only procedural rules. See E. WADE & A. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 642-51 (10th ed. 1985). That other constitution-makers may use such terms and be misinterpreted is illustrated by the use and judicial interpretation of a variant of the term "natural justice" in the recently adopted Canadian Charter of Rights and Freedoms. Constitution Act, 1982, § 7. Compare P. HOGG, *supra* note 40, at 746-49 with Reference Re Section 94(2) of the Motor Vehicle Act (1985) 24 D.L.R. (4th) 536 (S.C.C.).

<sup>172</sup> See *supra* text accompanying notes 24-33 and particularly the discussion of the *Cernauskas* case.

The Anti-Federalists bitterly opposed the Constitution, in part, because they felt it was vague and indefinite. See J. MAIN, *THE ANTI-FEDERALISTS* 153-55 (1961). Madison's response was not so much a defense of the virtue of generality as it was an argument that the Constitution had settled matters remarkably well, given the inherent limitations of language—a fact, he conceded, that con-

to say: we see what you are driving at, but you have not said it, and therefore we shall go on as before."<sup>173</sup>

John Hart Ely, in his enlightening and closely argued treatment of modern judicial review, has made the most specific assertions that certain broadly worded provisions were intended to give courts license to make decisions according to extra-constitutional criteria. Ely focuses his argument on the ninth amendment and the privileges or immunities clause of

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stituted an obstacle to achieving the founders' objectives. See *THE FEDERALIST* No. 37, 229-31 (J. Madison) (C. Rossiter ed. 1961).

In subsequent statements, participants in the constitution-making process similarly expressed a belief that the rules created were quite clear under the circumstances. Caleb Strong, speaking at the Massachusetts ratifying Convention, said:

Gentlemen have said, the proposed Constitution was in some places ambiguous. I wish they would point out the particular instances of ambiguity; for my part I think the whole of it is expressed in the plain, common language of mankind. If any parts are not so explicit as they could be, it cannot be attributed to any design; for I believe a great majority of the men who formed it were sincere and honest men.

3 M. FARRAND, *supra* note 91, at 248. Gouverneur Morris, writing in 1814, was slightly more cautious:

That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil.

*Id.* at 420. Earlier, Morris had written respecting article IV, § 3: "Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made." *Id.* at 404.

Abraham Baldwin, speaking in the House of Representatives in 1796, also agreed that certain constitutional matters were left unclear, but in doing so showed his belief that this was more the exception than the rule:

[S]ome subjects were left a little ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. If they could all be agreed in, it would compact the Government. The few that were left a little unsettled might, without great risk, be settled by practice or by amendments in the progress of the Government . . . . When he reflected on the immense difficulties and dangers of that trying occasion—the old Government prostrated, and a chance whether a new one could be agreed in—the recollection recalled to him nothing but the most joyful sensations that so many things had been so well settled, and the experience had shown there was very little difficulty or danger in settling the rest.

*Id.* at 370. Samuel Adams seemed to sum up a prevalent attitude in the period when he insisted in 1768 that a written constitution was required so "that not a single point may be subject to the least ambiguity." G. WOOD, *supra* note 153, at 267 (quoting Samuel Adams); see also *id.* at 301-03.

With respect to the fourteenth amendment, H. Jefferson Powell, who argues that the 1787-89 constitution-maker's interpretive intent did not rely on recourse to the original intentions, see *infra* text accompanying notes 222-72, concludes that the conventional view based on the original intentions was well established by the time of the Civil War. Powell quotes, among other things, Charles Sumner's remark that in case of doubt as to constitutional meaning, "we cannot err if we turn to the framers." Powell, *supra* note 163, at 947. Shortly after the fourteenth amendment's adoption a Senate Judiciary Committee Report stated: "A construction which would give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution." S. Rep. No. 21, 42d Cong. 2d Sess. (1872), quoted in R. BERGER, *supra* note 128, at 18.

<sup>173</sup> Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

the fourteenth amendment.<sup>174</sup> In each case, however, other research has indicated that the enactors may have conceived these provisions in a much narrower sense.

1. *Privileges or Immunities.*—Ely reasonably concludes that the provision of the fourteenth amendment<sup>175</sup> prohibiting state laws which would “abridge the privileges or immunities of citizens of the United States announces rather plainly that there is a set of entitlements that no state is to take away.”<sup>176</sup> He goes on to assert, however, that this amounts to “a delegation to future constitutional decisionmakers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding,”<sup>177</sup> and that the “invitation” to define the new rights so extended is “frightening.”<sup>178</sup>

This is only correct if we cannot discover an intended definition of “privileges or immunities of citizens of the United States” which limits judicial invention. Ely does not support his conclusion that no fixed definition was intended by citing legislative or other history in which some of the enactors affirmatively expressed such a position. Rather, he relies on a claim that his interpretation “fits the language,”<sup>179</sup> and on the argument that the other, limiting interpretations based on legislative history cannot be reconciled with parts of that history.<sup>180</sup>

It is not clear why the language, looked at independently, is more

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<sup>174</sup> Ely makes the same kind of argument for the Equal Protection Clause of the fourteenth amendment. As with the two provisions discussed below, he argues that the words of the provision are necessarily incomplete because they fail to specify which inequalities require more than mere rational justification. Moreover, almost any objection to any statute may be recast as one to unequal treatment. See J. ELY, *supra* note 43, at 30-32. But he does not show how these features of the amendment were intended to open the door to judicial formulation of new constitutional rules. Raoul Berger's evidence concerning the privileges or immunities Clause also points to a restricted scope for the Equal Protection Clause, limiting it to inequalities covering a defined set of rights. See *infra* text accompanying notes 176-87. A different but still limited and pre-defined original understanding has been suggested by Earl Maltz. See Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985). I explain below why I find Ely's arguments on the privileges or immunities Clause unconvincing. See *infra* text accompanying notes 176-87. Ely concedes that the enactors probably intended the Due Process Clause to have a limited scope. See J. ELY, *supra* note 43, at 14-21. It would be odd if the enactors, having rather finite aims for those two phrases, had an entirely undefined one for the Equal Protection Clause.

<sup>175</sup> U.S. CONST. amend. XIV, § 1.

<sup>176</sup> J. ELY, *supra* note 43, at 24. Raoul Berger insists that, notwithstanding the absence of express language to this effect, the clause was intended to reach only *discriminatory* treatment of privileges and immunities. See Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87, 102-06 (1981). Berger's interpretation is consistent with the construction given the similar language of article IV, § 2, and with the express anti-discrimination provision of the Civil Rights Act of 1866. *Id.*

<sup>177</sup> J. ELY, *supra* note 43, at 28.

<sup>178</sup> *Id.* at 23.

<sup>179</sup> *Id.* at 28.

<sup>180</sup> *Id.* at 22-30; see *infra* notes 204-12.

consistent with a no-intention position than with one positing some intention. It is true that no competing interpretation fits perfectly with the evidence from the debates on the adoption of the fourteenth amendment. In fact, given the character of those debates any particular interpretation is sure to show substantial deviation from them. Nonetheless, for reasons already discussed,<sup>181</sup> this fact does not preclude a determination that certain applications are, more likely than not, within the scope of the intentions of those who made the amendment and that certain others are not.

Two plausible accounts of the intended meaning of "privileges or immunities" have been offered. Neither is without difficulties, but each is supported by more affirmative, extrinsic evidence than is the claim that the phrase was meant to be defined by later decisionmakers.

First, Raoul Berger has argued, with substantial supporting evidence, that by "privileges or immunities" of national citizenship, the enactors referred to a more or less well-defined set of rights. These were intended to cover "civil rights" in the limited nineteenth century use of the term—that is, the capacity of individuals to enter legal agreements and statuses which defined their relations with other people—and to assure equality in the application of the criminal law.<sup>182</sup> The etymology of the phrase may be traced from the guarantees of Article IV of the Articles of Confederation through the parallel guarantees of Article IV, § 2 of the Constitution<sup>183</sup> as elaborated in Justice Washington's circuit court

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<sup>181</sup> See *supra* text accompanying notes 78-81.

<sup>182</sup> See R. BERGER, *supra* note 6, at 18-51. In defending the use of the term "civil rights and immunities" in the 1866 Civil Rights Bill, Representative Wilson, Chairman of the House Judiciary Committee, quoted BOUVIER'S LAW DICTIONARY: "Civil rights are those which have no relation to the establishment, support, or management of government." CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Alexander Bickel concluded that "civil rights" was not used in the fourteenth amendment because it was too broad. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 57 (1955). In his survey of the legislative history of the amendment's proposal, Bickel concluded:

[S]ection 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.

*Id.* at 58. This conclusion is amply supported by evidence from the legislative record presented in the article. Bickel's further conclusion that Congress may have intended to leave room for more expansive future judicial applications, see *id.* at 59-65, on the other hand, is based almost entirely on the particular language chosen and Congressional awareness of the "role of the Constitution in the scheme of American government." *Id.* at 59.

One commentator has found additional evidence that this same limited definition of the rights protected by the amendment was understood in some of the ratifying conventions. See Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 AKRON L. REV. 435, 443-48 (1985).

