

The Role of the Philadelphia Convention in Constitutional Adjudication

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ABSTRACT

Max Farrand's Records of the Federal Convention of 1787 shed light on the intricacies of the debates of the framers over the text of the Constitution. They do not, however, provide authoritative evidence of constitutional meaning. The Philadelphia Convention, after all, was conducted in secret, and the ratifiers, operating in thirteen distinct conventions in culturally and politically diverse states, had no access to its notes. Attempts to glean original intent or meaning from the Records face even greater challenges than attempts to discern a single, collective legislative intent from pieces of legislative history. Yet the Records are not entirely without value in constitutional interpretation. This Article suggests that Farrand's Records serve to confirm something fundamental about the nature of the original Constitution itself—that its text is the product of a hardscrabble compromise, rather than a statesmanlike articulation of broad principle. In contrast with the “living Constitution” theory that the Court has, at times, endorsed, the Records demonstrate that the Constitution's details are not mere placeholders for broader principles; they reflect bargained-for policy decisions. Accordingly, any theory of interpretation that treats textual detail as a marker for broader principle violates the terms of the bargain upon which the framers—who were a veto gate in the process—allowed the document to go forward.

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INTRODUCTION

Even among scholars who subscribe to some form of originalism in constitutional adjudication, many have grown skeptical of the relevance of Max Farrand's *Records of the Federal Convention of 1787*¹ to unearthing constitutional meaning. In the past quarter century, the practice of culling constitutional intent from the notes of the Philadelphia Convention has faced the same conceptual challenges as that of deriving legislative intent from committee reports. If one doubts that Congress possesses a coherent legislative intent, can one even imagine that thirteen different conventions in culturally and politically diverse states shared a coherent collective intent about matters the document left unsettled?² If one thinks it dicey to ascribe the contents of a legislative committee report to Congress as a whole, how could one possibly attribute the views of the Philadelphia Convention to multiple ratifying conventions that had no access to its then-unpublished notes?³ As a hermeneutic tool, Farrand's *Records* might provide, at most, some secondary evidence of the way eighteenth-century Americans used language, especially technical legal language.⁴ But even when used for that purpose, the notes of the Philadelphia Convention collect the practices of only a small sample of eighteenth-century Americans, even informed and politically active ones.⁵ On that view, the notes have relatively little to tell us about constitutional meaning.

At the same time, however, the *Records* may confirm something more fundamental about the nature of the original Constitution itself—that its text is the product of a hardscrabble compromise, rather than a majestic articulation of broad principle. This reading of the *Records* flies in the teeth of the so-called “living Constitution” theory articulated, at times, by the Supreme Court.⁶ Commonly traced to

1 See generally MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787* (rev. ed. 1911) [hereinafter FARRAND'S RECORDS]. In text, these volumes are referred to throughout as “Farrand's *Records*” or simply “the *Records*.”

2 See *infra* text accompanying notes 37–43, 47–48.

3 See *infra* text accompanying notes 44–46, 49–52.

4 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1198–204, 1214 (2003).

5 See *infra* text accompanying notes 73–85.

6 This Article will focus on the Court's theory of living constitutionalism rather than competing academic versions. Some academic accounts of living constitutionalism, for example, reject the very premise that interpreters continue to owe fidelity to the outcomes of the constitutionmaking process. See *infra* text accompanying notes 90, 134. Other prominent academics defend living constitutionalism on the ground that the document, in effect, embraces both rules and standards and that the choice of standards itself invites dynamic interpretation. See, e.g., JACK BALKIN, *LIVING ORIGINALISM* 28–29 (2011); RONALD DWORKIN, *FREEDOM'S*

Chief Justice Marshall's opinion in *McCulloch v. Maryland*,⁷ that approach imagines that the nature of a constitution permits its drafters merely to prescribe the broad outlines of government, with the details to follow.⁸ Interpreters should read the document accordingly, treating its provisions as markers for high-minded statements of principle, rather than as a detailed code meriting strict enforcement.⁹ The appeal of this approach lies in part in the notion that it provides interpreters with needed flexibility while maintaining fidelity to the nature of the document actually adopted.¹⁰ Of particular relevance where Farrand's *Records* are concerned, one sees the premises of living constitutionalism in action, at times, in cases enforcing abstract principles of federalism or separation of powers that the Court has culled from the more detailed structural provisions of the original Constitution.¹¹

Yet Farrand's *Records* confirm that, at least with respect to the original seven articles that compose the structural part of the document, the living Constitution theory does not describe reality. The document itself does not contain merely broad statements of principle, but instead expresses policies at widely variant levels of generality.¹² What the *Records* tell interpreters is that the framers debated, fought, and bargained over the details reflected in the document.¹³ The details are not simply placeholders for broader principles; they are carefully considered decisions to go so far and no farther in crafting a policy. One could know this without Farrand's *Records*. But the *Records* amply confirm that the document is a "bundle of compromises."¹⁴ Accordingly, any theory of interpretation that treats tex-

LAW 7-8 (1996). This Article evaluates the Court's tradition of living constitutionalism, which takes the intermediate position that interpreters owe fidelity to the written Constitution *and* that the document's true design permits interpreters to read the rules embedded in the document as markers for broader principles. See *infra* text accompanying notes 91-103.

⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁸ *Id.* at 407.

⁹ See *id.*

¹⁰ See *supra* note 6.

¹¹ See *infra* note 103 and accompanying text.

¹² See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1978 (2011). Of course, putting terms of art to one side, when the document *does* adopt open-ended standards, such a choice must be read to confer greater interpretive discretion upon interpreters charged with implementing those standards. See *id.* at 2012. While this Article focuses on the type of generality shifting that treats constitutional rules as markers for broader principles, the Court should no more read standards as rules than rules as standards. See *id.* at 2023-24.

¹³ See *infra* Part II.C.

¹⁴ MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (1913).

tual detail as a marker for broader principle violates the terms of the bargain upon which the framers—who were a veto gate in the process—allowed the document to go forward. In other words, Farrand's *Records* make clear that whatever the other virtues or vices of the living Constitution theory, it does not reflect a faithful reconstruction of the nature of the document. Nor does that theory capture the meaning agreed to in the constitutionmaking process.

Part I of this Article considers and briefly comments upon the constitutional debate over the role Farrand's *Records* should play in ascertaining constitutional meaning. Part II lays out the Court's living Constitution theory, emphasizing that part of its appeal lies in its claim of promoting interpretive flexibility while also maintaining fidelity to a document that necessarily embraces high-minded principle rather than nitty-gritty compromise. Part II then argues that the *Records* confirm that the document, in fact, represents "a bundle of compromises" and that any interpretive method meant to approximate fidelity to the constitutionmaking process must proceed on this assumption.

I. THE CONVENTIONAL WISDOM ABOUT PHILADELPHIA'S RELEVANCE

A. *The Problem of Collective Intent*

Although preferred methods of constitutional adjudication vary widely, virtually all constitutional lawyers find it useful to know what the document means. Constitutional originalists in particular seek to determine the original intent, understanding, or meaning of the document because those approaches weld interpretation to the lawmaking process that, for originalists, give the document legitimacy.¹⁵ The

¹⁵ See, e.g., JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 2 (2005) (arguing that originalists of various stripes are united in insisting that "interpreters be bound by the meaning the document had for those who gave it legal authority"); see also, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 146 (1990) (arguing that when a judge "accepts the ratifiers' definition of the appropriate ranges of majority and minority freedom," the counter-majoritarian difficulty implicit in judicial review "is resolved in the way that the founders resolved it, and the judge accepts the fact that he is bound by that resolution as law"); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295 (2007) ("Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that judicial review derives its legitimacy from "the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law"). It is useful to think of the

Court, too, has traditionally aspired to identify some form of original intent, understanding, or meaning in cases of first impression.¹⁶ Interestingly, however, many nonoriginalists also care about the historically situated meaning of the text.¹⁷ Even though they do not find such meaning dispositive of constitutional adjudication, many find it at least relevant—a factor to consider, among others, in determining how to apply the Constitution today.¹⁸ Hence, whatever one's priors,

problem by analogy to statutes. Legal philosopher Joseph Raz has written that if interpreters do not seek the meaning that the lawmakers themselves would have ascribed to the text, it would not “matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions of the country, or classes in the population, whether they are adults or children, sane or insane.” Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996). By the same token, those who wish to root constitutional decisionmaking in the adopted text predictably want to know what meaning its adopters would have attached to it. See Manning, *supra* note 12, at 1975–76 (noting the standard interpretive approach of “recovering or reconstructing the historically situated meaning of the constitutional text”).

¹⁶ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (“In interpreting this [constitutional] text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” (second alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275–76 (1989) (“We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.”); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (concluding that the meaning of the Constitution “must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states”).

¹⁷ See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) (“[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.”); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880–81 (1996) (“Everyone agrees that the text of the Constitution matters. Virtually everyone would agree that sometimes the text is decisive.”).

¹⁸ For example, some view the constitutional text as a potentially useful common point of reference for coordinating social activity when certain conditions are met. See Strauss, *supra* note 17, at 906–24 (discussing the coordinating potential of certain constitutional provisions). Others see the original understanding as a source of values for further reasoning about nonoriginalist evolution of the document's meaning. See, e.g., Dorf, *supra* note 17, at 1799–800 (“Resort to historical context enables the nonoriginalist judge to root normative arguments in values that derive from the Constitution's text.”). Still others simply regard it as one factor among many to consider in arriving at an interpretive outcome. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (identifying the text as one of the factors our tradition recognizes as relevant); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–46 (1987) (same). While these examples do not of course exhaust the many flavors of nonoriginalism, this list does give at least a sense of how nonoriginalists might use the text.

it is useful to think about the most accurate way to decipher the instructions that constitutionmakers set to paper more than two centuries ago.

Of particular relevance here is the appropriate role for Farrand's *Records* in that interpretive process. Perceptions of the *Records*' usefulness have shifted over time as more fundamental conceptions of the nature of originalism have themselves shifted.¹⁹ When modern originalism emerged as an intellectual movement roughly four decades ago,²⁰ its earliest and most prominent proponents—Raoul Berger and Robert Bork—described their approach as seeking the *intent* of the framers on questions of constitutional meaning.²¹ The intuition behind this approach is straightforward. Because speech is a volitional act, meaning depends on the speaker's intentions.²² So if an interpreter wants to discover what a lawmaker truly decided, he or she must ask what that lawmaker intended by the words that it chose to express its policy.²³ Accordingly, as Berger put it, "On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text."²⁴ Unsurprisingly, proponents of that approach freely consulted the records of the Philadelphia Convention to determine the intent of the

19 This discussion builds on Kesavan & Paulsen, *supra* note 4, at 1134–44.

20 Though originalism never dropped completely from judicial or academic discourse, the philosophy apparently became relatively unfashionable during much of the post-New Deal period. See Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 330 (2009). The conventional view is that the modern originalist movement took shape in the 1970s in reaction to perceived nonoriginalist excesses by the Warren Court. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 679–80 (2009); Kesavan & Paulsen, *supra* note 4, at 1134–35.

