Printed in U.S.A.
Vol. 113, No. 6

UNIFYING ORIGINAL INTENT AND ORIGINAL PUBLIC MEANING

John O. McGinnis & Michael B. Rappaport

ABSTRACT—Original intent and original public meaning are generally thought to be opposing camps within originalism. Both theories assert that that the meaning of a constitutional provision was fixed at the time it was enacted. But they disagree fundamentally on the nature of interpretation. Original intent asserts that the meaning sought is that intended by the Constitution's enactors. Original public meaning asserts that the meaning sought is that revealed by the text as reasonably understood by a well-informed reader at the time of the provision's enactment.

In this Essay, we unite these two conflicting principles of originalism under the original methods approach to constitutional interpretation, thereby providing a single coherent foundation for originalism. Under original methods, the Constitution is interpreted using the conventional legal interpretive rules deemed applicable to a document of its type at the time it was enacted. As properly understood, both the original intent and original public meaning approaches mandate that the Constitution be interpreted using the same conventional interpretive rules. Under original public meaning, a reasonable and knowledgeable person at the time would interpret the constitutional text by using the rules that were then thought to apply to it. Under original intent, the enactors would have intended the Constitution to be interpreted based on the conventional interpretive rules applied to it at that time.

We further argue that these interpretive rules should be identified using the methods that people at the time would have employed for determining the interpretive rules. Just as constitutional provisions should be interpreted using the interpretive rules employed at the time of the relevant provision's enactment, so too should the interpretive rules be identified based on the methods employed to identify those interpretive rules. We illustrate our approach by exploring the controversy of the Bank of the United States, showing, for instance, that there was a consensus against use of the substantive intent of the Philadelphia Convention as an interpretive rule.

AUTHORS—John O. McGinnis, George C. Dix Professor in Constitutional Law, Northwestern Pritzker School of Law; Michael B. Rappaport, Hugh and Hazel Darling Foundation Professor of Law and Director, Center for the Study of Constitutional Originalism, University of San Diego School of Law. The authors are grateful for the comments from the participants at the *Northwestern University Law Review* Symposium *Originalism 3.0*, particularly those of Richard Kay, who was the commentator on the paper. We also are grateful for comments on a previous paper that included portions of this Essay from participants at the 2016 Originalism Works-in-Progress Conference at the University of San Diego School of Law.

[W]hatever may have been the intentions of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.

—Alexander Hamilton[†]

[†] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank (Feb. 23, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 101 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley 1967) (1832).

INTRODUCTION

Original intent and original public meaning remain the opposite poles of originalism. While both theories share the view that the meaning of a constitutional provision was fixed at the time it was enacted, they diverge sharply on the object of interpretation. Original intent asserts that this object is the intended meaning of the Constitution's enactors.[1] In other words, it is the intentions of the enactors that are key to interpreting the Constitution. Original public meaning posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision's enactment.[2] In other words, it is the text, not the intentions of the enactors, that is key to interpretation. Thus, originalism appears to have two conflicting interpretive foundations.

In this Essay, we argue that these two approaches can be unified under the original methods approach to constitutional interpretation, thereby providing a single coherent foundation for originalism. Under original methods, the Constitution is interpreted using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted. We maintain that both the original intent and original public meaning approaches, when properly understood through the lens of original methods, require that the Constitution be interpreted using the same conventional interpretive rules. In the course of this Essay, we also sketch how to determine these conventional rules and illustrate our approach by exploring the controversy of the Bank of the United States.

We advance three interrelated claims. The first Part describes—through our original methods approach—the convergence of original intent and original public meaning. An original public meaning approach would use the conventionally applicable legal interpretive rules to interpret the Constitution. After all, a reasonable and knowledgeable person at the time would interpret the Constitution by using the interpretive rules that were then thought to apply to it. An original intent approach would also use those same conventional interpretive rules. While it might be thought that the original intent approach requires that interpreters look to the intentions of the constitutional enactors to determine the meaning of particular terms, that claim is not true. If one asked the constitutional enactors—either the drafters or the ratifiers—whether one should consider their subjective intentions

---

[1] *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988).

[2] *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004) ("'[O]riginal [public] meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.").

when interpreting the Constitution, they would have rejected this approach. Instead, they would have said that the Constitution should be interpreted based on the conventional interpretive rules that were applied to it at that time.[3] Thus, the enactors would have an interpretive intent—an intent about how the Constitution should be interpreted. In this Essay, we offer both reasons why the enactors would have had an interpretive intent and evidence that they in fact did have that intent.

The second Part sketches how to determine which interpretive rules were applicable to the Constitution at its ratification. We argue that the interpretive rules should be identified using the methods that would have been employed at the time for determining the interpretive rules. By using the methods that were employed then, we determine the interpretive rules in the same way the enactors would have. We call these methods the meta rules to distinguish them from the interpretive rules they identify. We argue that one of the main meta rules used for identifying the interpretive rules would have likely been the common law method.[4]

One might fear that a dispute could arise about the meta rules: just as the original intent and original public meaning approaches interpret the Constitution differently, there might be competing meta rules. Original intent advocates might determine the interpretive rules by asking what rules the enactors intended. By contrast, original public meaning advocates might determine these rules by asking what a reasonable observer would have thought those rules to be—what we call the reasonable import method. Thus, the interpretive process might seem to be stuck at an impasse.[5] But that potential impasse can be resolved because both the original intent and the reasonable import approaches embrace the same method for determining the interpretive rules—asking what conventional interpretive rules a reasonable observer would have deemed applicable to the Constitution. Thus, both the reasonable import and the original intent approaches lead to applying the same conventional interpretive rules.

---

[3] *See infra* Sections I.C, III.A. In this Essay we often refer to "the conventional interpretive rules" as a shorthand. In general, we are referring to the existing legal interpretive rules that were used to interpret legal documents at the time. As we argue below, we believe the conventional interpretive rules deemed applicable to the Federal Constitution were generally those applicable to statutes and state constitutions at the time. *But see infra* Section II.C (acknowledging that it is possible that a new interpretive rule in a few instances might have been deemed applicable to the Constitution).