<sup>183</sup> Articles of Confederation, art. IV ("the free inhabitants of these states . . . shall be entitled to all the privileges and immunities of free citizens in the several states . . ."); U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.").

opinion in *Corfield v. Coryell*<sup>184</sup> and into the Civil Rights Act of 1866.<sup>185</sup> While there are different understandings,<sup>186</sup> the core concerns running throughout these manifestations are with matters of contract, property, and criminal liability.<sup>187</sup> Members of Congress frequently repeated the same themes, again with some exceptions, in the debates on the fourteenth amendment.<sup>188</sup>

Secondly, Justice Black constructed an extensive and detailed argument based on the debates of the 39th Congress to show that the "privileges or immunities" clause was intended to make the first eight amendments to the Constitution enforceable against the states.<sup>189</sup> This position was vigorously criticized,<sup>190</sup> and for some time was generally thought to be discredited.<sup>191</sup> Recently, a modified version of this "incorporationist" interpretation has been revived by Michael Kent Curtis.<sup>192</sup> Curtis has strengthened Black's claim by placing the relevant congressional statements in the context of constitutional views widely held at the time of the fourteenth amendment's passage.<sup>193</sup>

Ely rejects each of these arguments. With respect to the narrow "civil rights" interpretation, he points out that the dictum in *Corfield* contains vague terms<sup>194</sup> and that the enumeration of protected rights in the Civil Rights Act was abandoned in favor of the general terminology used in the amendment.<sup>195</sup> But those proposing the amendment explicitly denied that its terms were vague or that they were radically changing the dimensions of state authority.<sup>196</sup>

As for the interpretation restricting "privileges or immunities" to the Bill of Rights, Ely notes that this view would render the due process clause of the fourteenth amendment redundant because the "privileges or immunities" clause of that amendment would already have incorporated due process from the fifth amendment.<sup>197</sup> He contends further that the

<sup>184</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>185</sup> Act of April 9, 1866, ch. 21, 14 Stat. 27.

<sup>186</sup> See, e.g., Justice Washington's inclusion on his list of privileges and immunities of "the elective franchise." *Corfield*, 6 F. Cas. at 552. This was specifically rejected by the Supreme Court in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174 (1874).

<sup>187</sup> See R. BERGER, *supra* note 6, at 20-36.

<sup>188</sup> See *id.*; Comment, *supra* note 102, at 153-54.

<sup>189</sup> See *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

<sup>190</sup> This criticism is most prominently articulated in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

<sup>191</sup> See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 101-04 (1962).

<sup>192</sup> M. CURTIS, *NO STATE SHALL ABRIDGE* (1986).

<sup>193</sup> *Id.* at 36-91.

<sup>194</sup> See J. ELY, *supra* note 43, at 28-30, 198 n.64; Soifer, *supra* note 9, at 673-75.

<sup>195</sup> See J. ELY, *supra* note 43, at 30, 198-200 n.66.

<sup>196</sup> See Benedict, *supra* note 129, at 47 n.23, 48 n.26; Maltz, *New Thoughts*, *supra* note 11, at 817-18.

<sup>197</sup> J. ELY, *supra* note 43, at 27.

Congressional references to the Bill of Rights do not indicate that privileges or immunities were exhausted by those rights. Thus, he concludes, we are left with the question of what else was included.<sup>198</sup>

Curtis' work suggests possible responses.<sup>199</sup> The "privilege or immunity" of due process may be read as applying only to citizens. The express due process guarantee, therefore, extends that right to non-citizens. There is some evidence that this was, in fact, a concern of the drafters.<sup>200</sup> While there were references to rights beyond the Bill of Rights in the debates, most such statements are consistent with a view that includes within "privileges or immunities" all federal constitutional rights—those in the first eight amendments, those in the body of the Constitution, such as habeas corpus, and the "privileges and immunities" of Article IV.<sup>201</sup> While the last category is less clearly defined, there is some evidence that the amendment's enactors thought it also referred to other express constitutional rights<sup>202</sup> or, alternatively, that it was limited to "civil rights" in the sense discussed above.<sup>203</sup>

Clearly, these other interpretations are not free of doubt. There is, however, a body of extrinsic evidence and a logical argument supporting each of them. And, in comparison, the case for either of them appears stronger than the claim that the enactors intended to write a blank check for "later constitutional decision makers."<sup>204</sup>

2. *The Ninth Amendment.*—Ely also relies on the ninth amendment's prohibition of constitutional constructions that "deny or disparage [other rights] retained by the people." The conventional understanding of this provision is that it was directed only at the extent of the powers granted to the federal government. It was intended to rebut the negative inference that might arise from the fact that the first eight amendments appeared to withdraw from the federal government powers which it otherwise would not have been thought to possess.<sup>205</sup>

Ely's response is almost entirely semantic. First, he contends that if the ninth amendment was exclusively directed at limiting federal power, then it was redundant because the tenth amendment accomplished the

<sup>198</sup> *Id.* at 28.

<sup>199</sup> It should be noted that Ely dealt with this question before the appearance of Curtis' work.

<sup>200</sup> See M. CURTIS, *supra* note 192, at 107.

<sup>201</sup> See, e.g., *id.* at 85-91, 129-30.

<sup>202</sup> See *id.* at 113-17. Curtis notes that there were many Republicans who thought "privileges or immunities" included other "fundamental rights," but "there was no consensus on what these rights were." *Id.* at 82.

<sup>203</sup> See *supra* text accompanying notes 185-96.

<sup>204</sup> J. ELY, *supra* note 43, at 28.

<sup>205</sup> See J. ELY, *supra* note 43, at 34; E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63-64 (1957); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1981); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

same end.<sup>206</sup> Second, he points out that while the tenth amendment is explicitly directed to powers, the ninth refers to rights. Rights limit otherwise proper powers. Ely suggests that it is thus reasonable to think that with the ninth amendment the enactors were concerned with more than the general extent of the federal government's authority.<sup>207</sup>

Though appealing, Ely's argument is less persuasive than the conventional understanding discussed above. There is ample evidence that the constitution-makers were concerned that a Bill of Rights might put at risk the strict confinement of the federal government within the limits established in the original Constitution.<sup>208</sup> There is no extrinsic evidence whatsoever that the enactors thought that the ninth amendment might provide for an ongoing and unpredictable redefinition of rights. The language of the amendment speaks to rights *retained* not newly created. It thus appears to speak to rights already in existence with content known and understood at the time of the amendment. Research suggests that the drafters had existing rights in mind, whether based in statutory, common, or even natural law.<sup>209</sup> Furthermore, neither the language of the amendment nor the history surrounding it suggest that the rights so "retained" were to be transformed by the amendment into specific federal constitutional rights, especially, constitutional rights that were to be defined in the future by some unknown process.<sup>210</sup>

On the other hand, if the amendment were designed to protect existing rights, then its method becomes clearer. From what were the rights to be protected? The amendment indicates that they might be at risk from a particular construction of the Bill of Rights, that is, a construction *expressio unius* which could lead to an inference of unstated

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<sup>206</sup> See J. ELY, *supra* note 43, at 34-35.

<sup>207</sup> See *id.* at 34-40.

<sup>208</sup> The evidence is collected in Berger, *supra* note 205 and Caplan, *supra* note 205.

<sup>209</sup> See Caplan, *supra* note 205; Monaghan, *Perfect*, *supra* note 11, at 366-67. Ely responds to the suggestion that the amendment refers to state law rights by noting that the Bill of Rights was intended only to limit the federal government and that it would have been preposterous for the enactors to think there was any possible inference that "the Bill of Rights, controlling only federal action, had somehow pre-empted the efforts of the people of various states to control the actions of their state governments" with respect to state constitutional rights, or that "state legislatures and courts could no longer order relations among their citizens by the creation of nonconstitutional 'rights.'" J. ELY, *supra* note 43, at 37 n.\*. But if the animating concern was an unwarranted inference as to the scope of supreme federal power, it seems likely that there was a particular fear that such power might interfere in state law matters. See Caplan, *supra* note 205, at 227-28. Caplan cites the amendment proposed by the Pennsylvania ratifying convention stating that Congress had no implicit power and "that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution." *Id.* at 252.

<sup>210</sup> See Berger, *supra* note 205, at 21-22. Ely's view would result in undefined limitations only on the federal government. See, J. ELY, *supra* note 43, at 38. To apply these rights against state governments involves some ultimate reliance on the fourteenth amendment. See *Griswold v. Connecticut*, 381 U.S. 479, 486-93 (1965) (Goldberg, J., concurring).

federal powers to encroach those rights. The amendment's protection of retained rights thus implies only a limited reading of federal powers—the standard conclusion and one borne out by the legislative history. Madison, who supervised the passage of the Bill of Rights through Congress, understood that rights would be protected by insisting on the limited powers of the federal government. In 1789, he wrote to Washington:

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.<sup>211</sup>

Perhaps, as Ely suggests, Madison was wrong in conflating rights and limited powers but he cites no evidence that anyone else in the amending process saw things differently,<sup>212</sup> while much of the evidence indicates that others saw them the same way.<sup>213</sup> Since we are presently working on the assumption that the original intentions are controlling, we cannot depart from them merely because they were unartfully expressed.<sup>214</sup>

This does, as Ely notes, appear to make the ninth amendment redundant in light of the tenth's express limitation on federal powers.<sup>215</sup> My experience is that redundancy in legal documents is not particularly odd. And, in this case, the drafting history of the Bill of Rights explains the presence of both provisions. As originally presented by Madison, the

<sup>211</sup> Berger, *supra* note 205, at 3 (quoting Madison).

<sup>212</sup> Ely places some weight on a 1788 letter by Madison to Jefferson in which Ely sees Madison "separating the question of unenumerated powers from the question of unenumerated rights."

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration . . . 1. because I conceive that in a certain degree. . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.

J. ELY, *supra* note 43, at 35 (quoting letter from J. Madison to T. Jefferson). While the concluding sentence might be read as noticing an unwritten right of conscience capable of abridgment by a granted power, it is not at all clear to me that the reference is to a legally enforceable right. It may be referring to the practice of religion under whatever laws are in place. As a whole, the quotation does not seem inconsistent my argument.

<sup>213</sup> See, e.g., text accompanying note 211. Caplan cites John Randolph's preference for a limitation of the powers of the central government to a reservation of rights, seeing them as alternative ways to protect state law. See Caplan, *supra* note 205, at 256. Governor Johnston defended the absence of a Bill of Rights at the North Carolina ratifying convention on the grounds that the same purposes were served by the fact that Congressional powers were limited to specific grants in the Constitution. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 141-42 (J. Elliot ed. 1974) [hereinafter DEBATES].

