

The Modern Misunderstanding of Original Intent

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Federalism: The Founders' Design. Raoul Berger. University of Oklahoma Press, 1987. Pp. 223.

It is an ideal time to publish an examination of the "original intent" of the Constitution's founders regarding federalism. The Chief Justice and the Attorney General of the United States are both public advocates of "original intent" as the only legitimate method of constitutional interpretation.¹ At the same time, the present national administration maintains its allegiance to a revived federalism,² and changes in the membership of the Supreme Court may lead to a reconsideration of precedents on national power and state autonomy.³ As a consequence, Raoul Berger's book on the "founders' design" of federalism⁴ is an event of both political and scholarly interest. Berger is the most prolific and uncompromising contemporary intentionalist writer on constitutional topics.⁵ In *Federalism: The Founders' Design*, as in his earlier writings, Berger's conclusions as to the founders' intentions and the constitutional views of contemporary conservatives are in almost

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[Editors' note: This issue contains two contrasting reviews of Raoul Berger's *Federalism: The Founders' Design*. Although Professors Powell and McConnell argue on behalf of significantly different positions, their articles are not in the form of a "debate;" neither reviewer had an opportunity to see the other's manuscript prior to publication of this issue.]

¹ See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex.L.Rev.* 693, 698 (1976); Edwin Meese, III, *Address before the American Bar Association* (July 17, 1985), reprinted in *The Federalist Society, Occasional Paper No. 2, The Great Debate: Interpreting Our Written Constitution 1* (1986).

² See Working Group on Federalism of the Domestic Policy Council, *The Status of Federalism in America* (Nov. 1986).

³ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 580 (1985) (Rehnquist dissenting).

⁴ Raoul Berger, *Federalism: The Founders' Design* (1987). All parenthetical page references are to this work.

⁵ There is no agreement on how to label constitutionalists of Berger's views; I shall use "intentionalist." See note 71. Berger's writings over the past decade include *Raoul Berger, Government by Judiciary* (1977) (presenting his view of the "original intent" of the fourteenth amendment), as well as a remarkable number of articles.

complete accord.⁶ He maintains, moreover, that intellectual honesty should compel contemporary interpreters to adopt those views (pp. 178-92).

In this review I consider some of Berger's historical claims in *The Founders' Design*. The first section briefly recounts Berger's overall thesis about the founders' understanding of federalism and then considers in more depth his treatment of two specific issues: the questions of (1) the historical priority of the states over the Union and (2) state sovereignty. The second section addresses Berger's claim that the founders shared his intentionalist views of constitutional interpretation, an assertion that underlies the whole of *The Founders' Design* and that is explicitly addressed in the book's appendix. On each of these issues, I conclude that Berger's conclusions are questionable or implausible. The striking modernity of Berger's working assumptions, in particular, has played a central role in his misunderstanding of the founders' original intentions.

I. THE FOUNDERS AND FEDERALISM

The central thesis of Berger's book can be stated briefly, for it is an old and familiar argument in American constitutional history. In our constitutional beginning, as Berger recounts the story, thirteen separate nation-states, "sovereign and independent of each other," jointly declared their several independences from Great Britain (p.47). The states subsequently formalized, in the Articles of Confederation, the alliance or league into which conflict with Britain had already driven them, but in doing so, did not compromise any state's individual sovereignty or create a national government. The Continental and Confederation Congresses apparently⁷ were "only a diplomatic assembly,"⁸ and "no one" thought that the

⁶ In *The Founders' Design*, Berger denies that his conclusions are the product of his predilections (p. 5). His agreement with Rehnquist, Meese, and others on "original intent," and the fact that his historical investigations invariably reach conclusions supporting conservative positions, make it appropriate to regard him as at least functionally a member of that school.

⁷ I qualify the statement only because every direct description of Congress in the relevant passage in *The Founders' Design* is a quotation. Berger's use of the quotations, as I read his book, clearly shows enthusiastic endorsement of them. See (pp. 27-29).

⁸ Berger correctly attributes this expression to John Adams (p.28). Berger does not note what followed Adams' remark. Thomas Jefferson wrote Adams a vigorous criticism of the suggestion that Congress was a meeting of ambassadors instead of a legislature, and Adams in turn explained that he had only meant to suggest a possible interpretation of Congress' nature, and not to put forward his own fixed view: "I should wish to have [my statement] considered as a Problem, rather for Consideration, than as an opinion." John Adams to

Articles “created any sort of *government* at all” (p.28).⁹

The Constitution of 1787 modified the prior league by creating a limited “federal government” to which the states agreed “*to surrender a portion of their sovereignty*” (p.53) (emphasis in original). However, the Constitution’s supporters disclaimed any aim to “create a ‘consolidation’ as differentiated from a union of thirteen independent republics” (p.52). The Constitution was meant to establish a system of “dual sovereignty” (p.49) in which the states would retain “exclusive jurisdiction” (p.59) over “‘internal’ [and] ‘local’ matters that operate only within a State’s borders” (p.76). This account of America’s early constitutional history is not presented, of course, out of purely academic interest. From his belief in state priority and state sovereignty, Berger, like other states’ rights constitutionalists,¹⁰ derives a narrow reading of congressional power and a correspondingly generous understanding of state autonomy. The substantive legal point of *The Founders’ Design* lies in Berger’s treatment of the scope of congressional power in chapters four through eight. Addressing in order the tenth amendment; the necessary and proper, supremacy, general welfare, and commerce clauses; and the fourteenth amendment,¹¹ Berger sharply criticizes contemporary doctrine for departing, in each case in a nationalistic direction, from the dual sovereignty design of the founders. “Judged by the historical facts, many of the Supreme Court’s recent ‘interpretations’ of the constitutional terms exemplify its ongoing revision of the Constitution, representing yet another usurpation of a function the people reserved to themselves by Article V—the amendment process” (p.178).

John Marshall wrote in *McCulloch v. Maryland* that “the question respecting the extent of the powers actually granted [to the federal government], is perpetually arising, and will probably

Thomas Jefferson (Mar. 1, 1787), in Merrill Jensen, ed., 13 Documentary History of the Ratification of the Constitution 90 n.3 (1981).

⁹ Quoting Martin Diamond, What the Framers Meant by Federalism, in Robert A. Goldwin, ed., A Nation of States 21 (1961) (emphasis in original). Diamond and Berger clearly are mistaken on this point. See text accompanying notes 14-41 below.

¹⁰ See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976)(Rehnquist); John C. Calhoun, Fort Hill Address (July 26, 1831) in Richard K. Cralle, ed., 6 Reports and Public Letters of John C. Calhoun 59-94 (1855). Berger enjoys distinguished company both in his historical views and in their normative implications. What is wrong with *The Founders’ Design* as an attempt to write history is Berger’s insensitivity to the evidence, and authorities, that contradict him.

¹¹ Chapter eight is a full-dress attack on the Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The chapter is an interesting example of Berger’s views on contemporary case law, but it adds nothing to our understanding of the founders’ views on federalism.

continue to arise, so long as our system shall exist.”¹² Berger himself concedes that controversy over the historical meaning of American federalism “revolves around interpretation of the available facts” rather than over the “facts” themselves (p.5). But in *The Founders’ Design*, Berger goes beyond mere presentation of the historical evidence; he claims instead to be able to adjudicate debates among the founders themselves, to determine objectively that, “[w]hat Madison wrote in Federalist No. 41 represented the opinion of the Framers, whereas Hamilton’s 1791 argument departed from their opinion and merely represented his own” (p. 101)(footnote omitted).¹³ In light of the varied and intense disagreements over questions of federalism and national power before 1787, at the Philadelphia convention, during the ratification campaign, and after adoption, this claim is audacious indeed and cannot be fully addressed in a book review. Instead, I will consider two propositions that Berger attributes to the founders—the priority of the states over the nation and the constitutional intention to create a system of dual sovereignty. Berger’s treatment of these propositions fairly reflects the overall methodology and plausibility of *The Founders’ Design*.

Berger vigorously asserts that the question he poses in the title of chapter two, “Nation or Sovereign States: Which Came First?” (p.21), must be answered as a matter of historical fact. Before the adoption of the Constitution, Americans regarded themselves as citizens of independent polities linked only in alliance and lacking a common national government. This proposition is the initial, “fundamental” foundation for his subsequent interpretation of the Constitution (p.21). Berger dismisses contrary statements by the founders, when he takes note of them, as the exceptional comment (pp. 30-31), as contrary to the “representations” made to the ratifiers (pp.32-33), or as contradicted by other statements by the same person (pp.32-33).¹⁴ But “national” inter-

¹² 17 U.S. 316, 405 (1819).

¹³ Berger properly recognizes that history is not a science of mathematical demonstration, but his analogy between the tentative nature of historical “truth” and the legal standard of proof by a preponderance of the evidence is somewhat misleading (pp. 6-7). Courts of law must resolve controversies one way or the other, but there is no a priori reason why the historical evidence about as complicated and elusive a question as the views of “the founders” (a group including, at the least, the Philadelphia framers and hundreds of state convention delegates) may not indicate unresolved disagreement. Berger’s views on constitutional interpretation compel *him* to seek a “founders’ design” even when there may not have been one.

¹⁴ Berger implies that Elbridge Gerry, who explicitly stated that “we never were independent States,” nevertheless was logically committed to “recogniz[ing] the existence of sov-

pretations of the pre-1787 Union were far more widespread than Berger recognizes.

