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RULES FOR ORIGINALISTS

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MUCH recent constitutional scholarship has revolved around the necessity and possibility of originalist¹ interpretation of the Constitution. Various members of bench, bar, and professoriat have warned that only faithful adherence to "the original intent of the framers" can enable courts to exercise "neither force nor will but merely judgement,"² as is their commission. Other justices and academics have denied an obligation to follow directly the founders' extratextual intentions, and some have suggested that, desirable or not, the endeavor is impossible. Given all the uproar, and the reams of paper consumed in its creation, one essential part of the debate seems missing: a sustained presentation of how the originalist interpreter would go about ascertaining the historical "original intent." Originalism's attractiveness, for the most part, lies in the possibility it seems to offer the judicial interpreter of an

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¹ Those who advocate giving normative force to the "original intent" of the Constitution's framers and adopters go by several names: intentionalists, originalists, interpretivists. I have chosen to use "originalist" in this essay because it suggests adherence to the Constitution's original *meaning(s)* without locating that (those) meaning(s) in the founders' actual intentions. (The latter is a deeply problematic enterprise historically, as this essay will suggest.) "Intentionalist" would be an appropriate label for Chief Justice Rehnquist or Attorney General Meese. The attempt by intentionalists or originalists to arrogate the term "interpretivist" is sheer propaganda: it is difficult to imagine *any* judge or scholar in the United States who does not claim that his or her constitutional opinions are in some sense interpretations of the Constitution. The current debate is over how, not whether, to interpret it.

² The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

escape from personal responsibility. Believing or at least fearing that constitutional decisions necessarily must reflect the subjective value-preferences of *someone*,³ the originalist insists that judges must refrain from imposing their personal preferences in a democratic society. The exercise of antimajoritarian judicial review is legitimate only when it can be shown to rest not on judicial choice but on the preferences associated with an earlier (super-)majority through the ratification or amendment processes. It is therefore intrinsic to the argument for originalism that the interpreter is obligated to determine, using the methods and data of history,⁴ what that intent objectively was before he can address what the Constitution now means. But how the interpreter is to take that critical first step is given little attention by originalists, although several powerful attacks on the methodological feasibility of originalism have been published.⁵ This essay is offered as a partial, indeed fragmentary, response to this gap in the discussion: a set of reflections, organized into fourteen "rules," on the requirements that the intellectually responsible use of history ought to impose on an originalist interpreter. My specific concern is to argue that the turn to history does not obviate the personal responsibility of the originalist interpreter for the positions he takes, because historical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment. Historical judgments, while by no means exercises in unconstrained or subjective creativ-

³ The essential skepticism about the objectivity of values, at least in the public sphere, that underlies most originalist thought is especially evident in Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976). The originalists' reduction of constitutional law to a war between subjective preferences past and present is of course hotly disputed. See, e.g., Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982). It is emphatically not my view.

⁴ The nature of history and the meaning of ideas like "historical fact," "truth," and "falsity" are themselves contested concepts. In the context of the debate over originalism, however, it seems clear that those theoretical issues need not be resolved. If history is, as some think, a form of discourse within which "truth" and "falsity" are essentially inapposite categories, then history cannot provide what all originalists presume it offers: a source of meaning and value transcending the interpreters' own views. For the remainder of this essay I shall simply assume the validity of an objective-truth model of history, reserving further comment for the appendix, *infra* p. 698.

⁵ See Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. Cal. L. Rev. 647 (1985); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980).

ity, necessarily involve elements of creativity and interpretative choice.

Using history responsibly, however, is an intellectually arduous endeavor. The United States Supreme Court's misuse of history is, of course, notorious, and the standards of litigating and even academic lawyers often are not very much higher. The pressures created by the need to defend a client or justify a viewpoint are so enormous, and the value of respect for historical method so abstract, that it is probably inevitable that the historical arguments of constitutionalists are historically irresponsible far more often than not. Indeed, even if the lawyer or judge consciously intends to resist the pressures and preserve the values, the limits imposed by time and training almost always will compel her to rely on secondary literature that she has little ability to evaluate or critique historically. The result usually is either the disreputable practice of according academic interpretations the authority of original sources, or the peculiar spectacle of lawyers adjudicating the merits of historiographic rather than legal questions. A constitutional discourse freed of these perversions of law and history arguably would be a more rational and more honest discussion.

We do not live, however, in a world where this will happen. No matter how often constitutional scholars deny the relevance of history for interpretation, and no matter how often historians bemoan the distortions of "law office history," advocates and judges will continue to invoke the past. In doing so, they may be wiser on a fundamental level than their critics, despite the accuracy of almost all of the latter's animadversions.⁶ I suggest in my conclusion that history is legitimately part of the interpretative enterprise. If this is so, the task of the constitutional historian is to make the lawyers' use of history as intellectually responsible (and therefore as hermeneutically useful) as possible. One aspect of this task is to bring to the lawyers' attention the place of judgment and choice in history, and that is the purpose of this essay.⁷

⁶ A classic complaint against legal misuse of history is found in Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119.

⁷ My remarks are made with the provisions written between 1787 and 1870 in mind. Some of the "rules" would require modification if applied to recent amendments.

I. USING HISTORY RESPONSIBLY: FOURTEEN RULES

A. *The Difference Between History and Constitutional Discourse (Rules 1 and 2)*

One logical starting point for any responsible use of history in constitutional interpretation is to recognize that these are two separate and distinct spheres of discourse. They cannot be equated, nor can one be collapsed into the other. History is the disciplined interpretation of past thought and action. Constitutional discourse concerns the current distribution of, and limitations on, power in our society.

Rule 1: *History itself will not prove anything nonhistorical.*

Originalists sometimes write as if the interpretative task were over once the interpreter determined the historical meaning of the relevant constitutional provision. Having shown that each and every Philadelphia framer and delegate to the state ratifying conventions thought the commerce clause would not empower Congress to regulate intrastate activities affecting the national economy,⁸ the originalist is tempted to assume that he has also proven what the commerce clause *means*. But this direct translation of history into norm is not possible, for at least two reasons, and an originalist approach must begin by recognizing this fundamental limit.

In the first place, even in the extreme case of the stated hypothetical, history has nothing to say to the listener who replies, after hearing the originalist's evidence, "So what?" History cannot answer or even address the question of whether modern Americans ought to obey the intentions of the Constitution's founders. That question belongs to political theory (or philosophy) or constitutional law and must be answered in the terms of those other spheres of discourse. Some originalists have attempted to avoid the necessity of resting originalism on a nonhistorical foundation, but the attempts are unsuccessful. The argument that the founders' wishes must be followed because they wished it so is viciously circular, as well as arguably based on a historical error.⁹ Attorney

⁸ Such a showing is, of course, impossible, but it represents the ideal state of the evidence from an originalist viewpoint.

⁹ See Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985)

General Meese has justified his call for a "Jurisprudence of Original Intent" with the claim that only so can judges avoid becoming politicians,¹⁰ an argument which obviously rests on pragmatic utility or political theory, not history. Professor Henry Monaghan's arguments are more sophisticated but ultimately nonhistorical. Originalism, he has written, is obligatory (a) because the equation of author's intent and documentary meaning follows from the very notion of a normative document; and (b) because the basic presupposition of American constitutionalism is the ability of the people to order authoritatively their political arrangements at a given time, and reorder them at a later point by a similar process.¹¹

Argument (a) resembles a basic inquiry in traditional intellectual history, the interpretation of a historical document as it bore meaning in its author's mind,¹² but the resemblance does not make Monaghan's argument one based on history. An intellectual historian does not, or at least need not, claim that his interpretation of, say, Hobbes's *Leviathan* is the correct, normative meaning of the text, but only that his interest in *Leviathan* is in what Hobbes thought he was saying. A philosopher very well might have a different purpose in reading or using the book, and if so *Leviathan's* meaning to the philosopher may legitimately differ from its meaning to the intellectual historian (or to Hobbes). The second problem with argument (a) is Monaghan's failure adequately to address the thorny issue of group intent. The Constitution, after all, was not the work of a single author, but rather the result of deliberations by a divided convention, actually drafted by subcommittees thereof, and given its normative force by the separate actions of state conventions the vast majority of whose delegates were not involved in the drafting convention and had little or no informa-

(arguing that the founders were not originalists). For a contrary view, see Berger, "Original Intention" in *Historical Perspective*, 54 *Geo. Wash. L. Rev.* 296 (1986). Berger's article stresses the widespread use of "original intent" language in the founding era, a fact that no one contests. He does not address the real historical question of that language's function and meaning.

¹⁰ Address Before the American Bar Association (July 9, 1985), *reprinted in* The Federalist Society, Occasional Paper No. 2, *The Great Debate: Interpreting Our Written Constitution* 9 (1986).

¹¹ See Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353, 375-76 (1981).

¹² See J. Pocock, *Politics, Language and Time* 6 (1971) ("the [historical] interpreter's aim should be to present the text as it bore meaning in the mind of the author or his contemporary reader").

tion about the latter's debates. The final problem with argument (a) is that it asserts rather than proves a highly controversial position in the theory of interpretation, namely that "meaning" is equivalent to "intent." The list of those who have rejected Monaghan's position, at least with respect to the Constitution, includes such worthies as James Madison, John Marshall, and Oliver Wendell Holmes.¹³ The claim that originalism is a necessary corollary of having a written constitution turns out to be debatable and nonhistorical.