[4] Under the common law, one would look to the existing interpretive rules and other factors to determine what to apply. We describe this method of reasoning below. *See infra* Section II.C.1.

[5] Thus, for instance, an original intent approach to interpretive rules might privilege evidence about the interpretive rules provided by the enactors. A reasonable import approach, on the other hand, would consider evidence about the interpretive rules more generally from legal practice at the time.

This Part also sketches how the interpretive rules for the Constitution emerged. We argue that the rules derived from the common law interpretive rules applied to statutes in the eighteenth-century Anglo-American legal system. Those rules were then applied to the state constitutions and ultimately to the Constitution. While those statutory interpretive rules were generally applied to the Constitution, the content of the rules may have been modified a bit when applied to the Constitution. The method for modifying the rules would have been determined based on the common law methods at the time.

The last Part considers the debate about the constitutionality of the Bank of the United States to illustrate how to investigate questions about the content of the legal interpretive rules. We show that there was general agreement that the Constitution should be interpreted according to conventional interpretive rules and substantial agreement on the content of these rules. Significantly, there was little, if any, evidence that the rules required or allowed using the subjective intent of the drafters or ratifiers to determine the meaning of constitutional provisions. But in certain limited circumstances decisions of a ratifying convention as a whole could be understood to be an early exposition of constitutional meaning and thus be entitled to some interpretive weight under a conventional interpretive rule applicable at the time.

I. THE CONVERGENCE OF THE ORIGINAL INTENT AND ORIGINAL PUBLIC MEANING APPROACHES UNDER ORIGINAL METHODS ORIGINALISM

A. The Different Versions of Original Methods

The basic idea of original methods originalism is that determining the original meaning of the Constitution requires the application of not merely the original word meanings and grammar of the constitutional language, but also of the interpretive rules deemed applicable to the Constitution at the time of its enactment.[6]

The justification for this approach is that the authors and readers of the language would have invoked the interpretive rules when determining the meaning of the language they were producing and reading.[7] It is not simply that the enactors and readers would have assumed that these interpretive rules would have been employed, but that they would have believed that applying those rules was the correct way to determine the meaning of the document. Consequently, the failure to apply those interpretive rules would

[6] *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 121 (2013).

[7] *Id.*

lead to an inaccurate interpretation, arriving at a different meaning than the enactors and readers of the document would have believed the words produced.

While application of the interpretive rules under the original methods approach is an essential part of determining the original meaning, we do not consider original methods to be an independent or stand-alone theory of interpretation. Instead, we understand original methods as being an essential component of the principal originalist interpretive theories: the original intent and original public meaning approaches.

Thus, there are two versions of original methods originalism: an original intent version and an original public meaning version. While both versions require the interpreter to apply the original interpretive rules, nothing guarantees that the two versions will have precisely the same content. For example, the interpretive rules that the enactors intended may be different than the interpretive rules that a reasonable and knowledgeable observer would have applied.

Nonetheless, we believe it is likely that the two versions have the same content—in which case original methods will have unified the two leading approaches to originalism. Even if the two versions do not have exactly the same content, the requirement that both the original intent and the original public meaning approach apply the conventional interpretive rules makes it more likely that they will have similar content. In the next two Sections, we present the arguments for why the original intent approach and the original public meaning approach require that the Constitution be interpreted in accordance with the same original interpretive rules.

B. Original Public Meaning

1. The Basic Public Meaning Approach

The original public meaning approach posits that the Constitution should be interpreted based not on the intent of its authors or enactors but on the original public meaning of the language.[8] The original public meaning is normally thought to be the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.[9] This approach, then, focuses not on the subjective intent of the writers, but on the way that the words would have been understood by people at the time. For this reason, original public meaning is often thought to be

[8] *See, e.g.*, BARNETT, *supra* note 2.

[9] *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 75–76 (2006).

associated with textualism,[10] in contrast to original intent, which is associated with intentionalism.[11]

Original public meaning, however, would require that the language be interpreted not merely based on word meanings, but also based on the interpretive rules deemed applicable to that language and type of document. A reasonable and knowledgeable interpreter would make use of the interpretive rules that were deemed applicable—it would hardly be reasonable to ignore the rules that were supposed to be applied to the language of a particular type of document. Thus, if the rule against surplusage were applicable at the time of the Constitution's enactment, it should be applied to prefer interpretations that did not make provisions or words of the Constitution redundant.

While the original public meaning approach is sometimes thought to require that the ordinary meaning of the language be followed, that is not necessarily true. Sometimes a reasonable interpreter would be acting unreasonably in assuming that the meaning of a document was that which an ordinary reader would ascribe to it. For instance, while a surgeon's report has a public meaning, that meaning does not reflect the ordinary meaning of the words, but the technical meaning used and understood by medical professionals. The report's meaning might also reflect conventions of surgical reports, like the prioritization of facts and the placement of terms.

The Constitution is not written in ordinary language, but in the language of the law.[12] As a result, the legal interpretive rules—conventions unique to the legal profession—become important to determine its meaning. Just as legal terms would be fixed based on their legal meaning at the time of enactment, so too would legal interpretive rules be ascertained by evidence of their use in the legal community at that time. These rules include not only legally substantive rules, like the rule of lenity, but also rules about interpretation, like the relevance of purpose to determining the meaning of ambiguous terms.[13] Hence our view is that the original methods of interpretation lay the foundation of original public meaning.

We have previously explained our view that the Constitution is written in the language of the law and therefore determining its original public

---

[10] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 630 (1999) (originalism motivated by the same considerations as textualism).

[11] *See* David Lyons, *Original Intent and Legal Interpretation*, 24 AUSTL. J. LEGAL PHIL. 1, 1 (1999) (viewing original intent interpretation of the Constitution as a variant of general philosophy of following intent).

[12] For full discussion of this position, see John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018).