For example, in George Washington's famous Circular Letter, issued upon his retirement from command of the Continental Army four years before the Philadelphia convention, Washington publicly and emphatically referred to the "auspicious period" in which "the United States came into existence as a Nation." For Washington, the United States in 1783 was no mere league, nor was Congress a simple diplomatic assembly. He wrote that it was the duty "of every true Patriot" to insist on state compliance with Congress' exercise of its "prerogatives" since Congress was "invested with [them] by the Constitution [i.e., the Articles]." The Confederation Congress was, in General Washington's opinion, the "one Federal Head" of the Union, the "Supreme Power to regulate and govern the grand concerns of the Confederated Republic," the "Sovereign Authority" in America. Washington rejected the claim, which Berger describes as the founders' understanding, that both American independence and the pre-1787 treaties were the work of thirteen separate sovereignties. The Circular Letter stated that, "It is only in our united character as an Empire, that our Independence is acknowledged, that our power can be regarded, or our Credit supported among Foreign Nations. The Treaties of the European Powers, will have no validity on a dissolution of the Union."¹⁵

Washington's views were widely shared. During a debate in Congress a few months before Washington's 1783 retirement, James Madison observed that disagreement over Congress' appropriate taxing powers derived from disagreement over the nature of the Confederation and that as a result he wished to "offer his ideas" on "the true doctrine of the Confederation." In doing so, Madison referred to the Articles as "the Constitution" and to the United States as "the republic." He vigorously rejected the claim that Congress' powers were "merely Executive" rather than legislative and asserted that congressional requisitions were "a law to the States, as much as the acts of the latter. . . were a law to their indi-

ereign States" (p. 31).

¹⁵ George Washington, Circular Letter (June 8, 1783) in John C. Fitzpatrick, ed., *26 Writings of George Washington* 484-89 (1938). It is quite clear that Washington is describing contemporaneous political reality rather than any future aspirations. Washington explicitly declined in the letter to take up "the great question" of delegating additional powers to Congress. Washington feared that "local prejudices and policies" might yet ruin America's "national character," but he did not doubt that the United States in 1783 was a sovereign nation with a national government.

vidual members." The Articles were an instrument of government strictly parallel to the state constitutions: "the foederal constitution was as sacred and obligatory as the internal constitutions of the several states."¹⁶

Nationalist views of the Confederation persisted in the late 1780s. A few months before the Philadelphia convention assembled, Dr. Benjamin Rush published an address calling on Americans to support a radical revision of the Articles of Confederation. Rush regarded the Confederation Congress as far too weak, but he nonetheless also described it as a legislature vested with "the sovereign power of the united states." Congress was, Rush insisted, "the only *sovereign* power in the united states." He labelled the belief that the thirteen states were sovereign a dangerous error: "No individual state, as such, has any claim to independence. She is independent only in a union with her sister states in congress."¹⁷ Similar claims were made throughout this period. Arguing for a stronger national government, William Barton stated that "the united states of America form one grand, entire republic," already vested with some "sovereign powers,"¹⁸ a view echoed repeatedly by supporters of a new constitution.¹⁹

¹⁶ James Madison, Notes on Debates (Feb. 21, 1783) in William T. Hutchinson and William M.E. Rachal, ed., 6 The Papers of James Madison 270-72 (1969)(footnote omitted).

¹⁷ Benjamin Rush, Address to the People of the United States (Feb. 1, 1787), in Jensen, 13 Documentary History at 46-47 (cited in note 8)(emphasis in original). Rush may have put forward such a nationalist position for strategic political reasons, of course, although this seems unlikely. Berger, however, denies the significance of such considerations even if justified: the interpreter, he insists, is bound by the public "representations" of the founders (pp. 101-02).

¹⁸ William Barton, On the Propriety of Investing Congress with Power to Regulate the Trade of the United States (Feb. 1, 1787) in Jensen, 13 Documentary History at 51-52 (cited in note 8).

¹⁹ See, e.g., Henry Lee, Speech in the Virginia Ratifying Convention (June 9, 1788), in Jonathan Elliot, ed., 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 178 (1836) ("The people of America, sir, are one people"); Anonymous, Foederal Constitution, Pennsylvania Gazette (Oct. 10, 1787), in Jensen, 13 Documentary History at 363 (attributing establishment of state governments to the Continental Congress) (cited in note 8); Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in Jensen, 14 Documentary History at 201, 203 (repeatedly insisting that "the people of the United States" are "but *one people, one nation*") (emphasis in original); William Heath, Speech in the Massachusetts Ratifying Convention (Jan. 15, 1788), in Elliot, 2 Debates at 12 ("I consider myself not as an inhabitant of Massachusetts, but as a citizen of the United States"); Theophilus Parsons, Speech in the Massachusetts Ratifying Convention (Jan. 23, 1788), in id. at 89 (under the Articles, Congress is vested with "powers as extensive" as those proposed by the Constitution and derived from "a grant from the people"); William Davie, Speech in the first North Carolina Ratifying Convention (July 26, 1788), in Elliot, 4 Debates at 120 (Confederation Congress vested with "original rights of sovereignty"); id. at 157 (July 29, 1788)("the people of the United States. . .are all members of the same community"); James Iredell, Speech in the first North Carolina Ratifying Convention (July 31, 1788), in

Berger's treatment of the evidence he does cite on the issue of state or national priority is sometimes peculiar. Perhaps the oddest example is the abrupt treatment of Charles Cotesworth Pinckney's unequivocal affirmation of national priority. Replying to an assertion of state sovereignty, Pinckney invoked the Declaration of Independence:

The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration; the several states are not even mentioned by name in any part of it—as if it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent. Let us, then, consider all attempts to weaken this Union, by maintaining that each state is separately and individually independent, as a species of political heresy.²⁰

Pinckney was a Philadelphia framer and signer of the Constitution, a member of the South Carolina ratifying convention, and one of that state's most prominent advocates of adoption. The speech in question was made publicly during the ratification campaign for the express purpose of commending ratification to South Carolinians. As such, by Berger's own standards,²¹ Pinckney's remarks were a "representation" of the founder's views on which the ratifiers were entitled to rely and to which current interpreters must defer. Indeed, Berger is happy to cite Pinckney as an authority when Pinckney supports Berger's opinions (p.14 n.46). If, as Berger maintains, the question of national or state priority is "fundamental" to the proper interpretation of states' rights under the Constitution (p.21), Pinckney's speech is powerful counterevidence to Berger's belief in state priority.

Berger, however, downplays this evidence. His sole treatment of Pinckney's speech is this sentence: "Even less do the facts support Story's quotation of Charles C. Pinckney's statement that the 'separate independence and individual sovereignty of the several

id. at 233 (attributing both "freedom" and "independence" to "the union"); John Matthew, Speech in the South Carolina Legislature (Jan. 17, 1788), in id. at 298 (the country of America existed even before the Articles' ratification, and Congress' resolutions "had the force of law").

²⁰ Charles Pinckney, Speech in the South Carolina House of Representatives (Jan. 18, 1788), in Elliot, 4 Debates at 301 (cited in note 19).

²¹ See, e.g., (pp. 70-71, 101, 107, 117) (ascribing final authority to "representations" made to the ratifiers in convention or in other public statements).

states were *never thought of* by the enlightened band of patriots who framed this declaration' ” (p.26) (emphasis added). Berger never explains why Pinckney's views or those of others can be so lightly dismissed. He does not even acknowledge that Pinckney was a framer and ratifier who presumably was “representing” the founders' views. Finally, Berger's statement that “the facts” do not support Pinckney's statement is fundamentally confused. Pinckney's views as expressed in his speech *are themselves among* the facts that someone investigating the “founders' design” must interpret or explain.

Berger accords similar treatment to Justice William Paterson's opinion in *Penhallow v. Doane*.²² Berger downplays the significance of Paterson's affirmation of national priority and congressional supremacy, despite invoking Justice James Iredell's opinion in the same case as well as Justice Samuel Chase's in *Ware v. Hylton*²³ as valuable support for his own position on state priority and sovereignty (pp.25-26, 45-47). Berger treats Paterson's opinion by first reporting two remarks that Paterson made in the Philadelphia convention. These remarks were to the effect that the “idea of a national government as contradistinguished from a federal one” was not the basis of the framers' commissions from the states and that the framers were “deputies of 13 independent states” (p.45). On their face, these statements support Berger's state priority position, but their import should be measured by their context. Paterson spoke against the convention's consideration of proportional representation in Congress. His argument is that the framers had not been commissioned to act on the assumption that “the confederacy was radically wrong” and that, consequently, to consider or adopt proportional representation would be to exceed their powers as agents of the states. It is with reference to this particular commission—not in an attempt to define the general nature of the Union—that Paterson described the framers as “deputies of 13 independent states.”²⁴

After quoting Paterson's remarks at the convention, Berger then gives the following account of Paterson's *Penhallow* opinion:

It is true, as he stated in *Penhallow*, that the Continental

²² 3 U.S. 53 (1795).

²³ 3 U.S. 199 (1796).

²⁴ See Max Farrand, ed., 1 *The Records of the Federal Convention of 1787* 177-78, 182, 250 (1937). Paterson's lack of interest in enunciating a general state sovereignty interpretation of the Confederation is further indicated by his description of the Convention's source: “The Convention he said was formed in pursuance of an Act of Congs.” *Id.* at 177.

Congress exercised the 'rights and powers of war,' and that the 'States individually did not.' But, by Article IX the States had delegated the power to the Congress.

(p. 45)(footnote omitted). This is a seriously misleading description of Paterson's opinion, which described the Continental Congress as having been, from the beginning, "the general, supreme and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system." Congress, he insisted, was vested "with the approbation of the people," the "supreme authority." Congress exercised a sweeping variety of powers, and *not* by delegation from the states or through articles of confederation. "These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America." The threat to American freedom that provoked the Revolution caused "the people or colonies" to "coalesce:" "they accordingly grew into union, and formed one great political body."²⁵ My point is not to "prove" that Paterson held a nationalist view of the Confederation in 1787, but only to show that the evidence is more complex than Berger's discussion reveals. Whatever else may be said of Paterson and his views on federalism,²⁶ his *Penhallow* opinion was an unequivocal rejection of Berger's state priority position by a man Berger describes as "a leading Framer" (p.184).