Monaghan's argument (b), that our constitutional tradition assumes the ability of the sovereign people to fix the political order and to have it remain fixed until the sovereign acts again, probably is itself a historical assertion about the tradition's self-understanding over time. Professor Monaghan's assertion is debatable as a statement of history.¹⁴ In any event, to attempt to prove the necessity of following historical intentions by another historical claim is to commit the same fallacy of circularity ascribed above to those who invoke the founders' supposed originalism to justify originalism.

History, then, cannot prove the originalist's fundamental claim that his interpretative stance is correct. There is, moreover, a second important sense in which history will not prove individual propositions about constitutional meaning. I have in mind the (almost?) universal recognition that the vast majority of contempo-

¹³ For Madison and Marshall, see Powell, *supra* note 9, at 935-44; for Holmes, see *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (state may have had control of the subject matter in issue at the time of the framing and ratification of the Constitution, but subject matter does not necessarily remain within state control permanently).

¹⁴ The position that constitutional change can occur legitimately only through the formal amendment process has been disputed by numerous important figures in American history. See, e.g., *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819) (Marshall, C.J.) (contracts clause can apply even if "this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted"); *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (Holmes, J.) (rejecting argument that the "Constitution itself does not change"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934) (Hughes, C.J.) (denying that the meaning of clauses of the Constitution must be confined to the framers' interpretation); *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169, 2193 (1986) (White, J., dissenting) (Court has rejected "simplistic" view that interpretation is limited to "the subjective intention of the Framers"). Monaghan's assertion has been challenged on another ground in Professor Ackerman's Storrs Lectures. See Ackerman, *Discovering the Constitution*, 93 Yale L.J. 1013 (1984) (arguing for constitutional analysis that acknowledges the cumulative effect of shaping historical events).

rary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders. Although it occasionally has been suggested that the Constitution should be read to address only those specific issues with which the founders were concerned,¹⁵ contemporary originalists apparently reject the reduction of the Constitution to a fossilized record of past disputes.¹⁶ But once it is conceded that the Constitution speaks to questions that those who adopted it did not answer, it becomes obvious that in such cases the interpreter must use some process of generalization or analogy to go beyond what history can say. The inevitable disputes over whether a given interpretation over-generalizes or is based on a faulty analogy are not resolvable by historical means; at this point history, and originalism as a program of obedience to history, have no more to add to constitutional discourse.

The situation appears to be different on the relatively rare occasions on which the interpreter confronts a dispute substantially identical to an issue the founders seemingly did consider and address. Suppose, for example, that the President, acting under an ambiguous interpretation of his or her statutory authority, authorized federal customs officers to search private property without judicial search warrants so long as they obtained a general warrant to investigate customs violations from an executive department administrative magistrate. In that situation, which is not quite as far-fetched as it may sound,¹⁷ I suspect we all would be tempted to think that here at last is a specific issue the founders did mean to settle. But even here, as close as the fit is between historical concern and contemporary question, a significant, nonhistorical interpretative move is necessary, because the fit can never be perfect. I glossed over this fact above with the words "substantially identical." As everyone knows who has contemplated the manipulability of holdings and precedents, whether two cases are on all fours depends on the advocate's or judge's selection of the facts considered relevant. This is equally true when the question is one of equating

¹⁵ See, e.g., *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted . . .").

¹⁶ See, e.g., Bork, *Styles in Constitutional Theory*, 26 S. Tex. L.J. 383, 394-95 (1985).

¹⁷ See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (upholding a warrantless search by customs officials).

the concerns of eighteenth- or nineteenth-century founders and of late twentieth-century interpreters. In my general warrant example I ignored a multitude of factors arguably relevant to those who adopted the fourth amendment: their historical experience was with *royal* customs officials, appointed by an administration electorally irresponsible to Americans, who were enforcing rules promulgated by lawmakers also free of American electoral control. The lawmakers were not themselves Americans, and neither they nor the local customs officials were constrained by either a written Constitution or an independent judiciary. Unlike contemporary customs laws, which probably enjoy the support or at least acquiescence of most Americans, there was almost certainly a consensus in 1789 America that King George's customs regulations had been tyrannical and unconstitutional in substance as well as in administration. Furthermore, if the hypothetical presidential general warrants were part of a national anti-drug policy, one might well argue that the nation confronts exigent circumstances that the founders did not anticipate. This list of differences could be strung out almost indefinitely, although even after considering it one might think that the President's warrants still look suspiciously similar to the King's. My point, of course, is that the interpreter *qua* historian cannot decide or justify which facts count for or against "substantial" identity for legal or constitutional purposes, and which are irrelevant. That task belongs to him as lawyer or politician or philosopher. Once again, history can carry interpretation only so far. There will always remain a gap between historical assertion and normative conclusion that can be crossed only by nonhistorical means. Originalism must begin with the recognition that its turn to history is no magical way out of nonhistorical decisions. Whenever any constitutional interpreter states that history proves a contemporary interpretation right or wrong, he is deceiving himself and, if they believe him, his readers.

Rule 2: *History is the servant, not the master, of constitutional interpretation.*

The first rule cautions the interpreter that history cannot be his only tool; the second rule warns him that the pursuit of historical knowledge must not become an end in itself rather than a means (for him as an interpreter—he may of course have other roles, such as that of constitutional historian). The turn to history is legiti-

mate only so long as it subserves the interpretation of, and fidelity to, the Constitution.¹⁸ As Justice Story remarked in response to what he took to be an early form of originalism, "Nothing but the text was adopted by the people."¹⁹ The originalist's invocation of history must further the task of explicating what the people adopted, or it is an arbitrary attempt to impose the dead hand of the past on the contemporary polity—a sort of political ancestor-worship.

This point may seem obvious (and the rule therefore pointless), but originalists sometimes seem to come perilously close to disregarding it. A case in point is the debate over the scope of the equal protection clause. Should it be limited to prohibiting racial discrimination by government, or does it empower the courts (or Congress through its section five powers) to protect any and all disadvantaged groups or "discrete and insular" minorities? Interpreters understandably have sought enlightenment on this issue from the historical records of the fourteenth amendment's framing and ratification, but a disturbing tendency is evident in some originalist writings²⁰ to treat a particular (and debatable) evaluation of the historical data as conclusive of the interpretative question. The amendment's adopters, we are told, were concerned with a single overriding purpose, the protection of the recently freed slaves. Therefore the clause must address racism (and perhaps its twin, ethnic-origin prejudice) only.²¹ Leaving aside the very real problems with these historical assertions about the adopters' purposes, this type of argument reverses the logical order of concern by simply disregarding the possibility that the clause's wording, its place in the amendment and in the text as a whole, and its role in

¹⁸ By "Constitution" I do not refer solely to the historical document and its formal amendments, although I think that the document has and ought to have a uniquely authoritative role in interpretation. See Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 Iowa L. Rev. 1427 (1986). Not even the strictest of textualists, however, calls for disregarding all of the extratextual aspects—prior judicial interpretations, governmental practice, social exigency—of the "Constitution" in its broader sense. For insightful analysis of what the broader "Constitution" includes, see Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 Am. Pol. Sci. Rev. 34 (1982).

¹⁹ 1 J. Story, *Commentaries on the Constitution of the United States* 288 (Boston 1858).

²⁰ See, e.g., Justice Rehnquist's dissent in *Sugarman v. Dougall*, 413 U.S. 634, 649-50 (1973) (maintaining that the fourteenth amendment was meant only to prohibit state racial discrimination, not to protect those in other "suspect" classifications).

²¹ See *id.*

the broader "Constitution," invite or require a different conclusion from that based on history. What is fundamentally wrong here is that the interpreter is treating the Constitution itself as an empty shell, a container into which the founders originally poured meaning that we now can extract by historical investigation. Having done so, we need pay little attention to the labels on the container. This is fundamentally unacceptable, for it effectively denies that we have a written Constitution at all (or locates the Constitution in the scattered and fragmentary records of its framing and adoption), and opens the door to the very subjectivity in interpretation that originalists avow a desire to escape. A legitimate interpretation of the scope of the equal protection clause must make sense of the clause's words and of its context, and not simply disregard them because of the interpreter's reconstruction of intentions not incorporated in the text and context. History's proper role in the clause's interpretation is to render the interpretation of the *clause* fuller and more convincing, not to supplant it. "This history is at best only a clue to what the text says; the text is not supposed to be used as a clue to this history."²² It is a Constitution the interpreter is expounding, not a question of intellectual history.

B. The Distance Between Past and Present (Rules 3-8)

The most fundamental of historical errors is that of anachronism: the failure to recognize that the thoughts, concerns, motivations, and ideals of other eras were not identical with our own and that, as a consequence, the actions of past persons often were undertaken or understood in ways we would regard as peculiar or even irrational. The historian of ideas, including constitutional ideas, must be prepared to be surprised: the people she studies will reject or ignore implications she finds self-evident while insisting on drawing associations she thinks untenable. The following six rules explore different aspects of this unavoidable cultural distance between the founders and the modern originalist.

²² Wells, *The Nature and Function of Theology*, in *The Use of the Bible in Theology: Evangelical Options* 175, 187 (R. Johnston ed. 1985). Wells, of course, is writing about this same interpretative fallacy as it appears in biblical exegesis.

Rule 3: *History answers—and declines to answer—its own issues, rather than the concerns of the interpreter.*

The originalist's use of history is goal-directed: he wants to understand past thought and action in order to address present concerns.²³ There is nothing wrong with this utilitarian interest in history, but it does pose a serious temptation for the interpreter. In his desire to mine something useful for his purposes, he easily may slip into the fundamental historical error of ignoring the past's essential autonomy. Put more concretely, the founders thought, argued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems. Several important limits on history's usefulness follow from this simple truth.