[13] *Id.* at 1340–41.

meaning requires reference to legal interpretive rules.[14] Thus, here we merely summarize our argument. In making our argument, we offer two ways of conceptualizing that the Constitution is written in the language of the law. Under the first, we view language broadly as including word meanings, syntax, and interpretive rules. Under the second, we view language more narrowly, as including only word meanings and syntax, with the interpretive rules conceived of as part of the context. Under either view, the original legal interpretive rules are needed to determine the original public meaning of the Constitution. We then briefly review the overwhelming evidence that the Constitution is written in the language of the law, which includes the legal interpretive rules.

2. The Analogy to Word Meanings and Grammatical Rules

Original methods originalism posits that the original public meaning approach should be to interpret the Constitution using the interpretive rules that would have been applicable to it.[15] One reason why the original methods approach follows the interpretive rules is that the interpretive rules can be thought of as part of the language in which the Constitution is written. Just as language includes word meanings and grammatical rules, it might also be understood to include the interpretive rules that would have been deemed applicable to the Constitution. In all three cases, language users would follow certain rules and conventions in expressing themselves. Thus, these interpretive rules have the same status within an original public meaning approach as the word meanings and grammatical rules. And if the document is written in the language of the law, these interpretive rules would include legal interpretive rules.

Consider an important interpretive rule governing language in formal documents: the rule against surplusage. This rule holds that one should prefer an interpretation that reads a passage so that none of its language is rendered redundant.[16] This interpretive rule probably had its basis in the fact that authors of formal documents tend to eliminate surplusage, and therefore, interpreting language to be surplusage is less likely to be the correct interpretation. But the rule in legal documents is not just a generalization, it is a legal interpretive rule that requires the interpreter to give additional weight to the interpretation that does not render language surplusage—a rule that is constitutive of meaning within the public meaning approach.[17]

---

[14] *See id.* at 1341–44.

[15] MCGINNIS & RAPPAPORT, *supra* note 6, at 123–26.

[16] *Id.* at 119.

[17] For a discussion of the significance of the surplusage canon, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012).

The rule against surplusage is an example of a legal interpretive rule with origins in ordinary language usage, but that is applied more strictly in the language of the law. But the language of the law also includes legal interpretive rules—like the rule of lenity[18]—which have no clear counterpart in ordinary language. In addition, the language of the law includes legal interpretive rules that specify aspects of the interpretive process. For example, these legal interpretive rules may indicate what kind of evidence is relevant to interpretation and what quantum of evidence is needed to choose one interpretation over another.[19] Overall, the distinctive legal interpretive rules developed for a variety of reasons, including the need for greater precision in law than in the communication of ordinary life.

3. The Argument from Legal Context

One argument against our claim that the interpretive rules are part of language is that language should be understood more narrowly as including only semantics and syntax. If that were true, then the interpretive rules, which are largely neither semantics nor syntax, would not be part of the language. But even if the interpretive rules are not part of language, they still would properly contribute to the meaning of the Constitution because they are part of the context of the Constitution's language. The branch of the philosophy of language called pragmatics is devoted to the subject of how context contributes to meaning.[20] The contribution that context makes to meaning is known as pragmatic enrichment or contextual enrichment.[21] Often the literal or semantic meaning will have one meaning, but the words employed by the speaker in context have a different meaning once contextually enriched. And that meaning is recognized by both the speaker and the hearer.

As we describe elsewhere, the context of a legal document includes the legal interpretive rules that governed legal interpretation when it was written.[22] First, when lawyers write formal documents in the language of the

---

[18] *See* 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.3, at 125–47 (6th ed. 2001).

[19] An example is the standard for invoking the absurdity rule, the canon that justifies disregarding the text to avoid absurd results. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 326 (Melville M. Bigelow ed., 5th ed. 1891) ("[I]f in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one *where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application*.") (emphasis added).

[20] *See, e.g.*, Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1126 (2015).

[21] *Id.* at 1128.

[22] McGinnis & Rappaport, *supra* note 12, at 1350–53.

law, they apply the relevant legal interpretive rules to the document.[23] Second, the practice of lawyers considering the actual legal interpretive rules, rather than the interpretive rules known by parties to a communication, helps decrease the uncertainty that is inherent in communications between multiple authors and readers.[24] As a result, the legal context includes all the actual legal interpretive rules.

4. Evidence for the Constitution's Language of the Law

The language of the law is one of many technical languages, including the languages of medicine and psychology. Lawyers are taught to use the language of the law at law school and use it unselfconsciously in practice.[25] It is not surprising that it includes more exact terms and more rules that aid precision than ordinary language. Law needs more precision and had centuries to devise ways of achieving it.[26]

Elsewhere we have shown the overwhelming evidence that the original Constitution is written in the language of the law.[27] The evidence begins with the Constitution's self-declaration: the Supremacy Clause proclaims that the Constitution is law.[28] But even more important is the pervasiveness of legal terms in the Constitution. In our review we found over a hundred uses of terms with a legal meaning. Some of them—like "Bill of Attainder"—clearly have a legal meaning, while others—like "due process"—have both a legal and ordinary meaning.[29] All these terms put the reader on notice that the document is a legal one. And once on notice, a reasonable interpreter must take account of numerous uses of other terms, like "legislative Powers," that might have a legal meaning.

The Constitution also implicitly references various legal interpretative rules. The *non obstante* clause in the Supremacy Clause appears clearly to assume existence of common law interpretive rules.[30] The Constitution also includes phrases like preambles and prefatory clauses for which there were established rules of legal interpretation.[31] The Bill of Rights, no less than the

---

[23] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 113 (2001) (noting that relevant interpretative rules are applied by any reasonably diligent lawyer when examining a statute).

[24] McGinnis & Rappaport, *supra* note 12, at 1352.

[25] *See, e.g.*, PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION, at x–xi (2016).

[26] *Cf.* David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921, 930 (2009) (noting that legal prose, unlike much literary prose, "aims for concision and clarity").

[27] McGinnis & Rappaport, *supra* note 12, at 1368–77.

[28] U.S. CONST. art. VI, cl. 2; *see also* McGinnis & Rappaport, *supra* note 12, at 1369.