21 See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 8 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (discussing the binding quality of "framers' intent").

22 See, e.g., Stanley Fish, *Play of Surfaces: Theory and the Law*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 299 (Gregory Leyh ed., 1992); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 725 (1982).

23 See, e.g., Frank E. Horack, Jr., *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 120 (1932) ("When X says, 'A big bundle of bills came this morning,' does Y know what X received? . . . Y is only interested in learning what meaning X is trying to convey."); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) ("The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed.").

24 BERGER, *supra* note 21, at 7. Anglo-American traditions of statutory interpretation have long focused on ascertaining the will or intent of the legislature. See, e.g., *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 21 (1829) (Story, J.); *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.); *Pennington v. Cox*, 6 U.S. (2 Cranch) 33, 52 (1804) (Marshall, C.J.); see also, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *59.

framers, who drafted the Constitution and presumably knew what it was supposed to mean.²⁵

Today, however, an original meaning rather than original intent appears to predominate in originalist discourse.²⁶ Rather than asking what the drafters subjectively intended, this approach focuses on “the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.”²⁷ This approach represents a different conception of the relationship between language and legislative supremacy. Ludwig Wittgenstein taught that language is intelligible by virtue of a community’s shared practices.²⁸ Lawmakers communicate their policies to

²⁵ See Kesavan & Paulsen, *supra* note 4, at 1135. Then–Justice Rehnquist, for example, advocated “reading the record of the Founding Fathers’ debates in Philadelphia” to determine original intent. William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976). The Court in this period did not hesitate to turn to the Philadelphia Convention when it wished to identify the framers’ intent. See, e.g., *United States v. Ptasynski*, 462 U.S. 74, 80–81 (1983) (noting that the concerns expressed in the Philadelphia Convention help to reveal “more clearly” the purposes underlying the Uniformity Clause, U.S. CONST. art. I, § 8, cl. 1); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (relying, *inter alia*, on the records of the Philadelphia Convention to conclude that “the prescription for legislative action in Art. I, §§ 1, 7, represents the framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure”); *Powell v. McCormack*, 395 U.S. 486, 533–39 (1969) (combing Farrand’s *Records* for evidence of whether the framers meant to make exclusive the criteria set forth by the Qualifications Clause, U.S. CONST. art. I, § 2, cl. 2, for membership in the House).

²⁶ See, e.g., Kesavan & Paulsen, *supra* note 4, at 1139–48. A number of prominent originalist scholars subscribe to the original meaning approach. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552–53 (1994); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1126 (1998); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1140 (1998). Even Judge Bork, one of the most prominent proponents of the original intent approach, has moved decidedly in this direction. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1996) (“The search is not for subjective intention. . . . [W]hat counts is what the public understood.”).

To streamline the narrative, the analysis here elides what Kesavan and Paulsen would characterize as an intermediate phase emphasizing original understanding. See Kesavan & Paulsen, *supra* note 4, at 1137–39. Building on the basic fact that the ratifying conventions gave legal force to the Constitution, proponents of original understanding exhorted interpreters to ask what the ratifiers, rather than the drafters, would have taken the document to mean. See *id.* at 1137–38. Even if original understanding represents a distinctive step in the intellectual history of modern originalism, separate consideration of that approach is unnecessary to delineate the proper role of Farrand’s *Records* in constitutional adjudication. Whatever else might distinguish original understanding from original meaning, the practical and conceptual difficulties with attributing the contents of Farrand’s *Records* to the ratifiers would be no different under either approach. See *infra* text accompanying notes 37–60.

²⁷ See Barnett, *supra* note 26, at 105.

²⁸ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134–142 (G.E.M. An-

others with the expectation that their commands will be decoded against a backdrop of such practices.²⁹ As a result, interpreters can properly ascertain a lawmaker's meaning by asking how someone conversant with all the applicable practices would read the text in context.³⁰ As discussed below, Farrand's *Records* play a far more limited role under this approach than they would under original intent originalism.³¹

What explains the shift from original intent to original meaning? Perhaps originalists took to heart a raft of nonoriginalist critiques of original intent.³² In a famous article published in the early 1980s, for example, Paul Brest nicely demonstrated the difficulties of reconstructing a coherent "original intent" from a lawmaking process that consisted of countless lawmakers spread across the framing convention and thirteen distinct ratifying conventions.³³ In an equally influential article of the same vintage, Professor Jefferson Powell made a powerful (though not uncontested) case that the framers themselves would have viewed original intent originalism as an inappropriate method of interpretation.³⁴

scombe trans., 3d ed. 1953). Of the leading original meaning originalists, Judge Easterbrook has relied most directly upon Wittgenstein's insights. See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359–60 (1992).

²⁹ See Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 758 (1966) ("The words [a legislator] uses are the instruments by means of which he expects or hopes to effect certain changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (e.g., judges and administrators) will understand these words."); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 339 (Andrei Marmor ed., 1995) ("A legislator who votes for (or against) a provision like 'No vehicle shall be permitted to enter any state or municipal park' does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.").

³⁰ Put another way, original meaning tries to function as "an objective, hypothetical construct that represents the meaning that the Constitution would have had to a fully-informed public audience." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 349 n.89 (2002).

³¹ See *infra* Part I.B.

³² For a fuller account of these developments, see Kesavan & Paulsen, *supra* note 4, at 1135–48.

³³ Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980).

³⁴ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the founders would have looked to common law interpretive techniques rather than asking the subjective intentions of the founders); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987) (book review) (arguing that the founders would have sought "the meaning an interpreter was entitled to derive

Yet, although these writings may have helped move originalists off original intent, the contemporaneous rise of “the new textualism”—an approach developed in a series of articles, opinions, and speeches by high profile judges who questioned the utility of legislative history as a source of legislative intent—likely solidified the shift.³⁵ It is at least suggestive that some of the most prominent proponents of original meaning originalism—namely, Justice Scalia and Judge Easterbrook—have been at the forefront of the new textualism in statutory interpretation.³⁶ There is, however, a more substantive reason to link these two movements. If there is anything at all to the textualists’ well-publicized concerns about the use of legislative history, then it is difficult if not impossible to treat Farrand’s *Records* as authoritative evidence of constitutional intent.

First, building on the intent skepticism of the legal realists,³⁷ the new textualists have questioned the very existence of collective legislative intent. Put to one side the reality that legislators vote for or

from the document using the common law’s techniques of construction,” which “might or might not be the meaning consciously intended by the document’s makers”). Of course, scholars disagree about the founders’ expectations concerning constitutional interpretation. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 342–64 (1996) (arguing that the founders were opportunistic in their accounts of proper constitutional technique); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 93–102 (1988) (arguing that the founders thought the understandings of the ratifiers to be crucial).

³⁵ See Kesavan & Paulsen, *supra* note 4, at 1136 (drawing the connection between statutory textualism and the rise of original meaning originalism); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1991) (describing the emergence of modern textualism); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 253–56 (1992) (same).

³⁶ Compare, e.g., Easterbrook, *supra* note 26, at 1125–26 (defending constitutional textualism), and Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (rejecting constitutional intentionalism), with Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J. L. & PUB. POL’Y 59 (1988) (criticizing judicial reliance on legislative intent in statutory interpretation), and Scalia, *supra*, at 18–25 (defining and defending statutory textualism).

³⁷ This aspect of textualism builds primarily on the work of Max Radin. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). According to Professor Radin:

The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinate, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinate should be narrowed. . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hun-

against a bill for countless—and, in most cases, undisclosed—reasons, only some of which have to do with substantive rather than political or strategic considerations.³⁸ To do intentionalism right, an interpreter must be able to reconstruct from snippets of legislative history what the legislature as a whole would have done about an issue that the statutory text itself does not resolve.³⁹ That is a tall order. Even if one could somehow reliably identify a set of substantive preferences shared by the legislative majority, those preferences do not translate seamlessly into law.⁴⁰ The legislative process is complex, opaque, and path dependent.⁴¹ Legislative outcomes often turn on nonsubstantive factors such as the order in which issues are presented, what strategic voting or logrolling has occurred, and how well a bill's proponents have been able to navigate the countless procedural hurdles that Congress imposes on itself.⁴² Although such considerations are not “total

dreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.

Id. at 870–71.

³⁸ See Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284 (1992). According to Judge Easterbrook:

Any one author has a mix of objectives, motives, desires, and concerns that we fuse together and for which “intent” is a handy label. Legislators care about reelection, about reputation, about ability to do good for constituents or the nation as a whole or posterity. These tug in different directions for anyone with a role in forming or executing laws; the concept of “an” intent for a person is fictive and for an institution hilarious.

Id. at 284.

³⁹ See *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952) (Hand, J.) (“Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.”), *aff'd per curiam by an equally divided Court*, 345 U.S. 979 (1953); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“[T]he task for the judge called upon to interpret a statute is . . . one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.” (footnote omitted)).

⁴⁰ See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“[I]t turns out to be difficult, sometimes impossible, to aggregate [legislators' preferences] into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made.”).

⁴¹ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 (2003) (summarizing the arguments of leading judicial textualists).

⁴² See Easterbrook, *supra* note 40, at 547–48 (“The existence of agenda control makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.”); *id.* at 548 (“[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body's design.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992) (noting that the

bars to judicial understanding,” they are “so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses.”⁴³

Second, even assuming that Congress has a coherent collective intent, the new textualists have expressed doubt about whether legislative history can supply reliable evidence of such intent. Even with high-profile legislative history such as the reports of the originating committees in each House, one simply cannot know whether a constitutionally sufficient majority of Congress read, much less agreed with, the contents of the legislative history.⁴⁴ Nor can one say with confidence that those responsible for generating the legislative history—who may or may not be representative of the chamber as a whole—have accurately portrayed the views or understandings of the majority.⁴⁵ Accordingly, as Justice Scalia famously wrote:

enactment of legislation often depends on “idiosyncratic, structural, procedural, and strategic factors”). Consider some of the procedural hurdles that a bill must clear en route to enactment:

The Rules Committee in the House may refuse to grant a rule for a committee bill, thereby scuttling it. The Speaker may use his power to schedule legislation and to control debate in ways detrimental to the prospects of a committee bill. A small group of senators in the U.S. Senate may engage in filibuster and other forms of obstruction. Any individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill. In short, veto groups are pervasive in legislatures

Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987).

⁴³ Easterbrook, *supra* note 40, at 548.

⁴⁴ See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 97–100 (1988) (Scalia, J., concurring in part and concurring in the judgment) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote”); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (“The great flood of legislative history suggests that members of Congress can scarcely be expected to master the secondary materials of the bills upon which they vote.”).