The first and most obvious limit is that on some issues of interpretation the founders said nothing at all useful. The most notorious and troubling example of this is the Bill of Rights, about much of which practically no contemporaneous discussion is recorded. Even when extensive information is available about the founders' discussions, those discussions often shed little or no light on the questions we want answered. The congressional debates over the fourteenth amendment contain extensive argument over the type and extent of the equality the amendment would or ought to guarantee, but except for a few negative and obviously tactical remarks by opponents of the amendment (and proponents' defensive responses), the important contemporary question of equality of the sexes was not addressed.²⁴ This was not because the applicability of the amendment's words to women's rights simply could not occur to members of the generation that adopted the amendment. Within a few years of ratification, cases already were reaching the Supreme Court in which women invoked the amendment as forbidding some types of sexual discrimination. The Court uniformly rejected these efforts (although Chief Justice Chase possibly thought them based on the correct interpretation of the amendment²⁵), but

²³ All historical research is goal-directed, but among professional historians, the goals may be internal to the process of investigation, i.e., the historian may seek understanding of the past so as to understand it, or to satisfy simple personal or professional curiosity. The originalist's goal, constructing the best interpretation of a text with contemporary normative force, is external to the historical task.

²⁴ See, e.g., J. James, *The Framing of the Fourteenth Amendment* 62, 130 (1956).

²⁵ Chase, an antebellum abolitionist and supporter of women's rights, noted that he dissented from the holding and reasoning of his colleagues in the only case on the subject that

that is only the weakest sort of evidence for what the amendment's adopters intended, given the Court's basic hostility throughout that period to the Civil War amendments. The adopters debated the equality they desired to secure, but they did not address the question of sexual equality we now face, although they could have done so.

For the originalist, however, perhaps the most perplexing cases of the founders addressing their own concerns, rather than ours, are those in which history indicates that the founders consciously chose to leave a question of constitutional meaning for later interpreters. Turning to history to avoid (or more correctly, as rule 1 points out, to reduce) interpretative freedom, in these instances the originalist finds history's message to be a flat refusal to restrict that freedom. The quintessential case is that of the ninth amendment, although there is evidence that the original founders may have employed this strategy of refusing to decide what the text meant more often than we might think.²⁶ Scattered throughout the records of the Philadelphia convention, the ratification campaign, and the discussion in the First Congress of James Madison's proposed bill of rights are expressions of an ongoing concern on the part of many Americans that certain essential rights be explicitly secured against federal interference and a somewhat antagonistic fear that explicit enumeration of certain rights would be taken by subsequent interpreters to "deny or disparage" the existence of other rights. Both in its wording and in the explanations of Madison who originally drafted it, the ninth amendment seems to have had as its purpose the reconciliation of these two concerns.²⁷ The amendment accomplished this reconciliation by explicitly denying the legitimacy of inferring the nonexistence of unenumerated rights from the existence of those explicitly stipulated. The problem this creates for the originalist, of course, is that fidelity to this provision's probable historical meaning requires one not to look to history for answers on the question of unenumerated rights.²⁸ And it may well be that the best historical reading of

he heard. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 142 Chase, (C.J., dissenting)(1872).

²⁶ See Powell, *supra* note 9, at 903-13.

²⁷ See Patterson, *The Forgotten Ninth Amendment* 12-14 (1955).

²⁸ See, e.g., Letter of Edmund Pendleton to Richard Henry Lee (June 14, 1788), in 2 *Letters and Papers of Edmund Pendleton* 533 (D. Mays ed. 1967) ("May we not in the

other provisions of contemporary importance (section one of the fourteenth amendment, for example) is that they too represent a deliberate refusal by the constitutional adopters to decide, or at any rate to agree on, the full meaning of their work. When history itself thus turns on the originalist, the principled nature of his avowed obedience to history is put to the test.

Rule 4: *Arguments from silence are unreliable and often completely ahistorical.*

This rule is a corollary of the preceding one, and addresses an all-too-common response to situations where the founders declined to address our concerns—the assertion that since the founders did not endorse a position, they must have rejected it. Arguments of this type are often found in judicial opinions, particularly when rejecting claims that an asserted but unenumerated right is constitutionally protected (so much for the ninth amendment!). The problem with the argument from a serious originalist's viewpoint is that it requires the hopeless task of constructing a historical something out of an evidentiary nothing.

At this point we must be careful to distinguish two superficially similar states of historical data: situations where the issue of contemporary importance could have been raised by the founders—was thinkable in their conceptual world—and situations in which our issue could not have been raised. In the former case it is possible that the combined weight of the founders' conceptual framework, contemporaneous word usage, cultural setting, and so on, may render a given claim unlikely. But even that conclusion is problematic and unreliable. As historians we cannot confirm or deny that the founders would have taken the position that we think follows from their other views if they had been compelled to address the question with which we are concerned. They were not so compelled, and, as a result, our inferential interpretation inevitably falls short of even that relative certainty which is the best that historical research can attain.

Not even a tentative conclusion can be drawn from an argument *ex silentio* when our concern is one totally alien to the founders'

progress of things, discover some great and Important [right], which we don't now think of?").

conceptual and political universe. A great intellectual historian has pointed out that "Men cannot do what they have no means of saying they have done,"²⁹ and at times the attempt to draw meaning from the founders' silence is actually an attempt to make them do things they lacked the conceptual tools to do. Most attempts to make an originalist contribution to discussion of the Supreme Court's decisions on the constitutional protection of reproductive and sexual freedom probably fall under this heading. The adopters of the fifth and fourteenth amendments simply did not have—or reject—the concept of "privacy" that informs those cases,³⁰ and they lived and died prior to the headlong collision of medical technology and religious belief that is the context for the abortion decisions in particular.³¹ Another, even clearer example is the Court's claim in *INS v. Chadha*³² that its invalidation of the legislative veto was a direct application of the framers' views on separation of powers. Neither the legislative veto itself, nor its context of governmental complexity and the modern administrative agency, was remotely within the founders' purview. A legitimate use of history could have contributed to the Court's background understanding of the complex governmental scheme established by the Constitution, but on the specific question at issue in *Chadha*, the founders had nothing to say.

Rule 5: *To converse with the founders, you need a translator.*

When a modern American student of ancient Near Eastern civilization interprets an Akkadian text from the second millenium B.C.E. [Before the Common Era], she is highly unlikely to forget that she is dealing with the artifact of a culture different from her own. The document itself is written in a language that differs radically from English in vocabulary, grammar, and syntax, and is

²⁹ Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. Interdisciplinary Hist. 99, 122 (1972).

³⁰ See *infra* note 41.

³¹ Invocations of preexisting common law and statutory restrictions on the freedom to secure an abortion or to engage in homosexual relationships are singularly unpersuasive: no one doubts that the amendments were meant to change preexisting law in some respects. To point to one segment of that law does not at all address the relevant issue for the originalist, which is whether that segment was one of those meant to be affected. The latter question has no answer.

³² 462 U.S. 919 (1983).

written in cuneiform characters rather than in the Roman alphabet. The more complex or literary the text, the more its essential alienness will be apparent on its face. There is an unmistakably great historical, conceptual, and cultural distance between the student and the ancient writer.

The originalist interpreter of the United States Constitution faces a historical distance from the founders minuscule compared to the gulf separating 1987 America and 1500 B.C.E. Babylonia. The founders spoke recognizably modern English. They, as are we, were heirs of classical Mediterranean civilization, biblical religion, and the European Enlightenment. Indeed, the founders themselves are among *our* cultural and political ancestors, and so it is unsurprising that we share with them a broad range of common presuppositions and concepts. But the very ease with which we can bridge the gap between our thought and that of the founders makes it too easy to assume that there is no gap, that the historical distance between 1987 and 1787 or 1868 is effectively zero. The unwary originalist may expect, as it were, that Madison, Wilson, Hamilton, and the rest can participate in our contemporary constitutional conversation without the aid of a translator.

This is a false assumption. The 1787 Constitution and the first twelve amendments were written and ratified by people whose intellectual universe was distant from ours in deeply significant ways. The title of Daniel Boorstin's classic study of their intellectual universe captures an essential truth about it: it is truly a "Lost World," not just of Jefferson but of his friends and foes alike.³³ The founders' failure to address the legislative veto issue, for example, was not due merely to the fortuity that no one had conceived of the device in the late eighteenth century. More fundamentally it is a consequence of the fact that the founders' purposes, intentions, and concerns—indeed, the whole of their discussions of matters of high politics—took place in a thought-world, and were conducted in a political language, distinct from our own. The remote and unfamiliar texture of the founders' thought leaves contemporary historians significantly divided about its overall interpretation.³⁴ Dispute over the basic orientation of the founders'

³³ See D. Boorstin, *The Lost World of Thomas Jefferson* (1948).

³⁴ For recent, informative commentary, see Appleby, *Republicanism in Old and New Contexts*, 43 *Wm. & Mary Q.* (3d ser.) 20 (1986); Banning, *Jeffersonian Ideology Revisited: Lib-*

political ideas obviously undermines confidence in our interpretations of their specific constitutional views. But even if their underlying assumptions were clear and undisputed, the originalist would need to keep always in view the fact that their world was not ours.