There are other questionable uses of historical data in Berger's treatment of priority issues.²⁷ Berger quotes John Adams' description of Congress as a "diplomatic assembly" without referring to the subsequent correspondence between Adams and Jefferson (p.48).²⁸ He quotes Justice Chase's statement that after the Declaration of Independence each state "had a right to govern intself by its own authority and its own laws" (pp.45-46) without noting that in the very same opinion Chase asserted both that "congress prop-

²⁵ 3 U.S. at 80-81.

²⁶ As with Pinckney, Berger uses Paterson as an authority when Paterson appears to support Berger's opinions (pp. 11 n.32, 27 n.22).

²⁷ One particular questionable use of historical data involves Berger in an apparent inconsistency. Berger's insistence that the wording of the Declaration of Independence (pp. 24-25) and of the Treaty of Peace with Great Britain (p. 29) "confirmed" or "recognized" state independence and priority (p. 47) is of course only *Berger's* opinion. The utterly mixed nature of the evidence regarding the *founders'* opinions makes it historically impossible to "demonstrate" (p. 25) that one view is "right" and the other "wrong." Berger supports his position by exactly the kind of textual exegesis that he ridicules and rejects when employed to reach conclusions that he does not accept. Compare (pp. 24-25, 29) (Berger's interpretation of the Declaration and the Treaty) with (pp. 107-08 and 110-115) (rejecting close textual exegesis by Hamilton and Story).

²⁸ See note 8 for a discussion of the subsequent correspondence.

erly possessed the great rights of external sovereignty” during the same period and also that “all the powers actually exercised by congress before [the Confederation] were rightfully exercised. . .[because] they were so authorized by the people they represented, by an express or implied grant.”²⁹

Finally, while recognizing that James Wilson is “often cited for the separation [of America] from Great Britain as a united nation” (p.22), Berger insists that Wilson changed his mind in the Pennsylvania state convention (pp.22 n.2, 33). This assertion greatly oversimplifies the views Wilson expressed there. Wilson had long maintained that from July 1776 the United States had enjoyed a national existence, and Congress had possessed national governmental powers. In 1785, he asserted that from 1776 the United States had possessed “general rights, general powers, and general obligations, not derived from any particular state, nor from all the particular states, taken separately” and that the Articles of Confederation had not been “intended to weaken or abridge the powers and rights, to which the United States were previously entitled.”³⁰ At the Philadelphia federal convention, Wilson was among the most adamantly and openly nationalistic of the framers, but in the subsequent state convention in that city, Wilson’s expression of his nationalism seems to have been colored by the expediencies of securing ratification.

As Berger stresses, Wilson made occasional reference to “the independent and sovereign States.”³¹ Indeed, on one occasion, Wilson stated that “by adopting this system we become a NATION; at present we are not one.” It is important, however, not to separate Wilson’s statements from the context in which they appear. Wilson went on to add that the “powers of our government [the Confederation Congress] are mere sound;” that in “the present situation of

²⁹ Quoting Ware, 3 U.S. at 232. Ten days after the Continental Congress adopted the resolution of independence, John Adams argued against state equality in voting in Congress on the ground that “we stand here as the representatives of the people.” The “individuality of the colonies is a mere sound,” he explained, and the “confederacy is to make us one individual only.” Soon thereafter James Wilson objected to the description of Congress as “a representative of states; not of individuals.” “We lay aside our [state] individuality, whenever we come here.” Debate in Continental Congress (July 12, 1776), in Phillip B. Kurland and Ralph Lerner, ed., 2 *The Founders’ Constitution* 89 (1987).

³⁰ James Wilson, *Considerations on the Power to Incorporate the Bank of North America* (1785), in James DeWitt Andrews, ed., 1 *The Works of James Wilson* 549, 558, 560 (1967). See also Farrand, 1 *Records* at 324 (cited in note 24) (according to Wilson, the United States became independent “not *Individually* but *Unitedly*”)(emphasis in original).

³¹ James Wilson, *Speech in the Pennsylvania Ratifying Convention* (Nov. 24, 1787) in John Bach McMaster and Frederick D. Stone, ed., *Pennsylvania and the Federal Constitution, 1787-1788* 218 (1888). See also *id.* at 219.

our country" (America, not Pennsylvania), "we" (Americans) cannot exert effectual national power.³² Wilson's point was that America lacked a national government capable of acting nationally.

Rather than abandoning his belief in national priority and sovereignty at the state convention, Wilson maintained it: "I consider the people of the United States as forming one great community,"³³ one in which "the citizens of United America" constituted the sole and singular sovereign.³⁴ While Wilson denied that the Constitution would annihilate the existence of separate state governments,³⁵ he was forthright in denouncing what he called "the common-place rant of State sovereignties,"³⁶ and in maintaining that the Confederation Congress was a genuine government, even if an ineffective one.³⁷ Indeed, Wilson's ascription of sovereignty to "the people" was an openly nationalistic position. He insisted both that the Declaration of Independence was, and that the Constitution if ratified would be, the work of "the people of the United States . . . forming one great community."³⁸ "This is the broad basis on which our independence was placed. On the same certain and solid foundation this system [the Constitution] is erected."³⁹

Wilson's opponents in the Pennsylvania convention were under no illusions about the "representations" Wilson was publicly making. Anti-Federalist William Findley complained: "Why is the sovereignty of the people always brought to view? There are 13 sovereignties in the United States, and 13 different governments."⁴⁰ Unlike Berger, Findley recognized the incompatibility of Wilson's statements with a state priority/state sovereignty understanding of the Union.⁴¹

³² Id. at 414-15 (Dec. 11, 1787).

³³ Id. at 316 (Dec. 4, 1787).

³⁴ Id. at 385 (Dec. 11, 1787).

³⁵ Id. at 322-25 (Dec. 4, 1787).

³⁶ Id. at 384 (Dec. 11, 1787).

³⁷ Id. at 322 (Dec. 4, 1787)(describing Congress as "a government of such insufficiency as the present is found to be"). See also id. at 302 (Dec. 1, 1787)(recognizing existence "hitherto" of "the federal government").

³⁸ Id. at 315-17 (Dec. 4, 1787). Observing that there "can be no compact unless there are more parties than one," Wilson dismissed the notion of government by compact as improperly applied to the Constitution, and ill suited to "the true principle of free government." Id. at 384-85 (Dec. 11, 1787).

³⁹ Id. at 317 (Dec. 4, 1787).

⁴⁰ James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 7, 1787), in Jensen, 2 Documentary History at 513 (cited in note 8).

⁴¹ One citation of a secondary source on the priority issue needs mention because it is of an article by the present reviewer. Berger cites my article apparently in support of his assertion that the consent of the Continental Congress was not "required for the colonists'

Berger's inadequate treatment of the historical evidence with regard to the question of state or national priority is paralleled by his handling of the issue of state sovereignty, but his specific methodological flaws are different. In the priority context, Berger often overlooks or makes questionable use of relevant data. On sovereignty Berger falls into a single, pervasive fallacy. He assumes—rather than shows—that whenever references to “sovereign[ty]” and related terms occur they can be interpreted to support his views of federalism. If the reference is to state “sovereignty” before the Constitution’s adoption, Berger assumes that the speaker or writer is endorsing a view of the states as completely independent and linked only by an alliance exercising a few powers based on agency (e.g., pp. 29-33). If the founder refers to state “sovereignty” after adoption, Berger assumes that the statement accepts an interpretation of the states as enjoying “exclusive” jurisdiction over local matters under the Constitution (e.g., pp. 59-65). This procedure demonstrably oversimplifies the complex and often contradictory meanings the founders attributed to the discussion of state “sovereignty.” In doing so, Berger seriously undermines the overall thesis of *The Founders’ Design*, since for him the issue of sovereignty is fundamental. It is the states’ pre-Constitution “sovereignty” that provides the basis for giving a narrow construction to federal power, and their post-Constitution “sovereignty” that explains their claim to exclusive jurisdiction over local matters.

One of the most considered uses of sovereignty language in the founding era stemmed from eighteenth century political theory. In every independent and “perfect” state, according to the theorists, there could be only a single, indivisible, supreme authority to which all other institutions were necessarily subject.⁴² Such a “sovereignty” could enter into alliances with other sovereigns, however,

formation of states” (p. 43 n.107). What I wrote was that “with the exception of a few ultranationalist Federalists, all the participants in the dispute over the Constitution’s ratification . . . regarded the Articles as a compact among the states as independent sovereigns, and the Confederation Congress as the agent, not the superior, of the states.” H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv.L.Rev. 885, 928-929 (1985)(footnote omitted). My statement, which concerns how the participants in the 1787-89 ratification debates viewed Congress as it existed under the Articles, manifestly has no relevance to the question of what authority the pre-Articles Congress had, or was thought to have, in the mid-1770s. I am indebted to Berger, however, for compelling me to reconsider, as I wrote this review, my statement that most of the founders “regarded. . .the Confederation Congress as the agent, not the superior of the states.” Nationalist views of Congress and the Confederation were actually far more widespread than I had realized.