[29] McGinnis & Rappaport, *supra* note 12, at 1370–77.

[30] *Id.* at 1378–81. The *non obstante* clause in the Supremacy Clause provides that "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[31] McGinnis & Rappaport, *supra* note 12, at 1381–83.

original Constitution, contains many legal terms, as well as phrases that play off legal interpretive rules.[32]

Finally, in the Early Republic, both those who were experts in the language of the law, such as jurists, and those who were not necessarily experts, such as legislators, interpreted the Constitution by references to a wide variety of legal interpretative rules.[33] We have shown that such rules include the antisurplusage rule, as discussed above, the *expressio unius* rule, which states that when one or more things of a class are expressly mentioned, others of the same class are excluded,[34] and the rule of lenity, which requires that ambiguity in the criminal law be resolved in the defendant's favor.[35]

5. Knowledge of the Interpretive Rules

An objection to our argument is that authors or readers would need to know all these legal interpretive rules, but such knowledge would not be necessary for the legal interpretive rules to contribute to the Constitution's meaning.[36] Certainly, the language of the law needed to exist, and it would be helpful if some of the authors and readers possessed a general knowledge of its existence, which is what our evidence shows. But they did not have to know all the particular rules. The nominal authors of legal documents, such as wills or powers of attorney, frequently did not understand all the legal nuances of the documents issued in their names because they were not fluent in the language of the law.[37] The authors and readers no more needed to know all the legal interpretive rules than they needed to know the meaning of all the legal terms, such as "letters of marque and reprisal."[38]

---

[32] *Id.* at 1376–77, 1380.

[33] *Id.* at 1383–96.

[34] For a description of the canon, see SCALIA & GARNER, *supra* note 17, at 107–11.

[35] *Id.* at 296–302. Other interpretive rules that were applied in the Early Republic include the rule that the specification of particulars is the exclusion of generals, the negative pregnant rule, the rule that unclear provisions should be interpreted in accord with their purpose, the rule that terms may be given a meaning based on historical practice, the rule of intratextualism, the rule that an interpreter should consider both the letter and the spirit of a provision, the rule that the interpretation of a document should accord with the nature of the document, and the rule that provisions should be interpreted in accord with legal maxims, such as no man should benefit from his own wrong. McGinnis & Rappaport, *supra* note 12, at 1395–96.

[36] Some scholars, however, claim otherwise. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 510 (2013) ("[Original methods] theory assumes that the authors of the relevant constitutional texts were aware of the original methods and hence that they could deploy the original methods to create communicative content.").

[37] One of the principal skills taught in law school is to think like a lawyer, which requires reading texts as a lawyer would. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 97 (2007).

[38] *See infra* notes 39–40 and accompanying text.

Even those who were generally familiar with the language of the law may not know all the legal interpretive rules, just as those generally familiar with a natural language might not know the meaning of all its words or grammatical rules. Similarly, lawyers consult cases and treatises to find relevant interpretive rules and the meaning of technical terms, just as users of natural languages consult dictionaries and other people to pin down the meaning of expressions with which they are unfamiliar.[39] While every rule is known by some subset of people, many rules are not known by everyone who speaks the language, whether the language is ordinary or technical.[40] Legal documents are produced, interpreted, and read under conditions conducive to deliberation, allowing lawyers to ponder the writing, look up unfamiliar matters, and consult experts.

We certainly agree that the meaning of the legal interpretive rules must have been publicly available. But in a language of substantial complexity, no one person knows everything about the language that can be ascertained through publicly available methods. A complex language can convey meaning through all its terms and rules, even if no one person knows all of them, which is part of its utility and beauty.

C. Original Intent

As the original public meaning approach should rely on the conventional interpretive rules to determine the meaning of constitutional text, so too should the original intent approach be understood to refer to an intent to apply the conventional interpretive rules. This Section first explains original intent methodology and explores its limitations if it is understood to require an inquiry into substantive intent—that is, the intent that the enactors had about the meaning of substantive constitutional provisions. It then suggests that many of these problems are resolved if original intent refers to an interpretive intent—that is, an intent simply to follow the conventional interpretative rules.

1. Problems with Original Intent

The original intent approach posits that the meaning of a constitutional provision is the meaning intended by the enactors of the provision. While commentators are not always clear about the precise intent that is relevant, the strongest view is that the original intent is the intended meaning of a provision rather than the results that the authors hoped the provision would

[39] Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 817 (2006) ("When faced with a problematic word in a legal document today, the lawyer's first instinct often is to consult a legal dictionary.").

[40] *Cf.* Manning, *supra* note 23, at 109.

produce. As Professor Larry Alexander puts it, it is the uptake that an author intends the audience to derive from his words.[41]

The original intent approach is most plausible when it involves a single author or speaker. In these situations, we are often interested in what the author intended to communicate, and there may be a clear answer to the question.[42] But the original intent approach becomes less plausible in communications jointly authored by a group. In this situation, it confronts the problem of aggregating the different intents of the law's enactors.

If some members of the lawmaking body intended a constitutional provision to have meaning *A*, while others intended it to have meaning *B*, and still others intended it to have meaning *C*, then what is the meaning of the provision? The need to aggregate intents involves at least three distinct problems.[43]

The first problem lies in determining the requisite consensus to determine a group's intent—should a majority, supermajority, or even unanimous agreement be the requisite consensus? The justification for the majority requirement is that when a group acts, a majority is necessary to resolve disagreements. Majority rule ensures that the meaning held by the larger number is followed. While this argument has some force, an important objection is that a majority may be insufficient to adequately capture the intent of the body. If a large minority had a different intent, then one might doubt that the majority intent really represented the body as a whole.

An alternative approach responding to this criticism is that a relatively stringent supermajority rule is needed to determine the group's intent. A supermajority rule assures that only a relatively small percentage of the body does not share the intent. While unanimity as to intent might be ideal, that ideal is rarely achieved or demanded by political institutions and thus can probably be eliminated as a serious option to resolve this problem.