⁴⁵ *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment) (arguing that the legislative history “does not necessarily say anything about what Congress as a whole thought”); *Edwards v. Aguillard*, 482 U.S. 578, 637 (1986) (Scalia, J., dissenting) (questioning whether all legislators would “agree with the motivation expressed in the staff-prepared committee reports they might have read”). In a much-publicized speech delivered at various American law schools in the 1980s, Justice Scalia opined:

Nor, in the realities of the modern Congress, is a committee likely to represent a microcosm of the whole body, with “middle-of-the-road” views on the issues it addresses. To the contrary, by process of self-selection the committee is almost invariably “out in front” of the remainder of the Congress on the issues for which it has responsibility. A farm bill adopted by the Agriculture Committee in either house, for example, would be a far cry from what the full Congress would adopt. Why,

In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate, or to read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone. The floor is rarely crowded for a debate, the members being generally occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken. And as for committee reports, it is not even certain that the members of the issuing *committees* have found the time to read them⁴⁶

Both sets of concerns apply *a fortiori* to Farrand's *Records*. First, on the question of collective intent, the scope and complexity of the constitutionmaking process makes the legislative process look straightforward and compact by comparison. Though no fan of textualism himself, Professor William Eskridge has written:

If the collective "intent" of the bicameral legislature is an incoherent concept, as the new textualists argue, the collective "understanding" of an entire nation during a constitutional moment must be even more so. After all, a statute running the legislative gauntlet only has to satisfy some portion of the 536 participants (President, 100 Senators, 435 House Members) in the process. The Constitution itself ran the gauntlet of the Philadelphia Convention and thirteen state ratifying conventions, involving thousands of people. The national "understanding" of what the Constitution meant involved millions.⁴⁷

Or consider Justice Story's words, penned far closer to the constitutionmaking process itself:

The constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself. In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and differ-

then, should we assume that a legislative history largely fabricated by such a committee will be representative of the full Congress? It almost assuredly will not.

Antonin Scalia, Speech on Use of Legislative History 13 (delivered during fall 1985 and spring 1986 at various law schools) (transcript on file with *The George Washington Law Review*).

⁴⁶ Scalia, *supra* note 45, at 32.

⁴⁷ William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1308 (1998).

ent explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favour. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. . . . It is not to be presumed, that, even in the convention, which framed the constitution, from the causes above-mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others.⁴⁸

In other words, it is most unlikely that constitutionmakers shared any sort of uniform intent on unsettled questions of any seriousness.

Second, even if one assumes that constitutionmakers formed a uniform intent about the meaning of the document, it is most unlikely that the ratifiers who gave the Constitution its legal force and effect were aware of, much less agreed with, the views expressed in the Philadelphia Convention. In contrast with a legislative committee that officially reports its collective views of proposed legislation, the Philadelphia Convention produced no official explanation of the Constitution. So even if a hypothetical ratifier had full knowledge of the substance of the debates, that ratifier would have had to make sense of the individual views expressed in countless statements on the Convention floor. Without a great deal of context, it would be impossible to develop a workable knowledge of the relative standing and potential biases of the speakers, or to parse the countless and often-shifting votes that took place during the months of deliberation.

The ratifiers, of course, had only the sketchiest knowledge of what went on in Philadelphia. Early on, the Convention adopted a rule of secrecy.⁴⁹ Near its conclusion, moreover, the Convention further decided not to publish the Journal of the Convention or any other papers, but rather to place them in George Washington's custody until he received further instructions from the new Congress (if the Constitution was adopted).⁵⁰ And Madison's notes themselves—the most comprehensive account of the deliberations—remained unpublished

⁴⁸ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406, at 388–89 (Hilliard, Gray & Co. 1833).

⁴⁹ See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 134–39 (1928).

⁵⁰ See 3 FARRAND'S RECORDS, *supra* note 1, at 423–24.

until 1840.⁵¹ To be sure, a number of individual delegates injected into the ratification debates their own accounts of the Convention and the intentions of the framers.⁵² But if one cannot reliably say that modern legislators are aware of or embrace the representations of intent made by an official committee report, it is most improbable that any particular ratifier—much less a constitutionally sufficient number of them—would have accepted the potentially idiosyncratic representations of intent made after the fact by individual delegates to the Philadelphia Convention.

Not to put too fine a point on it, but even if one accepted the most telling responses to the textualist critique of legislative history, one would still have to reject Farrand's *Records* as an authoritative source of constitutional intent. Legal scholars have argued that even if one cannot identify the *actual* or *subjective* intent of Congress, one might legitimately use legislative history as a source of imputed intent. If Congress enacts legislation against the presumed backdrop of well-settled rules of statutory construction,⁵³ and those rules of construction provide that certain kinds of legislative history (e.g., committee reports) will be treated as authoritative evidence of intent,⁵⁴ then an interpreter might reasonably impute the contents of such legislative history to Congress, whether or not any particular member has actually read or agreed with those materials.⁵⁵ Political scientists, moreover, have argued that textualists overstate the unreliability of legislative history as a proxy for Congress's views. To the extent that pivotal repeat players—such as legislative committees—generate legislative history as agents of the enacting majority, they face potential political sanctions if their assertions badly misrepresent the majority's

51 See Kesavan & Paulsen, *supra* note 4, at 1115.

52 See WARREN, *supra* note 49, at 792–93.

53 See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 486 (1991) (discussing the presumption “that Congress legislates with knowledge of our basic rules of statutory construction”).

54 See, e.g., *J. W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 591 (1978); *Commissioner v. Estate of Church*, 335 U.S. 632, 650 n.11 (1949).

55 This conclusion reflects the premise that communication depends on shared social practices. See *supra* note 29. If the use of legislative history reflects a shared social practice of the legal community, then judges arguably should read legislation in light of that practice. See William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *NOMOS XXXVI: THE RULE OF LAW* 265, 273 (Ian Shapiro ed., 1994). For an opposing viewpoint, see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 HARV. L. REV. 673 (1997) (arguing that such use of legislative history violates constitutional norms against self-delegation).

views.⁵⁶ Additionally, if committees are known to serve as crucial “legislative ‘gatekeeper[s]’ and ‘policy incubator[s]’” in the legislative process, then “legislators outside the committee and their staffs [may] primarily focus on the [committee] report” to learn how a bill works in practice.⁵⁷

It is beyond this Article’s scope to adjudicate the competing conceptual and empirical claims about legislative history. Suffice it to say that even if one accepts the antitextualist view of legislative history, the previously stated concerns about Farrand’s *Records* would remain intact. Even if one believes that eighteenth-century judges were expected to look for constitutional intent, there is no evidence that the ratifiers enacted the Constitution against the backdrop of an established interpretive practice requiring them to privilege the views expressed by its drafters. Nor can one say that the framers somehow spoke as agents of as-yet unformed ratifying conventions, especially since the method of ratification was not settled until near the very end of the Philadelphia Convention.⁵⁸ Finally, it is not plausible that the ratifiers generally found their answers to unsettled questions in the deliberations of the gatekeeping Philadelphia Convention, given the Convention’s decision not to publicize its proceedings in time for the ratification campaign.

In light of these considerations, it should come as no surprise that a broad swath of both originalists and nonoriginalists tend to agree that Farrand’s *Records* should count for very little in the derivation of constitutional meaning.⁵⁹ Certainly, interpreters should not treat them as authoritative evidence of constitutional intent.⁶⁰ This conclu-

⁵⁶ McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 24 (1994).

⁵⁷ DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 98, 100 (1991).

⁵⁸ See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 370 (2000) (noting that the framers deferred questions about the method of ratification until the end).

⁵⁹ Kesavan and Paulsen have assembled a long list. See Kesavan & Paulsen, *supra* note 4, at 1116–17 (citing, *inter alia*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1059 n.80 (1984); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–29 (2000); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 161 n.37 (1995); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 372 n.48 (1990); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1801–02 (1996)).

⁶⁰ Interpreters treat legislative history as “authoritative” when then they attribute a speaker’s declared intent to the legislature as a whole because the speaker occupies a pivotal

sion does not, however, mean that Farrand's *Records* have nothing to contribute to our understanding of the Constitution.

B. The Records as Lexicon?

In a famous article, Vasan Kesavan and Michael Paulsen suggest that even if originalists deny Farrand's *Records* their former authoritative status, the *Records* may still be informative or persuasive. Because the debates contain examples of how well-informed members of the founding generation used language (including technical legal language), Farrand's *Records* may provide an "extratextual dictionary of constitutional meaning."⁶¹ Indeed, Kesavan and Paulsen say, the *Records* may be superior to a good eighteenth-century dictionary because they use words (and, more importantly, phrases) in the very contexts in which we are interested in discovering their meaning.⁶² In addition, the evolution of a clause or the rejection of proposals or amendments may shed light on how the participants understood the meaning or purpose of particular clauses.⁶³ Finally, because the Philadelphia Convention's Committee of Style was not authorized to make substantive changes, consulting the more elaborate draft referred to the Committee of Style may clarify the participants' detailed understandings of the document's ultimate meaning.⁶⁴

Kesavan and Paulsen subscribe to the original meaning or textualist position. For them, each of these data points has probative value not because it authoritatively reveals a relevant lawmaker's intended meaning, but because it offers some insight into the way the framers, as well-informed eighteenth-century Americans, understood the text.⁶⁵ The framers' revealed understanding of the text, in turn, might provide insight into how a hypothetical reasonable person would have understood the words at the time.⁶⁶

There is certainly something to what Kesavan and Paulsen say. Even if one rejects using legislative history as authoritative evidence

role in the lawmaking process, and not because the utterance has truth value apart from the speaker's identity. See Manning, *supra* note 55, at 684.

⁶¹ Kesavan & Paulsen, *supra* note 4, at 1198.

⁶² *Id.* at 1201–02.

⁶³ *Id.* at 1204–05.

⁶⁴ *Id.* at 1206–07.

⁶⁵ See *id.* at 1149 (noting that "second-best" sources such as Farrand's *Records* "are evidence of meaning" but "are not *constitutive* of meaning, and hence binding determinations of meaning in their own right").

⁶⁶ See *id.* at 1183 ("[S]ubjective understandings by Framers or Ratifiers—their actual mental states—are admissible evidence in making a claim about objective original meaning to the hypothetical Ratifier.").

of legislative intent, it may have the power to inform or persuade an interpreter of facts relevant to meaning.⁶⁷ Because meaning depends on social and linguistic conventions, consulting the utterances of those on the scene has potential interpretive value precisely because “[a]lterations in the legal and cultural landscape may [otherwise] make the meaning hard to recover.”⁶⁸ Even hard-nosed textualists like Judge Easterbrook acknowledge that legislative history may give interpreters insight into the “the legal and political culture of the drafters,” supply crucial facts about “the setting of the enactment,” or reveal “that words with a denotation ‘clear’ to an outsider are terms of art, with an equally ‘clear’ but different meaning to an insider.”⁶⁹ In other words, legislative history—including Farrand’s *Records*—may contain facts that are relevant to interpretation but whose value does not depend on the identity of their utterer as a participant in the law-making process.⁷⁰

Even on these terms, however, use of the *Records* is fraught with peril if interpreters credit the assertions contained therein at face value. Of course, the *Records* are less worrisome than modern legislative history. Whereas modern legislative history is prone to posturing by legislators who know that their utterances will influence constituents and judges,⁷¹ the Convention’s choice to conduct itself in secret

⁶⁷ See Manning, *supra* note 55, at 732 (noting that committee reports “may simply offer the Court insight into the way in which any reasonable person, skilled in the legal arts, would have understood the relevant phrase, independent of the committee’s subjective understanding of statutory meaning”).

