The Case for Original Intent

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Abstract

This Article seeks to situate the constitutional culture's heavy reliance on the Convention debates within an academic environment that is generally hostile to original intent arguments. The Article argues that intentionalist-friendly sources like the Convention records and The Federalist *remain important not because they supply evidence of original meaning but rather because the practice of advancing historical arguments is best understood as a rhetorical exercise that derives persuasive authority from the heroic character of the Founding generation. This exercise fits within a long tradition of originalist argument and need not be abandoned in the quest for a more perfect originalism.*

Table of Contents

Introduction

Originalism has been running away from its past. Professor H. Jefferson Powell wrote in 1985 that constitutional actors from as early as the nullification debates of the 1830s "expressed their views as explications of the 'original intent' of the framers,"[1] and that "[b]y the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation."[2] Powell took intentionalism as his subject because it was, at the time, being offered by "interpretivists"[3] like Professors Raoul Berger and Attorney General Edwin Meese as a salve to liberal judicial activism. Berger, whom

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1 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 945–46 (1985).

2 *Id*. at 947.

3 Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 705–07 (1975).

Cass Sunstein called "the engineer of originalism as a serious approach to constitutional interpretation,"[4] offered in *Government by Judiciary*, an extended defense of "[e]ffectuation of the draftsman's intention" in constitutional law.[5] Meese famously directed the Reagan Justice Department to pursue a "jurisprudence of original intention."[6]

And yet there was U.S. Court of Appeals Judge Antonin Scalia, just one year after Powell's canonical article and three days away from being announced as a Supreme Court nominee,[7] saying that he "ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[8] The appropriate inquiry, Scalia said, is into "the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended."[9] Today, most academic originalists and even some living constitutionalists[10] say that constitutional interpretation should proceed, first and foremost, from the original meaning of the text at issue. Even as originalism has assumed a privileged place within constitutional theory discourse, intentionalism is in a bad way.[11]

Here's the puzzle then. This Article is part of a symposium celebrating the centennial of Max Farrand's *The Records of the Constitutional Convention of 1787*.[12] Farrand's *Records* is the most comprehensive collection of primary documents chronicling the deliberations in Philadelphia during the summer of 1787. The *Records* is,

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4 Cass Sunstein, *Debate on Radicals in Robes*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 287, 293 (Steven G. Calabresi ed., 2007).

5 RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 365 (1977).

6 Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464–65 (1986).

7 *See* Bernard Weinraub, *Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court*, N.Y. TIMES, Jun. 18, 1986, at A1.

8 Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 106 (1987).

9 *Id.* at 103.

10 *See* JACK M. BALKIN, LIVING ORIGINALISM 3–4, 21 (2011).

11 *But see* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 163 (1999); Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (1996); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009).

12 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

along with *The Federalist*, one of the two main sources of the intentions of the Constitution's drafters. Given the limited relevance of those intentions to the theories advanced by both originalists and living constitutionalists, it is a wonder why constitutional theorists should so fête the anniversary of Farrand's *Records*. It is a particular wonder why we should do so through an event whose keynote speaker was Justice Scalia, the person most responsible for marginalizing the relevance of the *Records* to modern constitutional theory.

This Article offers a solution to the puzzle. It argues, in brief, that we celebrate the centennial of Farrand's *Records* for the same reason judges consistently cite the *Records* and *The Federalist* in opinions: original intent not only matters but it matters more than original meaning. And well it should. As many original-meaning originalists have themselves emphasized, the practice of resolving constitutional cases is distinct from the practice of ascertaining the meaning of the words of the Constitution.[13] The question of what a text signifies goes to the text's meaning; the question of the degree to which it should govern cases and controversies goes to the text's authority.[14] Many originalists implicitly acknowledge that constitutional authority, not the Constitution's textual meaning as such, matters to modern adjudication.[15] An adjudicator who decides that the meaning of a constitutional provision is supplied by the original meaning of the words is not thereby committed to the view that she should decide cases solely on the basis of that meaning. Likewise, and less recognized, someone who believes that the subjective intentions of the eighteenth-century Framers should be authoritative in modern interpretation need not adopt any particular theory (nor even believe) that those intentions supply either the linguistic or the legal "meaning" of constitutional provisions. Original intent is disfavored as a theory of constitutional meaning but it remains a vital theory of constitutional authority.

Part I briefly explains the impetus behind the theoretical shift from original intent to original meaning, which was driven in large measure by hermeneutic criticism from scholars like Powell and Paul

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13 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF Liberty 89–121 (2004); WHITTINGTON, *supra* note 11, at 5; Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 3–4 (2011).

14 *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 633 (2008).

15 *See, e.g.*, WHITTINGTON, *supra* note 11, at 13 ("Examination of the goals and limitations of interpretation emphasizes the fact that other modes of constitutional elaboration are both possible and necessary.").

Brest. Brest emphasized the impossibility of discerning the "intent" of a multimember body with an array of contradictory and indeterminate subjective ends,[16] and Powell concluded based on historical research that the Framers would not have subjectively intended a constitutional methodology of original subjective intent.[17] Original meaning, celebrated for its objectivity and its consistency with traditional approaches to legal interpretation,[18] was advanced as a more practicable and theoretically satisfying alternative.[19]

As Part II explains, however, constitutional practice continues to privilege intentionalism. Citation to Farrand's *Records*, to *The Federalist* (especially to James Madison's writings), and to independent writings or speeches of Madison, Washington, and Jefferson[20] indicate that constitutional practitioners continue to reason as though the intentions and expectations of prominent members of the Founding generation are highly relevant to the Constitution's application to modern cases and controversies. Public discourse, moreover, is by all appearances indifferent to the scholarly distinction between original meaning and original intent. As Justice Scalia writes, "[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."[21]

Scalia and many other originalists explain the privileging of original intent over original meaning, or what is at best a frequent conflation of the two, as a kind of shorthand: "When the proponents of original intent invoke the Founding Fathers, I in fact understand them to invoke them," Scalia has said, as "strong indications of what the most knowledgeable people of the time understood the words to mean."[22] But the better way to understand the persistent, indeed essential, professional practice of appearing to care deeply about the intentions of the drafters is by reference to a theory that regards those

16 *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–17 (1980).