The second problem arises upon a failure to attain the required consensus of intent. If a constitutional enactment (or a bill) does not command sufficient agreement, the enactment would be invalid. If a supermajority were required, but only a majority agreed on their intent (or a

---

[41] Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013).

[42] Yet, even in this area of strength, the original intent approach has problems. Consider situations where the speaker misspeaks. Imagine that a speaker says, "I put the paper on the dresser," when the speaker meant to say that he put it on the "table." What is the meaning of the statement? It seems clear that it means that the paper was placed on the dresser, even though the speaker intended to say table. What the speaker meant to say was different from what he actually said. Yet, it would seem that the original intent approach would analyze the meaning of this statement in terms of the dresser, rather than the table, because that is what the speaker intended the hearer to understand by it.

[43] Some of these problems were first presented by Paul Brest. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

majority were required, but only a plurality agreed), then the provision would not be enacted, even though the provision would have received the requisite number of votes to pass. We know of no case in the history of Anglo-American law where a constitutional (or statutory) provision was held not to have been passed, even though it received the requisite proportion of votes, because different members of the lawmaking body had divergent intents.[44] In fact, we know of no cases where the question has even been asked by the lawmaking body or a court. Such a holding would not only be unprecedented, it would also be a shock to the lawmakers. We regard this problem as a powerful objection to the problem of aggregating intent.[45]

---

[44] The absence of any such debate also makes it hard to figure out the requisite consensus for group intent because there is no historical experience on which to draw.

[45] Professor Rick Kay has provided the most sophisticated case for group intent, *see* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988), but in our view it still shares the problem that it may result in a body purporting to enact an approach but failing to do so. This approach—which might be termed the shared intent approach—is based on a more developed theory than many other approaches. Under this view, an enactment is validly enacted by a lawmaking body only if the requisite number of legislators needed to enact the provision both vote for the provision and share the same intent as to its meaning. Under the original constitutional enactment process, which required a majority vote in the state conventions, the shared intent approach would require that at least a majority of the delegates to a convention who voted for the Constitution share the same intent and that same intent be shared among all of the corresponding majorities in the different state conventions that ratified the Constitution.

Professor Kay justifies these requirements based on several ideas. First, he argues that the enactors' intent captures what is important about legislation—the will of the lawmaker. *Id.* at 231–33. In determining that will, one looks to those capable of establishing an authoritative rule—that is, the lawmaker. *Id.* That group is limited to the members who vote for the measure because, in Professor Kay's view, the people voting against it do not participate in its enactment. *Id.* at 247–48. That group also needs to be large enough to have authority to enact the measure (if it is to be the lawmaker). *Id.* at 246–47. Finally, he believes that a group's intent is shared only if all members of the group have the same intent. *Id.* at 247–51.

These requirements seem daunting. How could all these people share the same intent? But Professor Kay argues that while enactors may often have different intents, those disagreements can be resolved. *Id.* at 248–51. Imagine a constitutional provision that might extend to *A* or might extend to *A* and *B*. Imagine, moreover, that half of the group supporting the provision intended *A* and the other half intended *A* and *B*, but that neither group is large enough to enact the provision on its own. Professor Kay argues that one can treat the two groups as supporting *A* alone, so long as those in the second group would have intended that *A* be enacted if there was not enough support for *A* and *B*. *Id.* In other words, the second group can be added to the first if its intent is to treat *A* and *B* as severable.

While Professor Kay argues that most members would embrace such an intent to sever, it will certainly not always be the case. *See id.* at 249. People in the second group might feel strongly about a provision and not be willing to have it enacted if it only had a narrow interpretation that extended to *A*. In that event, their intent could not be added to those in the first group to support the measure. Thus, Professor Kay's approach does not avoid the problem of a lawmaking body purporting to enact a provision but failing to do so because there is not a sufficient sharing of intent—a problem we regard as one of overwhelming importance.

This problem would both be likely to occur and have serious consequences: many of the ratification votes for the Constitution in states—including New York, Virginia, and Massachusetts—were close ones. *See Ratification Dates and Votes*, USCONSTITUTION.NET (last modified Jan. 24, 2010),

The third problem involves the ability of lawmakers and interpreters to determine the group intent. Even if intentionalists could reach agreement on the proper method for aggregating intents, discovering evidence of those intents is extremely difficult. Most lawmakers do not explain their votes, and those who do may be speaking strategically. Thus, interpreters of the enactments will often have a difficult time determining the meaning of a provision. Moreover, if the lawmakers themselves cannot easily determine the meaning of a provision upon which they are voting, this inability makes it all the less likely that they share a common intent with other lawmakers.

2. A Solution to the Problems of Original Intent: Interpretive Intent

Given these problems, one might wonder whether the original intent approach is a plausible theory of the meaning of laws. In its conventional form, we doubt that it is. But an original methods version of the original intent approach can avoid these serious problems and provide a relatively attractive interpretive theory.

Under this approach, the constitutional enactors are understood to have intended that the Constitution be interpreted in accordance with the existing interpretive rules deemed applicable to constitutions. Thus, the meaning of the enactment passed is not based on the individual intent of each individual enactor. Instead, each enactor intends that the provision have the meaning that it would have under the applicable interpretive rules. To put the point differently, each enactor has an interpretive intent—he intends that the Constitution be interpreted not as he understood it in his own mind, but instead in accordance with the applicable interpretive rules. Thus, his

---

https://usconstitution.net/ratifications.html [https://perma.cc/82UU-FJRJ]. Thus, a small number of voters in the majority who had a different and nonseverable intent as to a provision would be enough to prevent the ratification vote from being valid in a particular state. Moreover, that failed vote would have prevented this state from being part of the Union, even though it was regarded as such by the people. What is more, if more than four of the states did not support the Constitution, then the entire Constitution would not have been legally ratified because the requisite nine states would not have approved it.

This problem is not merely limited to the failure of the Constitution to be enacted. One problem is that the ratifiers would not have known the consequences of their actions. Because no one knew about this shared meaning approach, the ratifiers would not have realized their intents might cause the failure of the Constitution. Put differently, everyone assumed that when a majority of a convention voted for ratification, that vote was binding and valid. Imposing a different rule on those people, in the name of determining their intent, seems extremely problematic.