⁶⁸ *Atchison, Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 445 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring).

⁶⁹ *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.).

⁷⁰ For example, the Contract Clause, U.S. CONST. art. I, § 10, cl. 1, evidently was modeled after a similar clause in the Northwest Ordinance of 1787, see Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1907 (2010) (citing An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, as adapted by An Act To Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 51 n.a (1789)). Reading Farrand’s *Records* would inform a modern reader, who might not otherwise know of the connection, that the clause originated in a motion by Rufus King “to add, in the words used in the Ordinance of Congs establishing new States, a prohibition on the States to interfere in private contracts.” 2 FARRAND’S RECORDS, *supra* note 1, at 439. An interpreter making proper use of the *Records* would not take that fact as an expression of intent, but rather as an invitation to investigate whether the clause, in fact, tracked the language of the Northwest Ordinance and to consider whether such a connection, if verified, should carry any interpretive significance quite independent of King’s utterance.

⁷¹ Once legislators know that judges will use legislative history to guide their interpretation, the former have every incentive to salt the record with interpretations favorable to their preferred policy point. See, e.g., *Int’l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1015–19 (1992).

offers at least some comfort that statements made within its walls do not present the same risk of posturing.⁷² Still, that does not mean that its deliberations reliably reveal usage. Even with respect to the most objective of Kesavan and Paulsen's proposals—consulting the debates for evidence of ordinary or technical usage—one could hardly call Farrand's *Records* a lexicon.⁷³ When compilers of actual lexicons define meaning, they consider a comprehensive array of cultural sources to determine the way speakers within the relevant linguistic community use a word in context.⁷⁴ Even for a specialized lexicon of legal and political terms, the usage exemplified by the Philadelphia Convention would constitute but one data point in such a compilation.⁷⁵ In addition, even putting aside the obvious ways in which the Philadelphia Convention was unrepresentative, there is no good way to know whether its small and elite membership constituted a representative sample of the political community whose linguistic conventions a modern interpreter would want to know.⁷⁶ Even if Congress conducted its deliberations in utter secret, it is unlikely that one would treat its records as a reliable lexicon of legal and political terms.

Whether or not its deliberations were intended for public consumption, the Philadelphia Convention was a political body, prone to all of the defects of such bodies. An entire branch of interpretation is predicated on the idea that legislators sometimes act in haste and use language imprecisely.⁷⁷ In the heat of battle, even eminent lawmakers can speak or act carelessly or shade their expressions or actions in order to win needed support or gain a desired advantage. Consider

⁷² See Kesavan & Paulsen, *supra* note 4, at 1189–91.

⁷³ But see *id.* at 1201 (referring to the debates as a “specialized contextual dictionary”).

⁷⁴ See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 283–92 (1998).

⁷⁵ To form an accurate assessment even of specialized meaning, one presumably would have to consult numerous other sources to see how language was used at the time, including the records of the Continental Congress, state ratifying conventions, *The Federalist*, state legislative debates, newspaper articles, and private correspondence. For an excellent discussion of some of the other contemporaneous sources of legal meaning, see Kesavan & Paulsen, *supra* note 4, at 1148–80.

⁷⁶ See, e.g., RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 65–66 (2009) (describing the elite status of the framers); RONALD DWORKIN, LAW'S EMPIRE 364 (1986) (noting that the framers were unrepresentative of the people and were not chosen by any “nationally sanctioned” method). Others believe that the framers constitute a good proxy at least for the ratifiers. See, e.g., FARRAND, *supra* note 14, at 40–41; Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981). At a minimum, the idea that interpreters should view the framers' understandings as somehow representative of those of the relevant political and legal community is something to be proved, not assumed.

⁷⁷ Purposivists rely centrally on that view of legislative behavior. See *infra* note 106.

Kesavan and Paulsen's suggestion that modern interpreters use the more detailed pre-Committee of Style draft to clarify ambiguities in the sparser final document.⁷⁸ Although the Committee of Style's mandate did not include the authority to make substantive changes,⁷⁹ one cannot deny that its members had both the incentive and at least some capacity to sneak their substantive preferences into the document they reported to the Convention.⁸⁰ It is also hard to deny that the delegates were susceptible to haste, carelessness, idiosyncrasy, or artifice, making it difficult to treat Farrand's *Records* as a sort of lexicon.

Again, this is not to say that the *Records* are utterly without value. In light of the foregoing considerations, however, it would be unwise for an interpreter to predicate a conclusion about constitutional meaning exclusively upon the deliberations of the Philadelphia Convention.⁸¹ Still, in ascertaining meaning, evidence is cumulative. As noted, even unauthoritative sources such as legislative history or *The Federalist* can provide useful information about interpretive context—perhaps identifying potential terms of art or noting the mischief

⁷⁸ See *supra* note 64 and accompanying text.

⁷⁹ See 2 FARRAND'S RECORDS, *supra* note 1, at 553.

⁸⁰ As Dean William Treanor has written:

[As chair of the Committee of Style, Gouverneur] Morris also made substantive changes that the record of the debates indicate went unnoticed. He or one of the other members of the committee inserted the Contracts Clause into the Constitution, even though it had been previously voted down. He revised the Territories Clause so that new territories could be permanently kept as territories, rather than eventually being incorporated as states, and, by his own admission, he crafted the change in such a way so as to escape notice.

William Treanor, Against Textualism, 103 NW. U. L. REV. 983, 1000–01 (2009) (footnotes omitted); see also, e.g., FARRAND, *supra* note 14, at 181–82 (noting that “just a little suspicion attaches to the work” of Gouverneur Morris and the Committee of Style); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 272 (1985) (discussing the Committee of Style's addition of the Contract Clause to Article I); James Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1292 (1998) (“The Committee of Style neatly broadened the federal power to assume state debts by changing the language to include all debts contracted ‘before the adoption of this Constitution’—thereby capturing all state and federal debts that the new Congress chose to recognize as valid.”). The Court has noted—and, at times, credited—apparent substantive changes made by that committee. See, e.g., *Nixon v. United States*, 506 U.S. 224, 231–32 (1993) (giving substantive effect to the Committee of Style's addition of the word “sole” to the Impeachment Clause); *Myers v. United States*, 272 U.S. 52, 138 (1926) (crediting a structural argument based on a change made in Article I by the Committee of Style).

⁸¹ This Article merely addresses the value of the Philadelphia Convention as a tool for deciphering the Constitution's meaning. It does not address how it might be used in other, noninterpretivist approaches to constitutional adjudication. For a thoughtful Burkean defense of consulting the framers' intentions, see Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683 (2012).

that inspired the legislation.⁸² But because such sources lack authority independent of the truth value of their assertions, interpreters must assess their contents against sources external to the debates themselves.⁸³ To borrow from another context, the weight an interpreter gives to content from Farrand's *Records* should turn on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁸⁴ In other words, Farrand's *Records* may be useful to *confirm* other evidence about the founding generation's lexicon or the mischiefs it worried about, even if they cannot serve as an independent source of meaning.⁸⁵

⁸² See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1359–63 (1998); Manning, *supra* note 55, at 731–38.

⁸³ See Manning, *supra* note 82, at 1360 (arguing that "arguments [in *The Federalist*] must be carefully evaluated on their merits"); Manning, *supra* note 55, at 732 (arguing that interpreters "must take care to verify the accuracy of the [committee's or sponsor's] reporting").

⁸⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (prescribing the standard of review of agency action when the agency does not have delegated lawmaking authority).

⁸⁵ The Court's leading originalists do not always observe this principle. In his dissenting opinion in *Morrison v. Olson*, 487 U.S. 654 (1988), for example, Justice Scalia concluded that for purposes of the Exceptions Clause of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, it is necessary but not sufficient for an "inferior" officer to be subordinate to a principal officer. In concluding that "[e]ven an officer who is subordinate to a department head can be a principal officer" for purposes of that clause, Justice Scalia relied exclusively on a remark by Madison at the Philadelphia Convention. See *Morrison*, 487 U.S. at 722 (citing 2 FARRAND'S RECORDS, *supra* note 1, at 627); see also, e.g., *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (citing exchange between Madison and Johnson to show that mootness is an element of the case or controversy requirement of Article III). By contrast, in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), Justice Scalia relied on remarks by James Wilson at the Philadelphia Convention suggesting that the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, was to be interpreted in light of international conflicts law. *Sun Oil*, 486 U.S. at 723 (citing 2 FARRAND'S RECORDS, *supra* note 1, at 488). Importantly, Justice Scalia went on to substantiate Wilson's assertion by observing that "this expectation was practically inevitable, since there was no other developed body of conflicts law to which courts in our new Union could turn for guidance." *Id.* Although reasonable people may disagree about whether this remark offered an adequate verification of a lone remark by a framer, Justice Scalia's follow-up shows how an interpreter can use the *Records* to identify an externally verifiable conclusion that otherwise might or might not be obvious to the interpreter.

Justice Thomas similarly uses the *Records* in multiple ways. At times, he seems to treat them as almost probative of legislative intent. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 630–31 (1997) (Thomas, J., dissenting) (treating statements by Mason and Madison as "strongly suggest[ive]" of the meaning of the Imports-Exports Clause). At the same time, he sometimes uses them merely to confirm the apparent import of the constitutional text itself. See, e.g., *United States v. Int'l Bus. Mach.*, 517 U.S. 843, 859–60 (1996) (pointing to "substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language").

II. THE CONSTITUTION AS COMPROMISE

As a source of confirmation, the Philadelphia Convention tells us something quite fundamental about at least the first seven articles of the Constitution. In Farrand's words, the original document is "a bundle of compromises."⁸⁶ This premise contradicts an important conception of the nature of the Constitution, from which one prominent account of constitutional adjudication derives. Tracing back to the time of John Marshall, the Court's "living Constitution" tradition presupposes that the Constitution necessarily reflects broad articulations of principle and that interpreters should read it in that spirit. In practice, this translates to a highly purposive approach to constitutional adjudication that does not treat the text as a hard constraint on adjudicative discretion.⁸⁷

At least insofar as the original Constitution is concerned, this conception is misplaced.⁸⁸ The detail evident in the text of the document and the varying levels of generality at which it articulates its policies suggest that the Constitution resulted from compromises that paid careful attention to the means, as well as the ends, of government. To respect the process that gave political minorities the right to insist upon compromise as the price of assent, the interpreter must adhere to the lines drawn by the text of the document.