17 *See* Powell, *supra* note 1, at 887–88.

18 *See* Scalia, *supra* note 8, at 104.

19 *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248–49 (2009).

20 Jefferson was not, of course, a constitutional drafter, but as Parts II and III explain, his intentions and expectations nonetheless carry significant authority in constitutional argument precisely because intent need not be in the service of linguistic meaning.

21 *See* Antonin Scalia, *Common-Law Courts in a Civil Law System*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

22 Scalia, *supra* note 8, at 103.

intentions as wielding normative authority in constitutional argument. We may (and once did) describe an originalist as someone who believes that the product of constitutional construction should, as a normative matter, reflect the values, expectations, or intentions of the individuals responsible for declaring American independence, defeating the British in the American Revolution, and drafting and ratifying the Constitution. Part III argues that the time has come to bring intentionalists back into the constitutional mainstream.

I. The Rise of Original Meaning

The story of the shift from original intent to original meaning is well-trodden ground.[23] There is no need to linger on its particulars in this space except to recap the reasons why so many originalists claim to reject intentionalism. The canonical critiques of original intent were offered by Paul Brest and by Jefferson Powell.[24] Brest identified significant problems with allowing original intent, either of the Framers of the Constitution or of the ratifiers in the state conventions, to govern constitutional interpretation.[25] Chief among those problems is the paradox of numerosity.[26] The individual intentions of drafters or adopters must be shared by a sufficient number of delegates to count as law, but unless those intentions are understood at a level of generality too high to give practical guidance, it will often be the case that individual Framers—and a fortiori individual adopters—had either an indeterminate intent or none at all with respect to particular questions.[27]

Powell argued, contrary to Berger but consistent with Brest,[28] Scalia,[29] and many others, that the Framers were not themselves intentionalists in the subjective sense.[30] "As understood by its late eighteenth and early nineteenth century proponents," Powell writes, "the original intent relevant to constitutional discourse was not that of the Philadelphia framers, but rather that of the parties to the constitu-

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23 The standard account appears in Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 611–12, 620 (1999).

24 *See id.* at 612.

25 *See* Brest, *supra* note 16, at 213–17.

26 *See id.*

27 *See id.* For an opposing view, see Whittington, *supra* note 11, at 187–95.

28 *See* Brest, *supra* note 16, at 215–16.

29 *See* Scalia, *supra* note 8, at 104.

30 Powell, *supra* note 1, at 886–88.

tional compact—the states as political entities."[31] Discerning intent in this sense might, on occasion, have involved reference to state ratification debates, but it did not entail plumbing the statements of drafters at the Philadelphia Convention. Accepting Powell's criticism meant that intentionalism was at war with itself, since the Framers would not have subjectively intended that modern interpretation be guided by their subjective intentions.

Original-meaning originalism is said to avoid or mitigate these criticisms along several dimensions. First, the original-meaning originalist need not aggregate subjective, incommensurable intentions; he is instead seeking the most defensible objective meaning of words. This practice, by hypothesis, always has an answer, even if arriving at that answer requires the exercise of judgment.[32] Second, one may be an original-meaning originalist without committing to the view that the Framers would have approved of that interpretive method.[33] Third, in any event, Powell and others have shown that original-meaning originalism is broadly consistent with hermeneutic practices with which the Framers were familiar and of which they approved.[34]

In order to understand the broader story of the move from original intent to original meaning, it is crucial to recognize the distinct senses in which original-intent and original-meaning theories are concerned with judicial restraint. Judges engaged in constitutional review seek rules of decision that can guide their discretion and help them identify the content of the law they must apply. Insofar as methods of constitutional interpretation help judges to arrive at those rules, it is in their nature to promote judicial restraint of this kind. According to its proponents, original-meaning originalism achieves this type of restraint better than common law-, evolutionary-, or morality-based approaches to adjudication through its transparency and objectivity.[35] These features also recommend original-meaning originalism over

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31 *Id.* at 887–88. For an opposing view, see Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007).

32 *See* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 535 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

33 *See* Barnett, *supra* note 23, at 648. *But see* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (arguing that "the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it").

34 *See* Barnett, *supra* note 23, at 625–29; Powell, *supra* note 1, at 948.

35 *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2414–15 (2006) (reviewing STEPHEN BREYER, ACTIVE

original intent, whose capacity for settling constitutional meaning depends on a methodological coherence that, if we accept Brest's criticism, it cannot claim.[36]

But there is a second overlapping and at times incompatible kind of judicial restraint. Some political proponents of originalism in the 1970s and 1980s supported it as an alternative to living constitutionalism not because it provided transparent criteria and therefore better served the settlement function of constitutional methodology, but rather because it promised to arrest social and moral changes that those proponents found threatening.[37] Originalism was an appropriate response to the Warren Court because it was tied to conservative political projects and cultural assumptions.[38] On this view, the activist judge is not the one lacking objective decisional criteria, but the one who too easily facilitates alteration of the status quo.[39] It is on this view of judicial restraint that original-intent originalism soars. It beckons constitutional interpretation back to a time associated with values that better resonate with the world view of originalism's proponents.[40]

Originalism's academic refinement from original meaning to original intent has been in the service of the first kind of judicial restraint and to the detriment of the second kind. But a felt need for the second kind of restraint is alive and well in our politics and, as Part II shows, in our law.