⁴² See, e.g., J.J. Burlamaqui, 2 *Principles of Natural and Politic Law* 220-21 (1748).

without losing its supreme nature, its claim to independent nationhood, or its right to withdraw from such an alliance at its discretion.⁴³ There could be by definition no division of "sovereignty" in this sense, nor could two sovereigns wield authority concurrently over the same geographic area or governmental interests. The wording of the second of the Articles of Confederation clearly reflects this usage,⁴⁴ and it is frequently found in American political discourse of the 1780s. A supporter of a strong national government wrote in the summer of 1787 that Congress "ought to be the only sovereign, supreme, and absolute Authority, over, in, and throughout every Part of the United States,"⁴⁵ and opponents of ratification subsequently charged that such would be precisely the Constitution's effect. Thomas Tredwell told the New York state convention that the Constitution would destroy the states' sovereignty and dismissed as political chicanery Federalist protests that the Constitution divided sovereignty: "The idea of two distinct sovereigns in the same country, separately *possessed* of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference."⁴⁶ The continued existence of state governments with jurisdiction over local matters could not disguise, in Tredwell's opinion, the Constitution's effect on the locus of sovereignty: "The sole difference between a state government under this Constitution, and a corporation under a state government, is, that a state being more extensive than a town, its powers are likewise proportionably extended, but neither of them enjoys the least share of sovereignty."⁴⁷

Rawlins Lowndes similarly warned South Carolinians that adoption of the Constitution necessarily would sweep away the states' prior independence and sovereignty because the Constitu-

⁴³ Id. at 243-44.

⁴⁴ "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." Art. of Confed. art. II.

⁴⁵ Anonymous, Observations on the Articles of Confederation (July 27, 1787), in Jensen, 13 Documentary History at 181 (cited in note 8).

⁴⁶ Thomas Tredwell, Speech in the New York Ratifying Convention (July 2, 1788), in Elliot, 2 Debates at 403 (cited in note 19).

⁴⁷ Id. at 403. In the Massachusetts convention, Anti-Federalist Amos Singletary drew the same analogy between municipal corporations and states under the proposed Constitution, and bitterly accused the Constitution's supporters of trying to avoid admitting the obvious: "he wished they would not play round the subject with their fine stories, like a fox round a trap, but come to it." Amos Singletary, Speech in the Massachusetts Ratifying Convention (Jan 24, 1788), in id. at 101.

tion and the government established would be "sovereign over all."⁴⁸ Moreover, in a letter to Richard Henry Lee, the old revolutionary patriot Samuel Adams wrote: "I confess, as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a Federal Union of Sovereign States." The Constitution's adoption would mean that "the Idea of Sovereignty in these States must be lost." If the Constitution's location of sovereignty in the nation were accomplished, furthermore, Adams thought the very notion of the state "Sovereignties ought to be eradicated from the Mind; for they would be Imperia in Imperio justly deemed a Solecism in Politics."⁴⁹

In arguing for the Constitution's ratification, its supporters tended to avoid using the terminology of "sovereignty" in this high political sense for obvious reasons of political expediency,⁵⁰ but if pressed Federalists admitted that the Constitution was incompatible with state sovereignty of this type. Benjamin Rush told the Pennsylvania ratifiers that "A plurality of Sovereigns is political idolatry," and that the Constitution would make Americans proper political monotheists.⁵¹ A Massachusetts Federalist confessed that "I cannot conceive of a sovereignty of power existing within a sovereign power."⁵² Alexander Hamilton described opponents of adoption as "aim[ing] at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of State authority; at sovereignty in the Union and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*."⁵³

In *The Founders' Design*, Berger asserts that "political necessity" compelled the founders to abandon their belief that there could be only one sovereign "within the same limits" (p.50).⁵⁴ This claim is an overstatement: by Berger's own standards the remarks noted above to the contrary were "representations" to the ratifiers

⁴⁸ Rawlins Lowndes, Speech before the South Carolina Legislature (Jan. 17, 1788), in Elliot, 4 Debates at 287 (cited in note 19).

⁴⁹ Samuel Adams to Harry Alonzo Cushing (Dec. 3, 1787) in Harry Alonzo Cushing, ed., 4 The Writings of Samuel Adams 324 (1908).

⁵⁰ But see note 20 (quoting Charles Pinckney) and accompanying text.

⁵¹ Benjamin Rush, Speech in the Pennsylvania Ratifying Convention (Dec. 3, 1787), in Jensen, 2 Documentary History at 458 (cited in note 8).

⁵² E. Pierce, Speech in the Massachusetts Ratifying Convention (Jan. 23, 1788), in Elliot, 2 Debates at 77 (cited in note 19).

⁵³ Federalist 15, in Clinton Rossiter, ed., The Federalist Papers 105, 108 (1982).

⁵⁴ Quoting Alexander Hamilton, in Max Farrand, ed., The Records of the Federal Convention of 1787 258 (1911). See also (p. 51) (quoting Hamilton apparently rejecting this understanding of sovereignty).

and thereby direct evidence of the founders' views. At times prominent Federalists did back away from the proposition Berger describes, but on other occasions they maintained its validity.

A second usage of "sovereignty" was to refer to the possession of certain key governmental powers. Along these lines founding era Americans often identified the "sovereign" as the polity, or governmental body, authorized to deal with foreign affairs and issues of war and peace.⁵⁵ Lamenting the states' failure to comply with the decisions of "the Sovereign Power" (Congress), George Washington wrote in 1783 that "We are known by no other character among Nations than as the United States; Massachusetts or Virginia is no better defined, nor any more thought of by Foreign Powers than the County of Worcester in Massachusetts is by Virginia, or Gloucester County in Virginia is by Massachusetts."⁵⁶ At the Philadelphia convention, Rufus King remarked:

[t]he import of the terms "States" "Sovereignty" "*national*" "federal" had been often used & applied in the discussion inaccurately and delusively. The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign.⁵⁷

A third use of "sovereignty" often employed by the Constitution's supporters because it enabled them to sidestep politically troublesome issues was simply to designate a governmental body with legislative jurisdiction over something. In early 1787, William Barton described the Confederation Congress' legislative powers as those "rights of sovereignty" that had been "transferred" to it.⁵⁸ At the Pennsylvania state convention, Anti-Federalist William Findlay agreed: "The states have already parted with a portion of their

⁵⁵ A related use of "sovereignty" was as a label for the government possessing power "over the *purse* and the *sword*." Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), in Jensen, 2 Documentary History at 627 (cited in note 8). Thomas Tredwell asked the New York Convention delegates "[w]hat sovereignty, what power is left to [the state government] when the control of every source of revenue, and the total command of the militia, are given to the general government?" Elliot, 2 Debates at 403 (cited in note 19).

⁵⁶ George Washington to William Gordon (July 8, 1783), in Fitzpatrick, 27 Writings at 50-51 (cited in note 15).

⁵⁷ Farrand, 1 Records at 323 (cited in note 24).

⁵⁸ Barton, Propriety at 51 (cited in note 18).

sovereignty. It is now proposed to give more."⁵⁹ In *Federalist* 9, Hamilton wrote that the states both would be "constituent parts of the national sovereignty" by representation in the senate, and would retain "certain exclusive and very important portions of sovereign power."⁶⁰ Two years later John Adams explained that "In our constitution the sovereignty, that is, the legislative power, is divided into three branches."⁶¹

The final set of uses of "sovereignty" language that is of importance for our purposes seems to employ the term to refer to the interests of a state and to the state's ability to further those interests. Fisher Ames told the Massachusetts ratifiers that the state governments' equal representation in the Senate would have a "tendency to their preservation. The *senators* represent *the sovereignty of the states*; in the other house, individuals are represented." He added that the "state governments represent the wishes, and feelings, and local interests, of the people."⁶² James Iredell also regarded the Senate's structure as intended "to preserve completely the sovereignty of the states," and he glossed "that sovereignty" as "their interests, as political bodies."⁶³ Equal senatorial representation, Madison wrote in *Federalist* 62, was not the product of any belief in the abstract sovereignty of the states, but was "evidently the result of compromise. . . a part of the Constitution which is allowed on all hands to be the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.'" Only in this sense, of an accommodation of political interests, did Madison regard the Senate as "a constitutional recognition of the portion of sovereignty remaining in the individual states."⁶⁴

These varying uses to which references to state "sovereignty" could be put in late eighteenth century American political discussion rendered the term as much a source of confusion as clarity. Anti-Federalists criticizing the Constitution for abolishing state

⁵⁹ William Findley, Speech to the Pennsylvania Ratifying Convention (Dec. 5, 1787), in Jensen, 2 Documentary History at 502.

⁶⁰ *Federalist* 9 (Hamilton), in *The Federalist Papers* at 71, 76 (cited in note 53).

⁶¹ John Adams to Roger Sherman (July 18, 1789), in Charles Francis Adams, ed., 6 *The Works of John Adams* 431 (1851). The "three branches" are the two houses of Congress and the President.

⁶² Fisher Ames, Speech in the Massachusetts Ratifying Convention (Jan. 19, 1788), in Elliot, 2 Debates at 46 (cited in note 19).

⁶³ James Iredell, Speech in the North Carolina Ratifying Convention (July 7th, 1788), in Elliot, 4 Debates at 125, 133 (cited in note 19).

⁶⁴ *Federalist* 62, in *The Federalist Papers* at 376, 377-78 (cited in note 53).

“sovereignty” usually were objecting either to what they perceived as the Constitution’s transferral of absolute “sovereignty” (the first use discussed above) to the nation and national government, or else to the broad power over “purse and sword” that was to be granted to Congress. Federalist rejoinders that the Constitution recognized or preserved state “sovereignty” almost always meant either that state governments would continue to exist and wield some legislative powers, or that the Constitution’s structure was designed so as to protect the political interests of the states. The argument was thus never fully joined, a fact much to the Federalists’ benefit (as many Anti-Federalists were painfully aware⁶⁵) because it enabled them to assert both the supremacy of Congress (no “*imperium in imperio*”) and the continued “sovereignty” of the states.