<sup>214</sup> See *supra* text accompanying notes 26-33.

<sup>215</sup> See J. ELY, *supra* note 43, at 36. Caplan denies the amendments are redundant, noting that the ninth amendment deals with the incapacity of Congress to interfere with existing state law rights, while the tenth amendment deals with Congress' inability to displace state authorities in future legislation or other governmental functions. Caplan, *supra* note 205, at 262. Though there may be distinctions, both amendments are clearly variations of a single idea: maintaining the limits created by enumerating federal powers.



provisions of the Bill of Rights were to have been inserted into the body of the Constitution. Madison wanted to place most of these guarantees directly after the explicit limitations on congressional power in Article I, section nine, between clauses three and four.<sup>216</sup> These rights were then to be followed by the language that eventually became the ninth amendment.<sup>217</sup>

Madison had also initially proposed a separate article explicitly establishing the principle of separation of powers, limiting each branch of the federal government to the powers appropriate to it and denying to each the powers belonging to the others.<sup>218</sup> But apparently feeling that such general references to executive, legislative, or judicial powers might obscure the overall limitation of federal powers to those granted, this provision was to be followed by the language which ultimately became the tenth amendment—a reminder that the powers so allocated to the three branches were only those previously granted.<sup>219</sup> The article was not to be construed as a further grant of authority; all power not granted would remain with the states and the people. Thus the same notion was expressed twice because the new provisions might have raised the objectionable negative inference twice. When the House of Representatives switched to the articles of amendment format, the current ninth amendment became article 15 (following the new rights), the separation of powers provision became article 16, and the current tenth amendment was article 17. When the Senate deleted the separation of powers provision, the two remaining articles became adjacent, as they are today.<sup>220</sup> This does not make the two provisions any less redundant but it gives a pretty

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<sup>216</sup> E. DUMBAULD, *supra* note 205, at 207.

<sup>217</sup> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers or as inserted merely for greater caution.

E. DUMBAULD, *supra* note 205, at 208.

<sup>218</sup> The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

E. DUMBAULD, *supra* note 205, at 209. The model for this type of provision was probably Article XXX of the Declaration of Rights of the Massachusetts Constitution of 1780.

<sup>219</sup> "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." E. DUMBAULD, *supra* note 205, at 209.

<sup>220</sup> In the amendments reported to the House by the Select Committee, the insertion-in-text format was preserved. At the conclusion of the list of new rights to be inserted in Article I, section nine, was the following: "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people." *Id.* at 211. The new "Article Seventh" on separation of powers included this sentence: "The powers not delegated by this Constitution nor prohibited by it to the States are reserved to the States respectively." *Id.* at 212. Almost identical language was retained when the House passed the amendment as separate articles of amendment assigning the numbers mentioned in text. *Id.* at 215-16.

good idea of why such redundant expressions might be compatible with the traditional interpretation of these amendments.

I am not contending here that the conventional interpretation is proven beyond doubt, only that it is plausible and has evidence to back it up. On the other hand, the hypothesis that the ninth amendment was intended to establish a power for the creation of new constitutional rights has almost nothing in the record to support it. The usual understanding is, at least, more probable.<sup>221</sup>

### B. Rules of Construction

The second argument that the constitution-makers did not intend their own intentions regarding the reach of the Constitution to be controlling is based on an evaluation of the general way the enactors intended the courts to implement the Constitution. H. Jefferson Powell, in the most serious and thorough investigation of "interpretative intention" yet undertaken, has concluded that the constitution-makers of 1787-89 wanted the Constitution to be interpreted without reference to their intentions but solely according to techniques of judicial construction that look no further than the text itself.<sup>222</sup>

Although Powell acknowledges the enactors' frequent references to terms like legal "intent" and "intention," he contends their usage referred not to the authors' subjective purposes but to "the meaning the reader was warranted in deriving from the text."<sup>223</sup> Powell stresses the period's well established rules of interpretation that imputed to statutory words the intentions ordinarily associated with them.<sup>224</sup> This attachment for a meaning discoverable from the face of the instrument was consistent with what Powell notes was a strong hostility to the very idea of interpretation. Both lawyers and statesmen greatly feared judicial manipulation of statutes.<sup>225</sup> They warned against "artful constructions"<sup>226</sup> and the "wiles of construction."<sup>227</sup> A rule that mandated adherence to ordinary meaning would minimize these dangers.<sup>228</sup> When no such ordi-

<sup>221</sup> It seems most unreasonable to suppose that the authors of the Constitution, having carefully established a government of limited and clearly defined powers, would suddenly reverse themselves and confer on the courts of this government an unspecified and hence limitless power to "find" additional rights at their discretion and then to rely on these to impose their will on the States and the people.

Jenkins, *Judicial Activism and Constitutional Government*, 29 AM. J. JURIS. 169, 175 (1984).

<sup>222</sup> Powell, *supra* note 163, at 948.

<sup>223</sup> *Id.* at 895 (discussing etymology of the word "intent"); see *id.* at 903-06, 948.

<sup>224</sup> *Id.* at 895-96, n.54. Powell notes, however, that by the Civil War original intentions adjudication had become the accepted norm. See *id.* at 947. His conclusions, therefore, cannot automatically apply to the interpretive intent of the enactors of the Civil War amendments.

<sup>225</sup> *Id.* at 891-94. Lord Mansfield was the paradigm. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 18 (1977).

<sup>226</sup> Powell, *supra* note 163, at 893 (quoting the resolution of the Essex County Convention, 1778).

<sup>227</sup> *Id.* at 893 n.40 (quoting Edmund Pendleton, 1801).

<sup>228</sup> Powell cites numerous English cases to establish that this was the prevalent attitude in the

nary meaning existed, an examination of the related common law, the mischief the act was to remedy, and the purposes stated in the preamble were all appropriate sources of meaning.<sup>229</sup>

This picture of judicial practice in interpretation, however, is not necessarily inconsistent with the position that the intentions of the lawmaker are the proper object of interpretation. Instead, it may describe a particular way of ascertaining those intentions, by using sources that would be quite relevant to an investigation of the original intentions.

Powell's evidence of the special definition of "intention" employed by the constitution-makers is not conclusive. It falls roughly into three categories: restatements of the rule against use of legislative history in constitutional or statutory interpretation; statements of contemporaries, especially Madison, on the irrelevance of the original intentions; and judicial practice in the earliest constitutional cases.

1. *The Rule Against Use of Legislative History.*—Much of the material Powell cites for the proposition that the original intentions were thought irrelevant can be read to support a far narrower position, one which only forbid resort to what we now call a law's "legislative history." As discussed earlier,<sup>230</sup> this suspicion of legislative history was and continues to be the prevailing view in English courts and does not necessarily entail a rejection of the authority of the original intentions. Given the paucity and unreliability of legislative materials available in the constitution-making period, it might have been reasonable to suppose original intentions might actually have been more reliably identified by sticking to the ordinary inferences arising from the language of the text instead of being distracted by the scattered and incomplete extrinsic evidence.

Indeed, with respect to the Constitution, the question was largely academic in the period Powell discusses because practically no drafting history was available until the publication of Madison's notes in 1840.<sup>231</sup> What evidence there was in the immediate post-constitutional period

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period prior to the enactment of the Constitution. See Powell, *supra* note 163, at 894-900. Raoul Berger, however, has collected many contrary judicial authorities from the fifteenth to the eighteenth centuries. See Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296, 299-303 (1986).

<sup>229</sup> See Powell, *supra* note 163, at 899. Powell states that judicial precedent was "the most important source of information about an act's meaning beyond its actual text". *Id.* This might be thought to beg the question because we are concerned in the first place with rules for judicial construction. It thus cannot provide a method for a "first" interpretation. As to subsequent interpretations, however, there is no reason to doubt Powell's evidence that recourse to precedent was an accepted technique. But even presumptive adherence to precedent might be justifiable, in part, as a sound method of finding original intentions in the ordinary course. See the discussion of Madison's view of the relevance of practice in settling meaning, *infra* text accompanying notes 247-51.

<sup>230</sup> See *supra* text accompanying notes 34-37.

<sup>231</sup> See 1 M. FARRAND, *supra* note 91, at xv. The Journal of the Convention published in 1819 and Yates' notes published in 1821 give a far more limited account of the proceedings. See *id.* at xi-

tended to be anecdotal recollections of the constitution-makers themselves.<sup>232</sup> And, as Powell acknowledges, a significant number of people believed such information was relevant and reference to it proper in constitutional interpretation.<sup>233</sup> Those who opposed its use, relying on the traditional English rule, may have believed it unhelpful in the circumstances without denying the controlling force of the original intentions themselves.<sup>234</sup> In sum, this category of evidence does not seem to give strong support to the very general proposition about the nature of interpretation that Powell suggests.

2. *Madison's Position.*—Powell suggests that Madison and his contemporaries<sup>235</sup> did not believe in the propriety of appeals to evidence

xv. Elliot's compilation of the debates in the state ratifying conventions was published in 1836. 1 DEBATES *supra* note 213, at iv.

232 See, e.g., Powell, *supra* note 163, at 917-21 (discussing the 1796 debate in the House of Representatives on Congress' power to require the executive to produce documents connected with negotiation of the Jay Treaty).