II. The Practical Relevance of Original Intent

The need to defend the utility of the Convention debates to modern originalism is familiar to modern originalists.[41] In particular, the

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Liberty: Interpreting Our Democratic Constitution (2005)); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862–64 (1989).

36 *See* Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 Calif. L. Rev. 235, 251 (1989) ("[T]he founders' intent does not have the consistency of homogenized milk. It is more like a well-stocked pantry waiting for the imaginative chef.").

37 *See* Meese, *supra* note 6, at 464 (advocating originalism as a defense against "a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court").

38 *See* Jamal Greene, *How Constitutional Theory Matters*, 72 Ohio St. L.J. 1183, 1187–88 (2011).

39 *See* Scalia, *supra* note 35, at 862.

40 *See generally* Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 Colum. L. Rev. 356 (2011) (examining the demographics and views of individuals who consider themselves originalists).

41 *See generally* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113 (2003) (examining the role of records from the Constitutional Convention in interpreting the Constitution).

fact that the records of the debates were sealed, and therefore unavailable to the ratifiers and to ordinary Americans, means that relying on those records as an authoritative guide either to the ratifiers' understanding or to original public meaning requires explanation.[42] It is useful to consider an example from an influential 2003 article by Vasan Kesavan and Professor Michael Stokes Paulsen.[43] Kesavan and Paulsen advance the following proposition:

> A hypothetical, recently-discovered, heretofore-secret, intelligently-written, private letter from private citizen Reverend John Clergyman to private citizen Mr. John Farmer Parishioner, dated January 1, 1788, and making the point, based on its author's learned evaluation of then-current historical political assumptions, that the Constitution's assignment of "the executive Power" to the President necessarily embraces the presumptive power to formulate and carry out the nation's foreign affairs policy, would display something about the meaning the term "the executive Power" had to an informed member of the general public. The fact that Reverend Clergyman was not a Framer or a Ratifier would be, under an original meaning-textualist approach, pretty much immaterial. Clergyman's letter is at least *competent* evidence of original meaning, notwithstanding its purely private nature.[44]

As noted below, Kesavan and Paulsen believe that, because it is private, such a letter is inferior to both the Convention debates and to *The Federalist* as evidence of original meaning.[45] The important point for now, though, is their implicit acknowledgement of our constitutional culture's deep reliance on sources (such as statements by Framers and ratifiers) consistent with intentionalism and its shallow reliance on other sources (such as the letter) that are consistent with original-meaning originalism.

I would go further than Kesavan and Paulsen. Any U.S. lawyer or judge who considers Clergyman's letter as good a source of constitutional meaning as a comparable statement by Madison at the Philadelphia Convention is in fact incompetent within the norms of American constitutional practice. This is not to say that such a lawyer or judge lacks integrity or is not engaged in a coherent, or even ingenious, hermeneutic practice within some domain; it is simply to say

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42 *See id.* at 1113–21.

43 *See id*.

44 *Id*. at 1146.

45 *See infra* notes 59–70 and accompanying text.

that that domain is not American constitutional law. *The Federalist* and Farrand's *Records* are the two most significant sources of original understanding[46] in our constitutional tradition.[47] The Supreme Court has cited the Constitutional Convention in at least 164 cases,[48] and it has referenced *The Federalist* in 236 opinions from 1965 to 2005 alone.[49] Significantly, citation to *The Federalist* has increased dramatically during the period in which original-meaning originalism has been ascendant. According to research by Professor Ira Lupu, *The Federalist* was cited more often in the nineteen years from 1980 to 1998 than in the eighty previous years combined.[50] From 1986 to 2002, according to Professor Melvyn Durchslag, the Supreme Court referenced *The Federalist* in forty-two percent more cases (ninety-eight cases) than during the preceding sixteen years,[51] with Justice Scalia writing nearly one-fifth of those opinions.[52] Citation to the Convention debates has generally decreased as original-meaning originalism has gained prominence,[53] but the Court's originalists do not appear to be responsible for that decrease. Justice Scalia cited to the Convention debates in eight Supreme Court opinions from 1986 to 2009, and Justice Thomas did so in seven opinions from 1991 to 2009.[54] For each Justice, that number of citations is the highest of any member of the Court during that Justice's tenure.[55]

An original-meaning originalist confronted with these patterns of citation may offer a number of responses. A familiar reply is to suggest reasons why someone holding original-meaning commitments should nonetheless consider Convention debates and *The Federalist* relevant to constitutional interpretation. This justification typically involves describing the debates or *The Federalist* as evidence of the us-

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46 I use the term "original understanding" here to encompass both original intent and original meaning inquiries.

47 *The Federalist* and the *Records* were the two most frequently cited originalist sources in Supreme Court cases from 1955 to 1984. *See* Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 330 (2005).

48 Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63, 71 (2011).

49 Corley, Howard & Nixon, *supra* note 47, at 330.

50 *See* Ira C. Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1324, 1328 (1998).

51 Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 295 (2005).

52 *Id.* at 297.

53 *See* Sirico, *supra* note 48, at 170–71.

54 *Id*. at 99–100, 168, 175.