Berger’s treatment of “sovereign[ty]” language frequently overlooks or misinterprets the varying uses which founding era Americans made of the terminology. For example, in attempting to downplay the significance of Rufus King’s assertion at Philadelphia that the “states were not ‘sovereigns’ in the sense contended by some,” Berger quotes King’s remark that “If the states therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it” (pp. 30-31). Similarly, Berger attempts to undermine Eldridge Gerry’s statement that “we never were independent States, were not such now, and never could be even on the principles of the Confederation,” by presenting three other observations by Gerry:

The States & the advocates for them were intoxicated with the idea of their sovereignty.

[Gerry] thought the community not yet ripe for stripping the states of their power.

[Gerry said of a congressional negative on state laws that] such a power as this may enslave the States. Such an idea will never be acceded to.

(p.31).

In Berger’s view, King and Gerry “recognize[d] the existence of sovereign States” (p.31); in the context of his book, Berger claims that King and Gerry agreed with Berger’s understanding of state sovereignty. This was clearly not the case. King and Gerry both flatly rejected the notion that independence was achieved by

⁶⁵ See note 47 and accompanying text.

states "sovereign and independent of each other" and linked by Articles "which merely set up a 'league'" (p.47). King's statement that the states "retained some portion of their sovereignty" while divesting "essential portions" used "sovereignty" as an equivalent to "legislative power" and contradicts Berger's "league" view of the Confederation. Under the Articles, King said, America was already "a Nation" as well as "a Confederacy," and Congress already possessed the power of enacting binding legislation in matters entrusted to it.⁶⁶

Berger similarly misinterprets the comments of Gerry quoted above. Gerry's remark about states and states' rights advocates being "intoxicated with the idea of their sovereignty" was the sneering dismissal of a viewpoint Gerry had just described as wholly fallacious; the comment about "stripping the states of their powers" was a warning about the political problems with strengthening the federal government as much as Gerry thought ought to be done; and the objection to a congressional negative was based on Gerry's belief that the negative was unnecessary—so the objection was unrelated to the question of whether the states were, or ever had been, "sovereign" in any sense.⁶⁷

* * * *

Berger's assertions about the founders' views on state priority and state "sovereignty" are seriously undermined by his treatment of the evidence. Because he regards these assertions as the fundamental historical underpinnings for his interpretations of federal power and state autonomy, problems with those claims put into question the overall thesis of *The Founders' Design*.

I do not wish to suggest that the opposite propositions to Berger's—that the nation was prior to the states, and that the states were not and are not "sovereign" in Berger's sense—can be demonstrated from the historical data. They cannot be. The fundamental problem with Berger's argument is that it assumes there must have been agreement on these matters and thus overlooks the fact that the evidence is irreconcilably divided. The same would be true of a nationalist argument to the contrary. The founders simply did not agree on which came first, nation or states, or on the locus of "sov-

⁶⁶ Farrand, 1 Records at 323-24 (cited in note 24). The reader should consult King's entire speech.

⁶⁷ Id. at 165. Gerry explained that he "thought a remonstrance agst. unreasonable acts of the States wd. reclaim them. If it shd. not force might be resorted to." Rather than "recogniz[ing] the existence of sovereign states" (p. 31), Gerry was suggesting that the federal government would be entitled to use *force* to overturn "unreasonable" state laws.

ereignty," whatever that might be.

They did not agree, in fact, on a great many important questions about federal power and state autonomy and no amount of reinterpretation or rearrangement of the evidence can make them do so.⁶⁸ As Martin Diamond wrote, "the Framers were not themselves unanimous regarding the actual character of the document they framed. Further, the Constitution was ratified on the basis of many understandings."⁶⁹ Nothing in *The Founders' Design* creates any need to reexamine Professor Diamond's conclusion.

II. THE FOUNDERS AND ORIGINAL INTENT

Berger is a prominent and prolific advocate of "the Jurisprudence of Original Intention."⁷⁰ Berger's version of intentionalism⁷¹ is particularly marked by three characteristics. First, Berger insists that the Constitution's meaning is wholly invariant: "what the Constitution meant when it left the hands of the Founders it means today" (pp.18-19). Neither precedent (p.179)⁷² nor long-established constitutional practice (pp.180-84), nor arguments from text and structure (unless the founders made them during the era of framing and ratification) (pp.116-17, 123-29), nor any type of progression or reinterpretation in constitutional thought (pp. 17-18), can establish or discover constitutional meaning. Second, there are in essence only two legitimate sources of constitutional meaning: "representations" made to the ratifiers during 1787-89 (pp. 70-

⁶⁸ Berger seems to think it is a scholarly virtue to "avow [] his own conclusions forthrightly" rather than to "leav[e] the reader adrift on a sea of conflicting opinions" (p. 6). In doing so, I suggest, Berger has imposed his conclusions on the founders' conflicting opinions in the interest of reaching a normative conclusion. In contrast, Professor Akhil Amar's important article on federalism, Akhil Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1987), is a recent demonstration that sensitive and responsible handling of the evidence can, despite the founders' disagreements, play a significant role in contemporary constitutional discourse.

⁶⁹ Diamond, *What the Framers Meant* at 41 (cited in note 9).

⁷⁰ This term comes from Meese, *Address* at 9 (cited in note 1).

⁷¹ There is no agreement on what to call the adherents of original intent. In this review I shall call Berger's views "intentionalism" and reserve the term "originalism" for the broader set of approaches that accord at least some authority to the Constitution's original meaning. (Berger's intentionalism is thus a particular type of originalism). The issues described in Section II of this review are also addressed in two recent, well-argued articles. See Robert Clinton, *Original Understanding, Legal Realism, and the Interpretation of the Constitution*, 73 *Iowa L.Rev.* — (forthcoming 1987); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses* (forthcoming). Although I do not fully agree with either Professor Clinton or Professor Kay, their articles are important contributions to the current discussion of originalism.

⁷² See, e.g., (p. 179) (Berger "prepared to overrule all decisions that departed from the original design").

71), and statements made by the framers in the Philadelphia convention (pp. 108-110).⁷³ Finally, Berger insists that his intentionalist understanding of constitutional interpretation was part of the "founders' design" (pp.15-17), by which he apparently means that the founders agreed that intentionalism was their "interpretive intention."⁷⁴ My primary interest in this section of this review is to address Berger's third historical proposition, but before doing so I will make two preliminary observations.

First, although Berger does not seem to recognize the fact, the contemporary legal question of whether to limit constitutional meaning to the "original intent" need not, and indeed cannot, be resolved by historical research. Addressing the question of "why should we, at a remove of 200 years, look to the Founders for guidance," Berger's reply is that, in effect, the question is meaningless: "We are not, of course, 'bound' by the Founders; rather the issue is who may revise the Constitution—the people by amendment or the judges, who are unelected, unaccountable, and virtually irremovable" (pp. 7-8)(footnote omitted). This reply is disingenuous: no one among the many judges, lawyers and scholars who reject Berger's intentionalism claims that judges may "revise the Constitution." The debate over intentionalism is a debate over *how* to interpret and obey the Constitution, not over *whether* to do so, and Berger's attempt to recast it so as to make his position correct by definition begs the question and is mere propaganda. Berger's other justification for intentionalism appears to be that the founders intended later interpreters to be intentionalists (pp.15-17). This is a circular argument and simply pushes the question of authority back one step ("why should we obey the founders' interpretive intention?"). History cannot prove—or disprove—that legitimate constitutional interpretation must be intentionalist because that is a legal, not a historical, question. Intentionalism might be legally obligatory, or politically sensible,⁷⁵ whether or not the foun-

⁷³ A surprising amount of space in *The Founders' Design* is taken up by quotations from secondary sources and judicial opinions, but it seems clear that in theory Berger would limit the interpreter to statements by framers and ratifiers. Berger occasionally makes textual arguments of the sort traditional in common law interpretation, (pp. 123-24) (wholly textual argument, citing Dr. Johnson's dictionary, on the meaning of "commerce"), but again he seems committed in theory to rejecting the validity of such arguments (pp. 116-17) (criticizing Justice Story for relying on "rules of grammar, punctuation, and rules of construction" rather than using original intent history).

⁷⁴ For this useful concept, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L.Rev. 204, 215-16 (1980).

⁷⁵ Attorney General Meese's adherence to intentionalism, for example, seems grounded in prudential concerns about the legitimacy of judicial review in a constitutional democracy.

ders thought so.

My second observation is that Berger wholly ignores the fundamental evidentiary problems with the historical materials which he invokes. In a major article, James Hutson has argued persuasively that the records of the Constitution's framing and ratification vary wildly in their reliability, with the records of the state convention debates and of the legislative history of the Bill of Rights being exceptionally unreliable.⁷⁶ By themselves, Hutson's conclusions suggest that Berger's intentionalism is radically unworkable because we do not have the data with which to carry it out.

A few years ago, I published an article that contradicted Berger's claim that the founders agreed that the Constitution's meaning is invariant and discoverable only by investigation of the statements of the framers and ratifiers: the appendix of *The Founders' Design* is a shortened version of Berger's defense of his views (pp. 193-201).⁷⁷ In my study I concluded that the founders' use of terms such as "original intent" and "intent of the framers" was not identical to that of modern constitutionalists. Those expressions retained for the founders the meaning they had acquired as terms of art in the common law tradition of interpretation. The central concept—the goal—of common law interpretation was indeed what the common lawyers called "intention." John Marshall wrote in 1819 that he could cite from common law sources "the most complete evidence that the *intention* is the most sacred rule of interpretation."⁷⁸ But the undisputed centrality of "intention" is in many ways a hindrance to our understanding of the common law mode of interpretation, for on this issue we are almost irresistibly tempted to import twentieth century meaning into eighteenth century discourse.