Farrand's *Records* confirm what the text of the document itself suggests. The clauses of the original Constitution did not emerge as the byproduct of high-minded, abstract debates over principle. They resulted from practical, nitty-gritty compromise over the way government was to work in practice. Treating the detailed structural provisions of the first seven articles of the Constitution as placeholders for broader principles (including freestanding federalism or separation of powers doctrines)⁸⁹ ignores the reality that the document strikes numerous balances as part of the bundle of compromises presented to the ratifiers. This does not suggest that we should respect the compromises in the document *because* the Philadelphia Convention reveals their contents; rather, it merely indicates that the Philadelphia Convention confirms what a reasonable person would otherwise infer from the text: the U.S. Constitution sweats the details and should be interpreted accordingly.

⁸⁶ FARRAND, *supra* note 14, at 201.

⁸⁷ See *infra* text accompanying notes 101–03.

⁸⁸ See Manning, *supra* note 12, at 1978–2005; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2040–57 (2009).

⁸⁹ See *infra* text accompanying note 103.

This Part considers the Court's living Constitution tradition. Next, it examines the textual and structural arguments against ascribing that approach to the original document. As in Part I, analogies from the statutory interpretation debate sharpen the comparison of the two competing theories of constitutional interpretation. Finally, this Part offers four examples—presidential selection, the Impeachment Clause, the Bicameralism and Presentment Clauses, and judicial selection—to illustrate the salient role of practical compromise in the composition of the document.

A. *The Living Constitution*

The idea of the living Constitution takes many forms, many of which are openly nonoriginalist.⁹⁰ The present analysis, however, is concerned only with the way the U.S. Supreme Court uses that framework. The Court provides the appropriate focal point here because its version not only has an ancient pedigree, but also purports to root living constitutionalism in the idea of fidelity to the document. That is, because the Court's version of the living Constitution tries to ground itself in the likely expectations and designs of those who created the document, it falls squarely within the originalist tradition and can be measured against the criteria of originalism.⁹¹

In the Supreme Court, the idea of the living Constitution traces back at least to *McCulloch v. Maryland*, in which Chief Justice Marshall famously wrote for the Court:

⁹⁰ See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24 n.52 (2009) (noting that originalism and living constitutionalism are often viewed as a "simple binary choice: 'whether American constitutionalism . . . obligates interpreters to base decisions on what the framers had in mind when they wrote the Constitution or whether it obligates interpreters to adapt general constitutional principles to changing circumstances or more enlightened sensibilities'" (quoting Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 192 (1997))); Richard H. Fallon, Jr., *supra* note 18, at 1214 (contrasting originalism with "the familiar metaphor of a 'living Constitution' [that] suggests that our legal culture assumes a close connection between legal interpretation in general, and constitutional interpretation in particular, and an evolving ideal of justice"); David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 975–78 (2011) (contrasting the living Constitution approach of common law constitutionalism with the originalist idea "that changes in constitutional law can be justified only by some new discovery about what the relevant provision of the Constitution was taken to mean when it was adopted").

⁹¹ See, e.g., Jonathan R. Macey, *Originalism as an "Is"m*, 19 HARV. J.L. & PUB. POL'Y 301, 308 (1996) (arguing that "the difference between originalists and nonoriginalists is only a matter of degree" and that "[e]verybody agrees that the Framers' original design exerts at least some pull").

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.⁹²

To underscore the apparent premise that the nature of a constitution makes the interpretation of such an instrument unique, Marshall admonished: “[W]e must never forget, that it is a *constitution* we are expounding.”⁹³

Although Marshall uttered his famous aphorism in conjunction with affirming broad congressional authority to adapt legislation to unforeseen circumstances under the Necessary and Proper Clause, his reasoning has come to be associated with the idea that judges possess greater authority to interpret the constitutional text flexibly and purposively than they do with other written instruments, such as statutes.⁹⁴ Why? The nature of the document makes it reasonable to infer that its adopters would have expected and desired such an approach. Because the Constitution prescribes the architecture for a large polity meant to endure throughout the ages, constitutionmakers cannot reasonably expect to foresee or provide in detail for the many contingencies that the document will have to confront.⁹⁵ In other words, interpreters can expect only the “great outlines” and “major objects,” not the nitty-gritty detail of a rule-based code.⁹⁶ In addition, because constitutionmakers consciously rendered the document

⁹² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁹³ *Id.*

⁹⁴ See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 12 n.25 (1998) (“Marshall, of course, was speaking not of all constitutional interpretation, but of the expansive interpretation of Congress’s enumerated power. . . . Nonetheless, these words from *McCulloch* gave living constitutionalism its mantra.”).

⁹⁵ See, e.g., *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”).

⁹⁶ *McCulloch*, 17 U.S. at 407.

nearly impossible to amend—typically requiring the assent of a two-thirds majority of each House and three-quarters of the states—they could not reasonably have expected needed adaptations to occur through the amendment process.⁹⁷ Accordingly, the living Constitution tradition suggests that the constitutionmaker's design implicitly authorizes judges to adjust even a precise text to unforeseen problems.

To be sure, one aspect of the living Constitution tradition merely holds that judges should not read broadly or generally worded texts narrowly to reflect only the founders' subjective expectations or the precise mischief at which a particular clause was aimed.⁹⁸ That version is fully consistent with the textualist approach discussed below.⁹⁹ Of greater interest here, though, is the version of living constitutionalism that suggests that judges interpreting the Constitution have extraordinary power to adjust the text itself to unforeseen circumstances.¹⁰⁰ Then-Justice Stone offered perhaps the crispest articulation of this position when he wrote:

⁹⁷ See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981) ("Reference to the 'important objects' of the framers rather than their specific intentions is, no doubt, a necessity if the evolving needs of the nation are to be served. The amendment process established by article V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government."); see also *Oliver v. United States*, 466 U.S. 170, 186–87 (1984) (Marshall, J., dissenting). According to Justice Marshall:

We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.

Oliver, 466 U.S. at 186–87.

⁹⁸ In *Missouri v. Holland*, 252 U.S. 416 (1920), the Court invoked the living Constitution tradition not to overcome some express "prohibitory words," but rather to reject the claim that a challenged exercise of the Treaty Power, U.S. Const. art. II, cl. 2, could be "forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Missouri*, 252 U.S. at 433–34. Similarly, in *Weems v. United States*, 217 U.S. 349 (1910), the Court observed that because "[t]ime works changes, [and] brings into existence new conditions and purposes," the Constitution's general wording "must be capable of wider application than the mischief which gave it birth." *Id.* at 373; see also *supra* note 6.

⁹⁹ See *infra* Part II.B.

¹⁰⁰ See, e.g., *Juilliard v. Greenman*, 110 U.S. 421, 439 (1884) ("A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract.").

"[W]e must never forget, that it is a constitution we are expounding." Its provisions are not to be interpreted like those of a municipal code or of a penal statute, though even the latter is to be read so as not to defeat its obvious purpose, or lead to absurd consequences. In defining their scope something more is involved than consultation of the dictionary and the rules of English grammar. They are to be read as a vital part of an organic whole so that the high purpose which illumines every sentence and phrase of the instrument may be given effect in a consistent and harmonious frame-work of government.

The Court has hitherto consistently held that a literal reading of a provision of the Constitution which defeats a purpose evident when the instrument is read as a whole, is not to be favored.¹⁰¹

Justice Stone also perceptively catalogued prominent (and, by now, familiar) areas in which the Court acted on that set of assumptions:

The phrase 'due process' in the Fifth and Fourteenth Amendments has long since been expanded beyond its literal meaning of due procedure. See *Davidson v. New Orleans*, 96 U.S. 97; cf. Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 373. The term 'contract' in the contract clause is not confined literally to the contracts of the law dictionary. *Dartmouth College v. Woodward*, 4 Wheat. 518. The prohibition against their impairment has never been taken to be inexorable. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, and cases cited at 430 et seq. The injunction that no person 'shall be compelled in any Criminal Case to be a witness against himself' is not literally applied. *Brown v. Walker*, 161 U.S. 591, 595. 'From whatever source derived,' as it is written in the Sixteenth Amendment, does not mean from whatever source derived. *Evans v. Gore*, 253 U.S. 245. See, also, *Robertson v. Baldwin*, 165 U.S. 275, 281, 282; *Gompers v. United States*, 233 U.S. 604, 610; *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501; *United States v. Lefkowitz*, 285 U.S. 452, 467.¹⁰²

At times, moreover, the Court has at least implicitly acted on such assumptions in important cases treating the textual fine points of the Constitution's first seven articles, in effect, as markers for abstract

¹⁰¹ *Wright v. United States*, 302 U.S. 583, 606-07 (1938) (Stone, J., dissenting).

¹⁰² *Id.* at 607.

(but judicially enforceable) principles such as federalism or the separation or balance of powers.¹⁰³

Though the Court has said that it has greater flexibility in constitutional rather than statutory interpretation, the living Constitution tradition has always had something of an analogue in the strong purposivism that the Court practiced, until recently, in statutory interpretation cases. The theory is that in a system of legislative supremacy, judges should try to implement the purpose of the lawmaker.¹⁰⁴ Usually, reading a text in light of its conventional social understanding will suffice.¹⁰⁵ Yet legislators, like constitutionmakers, do not have perfect foresight and operate under severe time and resource constraints.¹⁰⁶ They inevitably will legislate in terms that are over- and underinclusive in relation to the legislation's apparent background goals.¹⁰⁷ Accordingly, in circumstances in which the conventional meaning of the text does not serve (or even diserves) a statute's apparent background purpose, the Court has deemed it consistent with the premises of legislative supremacy to adjust the text to capture the apparent legislative purpose and carry out the statutory

¹⁰³ See, e.g., *Alden v. Maine*, 527 U.S. 706, 713–15 (1999) (federalism); *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (same); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856–57 (1986) (balance of powers); *Bowsher v. Synar*, 478 U.S. 714, 722–23 (1986) (separation of powers). For a more detailed discussion of the Court's occasional tendency to engage in generality shifting in federalism and separation of powers cases, see Manning, *supra* note 12, at 1050–71 (raising such concerns about certain separation of powers cases); Manning, *supra* note 88, at 2025–36 (suggesting that the Court's cases sometimes enforce a freestanding federalism principle rather than the detailed provisions that allocate power between the federal and state governments).

¹⁰⁴ See, e.g., *ICC v. Baird*, 194 U.S. 25, 38 (1904) ("The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.").

¹⁰⁵ See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (making clear that "[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," and that enforcing ordinary meaning is usually (but not always) "sufficient . . . to determine the purpose of the legislation").

¹⁰⁶ See, e.g., *United States v. Locke*, 471 U.S. 84, 118–19 (1985) (Stevens, J., dissenting) (arguing that a clear text may be "the consequence of a legislative accident, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should" (quoting *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting))); *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) ("[Judges] know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings.").

¹⁰⁷ See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 17–37 (1991).

design.¹⁰⁸ The Section that follows considers a recent tightening up of the Court's approach to statutory interpretation and the implications, if any, for the Court's similarly flexible approach to the Constitution.