55 *See id.* at 175 graph 5,

age of words and phrases that appear in the Constitution,[56] what Professor David McGowan calls "a topical equivalent of Samuel Johnson's dictionary or any other usage guide."[57] Professor Randy Barnett writes that original-meaning proponents are not interested in "how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases . . . except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener."[58] Kesavan and Paulsen describe Farrand's *Records* as "an excellent, first-rate resource of rich insight into original linguistic meaning."[59]

Whether or not original-meaning originalists believe they are using the *Records* and *The Federalist* for this reason—on which this Article is, and must be, agnostic—the pattern of citation to these sources is difficult to explain solely by reference to this justification. Use of those two sources in federal judicial opinions simply overwhelms other sources of the contemporaneous meaning of the Constitution's words and phrases, as Kesavan and Paulsen's private letter example implicitly concedes.[60] Of course, private letters may be difficult to come by, much less to authenticate. A time-constrained judge will be forgiven for declining to mine the full corpus of eighteenth- and nineteenth-century writings on the nascent Constitution when the Convention debates and *The Federalist*, which will do, are sitting on his bookshelf.

But the secret letters of Reverend Clergyman are hardly the only option. What of the anonymous writings of antifederalists like Brutus, Cato, and the Federal Farmer, which are no less available than *The Federalist*? Robert Yates (the most likely "Brutus") was a New York Supreme Court judge and a delegate at the Philadelphia Convention.[61] George Clinton (the most likely "Cato")[62] was the longtime governor

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56 *See* Scalia, *supra* note 21, at 38.

57 David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist*, and the Supreme Court*, 85 MINN. L. REV. 755, 757 (2001); *see also* Prakash, *supra* note 32, at 537 (writing that extensive reference to statements of the "founding fathers" in originalist writing is an effort "to make sense of the text by surveying how its words were used in common parlance").

58 Barnett, *supra* note 23, at 622.

59 Kesavan & Paulsen, *supra* note 41, at 1133.

60 *See* Corley, Howard & Nixon, *supra* note 47, at 330; *see also supra* notes 43–45 and accompanying text.

61 *See* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 10 n.7 (2006). *But see* THE COMPLETE ANTI-FEDERALIST 103 (Herbert J. Storing ed., 1981) (sowing doubt about the traditional attribution).

62 Kesavan & Paulsen, *supra* note 41, at 1151.

of New York and later Vice President of the United States.[63] Richard Henry Lee (the most likely "Federal Farmer")[64] was a signatory to the Declaration of Independence.[65] These were educated men and yet their understandings of the Constitution's language are rarely treated as "topical concordances" on the meaning of the Constitution.[66] Quite the opposite. Consider the dissenting opinion of Justice Thomas (joined by Justice Scalia) in *United States v. Comstock*,[67] in which he argued for a limited reading of the scope of the Necessary and Proper Clause:

> During the State ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. See, *e.g.*, Essays of Brutus, in 2 The Complete Anti-Federalist 421 (H. Storing ed. 1981). Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. Referring to the "powers declared in the Constitution," Alexander Hamilton noted that "it is *expressly* to execute these powers that the sweeping clause . . . authorizes the national legislature to pass all *necessary* and *proper* laws." The Federalist No. 33, at 245. James Madison echoed this view, stating that "the sweeping clause . . . only extend[s] to the enumerated powers." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 455 (2d ed. 1854).[68]

As evidence of the objective public meaning of the Necessary and Proper Clause, it is not obvious why Brutus's view—that it gives Congress "virtually unlimited power"—is any less reliable than Hamilton's or Madison's.[69]

Kesavan and Paulsen argue that *The Federalist* is a better original-meaning source than the writings of antifederalists because "[t]he Federalists won" and "the statements of opponents of legislation are

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63 *See* JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 255–61, 274–75 (1993).

64 Kesavan & Paulsen, *supra* note 41, at 1151.

65 *Lee, Richard Henry, (1732–1794)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000201 (last visited May 9, 2012).

66 *See* Kesavan & Paulsen, *supra* note 41, at 1147–48.

67 United States v. Comstock, 130 S. Ct. 1949 (2010).

68 *Id*. at 1972 (Thomas, J., dissenting).

69 *See* McGowan, *supra* note 57, at 757.

entitled to less weight than those of proponents."[70] This is correct, of course, as a description of the practice of constitutional and statutory construction,[71] but it is not because opponents are somehow less knowledgeable about the contemporary meaning of words or have less access to prevailing public wisdom.

Nor have we any reason to assume that antifederalist writings are any less *credible* than *The Federalist*. The writings of Brutus and Cato are neither more nor less propagandistic than those of Publius.[72] As William Eskridge writes, "Because they were propaganda documents, seeking (often disingenuously) to rebut the arguments of the Anti-Federalists, some historians are reluctant to conclude that *The Federalist* even honestly reflects the views of Madison and Hamilton themselves."[73] Less discussed but still more problematic, it is possible to identify numerous instances in which *The Federalist* is obviously wrong.[74] Seth Barrett Tillman has done so, noting among other examples that *The Federalist No. 59* incorrectly states that sixteen Senators constitutes a quorum[75] and that *The Federalist No. 68* misstates the process for selecting the Vice President in the event the Electoral College is inconclusive.[76] In a document written in great haste as part of a high stakes political agenda, it is unsurprising that we would find errors.

Heavy reliance on Farrand's *Records* might be even more troubling by this measure. One need not accept William Winslow Crosskey's insinuation that Madison's notes were "deliberately false and misleading"[77] to conclude that notes taken in shorthand and later augmented by an aggressive political operative on debates whose proceedings were constrained by British parliamentary procedure should not be favored evidence of the meaning of words.[78] As James Hutson,

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70 Kesavan & Paulsen, *supra* note 41, at 1152.

71 *See id.*

72 *Compare* THE FEDERALIST NO. 14 (James Madison), *with* BRUTUS, NO. 1 (1787), *reprinted in* 1 THE FOUNDER'S CONSTITUTION 124–25 (Philip B. Kurland & Ralph Lerner eds., 1987), *and* CATO, NO. 3 (1787) *reprinted in* 1 THE FOUNDER'S CONSTITUTION 125 (Philip B. Kurland & Ralph Lerner eds., 1987).