An excellent example of the historical distance between the founding generation and the present is posed by John Marshall's constitutional jurisprudence. Marshall is, or seems to be to lawyers, one of the most familiar and comprehensible figures in American constitutional history. Chief inaugurator if not creator of judicial review, staunch nationalist, conservative defender of property rights—we know where Marshall, at least, stood among the founders and early shapers of the Republic. The problem with this familiar picture is that, to a very great extent, it is probably historically erroneous. Recent scholarship offers revisionist accounts of Marshall's views, suggesting that he was more concerned with preserving state autonomy, community values, and personal liberty than is usually thought.³⁵ If we want to understand the real Marshall, rather than simply to use his name ahistorically as a counter in our own interpretative games, we must avoid the anachronism of treating him as our contemporary. The originalist's concern to accord authority to history, and not simply to festoon his argument with rhetorical invocations of the founders, requires him to accord to Marshall's generation as a whole the same respect. He must enter into their world, and understand their deceptively familiar phrases as they understood them. The founders, in short, must be translated before they can contribute to our conversation.

Rule 6: *The founders' comments on constitutional issues always are parts of a larger historical and intellectual whole.*

This rule is a corollary of the preceding one. In order to translate the founders' thought we need to do more than construct a lexicon of late eighteenth- or mid-nineteenth-century political terms. We must also locate the cultural context that gave their constitutional views meaning and urgency. A good example is the Constitution's

eral and Classical Ideas in the New American Republic, 43 Wm. & Mary Q. (3d ser.) 3 (1986); Kerber, The Republican Ideology of the Revolutionary Generation, 37 Am. Q. 474 (1985).

³⁵ See Nelson, The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich. L. Rev. 893 (1978).

treatment of issues relating to property and contract. The 1787 text and the Bill of Rights denied the states power to impair contractual obligations and to enact tender laws,³⁶ forbade the nation to take property without affording due process or (and?) just compensation,³⁷ and authorized Congress to establish "uniform Laws on the subject of Bankruptcies."³⁸ As the constitutional text goes, these provisions are comparatively unproblematic, but to the extent that the interpreter needs or wishes historical illumination on their meaning, he is obligated as a historian to place them in a complex and unfamiliar setting: classical-republican thought about the autonomous and virtuous citizen, the British Country ideology that was developed in opposition to the Court administrations of the early 1700's, notions ultimately derived from ancient Greece concerning the inevitably redistributive tendencies of democracies, common law and Whig ideas about traditional English liberties, and so on.³⁹ To tear, say, the contracts clause out of this intellectual context and attempt to interpret its original meaning in isolation simply is bad (by which I mean intellectually disreputable) history. We can understand the original meaning of the Constitution, in whole or in part, only by "plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning."⁴⁰ If the originalist interpreter is unwilling or unable to undertake this difficult and time-consuming task, either personally or at least through intense familiarity with the original sources and scholarly literature, he ought to drop the claim that he is conforming his constitutional thought to that of the founders. The "law office history" of systematic anachronism and quotation out of context is unconvincing advocacy and unacceptable scholarship.

Rule 7: *The original understanding of constitutional provisions cannot be neatly separated from their later use.*

Most of the rules proposed in this essay address the difficult and problematic task of discerning what the original understanding (or

³⁶ U.S. Const. art. I, § 10, cl. 1.

³⁷ Id. amend. V.

³⁸ Id. art. I, § 8, cl. 4.

³⁹ The literature on this background is immense; important (though by no means uncontroversial) discussions can be found in F. McDonald, *Novus Ordo Seclorum* (1986); Appleby, *supra* note 34; Kerber, *supra* note 34.

⁴⁰ Appleby, *supra* note 34, at 28.

understandings!) was (were). The present rule addresses the desire to distinguish original from later meanings. The central tenet of originalism as it is often understood is the existence of a clear demarcation between the original meaning of a constitutional provision and its subsequent interpretation. The originalist, we are told, is the interpreter who knows the difference and acknowledges it by according authority to the founders rather than to their successors.

The original/subsequent dichotomy consists in fact of two quite different distinctions, one required by history, the other a nonhistorical policy choice, or rather wish, of the intentionalist school of originalism. The dichotomy mandated by history flows directly from the nature of historical experience: history is, in a very real sense, "one thing after another." Although bare chronology is not history (at least not meaningful history), even the most complex forms of historical analysis have to respect the sequential and unidirectional manner by which we live out our individual and communal lives. To ignore this reality is to invite the projection of the present onto the past. For example, it is a historical error, in my opinion, to attribute contemporary expansive notions of "privacy" or restrictive ideas about "state action" to the founders or the Reconstruction-era adopters.⁴¹ When constitutional interpreters do so, they commit the fundamental historical fallacy of anachronism.

The second and nonhistorical distinction between original and subsequent meanings is a product of the contemporary concerns, rather than the historical fidelity, of some originalists. A sharply defined contrast between the two categories is presumed to exist, because if it does not, the point of originalism—to undercut the interpretative tradition by invoking the founders—will be lost. But this is not a historical argument, and it ignores the fact that particular events or eras cannot be neatly isolated from the ongoing stream of historical experience. Despite appearances, this principle does not contradict the chronological restraints of history, for those restraints require respect for sequence and not the divorce of the founders' opinions and actions from their past or future. As Justice White recently observed, the founders were not writing a

⁴¹ Modern "privacy" jurisprudence dates from the seminal 1890 article, Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); see also H. Hyman & W. Wiecek, *Equal Justice Under Law* 335-438 (1982) (views and objectives of the Reconstruction-era founders).

deed but “announcing fundamental principles in value-laden terms,”⁴² and many of them recognized and intended that this meant that the Constitution as they conceived it was necessarily incomplete. The original understanding, in such cases, was that later interpreters would fill in the meaning of the Constitution. Originalism itself then seems to require attention to the subsequent interpretative tradition.

Rule 8: *If your history uniformly confirms your predilections, it is probably bad history.*

This rule, unlike most of the preceding ones, does not counsel or caution the originalist on the methods he ought to utilize in bringing history to bear on questions of constitutional interpretation. Instead, rule 8 proposes a post hoc criterion for self-evaluation. The criterion is simple and self-evident. If the founders, as you understand them, always agree with you, it is logically possible that you are in incredible harmony with them. It is considerably more likely that your reconstruction of their views is being systematically warped by your personal opinions on constitutional construction. Despite its obviousness, this rule is often disregarded by interpreters who use originalist arguments. Justices Hugo Black and William Rehnquist, perhaps the two most consistent originalists in the Supreme Court’s history, have been equally consistent in their claims that the founders’ views coincided with their own, despite historical evidence to the contrary.⁴³

It is essential that the conscientious originalist recall that the founders were neither Republicans nor Democrats, liberals nor conservatives, in the modern American sense. They had their own concerns (rule 3) and their own world-view (rule 6). The historical distance between the present and 1787, or even 1870, is great enough so as to reduce to a practical nullity the possibility that their opinions and divisions would precisely parallel our own. When, despite this distance, they seem to confirm our deepest wishes, we must suspect that our portrait of them is in fact a mir-

⁴² *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169, 2193 (White, J., dissenting).

⁴³ See, e.g., Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *Stan. L. Rev.* 5, 160-73 (1949) (criticizing Black’s use of history); Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 *Yale L.J.* 1317, 1363-70 (1982) (criticizing Rehnquist’s use of history).

ror of ourselves.

*C. The Tentative and Interpretative Character of History
(Rules 9-13)*

History is not an exact science, and nontautological historical assertions never enjoy the certainty of, say, a proof in traditional logic. Indeed, few historical assertions of interest to the originalist possess even the kind of pragmatic certainty that is the most the historian can achieve. The originalist, instead, must deal with historical propositions that are probabilistic and involve as much interpretation as description of the historical data. For this reason the originalist must justify his historical premises as well as his normative conclusions. The temptation to treat his history as "too well known" to require elaboration⁴⁴ must be resisted uncompromisingly. Various aspects of the temptation and its rejection are treated in the following six rules.

Rule 9: *At best, history yields probabilities, not certainties.*

It is sad but true that constitutional lawyers sometimes preface assertions about history with some variant of the words "History proves that" All such sentences are intellectually ungrammatical. Rule 1 warned that history cannot prove things nonhistorical; the point of rule 9 is that history cannot even "prove" *historical* statements in the sense of demonstrating their truth with a degree of certainty that renders intelligent disagreement impossible. Complex historical assertions are always probabilistic in character. They involve greater and lesser likelihoods that they are correctly describing past reality. It is true, of course, that many simple historical statements are either correct by definition or supported by such overwhelming evidence that we can assume their accuracy. An example of the former is "The British monarch whose authority the American revolutionaries denounced was King George III"; "George III" is the label we give to whomever the revolutionaries rejected and by itself tells you nothing about its subject. An example of the second type of statement is "The convention that drafted the present federal Constitution met in Philadelphia in 1787." The evidence for the framing convention's

⁴⁴ See *Trimble v. Gordon*, 430 U.S. 762, 777-78 (1977) (Rehnquist, J., dissenting).

location and date is enormous and uncontested. But I can think of few historical statements of value for contemporary constitutional interpretation that are of this type. The sort of historical affirmations and denials that the originalist wants to make are inevitably complex and contestable. This can be seen by briefly reflecting on the kinds of historical claims that seem to be of potential value for contemporary interpretation.

The first category is fundamentally lexicographic: we would like to know what words and phrases like "commerce," "freedom of speech," and "equal protection" meant to the generations that placed them in the Constitution. The heart of William Crosskey's famous and controversial study was an inquiry of this kind,⁴⁵ and a sound understanding of eighteenth- or nineteenth-century word usage clearly is essential to understanding texts from those periods. But this approach has its limits, and it certainly produces probabilities rather than certainties. Professor Crosskey, whose interest in history embodied a textualist rather than an originalist understanding of interpretation, at times fell into the trap of assuming that once he had reconstructed a standard contemporaneous definition for a constitutional term, he then could treat the term, inside or outside the text, as a mere placeholder for the reconstructed definition. This procedure is fallacious, in part because it wrongly construes definition as fixing rather than reflecting word usage,⁴⁶ and in part because it ignores the incredible linguistic creativity of the founders. A history of the constitutional accomplishments of 1787-1791 could be written by examining the new and utterly non-standard uses the founders made of terms like "Congress," "State," "executive power," and "Constitution" itself. As a consequence, "defining" the meaning of the founders' language is always a matter of considering both the vocabulary they inherited and that which they created. Such an enterprise necessarily involves the debatable exercise of historical judgment. Constitutional lexicography cannot produce infallible conclusions.