233 For example, George Washington based his refusal to comply with the House's demand for papers on his own recollection of the debate and actions at the Philadelphia convention. Powell also notes that Maryland Representative William Van Murray cited the Convention's official journal. Other Congressmen who relied on the original intentions were more general in their references. Powell notes objections to reliance on this kind of evidence but those objections can be understood largely as restatements of the rule against recourse to legislative history. See *id.*

234 For example, Powell cites Representative Lyman as one who denied the relevance of "materials from the framing and ratification process," and who insisted on "the ancient rules" for the interpretation and construction of laws or constitutions. But Lyman defended his own interpretation with the following argument:

But it had been asserted that this power, insisted upon on the part of the House, was a novel doctrine, introduced merely upon the spur of the present occasion; notwithstanding which, it had been proved by several gentlemen who had spoken upon the question, that this interpretation was given to the Constitution in most of the State Conventions at the time of the adoption; that the same interpretation had also been given, at that time, by the writers both for and against its adoption. It had appeared, from the extracts of publications at that period, that whatever might have been the diversity of opinion in other respects relative to the Constitution, that in this construction, at least, both the friends and opposers perfectly agreed.

5 ANNALS OF CONGRESS 604 (1796) (remarks of Rep. William Lyman). Raoul Berger has collected a number of references indicating a notion of intention that seems to refer to the actual subjective intentions of flesh and blood legislators. For example, Thomas Rutherford is quoted as stating in the 1750s: "The end which interpretation aims at is to find out what was the intention of the writer to clear up the meaning of his words . . ." Berger, *supra* note 12, at 21. James Wilson is quoted shortly after the Convention as saying: "The first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it." *Id.*

235 See Powell, *supra* note 163, at 935-41. Powell says Hamilton also held a limited and artificial notion of intention. In his opinion on the constitutionality of the bill to create a federal bank, Hamilton argued that "whatever may have been the intention of the framers . . . that intention is to be sought in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended." Powell, *supra* note 163, at 915 (quoting A. Hamilton). In THE FEDERALIST No. 83, Hamilton said "[t]he rules of legal interpretation are rules of *common sense* adopted by the courts in the construction of the laws." *Id.* at 911 (emphasis in original). In his bank opinion, however, Hamilton supported his position by references to "the intent of the Convention," and by amendments proposed in the state conventions. See 3 THE WORKS OF ALEXANDER HAMILTON 445, 453, 488 (H. Lodge ed. 1904). Also, as Powell

from the constitution-making process. Nevertheless, there are instances where Madison seems to have used "intention" in such a way that it could only mean the beliefs of the particular people who wrote and adopted the Constitution.<sup>236</sup>

Madison did note in *The Federalist* No. 37 the inherent limits on the communicative capacity of language,<sup>237</sup> but he made this point to illustrate the great difficulties facing the framers and the inevitable imperfections in their work not as an argument on the futility of attempting to discover actual intentions. Linguistic limitations were to Madison a misfortune—but one which, like other problems facing them, the framers had "surmounted and surmounted with a unanimity almost as unprecedented as it must be unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of astonishment. . . ." <sup>238</sup> He saw in this achievement the "finger of the Almighty hand which has been so frequently extended to our relief."<sup>239</sup>

Many of the other statements Powell quotes are merely recitations of the ordinary rule barring explicit examination of the legislative history.<sup>240</sup> Madison also sometimes rejected sources of interpretation not because he rejected reliance on the enactors' intentions, but because the particular sources relied on did not accurately reflect the intention of the right people.<sup>241</sup> So when Madison suggested that *The Federalist* might not always be a useful source because the authors were "sometimes influenced by the zeal of advocates,"<sup>242</sup> he implied no more than that they might give a distorted picture of the original intentions. Indeed, many of his statements against original intention go to the single point that the intentions of the Philadelphia Convention were not "authoritative intentions."<sup>243</sup> But this is not to say that Madison believed there was no such

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notes, it is Hamilton who, in *THE FEDERALIST* No. 78, forcefully advanced the idea that the courts in applying the Constitution would do no more than make effective the *will of the sovereign people*. Powell, *supra* note 163, at 911. The power of judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *THE FEDERALIST* No. 78, at 467-68 (A. Hamilton) (C. Rossiter ed. 1961).

<sup>236</sup> See Powell, *supra* note 163, at 937 n.267.

<sup>237</sup> See *THE FEDERALIST* No. 37, at 228-29 (J. Madison) (C. Rossiter ed. 1961). Richard Weisberg says this language is evidence that "[f]aith in language was foreign to [the framers]." Weisberg, *supra* note 146, at 993.

<sup>238</sup> *THE FEDERALIST* No. 37, at 230-31 (J. Madison) (C. Rossiter ed. 1961).

<sup>239</sup> *Id.*

<sup>240</sup> See Powell, *supra* note 163, at 921.

<sup>241</sup> *Id.* at 936.

<sup>242</sup> *Id.*

<sup>243</sup> See *id.* at 938-39 & n.278 (quoting 1830 letter of Madison: "It must be kept in mind that the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution."). Madison's views on this point are elaborated in Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1988). Powell acknowledges

thing as “authoritative intentions” of actual enactors.<sup>244</sup> This is borne out by the fact that on receiving an inquiry about the Philadelphia framers’ intentions, Madison did not deny the relevance of such an inquiry but directed it instead to those whom he believed were the “real” constitution-makers—the state ratifying conventions.<sup>245</sup>

Powell also argues that Madison believed the meaning of the Constitution could be settled after the fact by a continuous and uniform practice.<sup>246</sup> In *The Federalist* No. 37, Madison wrote that “all new laws . . . are considered more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular decisions and adjudications.”<sup>247</sup> He relied on this rationale when he signed the act creating the Second Bank of the United States, notwithstanding his prior opinion that such an act was unconstitutional.<sup>248</sup> The creation and long acceptance of the First Bank amounted to “a construction put on the Constitution by the nation which, having made it, had the supreme right to declare its meaning.”<sup>249</sup> Given that experience and the utility of the bank itself, Madison “did not feel [himself], as a public man, at liberty to sacrifice all these public considerations to [his] private opinion.”<sup>250</sup> These expressions might be rationalizations for an embarrassing change of mind, but they also support the view of the Constitution that Powell attributes to Madison.

Still, Madison’s statements can be read in a more limited sense—not as recognizing the right of subsequent practice to *change* the meaning of the Constitution, but viewing subsequent practice as evidence of original meaning. These statements may exhibit a belief in the wisdom of defer-

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that “in the heat of the congressional debate over Hamilton’s bank bill” Madison cited the actions of the Philadelphia Convention. *Id.* at 939, n.278.

<sup>244</sup> See *supra* note 243.

<sup>245</sup> The meaning of the Constitution, he wrote, is to be sought “not in the proceedings of the Body that proposed it, but in those of the State Conventions which gave it all the validity and authority it possesses.” 3 M. FARRAND, *supra* note 91, at 518 (Letter from Madison to N.P. Trist, December 1831) To another constitutional researcher Madison wrote:

I cannot but highly approve the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found; in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States. If the instrument be interpreted by criticisms which lose sight of the intention of the parties to it, in the fascinating pursuit of objects of public advantage or convenience, the purest motives can be no security against innovations materially changing the features of the Government.

3 M. FARRAND, *supra* note 91, at 474 (Letter from Madison to A. Stevenson, March 25, 1826). The same opinion was expressed in the congressional debates Powell cites. For example, Albert Gallatin objected to references to the Journal of the Convention, noting that the opinions espoused in Philadelphia were “unknown to the people when they adopted the instrument.” See Powell, *supra* note 163, at 920. See generally Lofgren, *supra* note 243.

<sup>246</sup> See Powell, *supra* note 163, at 939-41.

<sup>247</sup> THE FEDERALIST No. 37, at 229 (J. Madison) (C. Rossiter ed. 1961).

<sup>248</sup> See Powell, *supra* note 163, at 939-40.

<sup>249</sup> *Id.*

<sup>250</sup> Letter from Madison to LaFayette (November, 1826), reprinted in 3 LETTERS & OTHER WRITINGS OF JAMES MADISON 538, 542 (Philadelphia, 1865) [hereinafter LETTERS].

ring in certain circumstances to the prior judgment on the correct meaning implicit in the continuing practice. If the determination of original intentions is often difficult and uncertain, then the policy of settling on a single meaning may counsel some humility in not insisting on the correctness of an interpretation different from that of the people creating the relevant practice. This outlook is consistent with a letter Madison later wrote that compared his position as President with that of a judge whose interpretation of the law is rejected by a majority of his colleagues. A judge has a duty to subordinate his personal view to the institutional determination of the court. For Madison, the public duty of an official, whether judge or president, with a non-standard opinion of the meaning of the law was to subordinate that view to the majority. The president "will find it impossible to adhere and act *officially* upon his solitary opinion as to the meaning of the law or Constitution in opposition to a construction reduced to practice during a reasonable period of time; more especially when no prospect existed of a change of construction by the people or its agents."<sup>251</sup> This proposition may not deal with ascertaining meaning but with the circumstances in which an official should yield to someone else's determination of meaning when different from his own.

A great deal of evidence shows that Madison did not approve of the idea that public officials had the right to alter the meaning of the Constitution. For example, he criticized judicial constructions that expanded federal authority beyond the grants of power specified in the Constitution.<sup>252</sup> Such cases, he wrote, make the Constitution "something very different from its legitimate character as the offspring of the national will."<sup>253</sup> And he complained that "some of the terms of the Federal Constitution have already undergone perceptible deviations from their original import."<sup>254</sup> If the Constitution turned out to be ill suited to new problems "it ought to be amended but by the authority which made it, not by the authority subordinate to it."<sup>255</sup> Madison expressed this position even more explicitly in a letter:

I concur entirely in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution and if that be not the guide in expounding it there can be no security for a constant and stable; more than for a faithful

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<sup>251</sup> Letter from Madison to C. Ingersoll (June 25, 1831) *reprinted in* 4 LETTERS, *supra* note 250, at 183, 185.

<sup>252</sup> Letter from Madison to John Jackson (Dec. 22, 1821), *quoted in* Berger, *supra* note 228, at 334.