73 William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1309 (1998).

74 *See* Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 603–15 (2003).

75 *See id.* at 603–04.

76 *See id*. at 605–11.

77 *See* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1009 (1953).

78 *See* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*,

who edited the fifth supplementary volume of Farrand's *Records*, has noted, Madison's notes for any particular day can be read aloud in a few minutes, and yet he purported to be recording several hours' worth of proceedings per day.[79] These limitations are familiar to original-meaning originalists and are indeed reason for them not to be intentionalists in the subjective sense. But they also undermine the notion that *The Federalist* and the *Records* provide comparatively "first-rate"[80] evidence of original meaning.[81]

A second, less common originalist response to the ineluctable reality that "intentionalist" sources appear to be privileged even by many originalists is in the nature of a *mea culpa*, or perhaps a *sua culpa*. This response refuses to defend such citations and simply outs them as either always or often inappropriate. Professor Steven Calabresi has said, for example, that he "attach[es] no weight to secret legislative histories."[82] Original-meaning originalist Judge Frank Easterbrook writes favorably of John Marshall's originalism: "His opinions rest squarely on constitutional text—not on imputed intent, not on *The Federalist*, not on the debates in the Convention (which had been kept secret), not on the debates of the ratifying conventions . . . , and not even on the opinions he had [previously] written."[83] These scholars acknowledge the norms of constitutional practice but seek to change them to accommodate their particular views on originalism. Let it suffice for now to say that these normative efforts have not yet met with success. As Part III discusses, moreover, the aversion of some original-meaning originalists to original intent arguments may

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83 TEX. L. REV. 1265, 1310–11, 1315 (2005) (questioning why Madison's notes are accepted as "incontrovertible truth" and arguing that knowledge of parliamentary procedure is necessary to constitutional interpretation); Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1623–24, 1681 (2012) (offering reasons why interpreters "should pay more attention to the parliamentary and procedural context of the Constitution"); Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 L. & HIST. REV. 389, 410 (2010) (noting Madison's use of shorthand).

79 *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 1, 34 (1986).

80 *See supra* note 59 and accompanying text.

81 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 11–12 (1982).

82 Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 161 n.37 (1995) (acknowledging, however, that reference to statements of prominent Founders may be essential when contemporaneous dictionaries were unlikely to offer a useful definition of constitutional terms).

83 Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122–23 (1998).

rest on a too-narrow understanding of the role such arguments play within our constitutional culture.

A third, increasingly popular response to the disjunction between original-meaning originalism and constitutional practice is to acknowledge that the former is not always directed to the latter. That is, original-meaning originalism is a theory of "interpretation," an effort to understand what constitutional text signifies,[84] whereas constitutional adjudication and implementation involves a process of constitutional "construction" that is constrained (perhaps lightly) by interpretation, but is not controlled by it.[85] On this view, defining constitutional language is distinct from crafting constitutional decision rules and supplying meaning to the Constitution through political and social contestation and inertia. The interpretation-construction distinction is what enables Professor Jack Balkin to claim no incompatibility between originalism and living constitutionalism: for Balkin, the former is an exercise in interpretation whereas the latter is an exercise in construction.[86]

This Article proposes a variation on this third theme. It makes two moves. The first move is to identify constitutional construction with a related term of longer lineage. A theory of constitutional construction may be understood as a particular kind of theory of constitutional authority. It is a conceptual apparatus that specifies whether and how to assign weight to competing sources of constitutional wisdom when—because of vagueness, indeterminacy, or normative preference—no single source is dispositive. The second move is to understand that originalism may readily be conceptualized as a theory of authority either in addition to or instead of a theory of interpretation. On this view, originalism is not only the notion that the meaning of constitutional text is specified by its original public meaning; it is also the notion that the subjective expectations of the Framers are a privileged source of wisdom within constitutional practice. When we refer to the Convention debates or to *The Federalist*, it is often in the service of this second understanding of originalism, the one that occurred to most legal professionals prior to the celebrated shift to original meaning, and the one that still occurs to many legal professionals today.

On this view, original understandings are authoritative not because they specify the semantic meaning of a text, but because they

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84 SOLUM, *supra* note 13, at 3–4, 69–71.

85 *Id*.

86 *See* BALKIN, *supra* note 10, at 282–87.

reflect a set of values that are offered by proponents as uniquely or especially constitutive of American identity. Invoking the intentions of the Framers is a rhetorical, not a philosophical or linguistic exercise; what makes someone an originalist of this sort are her priorities within an argumentative tradition. *Pace* Balkin, it is not that originalism is interpretive and living constitutionalism is constructive.[87] Instead, we can understand, and long have understood, the principal dichotomy between the two as playing out *within* rather than independent of the domain of construction.[88] In Professor Philip Bobbitt's terms, we may style the originalism this Article identifies as a form of ethical argument, one that locates American ethos in a particular stylized past.[89] From this perspective, the drafters' intent is not just one example of reasonable views about the meaning of words, but is a better, more persuasive example than others because the drafters carry authority in narratives of American identity.

From this perspective, moreover, the "Framers" include people like Thomas Jefferson, who was out of the country during the Constitution's drafting but whose role in the Declaration of Independence, in the Louisiana Purchase, and in the formation and articulation of an influential strand of early American political identity[90] make his imprimatur extremely valuable in constitutional argument. Likewise, the post-ratification practices of President Washington, which appear frequently in originalist writing, are not merely relevant but are essential sources of authority within the ongoing practice of constitutional construction.[91]

Evidence of this form of originalism is abundant, and the explanatory power of understanding intentionalist originalism in this ethical sense is vast indeed. According to Charles Pierson, Justice Chase made the first Supreme Court reference to *The Federalist* in *Calder v.*

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87 *See* BALKIN, *supra* note 10, at 282.