The second category of historical assertions of interest to the originalist consists of statements concerning general ideas about

⁴⁵ See W. Crosskey, *Politics and the Constitution* (1953).

⁴⁶ Cf. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought" (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916))).

government, politics, and law widely shared within the founding generation. Historical assertions about popular views of checks and balances, limited government, republicanism, the role of property, inalienable rights, slavery, and the concept of citizenship belong here. Even more than lexicography, however, the investigation of broad cultural and ideological patterns of thought is dependent upon the historian's imposition of her own models of human behavior and her own conceptual organizations on the evidence. While I believe, and the originalist must assume, that these procedures, intelligently employed, can provide genuine insight into past reality, it is a mistake to expect the results to go unchallenged. Nothing is more common in historical scholarship than the revisionist study. A good example of what happens when lawyers treat this category of historical assertion as involving certainty is the response to the publication of Leonard Levy's *Legacy of Suppression* in 1960.⁴⁷ Levy's book was itself a revisionist attack on the widely believed historical claim that the first amendment's drafters and adopters were advocates of an extremely libertarian version of freedom of speech and press. Levy's attempt to demolish this claim led to consternation among constitutionalists, including Justice Black, who had rested their normative views on the historical position Levy critiqued. Levy's views, in turn, have achieved widespread acceptance, and those who justify narrow theories of constitutional free expression on that basis leave themselves open to the undermining effect of recent scholarship that suggests problems with Levy's analysis.⁴⁸ The moral of the story is that wise historians do not accord assertions of this sort uncritical approbation, and wise constitutional interpreters do not rest absolute positions on the shifting sands of historical opinion. When they do, the next doctoral dissertation may wash their views away.

The third category of historical claim that is of contemporary interpretative interest involves statements about the ideas, pur-

⁴⁷ L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960). Levy has recently published an expanded, revised, and somewhat qualified version of *Legacy of Suppression* under the title *Emergence of a Free Press* (1985).

⁴⁸ See Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91 (1984); Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985); Ross-Boon, *Setting Free the Press: An Examination of Three Eighteenth Century Advocates of an Absolutely Free Press* (unpublished manuscript on file with the Virginia Law Review Association).

poses, and intentions of specific founders. Constitutional interpreters have traditionally, and correctly,⁴⁹ taken special interest in the views of certain individuals, for the 1787-1791 period was led by a group including Madison, Hamilton, Wilson, Ellsworth, Marshall, Adams, and Jefferson (the last two not "founders" in the narrowest sense but usually, and again correctly, seen as important contributors to the founding generation's constitutional thought). On many issues, Wilson's nationalism being an example, it is possible to achieve a high degree of confidence that we know what the individual's position was. But even so, uncertainties can exist with respect to the views of even the best-reported founder. What did Alexander Hamilton really think the Constitution meant with respect to Supreme Court jurisdiction over actions brought against a state by another state's citizen? In the Federalist No. 81, Hamilton explicitly denied that article III would strip away sovereign immunity created by state law, but his overall ideas about federalism and his behavior in the aftermath of *Chisholm v. Georgia*⁵⁰ bring into question the sincerity of his acceptance of state sovereignty.⁵¹ It is no solution to this problem simply to assert that we are concerned not with Hamilton's private opinions, but with his publicly avowed positions, for the historically conscientious originalist then must show why the views that Hamilton, a Philadelphia framer and a New York state convention delegate, actually entertained are less relevant for contemporary interpretation than remarks he penned in one part of a series of newspaper propaganda pieces that his main co-author admitted were tinged by the "zeal of advocates."⁵²

Reconstructing the views of individual founders is further complicated by the state of the existing evidence. Lawyers accustomed to the phenomenal reliability of the West Reporter system and the modern United States Reports often forget that they cannot assume a similar accuracy when they read Madison's *Notes*, Elliott's *Debates*, the *Annals* of Congress, or even the modern critical edi-

⁴⁹ Although at times for the wrong reasons. See *infra* rule 10.

⁵⁰ 2 U.S. (2 Dall.) 419 (1793) (holding that the states could be sued in federal court).

⁵¹ See Minutes of Conference (Aug. 2, 1794), reprinted in 17 Papers of Alexander Hamilton 9, 12 & n.13 (Hamilton describing opposition to *Chisholm* as "opposition to the Constitution").

⁵² Letter from James Madison to Edward Livingston (Apr. 17, 1824), reprinted in 3 Letters and Other Writings of James Madison 435, 436 (Philadelphia 1865).

tions of original materials (the latter are almost always reliable as to the sources available to the modern editor, but that is not necessarily the same as being a reliable transcription of the original speaker's or writer's words). One can be almost certain that the official report of a 1987 opinion by Justice Stevens says what Stevens wanted it to say (barring typographical errors); much greater caution is necessary when reading an opinion by Justice Wilson or a speech by Governor Randolph. Constitutional historians ought to be keenly aware of the problems with the records of the Philadelphia framing convention: the limited nature of the official journal, the long-after-the-fact publication and tendentious character of the various private journals, the propensity of participants to reinterpret their and other framers' roles in the light of later experience. The remains of the state conventions are much spottier and equally subject to journalistic inaccuracy and partisan adaptation. In addition, until the magnificent *Documentary History*⁵³ began emerging from the presses, most constitutional interpreters were dependent on Jonathan Elliot's collection from the 1830's, which is marred by Elliot's uncritical editorial techniques and shaped by his political concerns.⁵⁴ The letters and personal papers that provide much of the most valuable information about particular founders' views often are extant only in hand-transcribed file copies or rough, rather than final, drafts. There are problems even with materials that appeared as books or pamphlets and of which first editions still exist. The continuing debate over the authorship of some of the *Federalist* papers is only the best known example.⁵⁵

None of this is meant to suggest that our sources are radically unreliable. What the originalist must recognize, however, is that the search for the opinions of an individual founder is not free of conjecture and rests on sources of less than complete reliability.

A final category of historical assertion, often thought to be the most important for the interpreter, is that of statements about

⁵³ The *Documentary History of the Ratification of the Constitution* (1976—).

⁵⁴ Elliot was a proponent of a strong states' rights interpretation of the Constitution. See Elliot, Preface to *The Virginia and Kentucky Resolutions of 1798 and '99*, at 2 (J. Elliot ed. 1832). Despite some nods at impartiality, in his work he probably permitted his political views to influence his editing. See Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 13, 20 (1986).

⁵⁵ The classic study is Adair, *The Authorship of the Disputed Federalist Papers* (pts. 1 & 2), 1 *Wm. & Mary Q.* (3d ser.) 97, 235 (1944).

“the intent of the framers (or founders).” This category involves special considerations and is treated separately in rule 11.

Rule 10: *History yields interpretations, not uninterpreted facts.*

This rule is the twin of the preceding one. Just as the best the historian can do with the types of complex information the originalist wants from the past is to offer his probabilities, not certainties, so the historian is equally unable to provide uninterpreted (“bare”) facts. She cannot, as it were, step out of the way herself, and grant the interpreter unmediated contact with the founders; all of the conclusions she reaches will themselves be interpretations molded by the questions, techniques, and presuppositions of the inquirer. The perennial American attempt to address federalism issues by determining whether the nation or the states enjoyed historical priority has repeatedly demonstrated this fact. Nationalist Joseph Story elaborately demonstrated that the nation came first, and nullifier John C. Calhoun responded by proving that the states created the union. Abraham Lincoln denied state priority and Jefferson Davis asserted it, and so it has gone. (The reader will recognize that the whole debate runs afoul of an even more fundamental rule—the first—for it is really an attempt to resolve a nonhistorical question of political or constitutional theory by historical means.) This example is obvious and involves the distorting influence of political preference on originalist history, but the point is more general and applies to the work of the most careful and least biased historian. The disagreement between Levy and his recent critics mentioned above,⁵⁶ for instance, stems from differences in historical methodology and interpretation, not from ideological opposition—Levy and many of his critics agree on a libertarian reading of the speech and press clauses as a matter of normative interpretation. In another area of discussion, a major reason that the debate over the fourteenth amendment’s historical meaning is unending is that its participants are operating out of historical stances so divergent as in effect to preclude meaningful disagreement, not to mention constructive discussion.

⁵⁶ See *supra* notes 47-48 and accompanying text.

Rule 11: *Consensus or even broad agreement among the founders is a historical assertion to be justified, not assumed.*

This rule is a corollary of the two preceding ones, and concerns the category of historical assertions involving "the intent of the [plural] framers (or founders)." Originalists sometimes write as if the goal of their historical investigations were to uncover an understanding of the constitutional text held by all of the relevant framers and adopters. At other times, it seems that they are looking for the views of the majority of the founders. In discussing the fourteenth amendment, for example, some originalists maintain that the adopters did not intend to "incorporate" (apply against the states) the federal Bill of Rights. If that statement is meant to claim that *all* of the people involved in the amendment's writing and ratification took this position, it is demonstrably false: a few important proponents of the amendment in Congress explicitly stated that it would incorporate the Bill of Rights. A few vocal participants in the process, mostly opponents of the amendment, essentially denied this proposition.⁵⁷ The vast majority of those whose votes counted in Congress and in the state legislatures never uttered a single recorded sentence on the issue. The silence of most of the adopters, to be sure, does not preclude the possibility that careful historical research might lead to a conclusion one way or the other about which position was more widely supported. But it will be a conclusion built on the individual historian's interpretative approach, and based on the probabilities as she sees them concerning the silent majority's opinion. That a consensus, or even a position endorsed by a majority, existed cannot be assumed. It is itself a historical claim. The only thing we know (as a practical matter) that the founders agreed on was the wording of the text, and even that certainty is undermined to some extent (as to the 1787 text) by the declarations of reserved rights and proposals for amendments with which several state conventions accompanied their resolutions of ratification.