<sup>253</sup> *Id.*

<sup>254</sup> Letter from Madison to Professor Davis (ca. 1832, not posted) *quoted in* Lofgren, *supra* note 243, at 106.

<sup>255</sup> *Id.*

exercise of its power.<sup>256</sup>

Madison's views over a long life are bound to be complex, and to some degree, inconsistent. But on balance, the statements adduced do not demonstrate a belief in the irrelevance of the intentions of the constitution-makers.

3. *Judicial Practice.*—Powell cites *Chisolm v. Georgia*<sup>257</sup> to show that courts in the early constitutional era ignored what we now believe to be the clear intention expressed in the ratification debates that states would be immune to suit in federal court.<sup>258</sup> While the Court did not rely on extrinsic materials, it does not follow that some of the judges, at least, did not think they were applying the actual intentions of the enactors. Justice Wilson's repeated references to what the "people of the United States intended" appear to be directed toward an actual historical event.<sup>259</sup> In dissent, Justice Iredell was even more precise: "The framers of the Constitution, I presume, must have meant one of two things . . ."<sup>260</sup> These expressions in both opinions looked backward, presumably to the human minds that initiated the constitutional regime.<sup>261</sup>

Powell similarly claims that Chief Justice Marshall shared this artificial notion of intention.<sup>262</sup> Although he drew his inferences primarily from the words and structure of the Constitution, Marshall repeatedly used "intention" in connection with specific human beings.<sup>263</sup> In *Sturgis v. Crowninshield*,<sup>264</sup> decided in 1824, he interpreted the contracts clause by relying on the intentions of "the Convention" and on what "we know from the history of the times that the mind of the Convention was di-

<sup>256</sup> Letter from Madison to H. Lee (June 24, 1824) quoted in Berger, *supra* note 228, at 326. Other quotations from Madison of a similar nature are found in *id.* at 324-35.

<sup>257</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>258</sup> Powell, *supra* note 163, at 922.

<sup>259</sup> *Chisholm*, 2 U.S. (2 Dall.) at 464. Powell appears to think these references are merely to the ordinary rules of construction. Powell, *supra* note 163, at 923. If so, this form of words for such a reference tells us something about what these rules were thought to be used for.

<sup>260</sup> *Chisholm*, 2 U.S. (2 Dall.) at 432. At least on one occasion, however, Justice Iredell expressed a view of constitutional interpretation rather squarely at odds with an adherence to actual original intentions. Powell notes that in a grand jury charge delivered in 1799 on the constitutionality of the Alien Act, Iredell discussed an interpretation of the "migration and importation" clause premised on extrinsic evidence of the enactors' intentions: "But, though this probably is the real truth, yet, if in attempting to compromise, they have unguardedly used expressions that go beyond their meaning, and there is nothing but private history to elucidate it, I shall deem it absolutely necessary to confine myself to the written instrument." Powell, *supra* note 163, at 922 n.202 (quoting Iredell). Note, even here, Iredell connects the language chosen to the drafters' attempt at compromise.

<sup>261</sup> Of course, the quick overturning of the result in *Chisolm* by the Eleventh Amendment is some indication that whatever deviation from the original intentions was involved in the case was widely disapproved. See Berger, *supra* note 228, at 320.

<sup>262</sup> Powell *supra* note 163, at 894 n.46, 942-44.

<sup>263</sup> See, e.g., *id.* at 943 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-89 (1824)); *supra* text accompanying notes 221-28.

<sup>264</sup> 17 U.S. (4 Wheat.) 122 (1819).



rected to . . . ."<sup>265</sup> In *Sturgis*, he defended a "plain meaning rule" partly because of its consistency with the original intentions. He also suggested a version of the "golden rule" discussed earlier:<sup>266</sup>

[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting, the application.

This is certainly not such a case.

. . . It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by installment would have expressed that intention by saying "no State shall pass any law impairing the obligation of contracts." No men would so express such an intention . . . .<sup>267</sup>

This view does place great weight on the ordinary meanings of the words of the text, but it also concedes, in its very expression, the paramount authority of the original intentions. In fact, in the great case of *McCulloch v. Maryland*, decided the same year,<sup>268</sup> Marshall again referred to "the Convention"<sup>269</sup> and "the framers of the Constitution."<sup>270</sup> He also cited *The Federalist* but insisted on the Court's power, in particular cases, to "judge of [those essays'] correctness."<sup>271</sup> Marshall's numerous judicial references to the people, the framers and the Convention cannot be easily dismissed as mere figures of speech.

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It is possible that the constitution-makers intended to create a constitutional rule enforcing the prevailing practice on statutory construction—that is, barring the use of legislative materials in constitutional adjudication. This is a question of intention like any other, and one which I have not yet answered to my own satisfaction. I do not think Powell's material disposes of the issue. The practice immediately following enactment is not persuasive one way or another because of the absence of reliable legislative materials. Moreover, constitutional

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<sup>265</sup> *Id.* at 202.

<sup>266</sup> See *supra* text accompanying notes 36-37.

<sup>267</sup> *Sturgis*, 17 U.S. (4 Wheat.) at 202-03, 205.

<sup>268</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>269</sup> *Id.* at 416 ("[T]he Convention was not unmindful of the subject.").

<sup>270</sup> *Id.* at 420.

<sup>271</sup> *Id.* at 433. Indeed, in *McCulloch* he did not find *The Federalist* wrong, but rather, the interpretation put on it. *Id.* at 435. He then claimed the authors of *The Federalist* would have agreed with him:

Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

*Id.* See also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827) (Marshall, C.J.).

construction might have been thought to present different considerations from statutory interpretation. Some evidence suggests that resort to extrinsic materials might have been thought proper in the constitutional context.<sup>272</sup> In any event, the issue, while important, is far narrower than the general issue of whether judges ought to look to the original intentions—whatever the allowable sources or techniques for doing so—or to some other, undefined sources of values.

Based on the foregoing discussion, the argument that the constitution-makers did not want their intentions to bind future generations is not very persuasive. This seems especially true when considered in light of the pervasive notion that the virtue of a written constitution lay in its capacity to fix the limits of proper governmental action.<sup>273</sup>

### C. *The Role of the Judiciary*

An equally serious problem with this objection is that, as presented, it is incomplete. It is negative in that its purpose is to show that the intentions of the enactors were not intended to govern. It is difficult to believe, however, that the enactors did not have some affirmative ideas of how the Constitution was to be applied to questions of governmental power. Yet the evidence that they held some particular alternative understanding is almost entirely absent.<sup>274</sup>

If the purpose of the objection is to support a form of constitutional adjudication that relies on something other than the rules of the Constitution as understood by their enactors, it is up to the objectors to show that such other form of adjudication was intended. The suggestion that the constitution-makers wanted to vest such an awful and ill defined authority in judges, however, is implausible on its face.<sup>275</sup>

In the period of the Constitution's creation, it is well documented that there was "a profound fear of judicial independence and discretion."

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<sup>272</sup> See Powell, *supra* note 163, at 915-17.

<sup>273</sup> See R. BERGER, *supra* note 6, at 290-91.

<sup>274</sup> The argument of H. Jefferson Powell, discussed *supra* text accompanying notes 163-265, does include such an alternate conception. He suggests that the enactors contemplated constitutional interpretation based on well established rules of statutory construction. But just how those rules work out is unclear. To the extent that he emphasizes reliance on judicial precedent, see Powell *supra* note 163, at 899, it is still left to determine how the original judicial interpretation, upon which subsequent judges rely, and which, therefore, defines pretty much all subsequent interpretation, will be chosen. With respect to such other factors as the mischief to remedied, the preamble and the background law, see *id.* at 898-99, we really seem to have nothing more than original intentions adjudication without recourse to legislative materials.

<sup>275</sup> [T]he claim is necessarily that at some point (or points) in American history governmental officials delegated to the judiciary, in particular to the Supreme Court, authority to enforce against government, not particular value judgments the framers had deliberated and constitutionalized, but unspecified value judgments not constitutionalized or even always foreseen by the framers. That would have been a remarkable delegation for politicians to grant to an institution like the Supreme Court . . .

M. PERRY, *supra* note 5, at 20.

In the colonial period, this was dealt with by "repeated resort to written charters."<sup>276</sup> The dominant political theory strictly limited the judicial role and sensed danger in any arrangements that might tempt the judges out of that role. Montesquieu, whose central tenets the "American Republican ideologues could recite. . . as if it had been a catechism,"<sup>277</sup> insisted that the judges should be "no more than the mouth that pronounces the words of the law."<sup>278</sup> The risk that judges would transgress this limited realm was particularly great in the construction of written law.<sup>279</sup> Thus Jefferson warned: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by Construction."<sup>280</sup> In 1776 Jefferson had written that the judge must "be a mere machine."<sup>281</sup>

Gordon Wood has shown how the early statesmen dealt with the tension between their insistence on reason and equity in the law, even legislative law, and their fear of undefined judicial power.<sup>282</sup> It was resolved by conceiving of the people as always superior to the legislature, and the people's will as being expressed in the written constitutions. The judge's role was merely to translate and execute that expressed will when it came into conflict with legislation. The judges were the people's "servants for this purpose."<sup>283</sup> Wood writes:

The judges were not, as was sometimes thought, "appointed arbiters" of the Constitution "to determine, as it were, upon any application, whether the Assembly have or have not violated the constitution." Rather, they were simply judicial officials fulfilling their duty of applying the proper law . . . . The exercise of this power, said Iredell, was "unavoidable," for the Constitution was not "a mere imaginary thing about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wistfully blind themselves."<sup>284</sup>

This limited role for the judiciary is best illustrated by the well-known debate at the Philadelphia Convention on the proposed "Council of Revision," in which judges would have shared the veto power with the president.<sup>285</sup> Both advocates and opponents saw judges performing dis-

<sup>276</sup> G. WOOD, *supra* note 153, at 298. See Berger, *supra* note 12, at 15.