Another problem with this shared meaning approach is the difficulty of determining what the intended meaning was. One must determine how broadly the ratifiers in the thirteen states would have intended the provisions to extend. To undertake this task in a serious way appears to be extremely difficult. Moreover, for the ratifiers at the time to know the meaning of the provisions they were voting on would have been extremely difficult, because it would have depended not only on the unstated intents of their own convention, but of the other conventions as well.

interpretive intent would replace his substantive intent as to the meaning of specific provisions.[46]

This approach to original intent avoids the serious infirmities of an approach that focuses on the enactors' intent as to the substantive provisions. First, it avoids the need to determine the consensus required to determine the group intent as to a substantive provision. Instead, the result of applying the interpretive rules to substantive provisions are what the enactors intend.

Second, the original methods version of original intent also avoids the serious problem of a lawmaking body's failure to enact a valid piece of legislation, even though the requisite number of members voted for the provision. Since the original methods version does not focus on the enactors' intent as to the substantive provisions, the original methods version will avoid the extremely problematic result of an enactment being passed but not being validly enacted because the requisite consensus of enactors did not share the same intent.[47]

Third, the original methods version of original intent also avoids the problem of making it difficult for interpreters and legislators to predict the meaning of the law. Because original methods originalism employs the existing interpretive rules, it uses the traditional interpretive approach, which does a good job—especially as compared to alternatives—of indicating the meaning of provisions.

Not only is this approach attractive as matter of theory, it was likely embraced as matter of fact. As discussed above, people normally speak against a background set of rules of language, including interpretive rules.[48] They generally expect that others understand their words in accordance with those rules. Thus, the intended uptake from their words is likely to be that produced after applying the interpretive rules. Put differently, they expect and intend that their words would be understood in terms of the applicable interpretive rules rather than their particular substantive intent about a provision, except to the extent that the applicable interpretive rules take that substantive intent into account.[49]

---

[46] The result of this replacement could in some circumstances result in different constitutional meanings. Thus, assume that there was evidence that the Framers (and enactors) intended a provision to mean *X* as a substantive matter. Nevertheless, if the meaning according to existing interpretive rules was best interpreted as *Y*, *Y* rather than *X* would be the original meaning of the provision.

[47] *See infra* Section II.C.1.

[48] This argument is strengthened by our argument above that the Constitution is written in the language of the law—a language that includes distinctive legal interpretive rules.

[49] It is possible that interpretive rules would direct the interpreter to consider substantive intent. We do not believe that interpretive rules at the time of enactment actually included such a direction. *See* Sections III.B–C.

While these background interpretive rules govern all speech, they are especially likely to be intended in the context of lawmaking for several reasons. First, although people generally rely on interpretive rules, they do so in a more consistent and disciplined way in written language than in oral statements made in a face-to-face interaction. In the latter situation, other sources of information beside the specific words—such as voice inflection, facial gestures, and opportunities to clarify—enable the parties to communicate the intended message. By contrast, when a writing cannot be clarified because the audience is not present, one is likely to apply the interpretive rules deemed applicable by the writer and the audience.

Second, people would be much more likely to rely upon the existing interpretive rules when the language is written in a formal document that has some official purpose. People normally regard a formal document as speaking for itself. Moreover, because formal documents often involve matters of importance, it will frequently make sense to attempt to convey the information with the precision that shared interpretive rules make possible.

Third, people would be much more likely to rely upon the interpretive rules when a group jointly authors a single writing. If each person's intent matters, but they author a single writing, then the problems of aggregating intents provide a strong incentive to use the interpretive rules.[50]

Finally, people would be much more likely to rely upon interpretive rules when they are writing in a technical area, such as law or medicine. And as we have argued extensively above, the Constitution is written in the language of the law.[51] Law requires such precision because significant harm can follow from the failure to communicate precisely.[52] Law also can employ greater precision because the participants to these communications share the knowledge necessary to understand the technical terms and the technical interpretive rules.[53]

---

[50] People would also be more likely to employ interpretive rules if those rules are regarded as binding. If they are binding, then the author and audience have the additional reason of conforming to the norm for following the rules. Otherwise, the language of the Constitution would not have the meaning that the enactors would have expected it to have. By "binding," we mean something different than the situation that we argue exists in which the originalist interpretive rules are required to be followed because they are needed to accurately determine the original meaning of the Constitution. Instead, we mean that the original interpretive rules were binding on interpreters not by their determining the original meaning, but instead by virtue of their authority as law prior to the Constitution—presumably by virtue of their being common law. We do not take a position here on whether the interpretive rules were binding in this sense. But if they were, that would be another reason for the enactors to have conformed to them.

[51] *See supra* notes 12–19 and accompanying text.

[52] *See, e.g.*, PETER M. TIERSMA, LEGAL LANGUAGE 112–14 (1999).

[53] *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 MERCER L. REV. 705, 710 (2009).

In the end, the case for concluding that the enactors intended the Constitution to be interpreted in accordance with the original interpretive rules is very strong. If one had asked the enactors at the time whether they expected and intended that the document would be interpreted based on an aggregation of subjective intents or the original interpretive rules, we have little doubt that they would answer with the latter. In fact, as we discuss below,[54] there is little evidence that participants during the Bank debate stated that their subjective intents should be considered as a legal argument. Instead, people applied traditional interpretive rules, based on word meanings, structure, and contemporary exposition.

3. Avoiding Aggregation Problems as to the Original Interpretive Rules

While the original interpretive rules appear to provide a way out of the problem of aggregating intents for substantive provisions, one might be concerned that it simply relocates the aggregation problem to the level of interpretive rules. What happens if one set of enactors intends interpretive rule *A*, another set of enactors intends interpretive rule *B*, and a third set intends interpretive rule *C*? Would this not create a problem of aggregating interpretive intents?