Two factors tend to mislead originalists into disobeying this rule and assuming consensus. The most important, perhaps, is the intuitive sense that the founders "must have" agreed on the meaning of the document they adopted. This intuition is, of course, an un-

⁵⁷ See H. Hyman & W. Wiecek, *supra* note 41, at 386-438.

witting way of sneaking the historical conclusion to be proven (the existence of agreement) into the argument proving it. In addition to this logical problem, the conclusion itself turns out, under examination, to be rather unlikely. Take, for example, an issue of importance to eighteenth-century politicians: Does the Constitution empower Congress to grant monopolies (other than the explicit, narrow power to award patents and copyrights)? Opposing a motion in the Philadelphia convention to include in article I a power to grant corporate charters, Rufus King remarked that the power would cause dissension because it would be construed to authorize "mercantile monopolies."⁵⁸ A few minutes later George Mason, who "was afraid of monopolies of every sort," echoed King's concern and suggested that the proposed incorporation power be limited to canal companies so as to avoid the danger.⁵⁹ Even this more limited motion was rejected by the convention.⁶⁰

From this, an unwary originalist easily might conclude that the Constitution's original meaning excluded a congressional power to create monopolies, except that James Wilson made, and James Madison recorded, a chance comment during the debate. Supporting the broader motion, Wilson stressed its value and rejected King's prophecy of "prejudices & parties" if it were adopted.⁶¹ He apparently concluded his speech with the offhand observation that "[a]s to mercantile monopolies they are already included in the power to regulate trade."⁶²

Mason was quick to reject Wilson's interpretation of the commerce clause, but the latter's comment shows disagreement among the framers, and the records leave us unable to determine whether a majority of the delegates agreed with either Wilson or Mason, or had no opinion on the matter. All we know is that the attempt to enumerate an incorporating power failed. And all of this leaves to one side the arguably more relevant question of what the state convention delegates thought.

A second reason why originalists sometimes assume rather than demonstrate consensus is the influence of the modern American

⁵⁸ The debate over corporate charters is related in J. Madison, *Notes of Debates in the Federal Convention of 1787*, at 638-39 (A. Koch ed. 1966).

⁵⁹ See *id.* at 639.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

legal practice of using legislative history. As a matter of psychological reality, it is probable that on many pieces and provisions of legislation most legislators have no well-thought-out opinions or intentions at all, and still less ones that they have shared with others in an attempt to establish an agreement on the meaning of the bill's language. Modern American lawyers and lobbyists, nevertheless, have developed over time a set of legal rules about which extra-statutory materials will be accepted by courts as relevant to statutory construction, and the result of applying these rules to the materials is labeled "the intent of Congress." The extreme example of this practice is its acceptance of the startling idea that legislators can communicate purposes (semi-)authoritatively to future interpreters through legislative history, thus bypassing the statutory text altogether.⁶³ A second important feature of the practice is its careful, hierarchical ranking of materials (committee reports outweigh floor manager's remarks, those remarks count for more than speeches by backbench supporters, and so on).

It is easy for lawyers to transfer the assumptions and techniques of contemporary statutory construction to originalist constitutional interpretation. But, whether or not our current use of legislative history makes sense in itself, a conscientious originalist must eschew its techniques altogether in dealing historically with the 1787 Constitution or its first fifteen amendments. The adopters of those parts of our current Constitution lacked almost entirely our practice of using legislative history.⁶⁴ The notion that legislative debates could be the vehicle of communicating extra-statutory commands to subsequent interpreters was quite foreign to eighteenth- and nineteenth-century lawyers, and a similar attitude toward pre-ratification discussion prevailed in constitutional discourse at least until the 1830's.⁶⁵ This historical difference requires a difference in treatment of the materials. When a contemporary legislator proposes an interpretation of a bill that is before her and her colleagues, it makes some sense to think that all concerned recognize that her words may influence judicial and administrative construc-

⁶³ See, e.g., *Peyote Way Church of God v. Smith*, 742 F.2d 193, 197-98 & n.15 (5th Cir. 1984) (treating legislative discussion as giving specific although wholly nontextual meaning to statute).

⁶⁴ For the founding generation's (non-)use of legislative context in statutory interpretation, see Powell, *supra* note 9, at 897-98.

⁶⁵ See *id.* at 944-47.

tion if the bill is enacted. In such circumstances, for her to put forward views she does not in fact support (at least if she is a supporter of the bill) is foolish—she may be taken seriously later on. For those who disagree with her statement, to remain silent is dangerous—later interpreters are likely to infer their agreement or acquiescence with what was stated without contradiction. These pressures on the articulate and the silent in contemporary legislatures were non-existent in the period that saw the original Constitution and the Bill of Rights adopted. No one then understood remarks by the texts' proponents as authoritative messages to subsequent interpreters, or even as binding representations by the proponents of what they expected the documents to accomplish. This permitted the founding generation to engage in a freer style of discussion. The Constitution's advocates could put forward tentative views on its meaning without fear that their remarks would fix the text's interpretation. More darkly, there was less reason pragmatically for the Constitution's supporters to reveal their actual views, if those were likely to be controversial; it is often suggested that they frequently exaggerated the degree of autonomy they expected and intended the Constitution to leave to the states in a successful effort to allay localist fears.⁶⁶

Modern statutory construction's organization of the materials of legislative history into a hierarchical order of authority is equally ahistorical when applied to the evidence of the founders' views. It is tempting to avoid the difficult problems of demonstrating agreement among the founders by privileging certain sources or certain founders' views. Madison's *Notes*, the *Federalist*, and the records of the Pennsylvania and Virginia conventions are frequent candidates for the former category, with Madison, Hamilton, and Wilson in the latter. But the conscientious originalist cannot do this until he establishes (as a matter of probability and interpretation) that Madison or the *Federalist* or the Virginia debates were *in fact* representative of the views shared by a majority of the founders. No amount of assumption or assertion can substitute for demonstration on this point.

⁶⁶ See, e.g., G. Wills, *Explaining America 169-75* (1981) (interpreting the *Federalist's* state autonomy arguments as essentially insincere).

Rule 12: *History sometimes justifies plausible but opposing interpretations.*

The originalist's task would be somewhat simpler if historical inquiry, probabilistic and interpretative as it is, at least produced a most likely claim or a most plausible explanation. History, unfortunately, does not always oblige. Often the historical researcher, or the constitutional interpreter seeking enlightenment from history, will find himself considering opposing accounts of the founders' thought that seem of roughly the same plausibility. An important instance of this involves the interpretation of the speech and press clauses of the first amendment. Modern first amendment doctrine has tended to extend the categories of speech protected by the amendment,⁶⁷ but a significant academic countertradition exists that would limit the amendment's coverage to explicitly political speech.⁶⁸ And even the most expansive judicial interpreters of the speech and press clauses sometimes acknowledge that "the core of the First Amendment" concerns "political discussion in a representative democracy."⁶⁹ An originalist interpreter seeking to bring history to bear on his dispute has a wealth of data to consider, for the founding generation and its Anglo-American parents and grandparents had a rich tradition of arguing about the appropriate scope and limits of free expression in a free polity. The originalist's problem is that this tradition can be read in more than one way when considered as evidence for the scope of first amendment freedoms as originally conceived. Some of the data seem to suggest a political focus for the view of free speech held by the founders; among these cultural features are the conceptualization of the press as the "palladium" of English liberty, the explicit link between a free press and a free society in British radical thought,⁷⁰ the existence of laws against libel and blasphemy. Other evidence apparently points to a much broader concept of free expression: the wide-

⁶⁷ See, e.g., *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (exotic dancing entitled to some first amendment protection).

⁶⁸ See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20-35 (1971).

⁶⁹ *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (Brennan, J.); see also *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., joined by Black, J., concurring) ("dominant purpose" of first amendment was to prohibit government censorship of politically embarrassing speech).

⁷⁰ See *The English Libertarian Heritage* (D. Jacobson ed. 1965).

spread enthusiasm for the Enlightenment's canonization of free inquiry and discussion, Scottish philosophical psychology,⁷¹ the first Continental Congress' description of freedom of the press in its appeal to the people of Quebec.⁷² Indeed, a considerable portion of the data supports either conclusion, depending on the way the evidence is viewed by the historian.