B. Legislative Compromise and the Reading of Statutes and the Constitution

In recent years, the Court has begun to move away from its strong purposivist approach in favor of an approach that enforces the clear import of the statutory text as written (unless it produces an absurd result).¹⁰⁹ That is to say, the Court now apparently enforces "letter" over "spirit" when the two conflict.¹¹⁰

What accounts for the change? The Court has become increasingly sensitive to the idea that Congress does not enact purposes or principles in the abstract, but rather strikes compromises that deal with both statutory ends and the means by which they are to be achieved. In a leading case exemplifying its new approach, the Court thus emphasized:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legisla-

¹⁰⁸ The leading case for this proposition is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which concluded that "the general language . . . employed [in the Alien Contract Labor Act] is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against," *id.* at 472. Until recently, the Court routinely held that when the "letter" of the law conflicted with its "spirit," the latter prevailed. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452–53 (1989); *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952); *Sorrells v. United States*, 287 U.S. 435, 446–47 (1932); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706–07 (1899).

¹⁰⁹ *See, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010) ("It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."); *Lockhart v. United States*, 546 U.S. 142, 146 (2005) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991))); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal citations omitted))).

¹¹⁰ *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1288, 1309–16 (2010) (discussing the Court's growing embrace of an approach that enforces clearly worded text over contrary indications of background purpose).

tion at the expense of the terms of the statute itself takes no account of the processes of compromise.¹¹¹

In other words, because “[n]o legislation pursues its purposes at all costs,” it may “frustrate[] rather than effectuate[] legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”¹¹² Accordingly, the Court now considers itself to be “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”¹¹³

None of this is meant to suggest that the text of a statute will answer every question raised under it. Nor does it foreclose interpreters from relying on purpose or other background principles to construe a statute. Rather, because the Court’s new approach emphasizes that the specification of the means of implementation is “the very essence of legislative choice,”¹¹⁴ an interpreter concerned with legislative supremacy must show sensitivity to Congress’s apparent determination of how much freedom the interpreter should have to consider background purpose. That is, the interpreter must take into account Congress’s choice about whether to proceed through rules or standards.

A legislature that seeks to achieve Goal *X* can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the

¹¹¹ Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986).

¹¹² Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)).

¹¹³ MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994); see also, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (“Dissatisfied with the text of the statute, the Commissioner attempts to search for and apply an overarching legislative purpose to each section of the statute. Dissatisfaction, however, is often the cost of legislative compromise The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.”); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (refusing to credit policy arguments where doing so would contradict a statutory text that “may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (Scalia, J., concurring) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”).

¹¹⁴ *Pension Benefit Guar. Corp.*, 496 U.S. at 646–47 (quoting *Rodriguez*, 480 U.S. at 526).

legislature to pick the rules. It pursues Goal *X* by Rule *Y*. The selection of *Y* is a measure of what Goal *X* was worth to the legislature, of how best to achieve *X*, and of where to stop in pursuit of *X*. Like any other rule, *Y* is bound to be . . . over- and underinclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule *Y* on the argument that, by doing so, it can get more of Goal *X*. The judicial selection of means to pursue *X* displaces and directly overrides the legislative selection of ways to obtain *X*. It denies to legislatures the choice of creating or withholding gap-filling authority.¹¹⁵

In other words, the new approach calls upon interpreters to consider whether the text of the statute uses open-ended language signaling a delegation of broad policymaking discretion to the interpreter or, conversely, uses quite precise language signaling Congress's decision to resolve the issue itself. The important point is that if interpreters do not pay attention to the level of generality at which the text is framed, they "dishonor[] the legislative choice as effectively as expressly refusing to follow the law."¹¹⁶

This new approach, of course, is not self-evidently correct. Respecting compromise is one value among many that an interpreter might emphasize in reading statutes. So too are such values as coherence, fairness, and adaptability, all of which are potentially sacrificed in the name of compromise. At the same time, however, the Court's new emphasis makes sense of the specific constitutional requirements for enacting legislation.¹¹⁷ Article I Section 7 prescribes bicameralism and presentment as the exclusive means for Congress to enact legislation.¹¹⁸ Political scientists have shown that bicameral processes protect political minorities by imposing, in effect, a supermajority requirement that insists upon unusual consensus before creating binding legislation.¹¹⁹ By providing for equal representation of the states in the Senate, moreover, American bicameralism provides extraordi-

¹¹⁵ Easterbrook, *supra* note 40, at 546–47 (footnotes omitted).

¹¹⁶ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

¹¹⁷ For a fuller discussion of this point, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–78 (2001) (discussing the interpretive implications of bicameralism and presentment).

¹¹⁸ U.S. CONST. art. I, § 7; see *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (establishing the exclusivity of those procedures).

¹¹⁹ See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 235–36 (1962).

nary protection for the particular political minority of people living in the small states.¹²⁰

Respecting the lines of compromise evident in the statutory text safeguards those process rights. If bicameralism and presentment gives political minorities the power to block legislation, then it also provides them with the right to insist upon compromise as the price of assent.¹²¹ If an interpretive method smoothes out the rough edges of a compromise to make it more coherent or consistent with the apparent background purpose, such an approach risks diluting the minority's capacity to agree to go only so far and no farther in pursuit of a policy that the majority wishes to enact but cannot without minority support.¹²²

This argument is a purely positive claim about how to make sense of legislative supremacy in our system of bicameralism and presentment. It does not depend on the conclusion that bicameralism and presentment is a normatively desirable method for the exercise of legislative power or that the legislative process should recognize the stakeholders it does in the way that it does. Instead, the analysis here merely suggests how an interpreter wishing faithfully to decode the output of the constitutionally prescribed legislative process should read the final product. From that starting point, it seems that following the lines of compromise is the only sure way to respect a process that has, by design, granted extraordinary power to certain stakeholders.

Applying the same sort of analysis to the constitutional text suggests that the Court's living Constitution tradition does not, in fact, properly link the document to the constitutionmaking process that produced it. That approach, as discussed, proceeds from the premise that constitutionmakers, of necessity, adopted a document that sets forth the "great outlines" and "important objects" of government, leaving interpreters to develop the details.¹²³ That conception, however, is contrary to the facts, as filtered through the lens supplied by the recent statutory cases.

¹²⁰ See U.S. CONST. art. I, § 3; see also *id.* art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1371-72 (2001).

¹²¹ See Manning, *supra* note 117, at 76-77; Posner, *supra* note 39, at 809 (noting that it is "often true" that a statute reflects "a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective").

¹²² Manning, *supra* note 117, at 77-78.

¹²³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

The original Constitution, as mentioned, is a “bundle of compromises.”¹²⁴ Like any complicated text, it includes a mix of provisions reflecting broadly worded principles and others that are mind-numbingly precise. That it reflects a range of choices about both the proper ends and appropriate means of government is evident from the text itself. For example, the document Delphically guarantees “to every State in this Union a Republican Form of Government.”¹²⁵ It also entitles “[t]he Citizens of each State . . . to all Privileges and Immunities of Citizens in the several States.”¹²⁶ At the same time, the document carefully specifies, for example, that Congress has the power “[t]o . . . fix the Standard of Weights and Measures,” “[t]o establish Post Offices and post Roads,” and “[t]o exercise exclusive Legislation in all Cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”¹²⁷ It even tells the President precisely how many days (“ten days (Sundays excepted)”) he or she has to sign or veto legislation after Congress has presented it.¹²⁸ One final example: the document tells us that no one can be convicted of treason “unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”¹²⁹

One could go on, but the point is clear: the document consists of an obvious mix of rules and standards. None of them is utterly indeterminate or utterly precise; all require some degree of interpretation. But the degree of detail one finds in the document as a whole itself suggests “the result of compromise and line-item voting.”¹³⁰ Whether or not constitutionmakers agreed upon the broad principles imagined by proponents of the living Constitution, they necessarily had to bargain about how to put them into effect. Lawmakers must always draw lines of inclusion and exclusion. They must decide questions of the law’s scope—how much they wish to take on. They must, as noted, find their preferred mix of rules and standards, and also make judg-

¹²⁴ FARRAND, *supra* note 14, at 201.

¹²⁵ U.S. CONST. art. IV, § 4.

¹²⁶ *Id.* art. IV, § 2, cl. 1.

¹²⁷ *Id.* art. I, § 8, cls. 5, 8, 17.

¹²⁸ *Id.* art. I, § 7, cl. 2.

¹²⁹ *Id.* art. III, § 3, cl. 1.

¹³⁰ JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999); see Frank H. Easterbrook, *The Supreme Court, 1983 Term: Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984) (“The more detailed the law, the more evidence of interest-group compromise.”).

ments about appropriate enforcement or remedial mechanisms. Even lawmakers who agree on broad principles must determine how far to go in pursuit of those principles. They must also determine what to decide and what to leave undecided. All of this is evident in the disparate provisions of the original Constitution.

If, indeed, the Constitution represents a bundle of compromises, then reading it faithfully requires interpreters to respect the lines of compromise reflected in the textual details—to treat rules as rules and standards as standards. It is true that the constitutionmaking process was adopted on the fly. But that does not negate the fact that its stakeholders agreed to certain ground rules that gave them distinct process rights. Delegates to the Convention agreed to participate on the basis of equal representation (with each state delegation to decide collectively how to cast its vote).¹³¹ For example, the ground rules according to which the states agreed to participate in the constitutionmaking process explicitly gave the residents of small states a disproportionate say in the shape of the Constitution.¹³² In addition, although the delegates deferred decisions about the method of ratification until the end of the Convention, historians have suggested that one could reasonably assume that the delegates bargained against the background expectation that they would need to win the assent of a high proportion, if not all, of the states.¹³³ If nothing else, it is clear that the document's final shape reflected a distribution of bargaining power that gave small states extraordinary leverage in relation to their populations.¹³⁴

¹³¹ Farrand has suggested that the delegates briefly considered but rejected other arrangements for fear that the Convention would break up if the ground rules did not assure equal state representation in the Convention. See FARRAND, *supra* note 14, at 57 (“The Pennsylvania delegates . . . urged ‘that the large States should unite in firmly refusing to the small States an equal vote, as unreasonable, and as enabling the small States to negative every good system of Government.’ The Virginia delegates, however, succeeded in stifling the project for fear that it ‘might beget fatal altercations between the large and small States.’”).

¹³² See Elster, *supra* note 58, at 369 (“The voting procedure at the Convention . . . increased [the small states’] bargaining power for logrolling purposes.”).

¹³³ If the delegates had followed the ratification procedure prescribed by Article XIII of the Articles of Confederation, the Convention would have had to submit the proposed Constitution “to Congress and the state legislatures for their unanimous approval.” RAKOVE, *supra* note 34, at 102–03; see also Elster, *supra* note 58, at 370 (“Although no ratification procedure was laid down in the convocation of the Convention, many assumed that the Constitution would eventually have to be ratified by the state legislatures. Reasoning from that premise, they argued that the Constitution ought to be tailored so as to be acceptable to those bodies.”).

¹³⁴ See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1425 (2008).