<sup>277</sup> F. McDONALD, *supra* note 109, at 81.

<sup>278</sup> *Id.* at 82 (quoting Montesquieu).

<sup>279</sup> See M. HORWITZ, *supra* note 225, at 12-13, 17-18. Horwitz notes that only in the last ten to twenty years of the eighteenth century was the distrust of judicial discretion extended to common law adjudication, but that fears of judicial overreaching in statutory construction were common well before then. *Id.* at 12-13.

<sup>280</sup> Powell, *supra* note 163, at 893 n.40 (quoting Jefferson).

<sup>281</sup> G. WOOD, *supra* note 153, at 161 (quoting Jefferson). Numerous expressions of the period evidencing a distrust of judicial discretion are collected at R. BERGER, *supra* note 6, at 306-11.

<sup>282</sup> See G. WOOD, *supra* note 153, at 304-05.

<sup>283</sup> *Id.* at 456 (quoting Providence Gazette, May 12, 1787).

<sup>284</sup> *Id.* at 461-62.

<sup>285</sup> See R. BERGER *supra* note 6, at 302-06.

tinctly non-judicial functions while sitting on the Council. James Wilson, who favored the idea, felt that though "as expositors of the laws," judges would have no power to correct laws that "may be unwise, may be dangerous, may be destructive, and yet not so unconstitutional as to justify the judges in refusing to give them effect," their talents should *also* be employed in the Council by giving them a "share in the revisionary power."<sup>286</sup> Elbridge Gerry opposed the action just because it was too dissimilar to ordinary judicial activity. "It was," he said, "making statesmen of the judges; and setting them up as guardians of the Rights of the people."<sup>287</sup> Moreover, Gerry thought the plan created the risk that judges might mix up their two roles and bring the entirely unsuitable considerations of the Council of Revision into their deliberations as judges.<sup>288</sup> These debates show a conception of judges *qua* judges that excludes any role as formulators of some values apart from positive law.<sup>289</sup>

There is also no evidence that the enactors of any later amendments intended this vastly increased judicial role. If the Civil War amendments were intended to expand any branch's power, that branch must have been the legislature not the judiciary.<sup>290</sup> Congress' attitudes towards the judiciary in the Reconstruction period were complicated, but it seems accurate to say that they ranged only from skepticism to outright hostility.<sup>291</sup> While the fourteenth amendment was adopted after judicial review was well established, there is no reason to think the courts were intended to play any more than their ordinary role, that is, applying the values enunciated by the constitution-makers or by Congress acting

<sup>286</sup> 2 M. FARRAND, *supra* note 91, at 73 (remarks of James Wilson, July 21, Madison's Notes).

<sup>287</sup> *Id.* at 75 (remarks of Elbridge Gerry, July 21, 1787 Madison's Notes).

<sup>288</sup> *See id.* at 77-80; *id.* at 75 (remarks of Caleb Strong, July 21); *id.* at 79 (remarks of Nathaniel Gorham, July 21); *id.* at 80 (remarks of John Rutledge, July 21); *id.* at 300 (remarks of Roger Sherman, August 15).

<sup>289</sup> Ely says it is a "cheap shot" to note that no legislative history supports judicial enforcement of the ninth amendment, since there is little legislative history supporting *any* kind of judicial review. J. ELY, *supra* note 43, at 40. It is hard to understand how an argument for a relatively unrestrained power of judicial review is helped by the fact that there is not much evidence for *any* kind of judicial review. In fact, there is fairly strong evidence that the enactors were familiar with and expected judicial enforcement of the Constitution. R. BERGER, *CONGRESS VS. THE SUPREME COURT* 50-116 (1969).

<sup>290</sup> *See* R. BERGER, *supra* note 6, at 227-28. Representative Bingham, speaking to the amendment, argued:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all citizens of the Republic . . .

CONG. GLOBE, 39th Cong. 1st Sess. 2542 (1866); *see also id.* at 2766 (remarks of Sen. Howard).

<sup>291</sup> S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 64-88 (1968); Kutler, *Ex Parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835 (1967).

under the amendment's power.<sup>292</sup> The argument that particular provisions of the fourteenth amendment were without defined substance has already been discussed.<sup>293</sup> The same reasoning argues against the claim that the amendment was intended to vest the courts with the kind of authority which modern models of constitutional adjudication suggest.

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To summarize, the second objection assumes that the interpretative intentions of the enactors ought to control constitutional interpretation and that those intentions were that substantive intentions should not control. The latter can be reduced to a mere (although certainly difficult) question of historical fact. We know that the constitution-makers thought it was important to enact written constitutional rules. We know they took great pains to choose the terms they did and that they argued about the best language and about the merits of the proposals before them as if their decisions on these things would make a difference.<sup>294</sup> We would not expect such deliberation from people who wanted their intentions to be ignored or to play a minor role in the future application of the rules they made. A strong case would seem in order from those who would impute such a desire to them. I do not contend that such a claim could never be proven. But it does not seem to me to have been proven yet.

## V. THIRD OBJECTION: IT'S WRONG

In the last two sections I have attempted to show that original intentions adjudication, while admittedly a difficult and imperfect exercise, is possible both in theory and in the practical circumstances presented by our courts and Constitution. I have also argued that such adjudication is not incompatible with the original intentions themselves. But, even if such adjudication is both possible and coherent, it must face a final objection: that original intentions adjudication makes for bad government and bad law. While rarely put so bluntly,<sup>295</sup> this is the most potent of the three objections that I have listed. Its power derives from the fact that, unlike the first two, refuting it requires more than simply an appeal to facts, history, or ordinary experience. This objection is the expression of a political and moral judgment about the best way for people to live in society. As such, conventional argument can take us only so far.

To evaluate this objection, we cannot consider original intentions adjudication in isolation, as we were able to do with the first two objections. The judgment here is necessarily relative: original intentions adju-

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<sup>292</sup> See Maltz, *New Thoughts*, *supra* note 11, at 818-19.

<sup>293</sup> See *supra* text accompanying notes 174-209.

<sup>294</sup> See R. BERGER, *supra* note 128, at 93 (citing debates and amendments at Philadelphia Convention focusing on specific word choices).

<sup>295</sup> But see Perry, *supra* note 15, at 576-87; Simon, *supra* note 5, at 1494-1531.

dication must be worse than *some other* system in which constitutional decisions are made according to some standards or processes other than fidelity to the original intentions.

Adherence to the original intentions, like any other purposive human activity, involves a choice. Legal words cannot magically bring about the state of affairs they describe.<sup>296</sup> The force of law results from the attitudes and reactions of human beings in response to legal rules. These attitudes and reactions, in turn, arise from widely shared (and largely tacit) political preferences. But there is no reason to think that those decisions are made only once, for all time. They are always provisional, always capable of being abandoned.<sup>297</sup> And because these choices inevitably reflect particular values they will always be, when fully understood, potentially controversial.<sup>298</sup>

Put more concretely, the plan of government intended by the creators of the United States Constitution could and can have only those effects which people—both public and private—choose to give it (although the choice is rarely conscious). This essay is about one such choice—reconstruction in practice of a government conforming to the one conceived in theory by the constitution-makers. Original intentions adjudication would entail such a choice by judges, particularly the justices of the Supreme Court.

The choice of following or rejecting the original intentions is necessarily not a legal choice, but a moral and political one.<sup>299</sup> It must be prior to law even—indeed especially—the law of the Constitution and is, in this sense, preconstitutional.<sup>300</sup> Our experience with political and

<sup>296</sup> See Hamilton, *Constitutionalism* 4 ENCY. SOC. SCI. 255 (1931) ("Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep government in order.").

<sup>297</sup> See Hegland, *Good-Bye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1211 (1985).

<sup>298</sup> See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 215-16 (1979).

<sup>299</sup> See R. DWORKIN, *supra* note 15, at 366-67; Dworkin, *supra* note 82, at 473-74, 496-97; Kay, *supra* note 30, at 193; Perry, *supra* note 15, at 582-83; Simon, *supra* note 5, at 1487. The same is true with the parallel arguments in the field of literary criticism. See E. HIRSCH, *supra* note 23, at 7-8, 77. E. D. Hirsch has posed the issue in terms strikingly similar to those involved in the legal dispute about original intentions adjudication:

[T]he politics of interpretation resides in the choice between the autocratic and allocratic norm. Under the autocratic norm, authority resides in the reader, while under the allocratic norm, the reader delegates authority to the reconstructed historical act of another person or community . . . . [A]utocratic interpretation is not in principle revisable except by accidental changes of preference whereas allocratic interpretation is revisable *ex post facto* on the basis of changing theories and evidence about a determinative historical event. Hence the autocratic norm is *a priori* and incorrigible; the allocratic norm is *a posteriori* and revisable. The authority to choose one of these norms lies with the reader, and this choice, being free, is ethical or political in nature; it is entirely unconstrained by epistemological considerations.

Hirsch, *supra* note 65, at 327-28. Walter Benn Michaels has said, the choice is whether to read the Constitution—or to write it. See Michaels, *Response*, *supra* note 21, at 678-79; see also T. EAGLETON, *supra* note 21, at 69; Hirsch, *supra* note 147, at 81.

<sup>300</sup> See Kay, *supra* note 30, at 189-90. Insofar as this decision defines the law of the Constitution

moral differences indicates that we should not be too optimistic about our capacity to resolve them by rational argument.<sup>301</sup> This is certainly true with regard to the questions at issue here.

Nevertheless, clarifying the moral and political nature of those questions does serve some useful purposes. First, it enables us to separate this basic value judgment from the essentially technical objections to original intentions adjudication discussed in the previous two sections.<sup>302</sup> Second, it encourages making explicit the underlying values that may cause us to prefer one preconstitutional choice to another. Thus, it opens the possibility that we may narrow our differences to the proper means of achieving goals we share or to the different weights we ought to give those goals. Finally, however, we will be left with differences about the best way for people to live together. No law book will show us the right side of such a disagreement.