Where the credibility of conflicting interpretations of the historical evidence is in equipoise, the prudent constitutional interpreter might well conclude that history in that instance is too inconclusive to be of even the limited assistance it sometimes affords.⁷³ The originalist, however, if he is incautious, may make the mistake of choosing the *historical* position that accords with his personal or political preferences, and build his normative arguments upon it. There is nothing improper about doing so—if he provides *historical* reasons for preferring the historical position he is utilizing. (His contemporary preferences, of course, are not a historical reason.) If he does so, he shoulders the difficult double burden not only of convincing his reader on the contemporary, normative issue, but also of persuading her to accept a historical claim that is, by hypothesis, eminently contestable. If the originalist does not justify historically his choice among the historical options, his arguments will be completely unpersuasive because they are logically defective: without historical justification for his choice, his “use” of history is nothing but a normative conclusion decorated with quotations from the founders. If he denies or ignores the existence of other plausible historical viewpoints, he adds deception to fallacy. Violations of this rule seem especially common in originalist discussions of the fourteenth amendment. We often are told that history “shows” (when the writer is completely unaware of rule 9, he uses “proves”) that the amendment's adopters did not intend to incorporate the Bill of Rights or meant only to constitutionalize the 1866 Civil Rights Act, when all that can be responsibly claimed is that some scholars have so argued in interpretations of the historical data hotly disputed by other competent historians.

⁷¹ See Ross-Boon, *supra* note 48.

⁷² Address to the Inhabitants of Quebec (1774), *reprinted in* 1 The Roots of the Bill of Rights 221, 223 (B. Schwartz ed. 1971).

⁷³ Cf. *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954) (“[A]lthough [the history of the fourteenth amendment's adoption] cast[s] some light, it is not enough to resolve the problem with which we are faced. At best, [it is] inconclusive.”).

Rule 13: *History sometimes reveals a range of "original understandings."*

This rule follows from several earlier ones, and suggests that the degree of "focus" a valid historical assertion has varies, depending on the type of question asked and the state of the evidence. If one's interest is in the suspension clause,⁷⁴ the quest for the original understanding of the words "Writ of Habeas Corpus" entails a narrow, lexicographic question and probably yields a quite specific answer: Those words were generally understood to refer quite exactly to the common law procedural device by which eighteenth-century English subjects could challenge in court their physical detention other than under judicial sentence.⁷⁵

If, on the other hand, one's interest is in the original understanding of the outer limits of Congress' powers (i.e., whether the founders thought that federal legislative authority potentially could oust the states from most of the traditional subjects of legislation), the results of historical investigation almost certainly will be much less precise. Some nationalists thought (and many Anti-Federalists feared) that the Constitution was a charter for what would amount to federal omnicompetence. Other founders—Madison, who would have preferred a stronger federal government than the one he thought the Constitution created, is the paradigm—believed that the constitutional text afforded Congress broad but significantly bounded powers. Still other members of the founding generation understood the Constitution as little more than a revision of the Articles of Confederation, strengthening Congress' authority to wield its narrowly defined powers while leaving the vast bulk of legislative authority in state hands. What history gives us in this instance is not a focused, specific answer, but a range of original understandings of the scope of congressional power.

It is important to realize that the situation just described, in which a range of historical interpretations exists, is quite distinct from those situations covered by rule 11. In those situations historians disagree as to which understanding of the founders' views is correct. In rule 13 situations, by contrast, historians agree that

⁷⁴ U.S. Const. art. I, § 9, cl. 2.

⁷⁵ See W. Duker, *A Constitutional History of Habeas Corpus* 95-116 (1980).

the founders did not agree. The range of interpretations in the latter cases is a result of the founders' failure to reach consensus, not of the incompatibility of the investigators' approaches.

D. The Limits of History (Rule 14)

Rule 14: *History never obviates the necessity of choice.*

This final rule summarizes all the others. It is apparently the hope of some originalists that history can serve as a way out of the realm of personal choice. They think that if we accord authority to the opinions of the founders, we can preclude judges, and ourselves, from importing into constitutional interpretation our own values, preferences, individual viewpoints, and subjective and societal blindness and prejudice. The central theme of this essay is that, even if this flight from choice were appropriate, it is impossible if history is the chosen escape route. The originalist who means to treat history responsibly is compelled to make judgments for which he is responsible throughout his interpretative enterprise, from his initial decision to employ history, through his reexamination of the founders' world views, his inquiry into the meaning of their statements, and his treatment of their silences, to his final reconstructions of their constitutional opinions and his use of those reconstructions in his normative work. Rather than avoiding the responsibility of choice, history requires of the originalist a whole new range of contestable and ultimately personal—which is not to say “purely subjective”—decisions. Thus, rather than ending dispute with an unarguable fiat from the past, his use of history simply becomes another arena for interpretative disagreement. It is not clear to me that some of the most vocal contemporary originalists would retain their enthusiasm for the method if they recognized its true nature and its limits. But if they wish to accord authority to history—and not to their own historicized myths—they cannot ignore these limits.

II. ORIGINALIST INTERPRETATION: AN EXAMPLE

In *Hawaii Housing Authority v. Midkiff*,⁷⁶ the Supreme Court upheld a Hawaii legislative program aimed at reducing what state

⁷⁶ 467 U.S. 229 (1984).

lawmakers saw as a dangerous overconcentration of real property in too few hands. The program utilized the state's power of eminent domain to take, with compensation, property belonging to descendants of the former royal family, and transfer it to the tenants actually living on it. The original owners challenged the program as invalid under the "public use" requirement of the fifth and fourteenth amendments. As the court of appeals restated this argument, the question was whether the Constitution permits a state to take property from private party A and transfer it to private party B.⁷⁷ A divided appellate panel answered this question in the negative, but the Supreme Court disagreed. Without dissent,⁷⁸ the Court reasoned that overconcentration of property ownership was a legitimate object of public concern, and held the Hawaii legislative scheme a rational means of addressing the problem.⁷⁹

Justice O'Connor's opinion for the Court did not make use of originalist history, relying instead on a discussion of the Court's earlier decisions. The exercise of supplying her omission serves as a useful demonstration of the value and limits of historically respectable originalism.

Although the "legislative history" of the just compensation clause itself is predictably barren of value, there is a wealth of information from the founding era concerning the founders' views on the relationship between governmental power and the rights of private property. In his famous discussion of the value of an extended republic in the *Federalist* No. 10, James Madison, for example, repeatedly touched on the threat power posed to property.⁸⁰ One of the primary evils of a "pure democracy," Madison explained, was its incompatibility with property rights, and its supposed link to a perfect equalization in the citizens' possessions.⁸¹ Because "the various and unequal distribution of property" is the most common cause of political conflict, the most pressing task of "modern legislation" in Madison's opinion was to maintain a just balance be-

⁷⁷ *Midkiff v. Tom*, 702 F.2d 788, 790 (9th Cir. 1983), rev'd sub nom. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

⁷⁸ Justice Rehnquist concurred in the result without opinion, and Justice Marshall did not participate.

⁷⁹ See 467 U.S. at 241-43, 245.

⁸⁰ See *The Federalist* No. 10, at 79-84 (J. Madison) (C. Rossiter ed. 1961).

⁸¹ See *id.* at 79-81.

tween the factions arising out of economic disparity.⁸² Unfortunately, even though the state governments under the Confederation were not pure democracies, they had shown themselves all too ready to serve the interests of "the most numerous party," which inevitably was made up in large part of the less wealthy elements of society.⁸³ One of the chief advantages of the proposed Constitution, Madison concluded, was the check it would place on "improper or wicked project[s]" such as a demand "for paper money, for an abolition of debts, [or] for an equal division of property"⁸⁴

Madison's analysis of faction and freedom was more sophisticated than most, but his association of majoritarian power with the injustice of property redistribution was a commonplace. In his famous opinion in *Calder v. Bull*,⁸⁵ Justice Samuel Chase expressed an opinion shared by Federalists and Republicans alike when he wrote that:

An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . .

. . . .
A few instances will suffice to explain what I mean[:] . . . a law that takes property from A. and gives it to B. . . .⁸⁶

From the viewpoint shared by Madison, Chase, and many other founders, Justice O'Connor's reasoning in *Midkiff* is radically defective. It was precisely the ability of a majoritarian legislature to respond to the poor majority by labeling the property of the wealthy few a "public" problem that concerned them. It seems highly probable that the purpose of the "public use" requirement of the fifth amendment to people like Madison and Chase was to ensure that economic redistribution schemes could not be justified merely by accompanying the forced transfer of property with compensation to the original owners.

If this were a full-fledged investigation of the original understanding of the just compensation clause, it would be necessary to

⁸² See *id.* at 79.

⁸³ See *id.* at 80-84.

⁸⁴ See *id.* at 84.

⁸⁵ 3 U.S. (3 Dall.) 386 (1798).

⁸⁶ *Id.* at 388.

go into much greater detail and documentation. For present purposes, we shall assume the validity of the assertions above. On their basis, it seems that the *Midkiff* Court's interpretation of the public use requirement probably is contrary to the original understanding, although of course an originalist interpreter might have other reasons (obedience to *stare decisis*, strong respect for the doctrine of state autonomy, rejection of the incorporation doctrine) for accepting the Court's decision.

But this is not the entire historical story. Coexisting with the fear of wealth redistribution widespread among the founders was a current of thought, also widely held, that republicanism required the alleviation of overconcentration of private property and mandated a broad distribution of land ownership. Much post-revolutionary legal change was aimed at breaking up large estates of real property,⁸⁷ and legislative action to further this goal was regarded by many as just and legitimately "public" in character. If this strand in the founders' views is the appropriate context for an originalist interpretation of the public use requirement, it seems that *Midkiff* probably was decided in accordance with the original understanding. That conclusion is bolstered by the weakest link in the contrary argument, the difficulty of tying the hostility to redistribution directly to the "public use" language of the fifth amendment.