The common lawyers and their followers among the founders often sounded remarkably like contemporary intentionalists. They referred to the "original intent" or "intention," the "intent of the framers," and so on. They also, with a distinctly less modern air,

See Meese, Address (cited in note 1).

⁷⁶ See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex.L.Rev.* 1, 12-24, 35-38 (1986).

⁷⁷ My article is Powell, 98 *Harv.L.Rev.* 885 (cited in note 41), and the full version of Berger's critique is Raoul Berger, "Original Intention" in *Historical Perspective*, 54 *Geo.Wash.L.Rev.* 296 (1986). To be fair to Berger, I shall refer freely to his longer discussion in the article, with which *The Founders' Design* is in perfect accord.

⁷⁸ John Marshall, *A Friend of the Constitution*, *Alexandria Gazette* (July 2, 1819), in Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland*, 155, 167 (1969).

cited the "intention of the Constitution," the "intent of the states," and the "intention" (used absolutely). In my study, I concluded that regardless of whether the word was modified by "of the framers," or "of the states," or "of the Constitution," or was used absolutely, "intention" was an attribute or concept attached primarily to the document itself, and not elsewhere. The debates of framers and ratifiers, the attributed preferences of states or people, all of these were at most evidence of the Constitution's own intention. They were persuasive (or not), but—as in the common law tradition—not directly authoritative.

The "intent[ion]" of a document, I went on to argue, referred to the meaning an interpreter was entitled to derive from the document using the common law's techniques of construction. This meaning might or might not be the meaning consciously intended by the document's makers. An excellent example of this (to us curious) usage of "intent" is found in Alexander Hamilton's 1791 opinion on the constitutionality of a national bank. Replying to Thomas Jefferson's allusion to the Philadelphia convention's decision not to include an explicit incorporating power in Article I,⁷⁹ Hamilton denied the decision's significance: Jefferson, he wrote, "will not deny, that whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction." It was no objection, Hamilton added, that the interpreter then might fix on some meaning for the document contrary to its framers' purposes. "Nothing is more common than for laws to *express* and *effect*, more or less than was intended" by their makers.⁸⁰

This denial of any equation between the authoritative intention of the text and the personal intentions of its makers was perfectly compatible, furthermore, with the use of language about "original" or "framers'" intent. At one point in his bank opinion Hamilton introduces a statement of (his view of) the Constitution's meaning with the words "it was the intent of the convention." My

⁷⁹ Jefferson's argument thus was of the modern intentionalist ilk. To the extent that my article has been read to suggest that such arguments were never made in the founding era, a position I did not in fact take, see, e.g., Powell, 98 Harv.L.Rev. at 915 n.153, 918-921 (cited in note 41), I welcome my colleague Robert Clinton's reminder that they were occasionally put forward. See Clinton, 73 Iowa L.Rev. — (cited in note 71). My point was that the modern type of intentionalist argument was rather rare before the 1830s.

⁸⁰ Alexander Hamilton, Opinion of the Constitutionality of an Act to Establish a National Bank (1791), in Harold C. Syrett, ed., 8 The Papers of Alexander Hamilton 97, 111 (1965).

reading of the evidence is that Hamilton was expressing the ordinary view, while Jefferson was adopting a fairly unusual argumentative technique.

Several points about my thesis should be stressed. First, I did not argue that common lawyers or founders influenced by them had no interest in the original historical setting of documents. Indeed, they included "the law [as it] was taken at the time" the document was made⁸¹ and "our ancient authors" (contemporaneous or near contemporaneous commentators on the document)⁸² as appropriate sources of interpretive enlightenment, along with "our yeare books" (judicial precedents) and "constant experience" (practice under a document).⁸³ The statements of influential common lawyers such as Lord Coke that "Acts of Parliament. . . are to be construed according to the intent and meaning of the makers of them"⁸⁴ must be read in light of their explanations of how that "intent and meaning" was to be discovered: Coke, for example, wrote that "the best expositors of this [Magna Carta] and all other statutes are our bookes and use or experience,"⁸⁵ or, in our terms, precedent and administrative practice.

On occasion, as in Jefferson's bank opinion, individual founders invoked the history of the Constitution's creation as would a modern intentionalist. More frequently, however, the argument from history was an appeal to a shared sense of society's past and was based on the implicit assumption that a constitution necessarily reflects and embodies that past. Congressman William Smith made a characteristic statement in the House of Representatives in 1796. He first asserted that the Constitution itself "must be our sole guide" and then went on to invoke "the general sense of the whole nation at the time the Constitution was formed."⁸⁶ During the same debate, Smith also remarked that in construing statutes, the Supreme Court did not "call for the Journals of the two Houses, or the report of the Committee of Ways and Means, in which the law originated, or the debates of the House on passing

⁸¹ Edward Coke, *The First Part of the Institutes of the Laws of England* 8b (1809). See Powell, 98 *Harv.L.Rev.* at 898-99 (cited in note 41).

⁸² Edward Coke, *The Second Part of the Institutes of the Laws of England* 181 (1797).

⁸³ *Id.*

⁸⁴ *Magdalen College Case*, 11 *Co.Rep.* 66b, 73b, 77 *Eng.Rep.* 1235, 1245 (1615).

⁸⁵ Coke, *Second Part of the Institutes* at 25 (cited in note 82). See also *id.* at 386 ("judicial precedents, and the right entries of pleas upon this (or any other) statutes are good interpreters of the same; and of questions that have been, or may be moved thereupon").

⁸⁶ 5 *Annals of Cong.* 495 (Mar. 10, 1796)(remarks of Rep. William Smith).

the law.”⁸⁷ This combination of seemingly incompatible views of legal interpretation can be found again and again in eighteenth and early nineteenth century discussions; my study is an attempt to explain how the founders understood and reconciled them.

The second point that may need to be restated is that the common law tradition maintained a fine balance between interpretive restraint and interpretive freedom. On the one hand, the tradition was itself a rich source of wisdom on how interpreters *ought* to construe texts, and was regarded by those who accepted it as legally binding.⁸⁸ On the other hand, the central role of precedent in the tradition⁸⁹ entailed a willingness to “develop” the meaning of a document by successive judicial decisions, each building on the previous precedents. As Coke wrote, “judicial precedents” were considered “good interpreters” of any statute and were to be used in any future “questions that. . . may be moved thereupon.”⁹⁰ That the result might be to open or widen the gap between the

⁸⁷ 5 Annals of Cong. 462 (Mar. 9, 1796). To a modern lawyer eighteenth and early nineteenth century lists of the sources for interpreting statutes make a startling omission: they customarily do not include legislative history. Berger twice suggests that this is because legislative history did not exist, Berger, 54 *Geo.Wash.L.Rev.* at 307, 309 (cited in note 77), but that statement is a plain historical error. Debates in Parliament had been reported since the late 1600s, and their use in British constitutional and political debate was well-established in the eighteenth century. See, e.g., Carl Stephenson and Frederick George Marcham, ed., *Sources of English Constitutional History* 624-27 (1738 House of Commons debate over the contemporaneous practice of publishing the House’s debates), 685-87 (similar 1778 debate)(1937); Caroline Robbins, *The Eighteenth-Century Commonwealthman* 54-55 (1959) (reports of parliamentary debates and proceedings used in political controversy from late 1600s-on). Deliberations in the federal House of Representatives were published from the beginning, see, e.g., James Madison to Thomas Jefferson (May 9, 1789) in Charles F. Hobson and Robert A. Rutland, ed., 12 *The Papers of James Madison* 142 (1979)(Madison remarks that he has enclosed “the first No. of the Congressional Register” and complains about its accuracy). See also John W. Johnson, *American Legal Culture, 1908-1940* 73 (1981)(United States has published various sources of Congressional legislative history since 1774). These were not “official” reports in the modern sense, but neither were early case reports. Late eighteenth century lawyers were well aware of legislative history; they simply did not regard it as particularly valuable evidence of a statute’s meaning. See also Powell, 98 *Harv.L.Rev.* at 900-01 (cited in note 41) (tracing increasing hostility to use of legislative history in early nineteenth century).

⁸⁸ Powell, 98 *Harv.L.Rev.* at 894 (cited in note 41). Berger’s assertion that I attributed a belief in judges’ “unfettered discretion” to the founders, Berger, 54 *Geo.Wash.L.Rev.* at 334 (cited in note 77), is a patent misreading of my argument. See, e.g., Powell, 98 *Harv.L.Rev.* at 898 (common law did not view construction as “an unstructured exercise of judicial choice”).

⁸⁹ Powell, 98 *Harv.L.Rev.* at 899 (cited in note 41).