The kind of interpretive intent for which we argue tempers these concerns as well, because the enactors would be intending to follow the rules generally deemed applicable at the time, not a set of specific interpretive rules. Put differently, if their interpretive intent is to follow the interpretive rules properly applied to the Constitution based on practices at the time, then the original intent view leads to an objective inquiry resembling that of original public meaning—requiring the application of the interpretive rules that a knowledgeable and reasonable observer would have applied.[55] There is no need for aggregation as to specific interpretive rules any more than there is a need for aggregation as to specific substantive provisions.

Many of the same reasons for concluding that the enactors would have intended that their interpretive intent be followed also suggest that they intended to follow the proper interpretive rules rather than their particular beliefs about the interpretive rules. First, applying the proper interpretive rules rather than the intended ones helps avoid aggregation problems, which are part of the reason for giving priority to interpretive intent in the first place.[56] Second, people normally communicate against a background set of

[54] *See infra* Sections III.B–C.

[55] We discuss how to determine what interpretive rules are appropriately applied to the Constitution. *See infra* Section II.C.

[56] *See infra* Section II.C.1.

language rules, including the interpretive rules accepted among the community of speakers.[57] They do not assume that they can determine those rules or that their beliefs change those rules if they misunderstand them. Finally, people are more likely to rely on an existing set of interpretive rules that have an independent content when they are writing a formal document and are writing in a technical area, such as law.

Under this approach, the interpreter must apply the interpretive rules that he concludes would have been deemed applicable, based on the existing materials, to the Constitution at the time of its enactment. Disagreements at the time about the content of interpretive rules would not lead to an aggregation issue because they would not be a matter of subjective intent, but of the objective evidence. The interpreter would decide, based on the evidence from the time, what interpretive rules would have been deemed applicable to the Constitution.[58]

Given the strength of these arguments, we believe that a strong supermajority, not a mere majority, of enactors would embrace an interpretive intent for the rules conventionally applicable at the time. Thus, under any plausible account of the requisite consensus for group intent, there would be sufficient consensus for that intent. We cannot claim that we have resolved every conceptual problem with original intent originalism, but we do suggest that the original methods version of original intent is the best version of original intent available.

II. DETERMINING THE INTERPRETIVE RULES

Under original methods originalism, the meaning of a provision is determined based in part on the original interpretive rules that would have been deemed applicable to the Constitution at the time of its enactment. But, this leaves open the question of how one determines what the original interpretive rules were. In the previous Section, we argued that there is a convergence between the original public meaning and original intent approaches. Our argument there relied on claims about what the interpretive rules were under different approaches. Here we explore in more depth the question of how one determines what the interpretive rules were, especially where there are disagreements about the interpretive rules.

In this Part, we first sketch a theory for determining the content of those interpretive rules. We argue that the interpretive rules should be identified the same way that people at the time would have determined what those

[57] *See, e.g.*, United States v. Shabani, 513 U.S. 10, 13 (1994) (noting that Congress must be understood to legislate against certain background rules, like the rule that terms are to be given their common law meanings unless there are indications to the contrary).

[58] We provide examples of how to resolve such disagreements below.

interpretive rules were. Just as constitutional provisions should be interpreted using the interpretive rules that would have been employed at the time of the relevant provision's enactment, so too should the interpretive rules be identified based on the methods that would have been employed to identify those interpretive rules. We call those methods the meta rules. Thus, one uses the meta rules to discover the interpretive rules. By employing the meta rules that the people at the time of the Constitution's enactment would have employed to identify the interpretive rules, we stay faithful to the constitutional enactors' decisions about how to interpret the Constitution.

We also address other issues concerning the meta rules. In particular, we discuss the possibility of fundamental disagreements about those rules. For example, one possible meta rule is that the interpretive rules are those that the enactors intended, while a different meta rule is that the interpretive rules are those that would have been embraced by a reasonable and knowledgeable person at the time of the Constitution's enactment. Such different meta rules might pick out different interpretive rules, but we argue that this divergence between these two meta rules does not occur. The intended interpretive rules and reasonably determined interpretive rules select the same rules—the conventional interpretive rules at the time.

We also discuss various aspects of the meta rules, including how they determine what evidence to consider and how strong the case for one interpretive rule must be. Finally, we provide a more detailed discussion of the evolution of constitutional interpretive rules. We argue that such rules were common law rules, and therefore, the methods for determining those rules would have been common law methods.

A. Determining the Meaning of Provisions and Determining the Interpretive Rules

In original methods originalism, we determine the meaning of provisions by looking at the original interpretive rules that would have been deemed applicable to the Constitution at the time of its enactment.[59] For instance, one interpretive rule determines whether the interpreter should select the ordinary meaning of words or the legal meaning of words.[60] Thus, the interpretive rules provide a rule that governs how to interpret the meaning of the constitutional text.

But our reliance on interpretive rules raises the question of how to determine the interpretive rules themselves. In our view, one should follow the interpretive rules that would have been applied at the time of the

[59] MCGINNIS & RAPPAPORT, *supra* note 6, at 117.

[60] McGinnis & Rappaport, *supra* note 12, at 1344.

Constitution's enactment. This follows directly from the central premise of original methods originalism—that to determine the meaning of a document one must use the interpretive rules that would have been deemed applicable to it.[61] In some cases, the applicable interpretive rules will be clear. If the Constitution itself provided direction on what interpretive rules to employ, then of course one should follow that direction. If there was a consensus at the time of the Constitution in favor of certain interpretive rules, then that would be extremely strong evidence that those rules would have been employed to interpret the Constitution.

But what if it is uncertain which interpretive rules were applicable? We argue that one should use the same methods for determining the applicable interpretive rules that people at the time of its enactment would have employed. We call these methods for determining the interpretive rules the meta rules. Thus, if people at the time would have resolved uncertainty about the interpretive rules by, for example, determining what interpretive rules applied to the Constitution under the common law, then we should use those same meta rules.

By following the methods that people at the time would have used, we stay faithful to the original meaning of the Constitution. People at the time would have known that there was uncertainty not only about the Constitution itself, but also about how the Constitution would be interpreted. They would have expected that both types of uncertainty would be resolved based on the then-accepted methods.