88 *Cf.* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009) (including specific intentions among the considerations that constitute the practice of constitutional construction signified by living constitutionalism).

89 *See* BOBBITT, *supra* note 81, at 93–119 (defining ethical argument as deriving from the "character . . . of the American polity"); McGowan, *supra* note 57, at 757–58, 822–25.

90 *See The Thomas Jefferson Papers Timeline: 1743–1827*, THE LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/collections/jefferson_papers/mtjtime1.html (last visited Apr. 10, 2012).

91 *See, e.g.*, McCreary Cnty, Ky. v. ACLU, 545 U.S. 844, 877 (2005); *id.* at 886–87 (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

Bull,[92] seeking support for the proposition that an ex post facto law must relate to criminal punishment.[93] Justice Chase wrote:

> The celebrated and judicious *Sir William Blackstone*, in his commentaries, considers an *ex post facto law* precisely in the *same* light I have done. His opinion is confirmed by his successor, *Mr. Wooddeson*; and by the author of *the Federalist*, who I esteem superior to *both*, for his extensive and accurate knowledge of the *true principles of Government*.[94]

Pierson surmises that Chase meant to heap praise upon Hamilton, who he believed wrote *The Federalist No. 44*, which was actually written by Madison.[95] The point, in any event, is that Chase's reliance on *The Federalist* was not to access collective knowledge about the meaning of words. Chase was a criminal court judge at the time the Constitution was ratified; his personal opinion as to the general understanding of an ex post facto law was as good as anyone's, and arguably more useful than Madison's, Hamilton's, or even Blackstone's.[96] Citation to *The Federalist* served a different purpose: it was an announcement of political affinity and an invocation of ethical authority.

Chief Justice Marshall, whose methodology originalists often link to their own,[97] did not (*pace* Judge Easterbrook) shrink from historical references sounding in intentionalism. In *McCulloch v. Maryland*,[98] he invoked Washington's authority, noting that arguments in favor of the constitutionality of the Bank of the United States "convinced minds as pure and as intelligent as this country can boast."[99] Later in the same opinion, Marshall referred directly to *The Federalist*,[100] which had been cited by Maryland's attorneys to support the proposition that the Constitution contains no implicit limitations on state tax-

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92 Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Charles W. Pierson, *The Federalist in the Supreme Court*, 33 YALE L.J. 728, 729 (1924).

93 *Calder*, 3 U.S. (3 Dall.) at 389–91.

94 *Id.* at 391.

95 *See* Pierson, *supra* note 92, at 729.

96 *See Chase, Samuel, (1741–1811)*, THE BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000334 (last visited Apr. 10, 2012).

97 *See* Easterbrook, *supra* note 83, at 1122–23; *see also* Edwin Meese III, Address, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 25 (1985); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2725 (2003).

98 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

99 *Id*. at 402. Washington signed the bill incorporating the First Bank of the United States after soliciting the written opinions of Jefferson, Hamilton, and Attorney General Edmund Randolph. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 811–12 (1994).

100 *See McCulloch*, 17 U.S. (4 Wheat.) at 433.

ing power.[101] In rebutting the argument, Marshall noted that "the opinions expressed by the authors of [*The Federalist*] have been justly supposed to be entitled to great respect in expounding the constitution."[102] This bit of rhetorical flourish might be discounted as softening Marshall's subsequent rejection of *The Federalist*'s authority in the case, but it is more difficult to explain away Marshall's coda to the discussion:

> Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.[103]

As security against his failure to persuade the reader that *The Federalist* supports his understanding of the constitutional structure, Marshall advances what would today be called an original expected applications argument. There is no way to understand the argument as intentionalism in a purely linguistic sense; it is subjective intentionalism, plain and simple.

Two years later, in *Cohens v. Virginia*,[104] Marshall again cogently explained the value of *The Federalist* to constitutional interpretation and construction:

> The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[105]

Marshall said expressly, then, that we appeal to *The Federalist* both because of its "intrinsic merit" and because "the part two of its authors performed in framing the constitution" gives Madison and Hamilton authority to speak for the intentions of the instrument. As Eskridge writes, "Background history has an *authority value* when the

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101 The arguments relied upon appear in *The Federalist Nos. 31–36*, all of which were written by Hamilton. *See* McGowan, *supra* note 57, at 852–53.

102 *McCulloch*, 17 U.S. (4 Wheat.) at 433.

103 *Id*. at 435.

104 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

105 *Id*. at 418.

materials are cited as independent authority for the legitimacy of a particular proposition. The fact that a key player said thus and so is independent evidence supporting the proposition that the document meant thus and so."[106]

Let us return, then, to poor Brutus, whose views are so often used as evidence of what the Constitution *does not* mean.[107] Someone invoking authority value cares deeply about the identity and status of the referenced author.[108] We assign greater value to the expectations of those who supported texts that reflect our constitutive commitments than to those who opposed those texts. Thus, Madison may have criticized reliance on the "authoritative character" of the Convention debates respecting "the legitimate meaning of the Instrument," but acknowledged "the laudable curiosity felt by every people to trace the origin and progress of their political Institutions."[109] Madison, roughly, is distinguishing interpretation and construction in their modern sense. The intentions of the delegates in Philadelphia and of other approved authors are part of our national heritage, and that is reason enough for their subjective views to carry normative weight within our rhetorical tradition.[110] As Professor McGowan writes, "[B]y citing *The Federalist*, the Court attempts to establish its own ethos as an institution carrying on in the great tradition of the Founding Fathers."[111] This is why we capitalize the words "Framers" and "Founders" and indeed "First Congress," whose substantial overlap with the delegates to the Philadelphia Convention would not be noteworthy if their chief contribution to authority was their status as reasonable eighteenth-century Americans.[112]

The ethical justification for original intent may also explain, in part, the fact that *The Federalist* essays authored by Madison, father of the Constitution and a former President, are disproportionately im-

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106 Eskridge, *supra* note 73, at 1314–15; *see also* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1832 (1997) (making an analogy to following a predecessor's recipe because the "authors of the recipe were very wise chefs").