If one thinks that contemporary constitutional law should not trace its authority to the constitutionmaking process that produced the document, then these process considerations should not matter.¹³⁵ But any system of interpretation that traces the Constitution's authority to its adoption pursuant to Article V will accurately implement the fruits of the prescribed process *only* if it accounts for the capacity of the relevant stakeholders to insist upon compromise as the price of assent. It is true that, in obvious contrast with legislation, the constitutionmaking process is divided more dramatically between the (Convention's) power to propose and the (ratifiers') power to enact the proposal into law. And this certainly raises the question of why we care if the proposers, rather than the ratifiers, struck a compromise. Still, because the proposers presented the document to the ratifiers on a take-it-or-leave-it basis, the proposal itself constituted an essential part of the enactment process, and ignoring the compromises reflected in that proposal would negate the terms on which the several states agreed to participate in the process. Again, one might well think it a bad process whose results are unworthy of respect, but if we wish to enforce the results of that process in any meaningful sense, it is necessary to respect the terms on which its participants chose to participate.

C. *What Philadelphia Tells Us*

Having suggested that the document itself reflects the fruits of legislative compromise, one might ask what the debates of the Philadelphia Convention could possibly tell us. Presumably a reasonable ratifier with *any* sense of political realities would have inferred the pervasiveness of compromise from the nature of the Convention and the intricacy and variety of the document's provisions. To the extent that the Convention debates might have revealed the compromises actually made, the ratifiers had no access to that information. And if one takes at all seriously the insights of original meaning originalism, an interpreter should never use Farrand's *Records* to establish the terms of any of the Constitution's compromises, except to the extent

¹³⁵ For example, one might conclude that the constitutionmaking process was illegitimate and should not bind us. See, e.g., Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499–500 (1985); Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 28 (2004). Or one might think it inappropriate today to be governed by the dead hand of the past. See, e.g., Brest, *supra* note 33, at 225. As noted, however, at least some nonoriginalists think it relevant to get an accurate read of the original meaning, even if they do not feel bound by it. See *supra* text accompanying note 17.

that the *Records* might contain externally verifiable information that would confirm or clarify the meaning of the bargained-for terms.¹³⁶

Nonetheless, if one thinks that the debates of the Philadelphia Convention have the capacity to confirm what one might infer from other sources, then examining Farrand's *Records* rather dramatically drives home intuitions about compromise. Contrary to key assumptions underlying the Court's living Constitution tradition, those who actually hammered out the document frequently were not driven by large principles or the great outlines of policy. The delegates did not fill their days with abstractions about federalism or the separation or balance of powers. Rather, they acted on hard-edged, practical concerns about the allocation and effective exercise of government power, and their concrete disagreements eventuated in drafting and redrafting, and reaching compromises that split the difference.¹³⁷ Whether or not that reality can properly be used to determine the meaning of any particular clause, knowing the nature of the drafting process tells us something important about the true character of the document. Often, the Court infers legislative compromise simply from general assumptions about the legislative process. Here, however, the process of compromise is there to see.¹³⁸ Four prominent examples capture the tenor of the debates.¹³⁹

First, the decision of how to select a President rested on practical differences of opinion rather than matters of principle. The default position, first presented in the Virginia Plan, provided that the chief executive was "to be chosen by the National Legislature."¹⁴⁰ The delegates, however, offered a raft of alternatives. Some proposed shift-

¹³⁶ See *supra* text accompanying notes 77–85.

¹³⁷ See, e.g., Easterbrook, *supra* note 28, at 366 ("The Constitution is a series of compromises . . . Prudence rather than unifying principle shaped the initial document and all of its amendments."); Monaghan, *supra* note 76, at 392 ("Like important statutes, the constitution emerged as a result of compromises struck after hard bargaining."); Scalia, *supra* note 15, at 861 (noting that the Constitution was an imperfect "political compromise").

¹³⁸ See CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 22 (1988). Along these lines, Professor Jon Elster has carefully examined the logrolling and bargaining strategies employed by the delegates to the Philadelphia Convention. See Elster, *supra* note 58, at 392–418. Confirming the intuition that the document resulted from line-item voting, moreover, Elster demonstrated that the draft Constitution emerged after the casting of some 5000 votes by the delegates to the Convention. See *id.* at 363.

¹³⁹ The examples that follow are based on a discussion in Manning, *supra* note 12.

¹⁴⁰ 1 FARRAND'S RECORDS, *supra* note 1, at 21. The Virginia Plan—which provided the focal point for the initial debate over the Constitution—set the tone by proposing that "a National Executive," "to be chosen by the National Legislature," would serve for a set term of years and then "be ineligible a second time." *Id.* The second major focal point—the New Jersey

ing to a popular election;¹⁴¹ others wanted a system of electors appointed by the state legislatures;¹⁴² and one even moved for selection of the federal executive by the chief executives of the several states.¹⁴³ The debates over selection, moreover, intersected with related questions concerning the executive's term of office, eligibility for reappointment, and even amenability to impeachment.¹⁴⁴ Delegates also argued about how the different methods would affect the character of the officeholder and the distribution of power among the states.¹⁴⁵ As Madison pointed out deep into the deliberation, there

Plan—similarly proposed “that the U. States in Congs. be authorized to elect a federal Executive” with a fixed term of years and ineligibility for reappointment. *Id.* at 244.

¹⁴¹ See, e.g., 2 FARRAND'S RECORDS, *supra* note 1, at 29 (statement of Gouverneur Morris) (“If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation.”); *id.* at 29–30 (statement of James Wilson) (defending the proposal of popular election); see also WARREN, *supra* note 49, at 357–58.

¹⁴² 2 FARRAND'S RECORDS, *supra* note 1, at 32 (statement of Luther Martin) (moving “that the Executive be chosen by Electors appointed by the [several] Legislature[s] of the individual States”); *id.* at 57 (statement of Oliver Ellsworth) (moving that the executive “be chosen by electors appointed, by the Legislatures of the States”).

¹⁴³ See 1 FARRAND'S RECORDS, *supra* note 1, at 175 (statement of Elbridge Gerry) (moving “that the National Executive should be elected by the Executives of the States whose proportion of votes should be the same with that allowed to the States in the election of the Senate”). Other idiosyncratic proposals were also floated. Oliver Ellsworth, for example, argued that the executive should be appointed by the national legislature but should be eligible for reappointment only “by Electors appointed by the Legislatures of the States for that purpose.” See 2 FARRAND'S RECORDS, *supra* note 1, at 108 (statement of Oliver Ellsworth). James Wilson also proposed that, in order to prevent party intrigue, a subset of the legislature, randomly chosen by lot, should select the executive. *Id.* at 105 (statement of James Wilson).

¹⁴⁴ See WARREN, *supra* note 49, at 364–65 (“It is important to note that, in almost all the votes a long term with no re-election was favored, if the choice of Executive was to be by the Legislature; and a short term with possibility of re-election, if the choice was to be otherwise than by the Legislature.”); see also, e.g., 2 FARRAND'S RECORDS, *supra* note 1, at 34, at 271 (statement of James Madison) (arguing that “[t]he Executive could not be independent of the Legislature [sic], if dependent on the pleasure of that branch for a reappointment”); *id.* at 33 (statement of James McClurg) (arguing that if the President were to be appointed by the legislature, the executive should hold office “during good behavior”); *id.* at 53–54 (statement of Gouverneur Morris) (arguing that the executive should be elected every two years by the people and, to protect against undue legislative influence, should be “unimpeachable”); *id.* at 57 (statement of Elbridge Gerry) (“If the Executive is to be elected by the Legislature he certainly ought not to be re-eligible.”).

¹⁴⁵ See, e.g., 2 FARRAND'S RECORDS, *supra* note 1, at 29 (statement of Gouverneur Morris) (arguing that popular election would produce “some man of distinguished character, or services” and that appointment by the legislature would be “the work of intrigue, of cabal, and of faction”); *id.* (statement of Roger Sherman) (opposing popular election because the people “will never be sufficiently informed of characters” and will simply tend to favor someone from their own state, thereby giving “the largest State . . . the best chance for the appointment”); *id.* at 30 (statement of Charles Pinckney) (arguing that under a popular election scheme, “[t]he most populous States by combining in favor of the same individual will be able to carry their points”);

were "objections [against] every method that has been, or perhaps can be proposed."¹⁴⁶ Ultimately, the system adopted—giving each state a set of electors equal to the number of its Representatives and Senators and authorizing each state to appoint its electors "in such manner as its Legislature may direct"¹⁴⁷—emerged only after the appointment of a special committee (the so-called "Committee of Eleven") to reach a compromise on postponed matters.¹⁴⁸ The final result was the product of politics and pragmatism, rather than any identifiable principle.

Second, the impeachment power similarly divided the delegates. They disagreed, for example, about whether to subject the executive to impeachment at all.¹⁴⁹ Some thought impeachment essential to "defend[] the Community [against] the incapacity, negligence or perfidy of the chief Magistrate."¹⁵⁰ Others worried that it would "hold

id. at 57 (statement of Elbridge Gerry) (opposing "popular election" on the ground that "[t]he people are uninformed, and would be misled by a few designing men").

¹⁴⁶ *Id.* at 109 (statement of James Madison); *see also id.* at 103 (statement of Elbridge Gerry) ("We seem to be entirely at a loss on this head . . . Perhaps [the Committee of Detail] will be able to hit on something that may unite the various opinions which have been thrown out.").

¹⁴⁷ *Id.* at 497.

¹⁴⁸ *See* WARREN, *supra* note 49, at 621–24 (discussing the special committee's resolution of the presidential selection issues). Even then, however, the delegates continued to fight over whether the Senate should select a President when no candidate received a majority of electoral votes. *See, e.g.,* 2 FARRAND'S RECORDS, *supra* note 1, at 498 (noting the Committee of Eleven's proposal that the Senate should select the President from the top five finishers if no one got an electoral majority); *id.* at 512 (statement of George Mason) (arguing that such an arrangement "puts the appointment in fact into the hands of the Senate, as it will rarely happen that a majority of the whole votes will fall on any one candidate," and that the President and the Senate, acting in combination, "will be able to subvert the Constitution"); *id.* at 522 (statement of James Wilson) (arguing that adding this authority to the Senate's other roles would create "a dangerous tendency to aristocracy"). As Charles Warren explains:

Roger Sherman of Connecticut then made an ingenious compromise suggestion which seemed to conciliate those who feared the Senate—namely, that the eventual election would be by the House of Representatives, each State to have one vote. This suggestion preserved the influence of the small States, but removed the objection that the same body which was to try impeachments and confirm appointments ought not to share in the election.

WARREN, *supra* note 49, at 630.

¹⁴⁹ *See* WARREN, *supra* note 49, at 660–61.

¹⁵⁰ 2 FARRAND'S RECORDS, *supra* note 1, at 65 (statement of James Madison); *see also, e.g., id.* (statement of Benjamin Franklin) (arguing that impeachment would "be the best way . . . to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused"); *id.* (statement of George Mason) ("Shall any man be above justice?"); *id.* at 66 (statement of Elbridge Gerry) ("A good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them.").