⁹⁰ The Second Part of Coke’s *Institutes*, in which he laboriously investigated “the intention” and “meaning” of the old English statutes from Magna Carta on is one long illustration of the freedom, within the tradition’s techniques of interpretation, that common lawyers exercised in interpreting documents. Coke, *Second Part of the Institutes* at 286 (cited in note 82).

official "intent" of the statute and the subjective purposes of its makers was not of primary concern to Coke. Coke's contemporaries (and later critics of the common law) were not unaware of this possibility,⁹¹ and their attacks on traditional legal interpretation contributed to a cultural suspicion of "interpretation" widespread in late eighteenth century America.⁹²

Intimately related to the common lawyers' reliance on precedent in interpretation was their acceptance of the notion of "liquidation:" a document's meaning might become clearer and more certain over time by successive decisions that settled ambiguities and uncovered implications. Commenting to a correspondent on the tasks of the First Congress, Madison wrote: "Among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."⁹³

Settled interpretations of a text became part of its official meaning or "intent." Judge Joseph Hopkinson wrote of John Marshall that it had fallen to Marshall to "develope, define, and establish, the true and fundamental powers and character of our incomparable government." The principles Marshall applied in interpreting the Constitution "thus bec[ame] part of itself, and necessary to its healthful, durable, and consistent action."⁹⁴ This recognition that the interpretive process legitimately might accord meanings to a text not originally expected or agreed upon by the text's makers coexisted with professions of adherence to "the intent of the framers" and references to the value of contemporaneous evidence because the common lawyers and founders lived before the modern era's loss of faith in the inherent meaning of words. An interpreter conscientiously using the proper tools of interpretation (common lawyers and their critics disagreed on what these were, of course) might recognize aspects of a document's tex-

⁹¹ King James I, Coke's master and great opponent, angrily commented that "If the Judges interpret the lawes themselves and suffer none else to interpret, then they may easily make of the lawes shipmens hose." Quoted in Howard Nenner, *by Colour of Law* 72 (1977). Criticism of "activist" courts and judicial imperialism long predates modern intentionalism.

⁹² See Powell, 98 *Harv.L.Rev.* at 889-894 (cited in note 41) (tracing the history of "the cultural rejection of interpretation"). In his response to my study, Berger showed little interest in these early critics of construction, perhaps because they were clearly not intentionalists.

⁹³ James Madison to Samuel Johnston (June 21, 1789), in *Hobson*, 12 *Papers* at 250 (cited in note 87).

⁹⁴ Joseph Hopkinson, *Memoir of Chief Justice Marshall* (1837), in John W. Brockenbrough, ed., 1 *John Marshall's Circuit Court Decisions* xiii (1837).

tual meaning that were unclear to its makers without thereby being disobedient to the "original intent."⁹⁵

The third point I wish to make about my thesis is that it is an essay in global explanation, one that makes sense of the entirety of the founding era discussions over how to interpret the Constitution. In particular, it is a proposal about how to understand the language of "intent" in those discussions. There is no disagreement over the proposition that the common lawyers, and most of the founders, thought that interpretation ought to subserve a document's "intent;" indeed, the starting point of my argument is the observation that references to "intent" were legion.⁹⁶ The debate instead is over what "intent" meant. The mere piling up of additional examples of the term's appearance self-evidently does not answer, or even address, the question.⁹⁷

⁹⁵ The analogy Berger implicitly draws between constitutional interpretation and the proper understanding of a personal letter or verbal statement, see (p. 47) and Berger, 54 *Geo. Wash.L.Rev.* at 315 (cited in note 77), is inapposite. It is usually inappropriate to contradict a speaker's or writer's explanation of her meaning because as a communicator she (presumably) has a particular intent. Even in private situations, however, the law does at times "insist in the teeth of the speaker's own explanation that he meant exactly the opposite:" (p. 17) a principal may be estopped from denying a power that her agent reasonably thought she was given, and courts regularly insist that the "intent" of contracting parties is determined "objectively." In interpreting a statute or the Constitution there is, of course, no individual person whose intentions or purposes are authoritative. In looking for an "original intent" we necessarily are constructing from the evidence the meaning that we believe a majority of the instrument's makers likely endorsed, or would have endorsed. Berger regards the debates of the framers and ratifiers as virtually the only legitimate sources for doing so, while founding era Americans did not. Given the unreliability of the evidentiary record, see text accompanying note 76, and the difficulty of interpreting those records even when trustworthy, it is not clear that the founders were unwise.

⁹⁶ See, e.g., Powell, 98 *Harv.L.Rev.* at 894 (cited in note 41) (the central concept in common law and early constitutional interpretation was "intention").

⁹⁷ An example of Berger's all-too-frequent assumption that any reference to "intent" is an endorsement of intentionalism is his criticism of my reading of Blackstone's views on the interpretation of wills. Compare Powell, *id.* at 896-97, with Berger, 54 *Geo.Wash.L.Rev.* at 305 (cited in note 77). In discussing the common law approach to interpreting wills, I noted the traditional insistence on paying special attention to the testator's intent, but I suggested that this apparent concern for subjective intentions was primarily a presumption against "hypercritical readings of the words of unlearned laypersons, not [an endorsement of] an extratextual search for the purposes underlying those words." I cited Blackstone in support:

Blackstone's description of the proper approach to the construction of a will is typical: "the construction [should] be favorable, and as near the minds and apparent intents of the parties, as the rules of law will admit." But Blackstone did not mean that in interpreting what lay in the testator's mind a court was free to disregard the rule of law governing the "apparent intent" of the testator's words: "the construction must also be reasonable, and agreeable to common understanding."

Powell, 98 *Harv.L.Rev.* at 896-97, quoting William Blackstone, 2 *Commentaries* *307 (italics omitted). Berger claims that Blackstone's subsequent citation of the maxim "*verba intentioni debent inservire*," words ought to be made subservient to the intent, demonstrates

One final observation: my thesis is *not* an argument about how we *ought* to interpret the Constitution.⁹⁸ It is irrelevant to the question I addressed—what founding era Americans thought about constitutional interpretation—whether I, or Berger, think their views were wise, prudent, or sensible.⁹⁹

* * * *

The relative plausibility of my thesis and of Berger's critique of it properly can be assessed only by reading both articles in their entirety. In this review, I shall reexamine one particular point: the interpretive views of James Madison.

Central to Madison's views was the distinction he drew between the public meaning (the legally binding "intent") of a public document and the personal opinions of the individual persons who wrote or adopted it. Madison, for example, relied on this distinction in correspondence concerning President Andrew Jackson's use of an 1817 veto message written by Madison. Jackson's understanding of the message was, Madison wrote, contrary to "the meaning of which J.M. retains the consciousness," although Madison admitted that "the entire text" of the 1817 document might have conveyed his meaning faultily. In any event, as a state paper, the message's public meaning might well be what Jackson thought:

On the subject of the discrepancy between the construction put by the Message of the President [Jackson] on the veto at 1817 and the intention of its author, the President will of course consult his own view of the case. For myself, I am well aware that the document must speak for itself, and that that

that I misread Blackstone. Berger fails to note that Blackstone then goes on immediately to quote a maxim forbidding interpretation "*contra verba*," against the literal meaning where there is no ambiguity in that meaning. Blackstone's meaning seems quite clear to me and in perfect accord with my citation of him: while insisting that, as in all legal interpretation, a will must be construed in accordance with the rules of construction and the usual, legal meaning of words, the interpreter ought to bear in mind the likely possibility that the testator was unskilled in expression. I am at a loss to explain Berger's implication that I asserted that Blackstone was "making a break with the past." Berger, 54 *Geo.Wash.L.Rev.* at 305. On the contrary, I stated that Blackstone's views were "typical." Powell, 98 *Harv.L.Rev.* at 896.

⁹⁸ See Powell, 98 *Harv.L.Rev.* at 948 (noting that "[t]here may well be grounds to support either" intentionalists or their critics).

⁹⁹ See, e.g., Berger, 54 *Geo.Wash.L.Rev.* at 329-30 (cited in note 77) (stating that "representations to the ratifiers" cannot be discounted by the advocates' zeal). It was James Madison who warned against overreliance on sources such as *The Federalist* because they might be biased by "the zeal of advocates." See Powell, 98 *Harv.L.Rev.* at 936 (cited in note 41). Berger's quarrel is with Madison.

intention cannot be substituted for [the meaning derived through] the established rules of interpretation.¹⁰⁰

Madison was a vigorous champion of the traditional common law belief that the meaning of legal documents was uncertain until settled by decisions. Replying to Spencer Roane's bitter denunciation of *McCulloch v. Maryland* as a judicial amendment of the Constitution, Madison insisted that the Constitution's meaning, "so far as it depends on judicial interpretation," is established by "a course of particular decisions."¹⁰¹ And, he continued, this had been understood at the time of the Constitution's creation:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter. . .and that it might require a regular course of practice to liquidate and settle the meaning of some of them.¹⁰²

Madison's belief in the distinction between public and private meaning, and of the legitimacy of "liquidating" the Constitution's meaning by ongoing interpretation led him to accept the possibility that at times the Constitution's public, legally binding meaning might diverge from his own personal view of what the text means

¹⁰⁰ See Powell, 98 Harv.L.Rev. at 935-36 (cited in note 41), quoting James Madison to Martin Van Buren (July 5, 1830). Berger's treatment of this correspondence is curious: his only comment is that "Madison did not refer to an 'intention' simultaneously recorded with the 'text'—a 'contemporaneous interpretation'—but to his own 'consciousness' years later." Berger, 54 Geo.Wash.L.Rev. at 324 (cited in note 77). Madison, of course, was making a direct assertion that he remembered what he meant in 1817 ("meaning of which J.M. retains the consciousness") and, indeed, insisting that his memory of his meaning was in accord with "the general understanding" in 1817. Id. at 936 n.261, quoting James Madison to Martin Van Buren (June 3, 1830). In other circumstances, Berger insists that testimony from memory by a framer of a document is direct evidence of "original intent." Berger, 54 Geo.Wash.L.Rev. at 318-19.

¹⁰¹ See Powell, 98 Harv.L.Rev. at 939 n.280 (cited in note 41), citing James Madison to Spencer Roane (Sept. 2, 1819).