107 *See supra* notes 61–76 and accompanying text.

108 *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1810 (1997) (noting that under a theory of "[a]ncestral and heroic originalism . . . an appeal to the Framers constitutes an appeal to moral authority and expertise").

109 3 FARRAND'S RECORDS, *supra* note 12, at 447–48.

110 This usage of intentionalist arguments approximates what Professor Michael Dorf has called "ancestral originalism." Dorf, *supra* note 108, at 1801–03.

111 McGowan, *supra* note 57, at 757–58.

112 *See id*. at 757.

portant to constitutional practice.[113] Much citation to the *Records* and to *The Federalist* appears to emerge from a phenomenon not unrelated to the use of famous athletes and entertainers in product advertisements. James Hutson somewhat dismissively recounts an article describing an attorney who refers to "selected snippets" from Farrand's *Records* "not because he subscribes to their contents, but because he knows they will impress the judge and better justify his fee."[114] Hutson explains that "the judge, described in the same article, cites Farrand, not because he grounds his decision on the intentions of the framers, but because references to them will make his opinion sound more learned and convincing."[115] Making one's argument sound learned and convincing is an essential constitutive element of legal practice. The authors of a recent comprehensive study of citation to *The Federalist* concluded that the papers are referenced more often when the Court faces "special legitimacy challenges," such as overruling precedent, invalidating a law, or when the vote is close.[116] Judges in constitutional cases are not simply deciding the meaning of a text. They are associating an outcome in a close, unsettled case with the commitments of the American people, sometimes embodied in text, but as often embodied in judicial and political precedent and in the narratives we tell ourselves about American identity.[117] The wisdom reflected in the expectations of heroic historical figures can validate the conclusions modern judges reach in hard cases.[118] As the study's authors write, invoking the views of the Framers may "provide a veneer of authority that can insulate the Court, and the justice, from criticism and controversy."[119]

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113 *See* Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403, 410 (1998) (quoting THE FEDERALIST PAPERS xi (Clinton Rossiter ed., 1961)). Madison wrote four of the eight most cited essays (through 1998), but Hamilton authored twice as many papers overall. *Id.*; *see also* Eskridge, *supra* note 73, at 1309 (stating that Justice Scalia and Justice Thomas "overwhelmingly cite" Madison).

114 Hutson, *supra* note 79, at 4–5.

115 *Id.*

116 Corley, Howard & Nixon, *supra* note 47, at 334. For example, in a multivariate regression controlling for number of opinion pages, identity of the Chief Justice, and Clinton Rossiter's influential edition of *The Federalist Papers*, the authors found that the presence of a small vote margin in the case is a highly significant predictor of citation to *The Federalist*. *Id.* at 337–38.

117 *See generally* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011).

118 This usage approximates what Professor Dorf calls "heroic originalism." *See* Dorf, *supra* note 108, at 1803–05, 1810.

119 Corley, Howard & Nixon, *supra* note 47, at 329.

III. The Value of Original Intent

As Part II makes clear, original intent as such, invoked for its inherent authority value, has been a significant part of constitutional practice since the beginning of the republic and remains significant today. This Article is not the first theoretical defense of this practice, but it claims important differences from extant accounts. Professor Richard Kay has for many years been among the most prominent academic defenders of the notion that subjective intentions are and should be relevant to constitutional interpretation,[120] an idea that he says, correctly, "was, for a long time, so natural as to require no name."[121] Significantly, though, Kay's defense of intentionalism is based on what is essentially a linguistic claim, that the "intention" behind the Constitution's text—which original-meaning proponents tend to agree is the proper object of interpretation[122]—is better specified by the aggregated intentions of its actual rather than its hypothetical ratifiers.[123] Kay agrees, then, with public-meaning originalists that the intention of the Constitution's ratifiers, not its drafters, is what matters.[124] He is not, moreover, an expectations originalist. He believes that there can be some distance between the rules the ratifiers intended to announce and how they expected those rules to be applied; the latter might be significant evidence of the former, but carry no weight standing alone.[125] Other nominal intentionalists, such as Professors Larry Alexander, Saikrishna Prakash, and Keith Whittington, generally share each of these commitments.[126]

This Article is not quite in this tradition, though Kay's normative defense of his intentionalism also applies to the "authority"-based version I have articulated. Kay worries that separating originalism from the actual views of historical actors diminishes its capacity to specify

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120 *See* Richard S. Kay, *"Originalist" Values and Constitutional Interpretation*, 19 Harv. J.L. & Pub. Pol'y 335, 336–37 (1996).

121 Kay, *supra* note 11, at 704.

122 *See, e.g.*, Scalia, *supra* note 21, at 16–17 (suggesting that textualists seek not subjective intent but "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 54–56 (2006) (defending reference to the "intentions" of "hypothetical authors"); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 Geo. Wash. L. Rev. 1337, 1341–42 (1998) (arguing that textualists look for an "objectified" intent shared by "a reasonable speaker and interpreter").

123 See Kay, *supra* note 11, at 704–06.

124 *See id.* at 706.

125 *See id*. at 710–11.