With this background, the third objection to original intentions adjudication might be put this way: limiting government by fixed rules intended by people in the more or less distant past will yield less satisfactory political and social consequences than will some other limiting technique. The exact nature of the objection depends on the proffered alternative, but most versions find similar problems with submission to the original intentions. These problems involve the incapacity of set, abstract rules to respond over time to our collective and individual well-being. The objection, therefore, presupposes that judges can apply fixed rules to particular instances of adjudication. In light of the discussion in the previous two sections, this assumption requires further examination.

I have argued that original intentions adjudication does not depend on the ability to discover with certainty the governing intentions.<sup>303</sup> Nevertheless, the probability judgments on which individual results will turn will be based on data that is, in theory, and largely in fact, both fixed and available.<sup>304</sup> Consequently, constitutional rules will be capable of

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and insofar as the Constitution is the benchmark for all other valid law-making, the choice is equivalent to selection of a "rule of recognition" as expounded by H.L.A. Hart. See H. HART, *supra* note 25, at 96-107.

<sup>301</sup> [O]ne cannot successfully contend for legitimacy, as a matter of democratic theory, of judicial activism in human rights cases without presupposing that there are right answers to political-moral questions—without presupposing, that is, that political-moral claims are cognitive claims, that truth and falsity are properties of values, in short, that there is moral *knowledge*.

Perry, *supra* note 130, at 73-74. On the relationship between moral theories and constitutional adjudication, see Morawetz, *Constitutional Review and Moral Premises: The Future of an Illusion* (unpublished manuscript, 1985) (on file with the *Northwestern University Law Review*).

<sup>302</sup> See *supra* text accompanying notes 50-293; see Michaels, *Fate*, *supra* note 21, at 775-76.

<sup>303</sup> See *supra* text accompanying notes 77-81.

<sup>304</sup> I assume here that the method will be applied honestly and intelligently by judges. This raises a question which might properly have been considered in Section III. There, I argued that adherence to an interpretation based on the original intentions was possible and practical. But it may be that my assumption about the capacity and good faith of judges, on which these arguments depend,

determination in advance of its possible application in some action.<sup>305</sup> This is not to say that the results of such constitutional adjudication will be perfectly predictable or that the interpretations emerging from it will be immune to reconsideration or change. The approach, however, is about as stable and objective as human beings can contrive while still working with a constitution sufficiently complex to be a workable instrument of government. Other competing models of judicial review depend much more on judicial elaboration of broad, ill-defined standards and they authorize some judicial evolution of these principles over time.<sup>306</sup>

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is unrealistic. That is, original intentions adjudication may be impossible because judges will be unable to resist the temptation to stray from the original intentions in order to achieve a result that seems right to them. The temptation may, in accordance with Lord Acton's observation about power, be irresistible in the Supreme Court because there is no further legal review. Certainly the evidence of our judicial history reinforces these doubts. See Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979) (arguing and approving the inevitable instability of the law.) This is an extremely important question and the significance of one's convictions about the issues discussed in this article may well turn on the answer. My own feeling is that human beings can, at least for some length of time following a constitution's creation, apply it in most cases in the sense in which it was intended. See Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 844-45 (1931). In any event, insofar as the question is a comparative one, the opportunities and temptations to "cheat," consciously or unconsciously, by departing from the prescribed decision-making model are far greater in the competing suggestions as to the proper character of judicial review.

<sup>305</sup> Frederick Schauer has shown how giving a more precise form to legal rules (which, according to the reasoning in the text, would follow from original intentions adjudication) may itself give rise to more situations to which no rules apply because the very precision will necessarily exclude unforeseen events. The potential breadth of the universe subject to legal authority is, therefore, increased when we make rules more indeterminate (or when we adjudicate in a way having the same effect). Such a development extends the control of officials (especially judges) as it necessarily commits the determination of the propriety of the challenged action to a more discretionary, and, therefore, more unpredictable, decision. See Schauer, *Authority and Indeterminacy*, in NOMOS XXIX: AUTHORITY REVISITED 28 (J. Pennock & J. Chapman eds. 1987). Original intentions adjudication advances the value of certainty by denying such flexibility to judicial decision. The cases consequently unprovided for are determined by the "back-up" rules discussed *supra* text accompanying notes 125-30. These back-up rules permit a reasonable estimate of the legality of government action although they may, because of new circumstances in a given case, not appear sensible according to some coherent scheme of public values held by the constitution-makers or anybody else.

<sup>306</sup> See, e.g., M. PERRY, *supra* note 5, at 101 (Judicial review should "deal with those political issues that are also fundamental moral problems in a way that is faithful to the notion of moral evolution (and, therefore, to our collective religious self-understanding)—not simply by invoking established moral conventions but by seizing such issues as opportunities for moral reevaluation and possible moral growth."); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of the Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 618 (1985) (Judicial review "should be guided mainly by what is good and just, although this too is a question of fact . . ."); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication* 83 YALE L.J. 221 (1973). On the relative indeterminacy of such approaches, see J. ELY, *supra* note 43, at 43-72; Grano, *supra* note 11, at 61-75.

Modern constitutional adjudication, while certainly not defensible under the original intentions, typically does not invoke any alternative method of decision-making, but explicitly claims the sanction of "the Constitution." See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 771-72 (1986) ("We recognized at the very beginning of our opinion in *Roe* . . .



In practice, judges applying these standards will be less constrained by the discipline of the process and more inconsistent decisions will be defensible as proper applications.<sup>307</sup> The outstanding characteristic of original intentions adjudication, for good or ill, is that it is, compared with the alternative methods, most likely to produce relatively clear and stable rules for lawful government activity.<sup>308</sup>

Yet it is exactly this aspect of original intentions adjudication which forms the basis of the third objection. The argument is that such fixed rules would impose outdated and unduly rigid restrictions on government behavior. "[T]here is no justification," Paul Brest has written, "for binding the present to the compromises of another age."<sup>309</sup> The Constitution is a long-term proposition and to do things in the way and within the limits intended by the enactors is bound to become increasingly uncomfortable.<sup>310</sup> (It is assumed in this kind of argument that the rigors of the amendment process make amending the Constitution too difficult and, therefore, unavailable as a practical matter.)<sup>311</sup>

Such restrictions will have two kinds of adverse consequences. First, they will prevent the government from accomplishing things the national welfare urgently requires because another set of people, living in a time when such problems were unimaginable, intended that such acts not be done by government. A good example may be government power to suspend or abridge contractual liability in an era of world-wide and deep-rooted economic depression, a phenomenon unknown to the origi-

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that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But these disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully."'). It is not at all clear just what is meant by "the Constitution" in such citations. In such circumstances the Constitution serves not so much as an object of interpretation as of incantation. *But see* M. PERRY, *supra* note 5, at 143-44 n.\*; Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435, 1447-49 (1984).

<sup>307</sup> I speak here only of models which have some defensible claim to political legitimacy. *See supra* note 136. Thus adherence to some plain or standard meaning of the constitutional text might be argued to involve more stability and predictability than original intentions adjudication. *See, e.g.,* Moore, *supra* note 16, at 258 (making this argument with respect to statutory interpretation). But, for reasons argued above, that approach would lack any reference to an authorized maker of law. *See supra* text accompanying notes 21-32.

<sup>308</sup> *See* Maltz, *Constitutional Originalism*, *supra* note 11, at 51.

<sup>309</sup> Brest, *supra* note 6, at 229 n.96. Michael Moore's view is exemplary:

Better that we fill out the grand clauses of the Constitution by our notions of meaning (evolving, as we have seen, in light of our developing theories about the world), by our notions of morals, and by two hundred years of precedent. What the founders intended by their language should be of relevance to us only as a heuristic device to enable us to think more clearly about our own ideals. The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.

Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985); *see* Brennan, *supra* note 60, at 438; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1033 (1977).

<sup>310</sup> *See supra* note 299; Simon, *supra* note 5, at 1499-1500.

<sup>311</sup> *See id.* at 1501.

nal constitution-makers.<sup>312</sup> Second, such restrictions may permit the government to do things that seem as horrible to us as the enactors found the things they prohibited. The imposition of the death penalty, for example, has been suggested as something clearly outside the enactors' view of cruel and unusual punishment but which, it is argued, we view today as far crueler.<sup>313</sup>

A common response to this objection stresses the fundamental commitment of our society to democracy.<sup>314</sup> Any alternative to original intentions adjudication that cures the problem of rigidity requires someone to revise the constitutional rules in light of new conditions. Most objectors locate that agency (subject to some specified non-textual constraints) in judges who are unelected and largely unrepresentative. But original intentions adjudication is not particularly incompatible with democratic government either. The enactors' intent may have been popularly sanctioned when first enacted, but over time their judgments are increasingly unlikely to reflect contemporary majority opinion any better than the choices of unelected, but living, judges.<sup>315</sup>

It is true that many judgments inconsistent with the original intentions have displaced decisions made by the politically accountable branches. But such results are not an inevitable feature of adjudication which is not constrained by the original intentions. Courts might ignore original intent and formulate constitutional rules that leave legislative and executive acts intact, while adherence to original intentions might invalidate the very same acts. The Supreme Court's construction of the privileges or immunities clause of the fourteenth amendment is one such an example,<sup>316</sup> and certain justiciability doctrines, especially the political question doctrine, are others.<sup>317</sup> Original intentions adjudication is neither inherently restrained nor activist.<sup>318</sup>

Thus, the recitation of the countermajoritarian problem is not an adequate response to the objection of rigidity and antiquity. A better response is to affirm the values inherent in "inflexibility"—the values of stability and clarity. Constitutional government exists to limit the sphere

<sup>312</sup> See *Home Loan Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439-40, 442-44 (1934).