[the executive] in such dependence that he will be no check on the Legislature.”¹⁵¹ The delegates also divided over whether the judiciary or Senate should conduct trials of impeachment. Some believed that vesting such a power in the courts would compromise the impartiality of the trial because the President would have appointed the judges who would then try the impeachments.¹⁵² Others, however, argued that vesting that power in the Senate might render the President “improperly dependent” on the legislature.¹⁵³ Again, the Committee of Eleven hammered out a compromise—one that authorized the President’s impeachment and gave the Senate the authority to try impeachments, but then required “the concurrence of two thirds of the members present” for any conviction.¹⁵⁴ As with questions concerning election of the President, those surrounding impeachment generated a wide diversity of opinion at the level of implementation and produced a precise, difference-splitting compromise.

Third, the fight over the precise contours of American bicameralism¹⁵⁵—and the Great Compromise prescribing equal representation of the states in the Senate—is too familiar to require lengthy recitation.¹⁵⁶ The delegates spent almost three weeks debating the mode of representation in Congress without a solution.¹⁵⁷ In particular, the

¹⁵¹ *Id.* at 53 (statement of Gouverneur Morris).

¹⁵² See WARREN, *supra* note 49, at 662; see also, e.g., 2 FARRAND’S RECORDS, *supra* note 1, at 551 (statement of Roger Sherman) (arguing that the “Supreme Court [is] improper to try the President, because the Judges would be appointed by him”). Moreover, were the Supreme Court to try the President for criminal charges *after* impeachment, its impartiality would be compromised by having previously tried his impeachment. See *id.* at 509 (statement of Gouverneur Morris).

¹⁵³ 2 FARRAND’S RECORDS, *supra* note 1, at 551 (statement of James Madison); see also *id.* (suggesting that “[h]e would prefer the supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part”); *id.* (statement of Charles Pinckney) (noting his disapproval “of making the Senate the Court of Impeachments, as rendering the President too dependent on the Legislature”).

¹⁵⁴ *Id.* at 497 (Report of the Committee of Eleven). Even then, delegates had to hammer out remaining disagreements about the criteria for impeachment. As reported by the special committee, the Constitution authorized impeachment and removal of the President *only* “for Treason, or bribery.” *Id.* at 499. Believing that these categories would not “reach many great and dangerous offences,” George Mason proposed adding “maladministration” to the list of impeachable offenses. *Id.* at 535 (statement of George Mason). Madison replied that “[s]o vague a term will be equivalent to a tenure during the pleasure of the Senate.” *Id.* (statement of James Madison). Mason then withdrew “maladministration” and successfully proposed “other high crimes & misdemeanors [against the State].” *Id.*

¹⁵⁵ The delegates had little disagreement over the need for two Houses. See WARREN, *supra* note 49, at 158–59.

¹⁵⁶ See, e.g., FARRAND, *supra* note 14, at 91–112 (describing the circumstances leading up to the Great Compromise); WARREN, *supra* note 49, at 305–16.

¹⁵⁷ See FARRAND, *supra* note 14, at 94.

convention came to “a standstill” over the question of whether each state should have equal representation in the upper house, and the delegates formed a committee composed of one member from each state to reach a compromise and report back.¹⁵⁸ Although “[l]ittle is known of what took place in the committee,” it ultimately reported a proposal providing for proportional representation in the House and equal representation in the Senate.¹⁵⁹ After the debate, lasting more than one week, the convention eventually approved the compromise by a five-to-four vote, with Massachusetts divided and New York absent.¹⁶⁰ As Farrand explains: “This is the great compromise of the convention and of the constitution. None other is to be placed quite in comparison with it.”¹⁶¹ Accordingly, perhaps the most important decision of the entire Convention was not a matter of principle, but rather an obvious political compromise.¹⁶²

Finally, consider the question of who should appoint judges. Consistent with the practice of most states, the Virginia Plan initially gave that power to a “National Legislature.”¹⁶³ Madison, however, argued that the National Legislature would be “too much influenced by their partialities” to avoid selecting legislative cronies.¹⁶⁴ He favored appointment by “a less numerous & more select body” such as the Senate.¹⁶⁵ Others favored the executive, either on its own authority or with some form of senatorial advice and consent.¹⁶⁶ The com-

¹⁵⁸ See *id.* at 97–98.

¹⁵⁹ *Id.* at 98–99; 2 FARRAND’S RECORDS, *supra* note 1, at 10–11. The committee itself was divided on the proposal and “agreed to the Report merely in order that some ground of accommodation might be proposed.” 1 FARRAND’S RECORDS, *supra* note 1, at 527 (statement of Elbridge Gerry). Apparently in exchange for granting equal representation in the Senate to the smaller states, the proposal also contained a provision requiring revenue and appropriations bills to originate in the first, popularly elected house—which some representatives viewed as a “considerable concession” by the smaller states, 2 FARRAND’S RECORDS, *supra* note 1, at 8 (statement of Caleb Strong), while others saw it as no concession at all, *id.* at 8–9 (statement of James Madison).

¹⁶⁰ See FARRAND, *supra* note 14, at 104–05; see also 2 FARRAND’S RECORDS, *supra* note 1, at 11 (recording the vote).

¹⁶¹ FARRAND, *supra* note 14, at 105.

¹⁶² See Clark, *supra* note 120, at 1359–64 (discussing this feature of the Constitution).

¹⁶³ 1 FARRAND’S RECORDS, *supra* note 1, at 21 (“Res’d that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.”); see also WARREN, *supra* note 49, at 640 (discussing state practice).

¹⁶⁴ 1 FARRAND’S RECORDS, *supra* note 1, at 232 (statement of James Madison).

¹⁶⁵ *Id.* at 233 (statement of James Madison).

¹⁶⁶ The New Jersey Plan, for example, proposed “that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive.” 1 FARRAND’S RECORDS, *supra* note 1, at 244. James Wilson similarly proposed appointment “by the Executive” alone. 2 FARRAND’S RECORDS, *supra* note 1, at 41 (statement of James Wilson).

peting arguments focused on such practical issues as relative institutional competence to identify fit characters,¹⁶⁷ the potential for conflicts of interest,¹⁶⁸ and the fair distribution of judicial appointments among the states.¹⁶⁹ In the end, the Committee of Eleven reached a compromise vesting the authority over appointments of all officers in the President of the United States, subject to the advice and consent of the Senate.¹⁷⁰ This outcome, too, was a matter of compromise.

Obviously, many of the Court's cases reflect the particularity of the document's structural clauses.¹⁷¹ Others, as discussed, treat such clauses as markers for broad, freestanding principles such as federalism or the separation or balance of powers.¹⁷² What the foregoing examples confirm, however, is that the delegates to the Philadelphia Convention, much like any other lawmaking body, may or may not

Nathaniel Ghorum was the first to propose appointment by the executive by and with the advice and consent of the Senate—the approach that had long prevailed in his home state of Massachusetts. *Id.* (statement of Nathaniel Ghorum). James Madison urged appointment by the President, subject to rejection by two-thirds of the Senate within a fixed number of days. *Id.* at 44 (statement of James Madison).

¹⁶⁷ Compare, e.g., 2 FARRAND'S RECORDS, *supra* note 1, at 41 (statement of Luther Martin) (arguing in favor of Senate appointment on the ground that “[b]eing taken from all the States it [would] be best informed of characters & most capable of making a fit choice”), with *id.* at 80 (statement of Edmund Randolph) (opposing Senate appointment power because “[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications”).

¹⁶⁸ When the power to try impeachments was vested in the judiciary, concern arose about the executive's appointment of officials who might try his or her impeachment. See, e.g., *id.* at 42 (statement of George Mason) (“If the Judges were to form a tribunal for [purposes of impeaching the Executive], they surely ought not to be appointed by the Executive.”). When it appeared that the Senate might have the power to try impeachments, the concerns about conflicts of interest also shifted. Gouverneur Morris thus argued that “[i]f Judges were to be tried by the Senate . . . it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.” *Id.* at 389 (statement of Gouverneur Morris); see also *id.* (statement of James Wilson) (agreeing with Morris).

¹⁶⁹ See, e.g., *id.* at 43 (statement of Roger Sherman) (arguing that vesting power in the Senate, rather than the executive, would better ensure that judges would come from many states); *id.* (statement of Gunning Bedford) (vesting the appointment power in the executive “would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens”). Ultimately arguing for presidential appointment with the advice and consent of the Senate, Madison noted that since the Senate was “now to be composed of equal votes from all the States, the principle of compromise” suggested that judges should be appointed jointly by the President and the Senate. *Id.* at 80–81 (statement of James Madison).

¹⁷⁰ *Id.* at 539; see also WARREN, *supra* note 49, at 642 (describing the compromise).

¹⁷¹ See, e.g., *INS v. Chadha*, 462 U.S. 919, 944–59 (1983) (strictly enforcing the Bicameralism and Presentment Clauses); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (closely reading the Appointments Clause).

¹⁷² See *Wright v. United States*, 302 U.S. 583, 607 (1938) (Stone, J., dissenting).

have agreed on important matters of principle (such as the desirability of federalism or separation of powers). But when it came down to brass tacks, the document they produced resulted from compromise over practical, hard-edged, and often quite political disagreement about the details. One could surely infer as much from the shape and contours of the document itself, but Farrand's *Records* make the matter clear beyond quibble.

CONCLUSION

Farrand's *Records* tell us little about the meaning of particular provisions of the Constitution. If one worries at all about the probative value of legislative history, then reliance on Farrand's *Records* as authoritative evidence of constitutional intent is a nonstarter. It may seem difficult to reconstruct the intentions of a multimember, tricameral legislature. If so, it is impossible to imagine trying to reconstruct, in any meaningful sense, the intentions of a lawmaking process that consists of the Philadelphia Convention and thirteen ratifying conventions spread across culturally and geographically distinct states. Similarly, it is difficult to know whether a constitutionally sufficient majority of Congress read or assented to a committee report. One can be certain, however, that none of the ratifiers had access to the *Records*, which were not published until long after the document was ratified. This doesn't mean that interpreters should exclude the *Records* from all consideration; rather, it suggests that the *Records* should be used only as a source of information about eighteenth-century usage or commonly perceived mischiefs—and then only to confirm propositions that can be derived from other sources.

As sources of confirmation, however, the *Records* have a potentially more significant function. They help refute the notion—associated with the Court's living Constitution theory of adjudication—that the Constitution only marks out great outlines and broad principles and should be construed accordingly. The document itself rebuts that notion because its detail shows the work of compromise. It contains provisions that are very precise, reserving little discretion for its implementers, and those that are clearly open-ended, matters of principle to be adapted to circumstances they do not address. As with almost any document, the presence of rules and standards reflects a choice about means. The document not only tells us what principles we are to implement, it tells us how. Respecting the compromise implicit in the diversely worded provisions of this very detailed document respects the process by which the document became law. *The*

Records of the Federal Convention of 1787 tell us that we are not imagining things when we see the lines of compromise in the constitutional text.