126 *See* Whittington, *supra* note 11, at 175–79; Alexander & Prakash, *supra* note 11, at 983–89.

rules likely to be applied consistently over time.[127] It also deprives the constitutional system of the legitimacy that may be conferred by the high regard we have for the moral and democratic authority of the lawmaker.[128] Even if determining constitutional meaning is antecedent to determining the authority that meaning should have in modern adjudication, Kay writes, responding to his original-meaning critics, "[I]t does not follow that the historical process of lawmaking is irrelevant to the question of authority."[129] Both of these justifications for intentionalism not only count in favor of the version this Article identifies, but are the very reasons why, within our system, original expectations are relevant as such. We care about Madison's, Hamilton's, Jefferson's, and Washington's views both as to the intended rules and as to the expected application of those rules because adjudication according to their intentions and expectations better comports with a particular set of normative claims about the judicial role.[130] Attention to original intentions and expectations facilitates judges' guardianship of long-term values, helps to constitute us as a people with temporally extended commitments, and lends the Framers' credibility to the results reached through an otherwise legitimacy-challenged system of judge-made constitutional law. Intentionalism on this Article's view has a Burkean appeal that original-meaning originalism lacks[131]: it is Burkean both in the sense that it resists changes to longstanding assumptions about our constitutive commitments and in the sense that it shows humility toward the existing matrix of constitutional argument.[132]

The authority-based version of originalism has other advantages over academic theories of original meaning. It more persuasively explains both the professional and the popular practice of originalism, including the reliance on Convention debates, the reliance on the writings of Madison and Jefferson, and the reliance on *The Federalist*. It may also explain why the legislative history of the Constitution is essential to Justice Scalia and Justice Thomas while the legislative his-

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127 *See* Kay, *supra* note 11, at 715.

128 *See id*.

129 *Id*. at 716.

130 *See generally* Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403 (1996).

131 *See* Prakash, *supra* note 32, at 537; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

132 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 899–900 (1996) (arguing that attention to the Framers' specific intentions might be justified in Burkean terms).

tory of statutes is irrelevant to them.[133] It does so while offering at least as good of an answer to the standard criticisms of original intent as original meaning offers. It need not concern itself with the problem of aggregating intent because it is selfconsciously and unapologetically selective about whose intent matters. It is unbothered by the original understanding of original intent because it does not view intent as a source of textual meaning. This authority-based version of originalism also rescues the method from the charge that a theory of meaning in the absence of a theory of authority is irrelevant to modern constitutional debate. In fact, this version of originalism does not require any independent theory of textual meaning, for it understands that when we do constitutional interpretation for real, we are interpreting a tradition rather than a text; what we need to know is not the linguistic meaning of ancient words but rather *who* or *what* speaks for the tradition. The originalist is and long has been the person who says that the Founding generation best represents our constitutional tradition.

The chief objection to this approach is that it conflates the normative and the descriptive. The reason so many originalists have turned to original meaning is because they believe other approaches to interpretation are inferior according to criteria that those originalists deem important.[134] If one really does believe that the Constitution's authority derives from its embodiment of binding commitments in a text, and if one really does believe that the original public meaning of that text specifies its legal meaning, then it is no answer to say simply that constitutional practice is inconsistent with that view. A further, related objection might be directed at the notion that judicial constitutional construction—which on some conceptions might be likened to the articulation of constitutional decision rules[135]—should be performed according to criteria appropriate to the judicial role. Thus, identification and navigation of relevant precedents might count, but choosing among competing cultural and political narratives might not. On this view, the fact that judges affiliate with political and cultural narratives all the time is not, in itself, reason to tolerate the practice.

The best response to the first version of this objection is a variant on Professor Balkin's response to originalists who criticize his ap-

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133 *See* Eskridge, *supra* note 73, at 1314–15. In Professor Eskridge's terms, it is appropriate to cite constitutional legislative history for its "authority value" in a way in which it might not be appropriate to cite ordinary legislative history. *See id.*

134 *See supra* Introduction–Part I.

135 *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 60–61 (2010).

proach.[136] If we accept the interpretation-construction distinction, then there is no necessary incompatibility between an original-meaning view and the use of original intent within constitutional construction.[137] Someone who believes that the constitutional text is specified by its original public meaning is not disabled from arguing that original intentions are relevant to the separate question of the weight to give the text in adjudicating cases. This Article is not a challenge to original public-meaning interpretation as such; it is, rather, a reminder that reference to original intentions need not serve as a source of embarrassment for the method or for its practitioners, and indeed that original intent may be infused with the same Burkean sensibility that leads so many originalists to be fainthearted when push comes to shove.

The second objection reflects a basic discomfort with ethical argument as an element of judicial practice. This objection sits at a point of incommensurable disagreement between originalists and their critics, the point where originalism's nearly existential aspiration for constraint confronts the unavoidable reality of constitutional politics. In the nature of incommensurability, we may do well simply to agree to disagree. But for my part, I maintain that if judges are to participate in the project of constitutional interpretation, they must never forget that it is, alas, *a constitution* they are expounding. To ask judges to ignore ethical argument is to ask them to interpret something else entirely.

Conclusion

Originalists have thrown originalism under the bus. The price of respectability within the legal academy has been self-alienation from a consistent, two-centuries-old practice of intentionalism. Reliance on the authority of the intentions and expectations of the Framers is an entirely respectable and time-honored form of ethical argument in constitutional law, and it is a practice that most originalists are already engaged in. What is sacrificed in conceding this rather obvious fact stems from the reality that this version of originalism is selfconsciously a form of storytelling. It therefore makes no special claim to reliance on quasi-technical or quasi-scientific methods. It offers arguments rather than answers. In doing so it admits that originalism, like all

136 *See supra* note 86 and accompanying text.

137 *See supra* note 86 and accompanying text.

constitution methodologies, is most interestingly a normative rather than a descriptive exercise, one whose only actual constraint is its practitioners' power to persuade.