An individual originalist interpreter might well decide that one or the other of these contrasting historical interpretations is historically preferable. What he would have to recognize, however, is the impossibility of dismissing either as historically unsupportable. Indeed, it is entirely possible that both interpretations were entertained during the founding era. Originalism's contribution, in this case as in so many others, is to expand the range of interpretative possibility rather than to restrict it. This ought not to be seen, however, as a disadvantage. Even though the founders' views cannot be reduced to a unitary "original intent," their conflicting concerns over the redistribution of property and the republicanization of society point to the historically appropriate context of the public purpose requirement, which turns out to be fundamental views of the place of property rights in our constitutional system rather than (only) a narrow, individualized concern with the economic in-

⁸⁷ Examples include the abolition of primogeniture and the fee tail.

terests of particular property owners. In the concluding section of this essay I discuss further the positive contributions of originalist history to constitutional interpretation.

III. CONCLUSION: A USE FOR HISTORY

The part responsible historical work can play in constitutional interpretation is sufficiently circumscribed that some might be tempted to abandon its use altogether. But I do not think that the necessarily tentative and limited character of history's possible contributions must mean that history has no part to play in constitutional thought. Responsible, intellectually respectable history in my opinion is an inextricable and essential element in our discussions of the Republic's fundamental law. In the first place, constitutional interpretation is not a species of deductive or inductive logic; it is instead a discourse of argument and persuasion. The more varied the participants in the conversation the richer it will be and the more satisfactory will be its results. We would impoverish ourselves if we refused to listen to the constitutional views of our predecessors, and especially of those persons who originally debated the advisability and meaning of the Constitution and its amendments. This essay has emphasized the cultural and intellectual distance between contemporary interpreters and the Americans of the 1780's and 1860's. But we also share with the founders and adopters important concerns and values. We no longer view liberty and its foes through the lens eighteenth-century English radicalism provided the founding generation, but we too know of the restless and self-aggrandizing nature of power. When the generation that fought the Civil War discussed the constitutional value of equality, none of its members analyzed equality's meaning and problems precisely as we would do, but their debates were not wholly alien to our concerns. Our distance from the founders makes translation necessary; what we have in common with them makes translation worthwhile.

But the contribution of history to constitutional discourse is not limited to providing our conversation with additional interlocutors. Concern for the historical meaning of the Constitution is necessary, not because the history itself has authority (as the intentionalist would have it) but because the text does. Although, as I

suggested earlier,⁸⁸ the "Constitution" that is the object of interpretation is not confined to the bare text, I think it unquestionable that at the center of American constitutional discourse we are engaged in the enterprise of making sense of a particular document, the text written one summer in Philadelphia two centuries ago and amended on rare occasions since then. The Constitution in this narrower sense is a historical document, and part of the constitutionalist's obligation to respect its textual nature involves a need to deal with its historical character. History properly functions, for example, to prevent the words of the text from becoming completely empty containers for whatever meaning with which we care to fill them. James Madison, no friend of originalist interpretation generally, thought that contemporaneous expositions of the Constitution were of some value in checking unintended change resulting from the fluidity of language.⁸⁹ Even if the reference of the word "Indian" becomes limited to citizens of the Republic of India, for example, one might reasonably expect that its historical usage in the 1787 Constitution⁹⁰ would continue to inform constitutional discussion.

It may be objected, however, that history's serviceability in this regard, although real, is fairly unimportant. Historical research may provide almost irrefutable arguments for the meaning of phrases like "Indian," "natural born Citizen," "Oath or Affirmation" and so on. But such expressions are almost never the subject or source of constitutional dispute. The provisions that demand interpretation are precisely those that seem most subject to change of meaning, whether change is viewed as development or degeneration.

There is a great deal of truth in this argument. As *Williams v. Florida*⁹¹ demonstrated, even constitutional language that has a nearly certain original meaning—in *Williams*, the word "jury"—is not immune to the passage of time or the vagaries of interpreters.⁹² The amenability of the more generally worded provisions, such as

⁸⁸ See *supra* note 8 and accompanying text.

⁸⁹ See Powell, *supra* note 9, at 938 & n.273.

⁹⁰ See U.S. Const. art. I, § 2, cl. 3 ("excluding Indians not taxed"); art. I, § 8, cl. 3 ("Commerce . . . with the Indian Tribes").

⁹¹ 399 U.S. 78 (1970).

⁹² See *id.* at 98-100, 102-03 (holding that "jury" did not exclusively mean the institution as it existed in the eighteenth century).

the commerce clause or the first and fourteenth amendments, to change—or manipulation—is well known and one of the major sources of controversy in contemporary discussion. Even with regard to these provisions, however, I believe that history can be of some value. The use of “State[s]” in the Constitution is a good example of language of contemporary interpretative concern that remains closely tied to its probable original meaning. Although the issue of when “the state” is acting, or at least responsible, is hotly disputed, there is a core of meaning to the term that is historically derived and constitutionally significant.⁹³ It is not seriously argued, for example, that the District of Columbia, Puerto Rico, or New York City is entitled, as a matter of constitutional law, to two senators or to participate in the adoption of constitutional amendments, even though all three political entities might reasonably be termed “states” in some senses of the word. In addition, it is always possible in American constitutional discourse to appeal behind the broader “Constitution’s” elements of practice and precedent to the document itself, to challenge current wisdom in the name of what once was written. This possibility of textual (and therefore of historical) argument serves as a brake on, although it clearly does not prevent, constitutional change. Whether such a brake is wise or desirable is a matter for political philosophers; its existence (as well as that of the opposing impetus toward change) is an inextricable part of the constitutional tradition we have received and carry on. American constitutional discourse is not and has never been a free wheeling debate over personal political views, notwithstanding the almost hysterical claim of some contemporary originalists that this is what it has become. But constitutional discourse equally has not been, and I have argued in this essay cannot become, a form of legal divination, in which originalist interpreters descry contemporary constitutional commands in the enigmatic extratextual sources of the founders’ thought. In the end, treating the founders as oracles, as some intentionalists would have us do, results not in fidelity to the founders’ intentions, but in an inability to understand their achievement.

⁹³ See *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805) (holding that the Constitution’s reference to “states” must be construed as “retaining the sense originally given” the term).

APPENDIX: A NOTE ON "TRUTH" AND "HISTORY"

Originalists seek to avoid subjectivity in constitutional interpretation by directing the interpreter's attention to historical fact. But the belief that history deals with objective "facts" is itself a hotly disputed issue among contemporary historians. The modern profession of academic history inherited from its nineteenth-century founders the image of the historian as one who writes about the past "as it had really been—*wie es eigentlich gewesen*."⁹⁴ For a variety of intellectual, cultural, and political reasons, however, this traditional understanding of history has been under sharp attack for many decades. The relativist historians of mid-century attacked the possibility and morality of traditional objective history.⁹⁵ Scholars influenced by Karl Popper's views⁹⁶ denied the traditional historians' claims that they could describe history scientifically. More recently, under the influence of a variety of European intellectual movements, some historians have placed heavy emphasis on the freedom of the historian and the constructive or hermeneutical nature of historical statements.⁹⁷ And throughout this century, of course, Marxists have argued for the superiority of Marxist historiography.⁹⁸ Various legal historians have been influenced by one or the other of these broad currents in historical theory.⁹⁹

It is readily apparent, however, that contemporary originalists do not enjoy the luxury of choosing among these views of history. The very point of their turn to history is to escape from interpretative freedom. Theories of history that deny the empirical nature of historical research or the objective quality of historical fact do not

⁹⁴ P. Gay, *Style in History* 68 (1974) (quoting classic description of historian's task by nineteenth-century scholar Leopold von Ranke).

⁹⁵ See J. Higham, L. Krieger & F. Gilbert, *History* 117-31 (1965).

⁹⁶ See 2 K. Popper, *The Open Society and Its Enemies* 259-69 (5th ed. rev. 1966).

⁹⁷ See, e.g., H. White, *Tropics of Discourse* (1978); H. White, *Metahistory* (1973).

⁹⁸ See D. LaCapra, *Rethinking Intellectual History: Texts, Contexts, Language* 325-46 (1983).

⁹⁹ The historical work of critical legal scholars like M. Horwitz, *The Transformation of American Law, 1780-1860* (1977), and Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo L. Rev.* 205 (1979), is obviously influenced both by traditional Marxism and by more recent European movements. In a penetrating essay, G. Edward White has attempted to distinguish a middle ground between "Marxist legal history" and what I am calling the objective-truth model of history. See White, *Truth and Interpretation in Legal History*, 79 *Mich. L. Rev.* 594 (1981).

provide an exit from subjectivity; their use by the originalist would merely substitute one form of interpretative discretion for another. The originalist's most fundamental goal requires him to adopt a strongly objective view of the historical endeavor.

Originalism, to be sure, does not compel its adherents to reject all of the criticisms that have been made of traditional historical theory. Not even the most fervent believer in objective historical truth among modern historians denies that the historian's conclusions are influenced and to some degree shaped by the historian's interests, presuppositions, and specific methodology. The historian, it cannot be doubted, is to some significant extent the interpreter of the past rather than a window through which the past can be viewed directly. Scholars who adhere to an objective account of historical work differ from other historians in that they think it possible for the historian to construct valid—or in other words, provisionally true—interpretations of the past's "own" objective reality.¹⁰⁰ A central purpose of historical theory is to clarify the most appropriate and effective methods of building valid interpretations as well as to establish the grounds for rejecting invalid or false ones.

In this essay I have assumed the intellectual validity of the objective-truth model of history. If originalism is unworkable under such a model, then its current advocates must look to sources other than history for an answer to their quest for interpretative certainty.

¹⁰⁰ See, e.g., A. Danto, *Narration and Knowledge* 112 (1985) ("[H]istorians seek to make true statements about their past."); O. Handlin, *Truth in History* 1 (1979) ("[T]he world of the elapsed past has its own reality, independent of who attempts to view and describe it, and is thus objective . . .").