<sup>313</sup> See *Brest*, *supra* note 6, at 220-21. Cf. *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring). The arguments about changing attitudes toward death are quite reasonable on their face. I cannot help thinking, however, that from the viewpoint of the condemned person the cruelty of the punishment must be about the same in either time period. Accord *Weisberg*, *supra* note 146, at 990 & n.153.

<sup>314</sup> See, e.g., J. ELY, *supra* note 43, at 4-6; M. PERRY, *supra* note 5, at 9-10.

<sup>315</sup> See Maltz, *Appeal*, *supra* note 11, at 4-5.

<sup>316</sup> *The Slaughterhouse Cases*, 83 U.S. 36, 75-80 (1872); see R. BERGER, *supra* note 6, at 37-52; L. TRIBE, *supra* note 127, at 418-21.

<sup>317</sup> L. TRIBE, *supra* note 127, at 53-114; see also Maltz, *Constitutional Originalism*, *supra* note 11, at 52-53.

<sup>318</sup> Earl Maltz has put forward a somewhat different argument for the desirability of original intentions adjudication based on the need for "neutrality" in judicial decision-making. See, Maltz, *supra* note 11.

of appropriate government activity.<sup>319</sup> It rests on the premise that there should be a realm of action and private decision-making immune from public coercion. The value of dividing human activity into exclusively private and potentially public zones would be severely diminished if the boundary between the two areas could be frequently and unpredictably altered. It is not merely the ability to contest, and sometimes successfully resist, government impositions that benefit those living under a constitutional government. It is, at least as much, the ability to "count on" government being constrained by certain procedures and within certain limits. Such stability permits us confidently to plan our lives, a freedom which is at the core of our capacity for self-definition.<sup>320</sup> The opposite kind of existence, where we live in perpetual dread of the secret decree and the surprise order becomes, at the extreme, totalitarianism—the opposite of government under law.<sup>321</sup>

This characteristic of government under law is not the only important value in the relationship of government and the individual, but it is difficult to overestimate its importance. In many circumstances stability and assurance may be more important than the actual content of the substantive rules applied. An example suggested by Hayek may make this clearer.<sup>322</sup> Imagine two conscription regimes. Under the first, you may be called for military service for a period of one month to five years at any time between age 20 and age 40. Under the second, you will definitely be in military service for a three year period between ages 22 and 25. The average expected service for any individual may be the same

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<sup>319</sup> It has been suggested that judicial review, limited to original intentions, increases the government's overall ability to respond to changed circumstances because it frees the legislative and executive branches from the inhibiting restrictions created by the judiciary. See Maltz, *New Thoughts*, *supra* note 11, at 825-26; Maltz, *Appeal*, *supra* note 11, at 18-19. Whether or not this is correct depends on the particular rules the judges substitute for those originally intended. See *supra* text accompanying notes 313-17. It might be argued that the very question of how much discretion should be accorded the various branches is one that should be answered differently in different situations.

<sup>320</sup> See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 156-57 (1960); F. HAYEK, *I LAW, LEGISLATION AND LIBERTY; RULES AND ORDER* 106-07 (1973); Harris, *supra* note 16, at 35; Simon, *supra* note 306, at 604. It has been suggested that the introduction of original intentions adjudication, at this time and in light of the accumulated precedents that are inconsistent with it, would aggravate the problems of predictability and certainty. See Simon, *supra* note 5, at 1527. For reasons already noted, see *supra* text accompanying note 14, I am not concerned here with these admittedly difficult questions, but only with the relative stability of original intentions adjudication as an abstract matter. It has also been noted that, in light of the relative inaccessibility of legislative material to most individuals, certainty and predictability would not really be served by adherence to original intentions. See Moore, *supra* note 309, at 353-54. As I hope is clear by this time, my concern is a comparative one. The rules issuing from original intentions adjudication will be *more* knowable and *more* stable than those from any other plausible model of judicial review.

<sup>321</sup> See L. FULLER, *THE MORALITY OF THE LAW* 39-41 (1964). It is the capacity to know how to avoid the impositions of government that separates the regime of law from the kind of pseudo legal system depicted in F. KAFKA, *THE TRIAL* (1948).

<sup>322</sup> See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 143 (1960).

under either system, but most people would probably be far more disturbed by the first scheme than the second. The incapacity freely to plan one's life, and the injury of never knowing when there may be a significant interruption will outweigh whatever benefit the chance of a short period of service might give us. When life-plans are at stake, we are "risk-averse." Indeed, it may be the securing of a class of expectations from undefined and unpredictable interferences that is the peculiar contribution of law to society,<sup>323</sup> a contribution particularly important when it is applied to the potential dangers of abuse by government.<sup>324</sup>

The need for some minimum degree of stability can be seen by the fact that nearly everyone agrees that some constitutional provisions require judges to follow the evident, and evidently intended, meaning. Expansive models of constitutional interpretation are rarely advanced with respect to the minimum age of senators, the vote necessary to confirm a treaty, or the days a bill may rest without a president's signature before it becomes a law.<sup>325</sup> These rules, like any others, could become inappropriate in changed circumstances; they could become obstacles to the achievement of important benefits. But if these provisions were vulnerable to judicial revision, the government would be precluded from undertaking any long-term action because no official could act with the secure expectation that his action would accomplish certain results.<sup>326</sup> But no easy line can be drawn between determinate structural or procedural rules and open-ended substantive ones.<sup>327</sup> And if some degree of certainty is essential to the regulation of the internal affairs of government, it is hard to see why it is less essential to the regulation of government interference in the internal affairs of individual lives.<sup>328</sup>

But recognition of this value does not rebut the initial objection to original intentions adjudication that static constitutional rules are unsuitable for a constantly changing society. It is merely a counter-weight. Whether it is sufficient depends on an evaluation of the relative importance of the competing values: the value of flexibility and adaptability on

<sup>323</sup> See *id.* at 156-59, 208-09.

<sup>324</sup> Thus the common law maxim that an uncertain jurisprudence is the most wretched servitude. See Adams, *A Defence of the Constitution of Government of the United States of America*, in *WORKS OF JOHN ADAMS* 583-84 (C. Adams ed. 1851) quoted in *Chadha v. I.N.S.*, 634 F.2d 408, 424 n.19 (D.C. Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

<sup>325</sup> See *supra* text accompanying notes 164-67; Carter, *supra* note 54, at 853-59; Levinson, *supra* note 50, at 382 n.33; Maltz, *New Thoughts*, *supra* note 11, at 833; Perry *supra* note 15, at 570-71. Of course some commentators deny there are any provisions which ought to be regarded as having only one plausible interpretation. See *supra* note 164; Easterbrook, *supra* note 106, at 90-91; Peller, *supra* note 50, at 1174; Simon, *supra* note 306, at 621.

<sup>326</sup> See R. DWORKIN, *supra* note 15, at 368; Brest, *supra* note 6, at 229; Carter, *supra* note 54, at 856-57.

<sup>327</sup> See Schauer, *supra* note 69, at 430.

<sup>328</sup> But see R. DWORKIN, *supra* note 15, at 368-69 (As "matters of principle," the meaning of individual rights "cannot be seen as stopping where some historical statesman's time, imagination and interest stopped.").

the one hand, and the value of predictability and stability on the other.<sup>329</sup>

Moreover, in specific cases, these concerns cannot be considered in isolation. How we view their competing advantages will be influenced by the substantive content of the constitutional rules at issue, and our regard for the individuals who, as judges, will undertake whatever revisions are allowed.<sup>330</sup> Our enthusiasm for stable rules will be reduced if we think the rules protected are oppressive and unfair. Our taste for responsive and up-to-date rules will be diminished if we know they will be "improved" by people we regard as ignorant or immoral. Thus the preconstitutional decision must be largely empirical, depending on facts that may be disputed and it must, therefore, be only provisional.<sup>331</sup>

Even if we could agree about the quality of the substantive rules and the credentials of the judges who would supervise their evolution, we would probably still disagree on the desirability of adhering to the original intentions because the weights we assign these competing sets of values are different. Those preferences, in turn, would depend on our confidence in the capacity of government officials, including judges, to discover and act on the public good without well-defined prior rules and on the risk that, without strict prior limits, such officials might cause suffering, unrest, and injury.<sup>332</sup> Our choice of the governing norm of constitutional adjudication, then, will turn on the kinds of chances we are willing to take in living together in society, and, what comes to the same thing, on our judgment as to the kind of people we are.

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<sup>329</sup> Cooley posited the same opposition almost one hundred years ago. See Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 346-47, 349 (1889); see also Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985). Some writers have explicitly questioned whether the values of clarity and predictability are important enough to justify original intentions adjudication. See R. DWORKIN, *supra* note 15, at 141-42; Simon, *supra* note 5, at 1529. Cf. Schauer, *Precedent*, 39 STAN. L. REV. 571, 599-600 (considering trade-off between predictability and optimal results in individual cases). Another commentator has questioned whether the distinction between certain rules and flexible standards can be maintained, see Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). And yet another has found the Constitution's greatness in its sprawling and even contradictory nature. See TRIBE, *The Idea of the Constitution: A Metaphor-Morphosis* 37 J. LEG. ED. 170, 173 (1987).

<sup>330</sup> See M. PERRY *supra* note 5, at 143; Perry *supra* note 15, at 582.

<sup>331</sup> See Alexander, *supra* note 130, at 463. I have ignored here the question how this decision is made and who makes it. It is, I suspect, a tacit social decision, one to which officials, scholars, and the temper of the times all contribute. It follows obviously from what I have argued that no person or group of persons has any "authority" to make this decision, certainly not the judges themselves.

<sup>332</sup> See Kay, *supra* note 30, at 195-202.