¹⁰² See id. at 939 n.280, 940-41 (cited in note 41), quoting James Madison to Spencer Roane (Sept. 2, 1819). Madison was not suggesting that whatever Marshall might say in an opinion was by definition unquestionable: Madison was intensely concerned with proper constitutional interpretation. See, e.g., id. at 914 (Madison concerned "that Congress should interpret well"). But Madison in this letter and elsewhere clearly accepted the binding nature of "a course" of governmental practice. See, e.g., Federalist 37, in *The Federalist Papers* at 224, 229 (cited in note 54) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications") Berger quotes Madison's letter to Roane without comment. See Berger, 54 Geo.Wash.L.Rev. at 330-31 (cited in note 77).

or its framers had meant. As a member of the First Congress, Madison had opposed Hamilton's national bank bill, primarily because he thought it could be justified only by a mode of construction that would render federal power limitless, but also in part because he believed that the Philadelphia framers had purposefully excluded the power to charter corporations from Article I.¹⁰³ A quarter century later, President Madison signed the bill chartering a second national bank.

Against accusations that he had changed his mind or acted against his view of the Constitution's proper interpretation in signing the bill, Madison insisted that "the inconsistency is apparent only, not real." Madison's "abstract opinion of the text" remained that Article I ought not to be read to authorize a national bank. But it was also his "early and unchanged opinion" that individual views of the Constitution's meaning ("solitary opinions") had to give way to "authoritative, deliberate, and continued decisions," for such decisions "fix the interpretation of law." Since Congress, the president and the courts had acted for two decades on the presumption that the First Bank was constitutional, Madison bowed to their construction. "I did not feel myself, as a public man, at liberty to sacrifice all these public considerations to my private opinion."¹⁰⁴ For Madison, "private opinion," even personal knowledge of the framers' deliberations, could not supplant sustained "official construction."¹⁰⁵

Among the various tools of interpretation that Madison accepted as legitimate were what he called "contemporary expositions,"¹⁰⁶ commentary on the Constitution's meaning by its supporters at Philadelphia, in the state conventions and in publications such as *The Federalist*, but Madison did not regard this evidence as controlling in and of itself. He wrote of the fram-

¹⁰³ See Powell, 98 Harv.L.Rev. at 939 n.278 (cited in note 41). Madison's invocation of the framers' discussions as even subsidiary authority was unusual for him. His more common view was that "the sense of the Convention" was neither "required or admitted as material in any Constitutional question." 5 Annals of Cong. 776 (April 1, 1796).

¹⁰⁴ Powell, 98 Harv.L.Rev. at 940, quoting James Madison to Marquis de LaFayette (Nov. 1826). Berger quotes two of Madison's remarks, and then baldly asserts that Madison was wrong. See Berger, 54 Geo.Wash.L.Rev. at 334 (cited in note 77) ("Much as I revere Madison, I find this statement flawed.") Berger proceeds to argue against Madison's views on the basis of Berger's understanding of constitutional interpretation. However interesting Berger's evaluation of whether Madison's position was sensible may be for an understanding of Berger's opinions, it is completely irrelevant to an understanding of what Madison thought.

¹⁰⁵ See Powell, 98 Harv.L.Rev. at 941-42 n.294 (cited in note 41), quoting James Madison to C.J. Ingersoll (Nov. 27, 1827).

¹⁰⁶ Id. at 938 n.273, quoting James Madison to N.P. Trist (Mar. 2, 1827).

ers' debates, for example, that they were at most "presumptive evidence of the general understanding at the time of the language used."¹⁰⁷ Although he regarded the proceedings of state ratifying conventions as of greater theoretical value,¹⁰⁸ he drew a distinction between the directly binding "intention of the States" expressed through the conventions' formal acts¹⁰⁹ and the secondary evidence afforded by the convention debates. As he wrote one correspondent, the interpreter's goal was the meaning given the text "by the Conventions, or rather, by the people, who through their Conventions, accepted and ratified" the text.¹¹⁰

Madison's interpretive theory, in the end, rested on an unrelenting insistence that the Constitution is the act of the people, who gave it force by ratifying it in state conventions and continue to interpret it authoritatively through their constitutional organs of expression. It was the "construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning,"¹¹¹ and not the opinions of any individual, wherever and whenever expressed, that was for Madison authoritative.

III. CONCLUSION

Federalism: The Founders' Design is plagued by a variety of specific failings in historical method. Berger is far too ready simply to assume that the existence of particular words, "sovereignty" or "intent," for example, signals the acquiescence of the speaker or writer in Berger's understanding of the those terms and their im-

¹⁰⁷ Id. at 939 n.278, quoting James Madison to M.L. Hurlbert (May 1830).

¹⁰⁸ Id. at 937-38.

¹⁰⁹ For discussion of Madison's and Jefferson's understandings of the concept of "the intention of the states," see id. at 930-34.

¹¹⁰ Id. at 938 n.272, quoting James Madison to Andrew Stevenson (Nov. 27, 1830).

¹¹¹ Id. at 940, quoting James Madison to Marquis de LaFayette (Nov. 1826). Berger quotes Madison's remark that "there has been a fallacy" in confounding a question whether precedents could *expound* a Constitution, with a question whether they could *alter* a Constitution." Berger, 54 Geo.Wash.L.Rev. at 335 (cited in note 77), quoting James Madison to N.P. Trist (Dec. 1831). No one, including myself, has suggested that Madison thought precedent could "alter" the Constitution. Powell, 98 Harv.L.Rev. at 941, nn.293-94 (cited in note 41) (discussing Madison's resistance to "unwarrantable" and "novel" construction.) The range of legitimate constructions Madison recognized included *McCulloch v. Maryland* and *Gibbons v. Ogden*. See id. at 941 n.294, quoting James Madison to C.J. Ingersoll (Nov. 27, 1827)(expressing confidence that the barrier against constructive usurpation was "happily too strong in the text of the Instrument, in the uniformity of official construction, and in the maturity of public opinion, to be successfully assailed"). Berger, in contrast, attacks both *McCulloch* and *Gibbons*. See (pp. 108-10) (suggesting that *McCulloch's* approval of a national bank was mistaken), and (pp. 123-25, 133-39) (suggesting that *Gibbons's* definition of "commerce" was mistaken).

plications. As a consequence, he often misreads the evidence, flattening out distinctions and disagreements, and imposing a uniformity of "design" that is of his own making. The main theme of the book amounts in fact to the remarkable assertion that in the 1980s we can determine that one great body of founders' opinion—the views of the Jeffersonian Republicans—was "right," and the other, Federalist perspective, was "wrong." The underlying assumption that the founders "really" had agreed in 1787-88 on issues of interpretation about which they immediately fell into intense disagreement in 1789 is inherently implausible, and was known to be false by the founders' contemporaries. In exasperation, and with some obvious hyperbole, a political writer asserted in 1801 that of the Constitution's makers, "neither two of them can agree to understand the instrument in the same sense."¹¹² Berger's apparently overriding goal of enunciating a single "founders' design" leads him to overlook or deny the existence of principled disagreement among the founders. Ironically, Berger's views also lead implicitly, but inexorably, to the conclusion that some of the most distinguished founders perpetrated "fraud" (pp. 102, 117) on their contemporaries by asserting constitutional views that contradicted their own knowledge of the "founders' design."¹¹³

Perhaps the most fundamental of the book's problems lies not in specific deficiencies of execution, but in its author's alienation from the world that he was investigating. Amidst all of their strident political arguments, Americans of the founding era overwhelmingly shared a common faith in the meaningfulness of words,¹¹⁴ and (as Professor Sherry demonstrates in her excellent article elsewhere in this issue)¹¹⁵ of public discussion about the rights and duties of political morality. Berger, on the other hand,

¹¹² An Impartial Citizen, *A Dissertation on the Freedom of the Press* (1801), in Charles S. Hynemen and Donald S. Lutz, ed., *2 American Political Writings During the Founding Era* 1128 (1983).

¹¹³ George Washington, for example, signed the national bank bill into law and proposed a national university, both actions that Berger thinks were directly contrary to the "original intent." See (pp. 74 n.125) (on the University), (pp. 108-110) (on the bank). If, as Berger also asserts, the founders agreed that "original intent" should control constitutional interpretation, Washington (who, as Berger points out in his earlier article, enjoyed both "his own knowledge of the Philadelphia Convention's views" and custody of the convention's official journal, Berger, 54 *Geo.Wash.L.Rev.* at 318-19 (cited in note 77)) knowingly or negligently approved unconstitutional acts by Congress.

¹¹⁴ See, e.g., the extended textual arguments over the meaning of "necessary" and "proper" in the bank opinions of Jefferson and Hamilton.

¹¹⁵ Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U.Chi.L.Rev.* 1127 (1987) (demonstrating that the founders regarded natural law as both discernible and judicially enforceable).

accepts the widespread modern assumption that words have lost their meanings¹¹⁶ and that public discussion of right and wrong among those who disagree is an endless dispute over opinion.¹¹⁷ Like others, Berger's response to the disappearance of an objective Constitution and of the traditional practices of textual interpretation and moral discourse that were applied to it, is to resort to the history of the Constitution's origins.¹¹⁸ But Berger's presuppositions are so thoroughly modern that he cannot perceive the radically different assumptions of the founders. *Federalism: The Founders' Design* tells us a great deal about how a contemporary lawyer might use "original intent" in writing a brief on behalf of state autonomy, but it is at best a partial and distorted portrait of the founders' views on federalism, and on the task of constitutional interpretation.

¹¹⁶ I have borrowed this expression, of course, from James Boyd White, *When Words Lose their Meaning* (1984).

¹¹⁷ I discuss the modern loss of faith in "constitutional objectivism" in H. Jefferson Powell, *Constitutional Law as Though the Constitution Mattered*, 1986 *Duke L.J.* 915.

¹¹⁸ See, e.g., Rehnquist, 54 *Tex.L.Rev.* 693 (cited in note 1).