B. The Nature of the Methods for Determining the Interpretive Rules

The methods for determining the interpretive rules—which we refer to as "the meta rules"—are an important ingredient of the original methods approach and our argument for the convergence of original intent and original public meaning. In this Section, we explore the nature (or some general features) of these methods for determining the interpretive rules.

1. A Comparison of the Meta Rules with the Interpretive Rules

The meta rules for determining the interpretive rules are similar in many ways to the interpretive rules themselves. In both cases, they help us discover or determine something—either the meaning of the document or the applicable interpretive rules. But there is one significant difference: the rules are applied to different objects. In the case of the interpretive rules, those rules are applied to enacted law—the constitutional document itself. In the case of the rules for determining the interpretive rules, these meta rules are

[61] MCGINNIS & RAPPAPORT, *supra* note 6, at 117.

applied to something else—in our view, to the unwritten law or the background rules of the legal system.

2. Two Salient Meta Rules for Determining the Interpretive Rules

While one might imagine any number of meta rules for determining the interpretive rules, there are two salient approaches to determining the interpretive rules: the reasonable import and the interpretive intent approaches. Each of these meta rules corresponds to the two principal interpretive approaches for interpreting the Constitution: original public meaning and original intent.

Under the reasonable import approach, one looks to how a reasonable and knowledgeable person at the time would have determined what the applicable interpretive rules were. This rule is similar to the original public meaning approach—in that it looks at how a reasonable and knowledgeable person at the time would have behaved[62]—but it differs because it is asking what interpretive rules that person would have found and applied.

In our view, the reasonable import approach ends up applying the conventional interpretive rules that would have been deemed applicable to the Constitution. A reasonable and knowledgeable person would apply the existing rules that were associated with the Constitution. And when those conventional rules were uncertain, that reasonable and knowledgeable person would apply the methods that would have been applied to resolve uncertainty about the interpretive rules. In our view, as discussed below,[63] those methods were the common law methods at the time.

Under the interpretive intent approach, one looks to the interpretive rules the enactors of the Constitution would have intended to apply to the document. That is, one looks to determine the interpretive intent of the enactors. This rule is similar to the original intent approach, in that it looks at how the enactors would have intended their words to be interpreted.[64]

In our view, the interpretive intent approach leads to applying the conventional interpretive rules for the Constitution. As we have discussed, people at the time would have intended to apply the conventional interpretive rules for constitutions.[65] They would not have sought to have readers determine what their subjective intentions were. Our conclusion is based not only on the arguments we have already made but also on a review of the

---

[62] *See* Lawson & Seidman, *supra* note 9, at 48.

[63] *See infra* Section II.C.2.

[64] *See* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709–10 (2009) (describing how original intent seeks to find the subjective intent of the enactors).

[65] *See supra* notes 12–14 and accompanying text.

ratification conventions. There is no evidence that the ratifiers stated that interpreters would consider the ratifiers' intentions. Instead, the ratifiers often referred to the conventional interpretive rules to determine the Constitution's meaning.[66]

Moreover, where the conventional interpretive rules were unclear, people at the time would have employed the existing conventional approach for resolving that uncertainty. In our view, that approach involved the common law rules at the time.

3. Deriving the Interpretive Rules and the Problem of Infinite Regress

We are now in a position to briefly describe how interpretive rules might be derived. We have argued that these interpretive rules are derived by employing the meta rules at the time. That is, one would apply the meta rules that people at the time would have employed for determining what interpretive rules to use.

But what if there was disagreement about the meta rules? There are at least two different approaches to the meta rules—the interpretive intent approach and the reasonable import approach. If some people believed that one of these meta rules was correct and other people believed that the other meta rule was correct, how could one resolve the issue? One might be tempted to argue that one should resolve the matter with a meta-meta rule—that is, by considering the approach that people at the time would have employed to determine what the meta rules were. But that proposed solution might not resolve the issue if people also disagreed about what the meta-meta rule was. Thus, one might believe there is a serious risk of infinite regress.

While infinite regress is a theoretical possibility, it is not necessarily the only outcome. Another possibility is that there is a full convergence—that the contending meta approaches lead to the same interpretive rules. In that case, the different starting points would end up in the same place. All roads would lead to Rome. Not only would there not be an infinite regress: there would also be a convergence between the different originalist approaches to constitutional interpretation.[67]

And, in fact, we believe that this full convergence is the actual result of applying the alternative meta rules at the time of the framing. The two salient meta rules, reasonable import and interpretive intent, both lead to largely the

---

[66] *See infra* notes 149–167 and accompanying text.

[67] Another possibility is that there is a partial convergence. In this situation, the contending meta rules lead to significant overlap between the different approaches. But there would remain some residual disagreement. Still, the differences between the approaches would have been reduced.

same conclusion: that the conventional rules for interpreting the Constitution should be followed. Moreover, if there is disagreement about what the applicable conventional interpretive rules were, both meta rules require that they be resolved based on the common law at the time. Thus, despite the theoretical possibility of infinite regress, there is in fact a single result as to the original interpretive rules: a convergence as to the conventional interpretive rules.[68]

4. Aspects of the Meta Rules

In this Section, we briefly discuss three aspects of the meta rules: what evidence to consult, the amount of evidence needed to establish an interpretive rule, and the different types of evidence that are relevant.

One important category of meta rules are those that indicate what evidence to consult in determining the interpretive rules. The two rules we discussed above require different evidence to be consulted. The reasonable import rule requires the interpreter to consider evidence of the interpretive rules that a reasonable and knowledgeable observer would have employed. The interpretive intent approach attempts to ascertain what interpretive rules the enactors intended to be applied.

Another type of meta rule would involve the amount of evidence required to determine the existence of an interpretive rule. We have argued that there was a 51%-to-49% rule for determining the meaning of constitutional provisions.[69] Under this rule, one would choose the interpretation that has the greater degree of support, even if two contending interpretations are both strong.[70] Similarly, we believe it was likely there was a 51%-to-49% rule for determining the correct interpretive rule.[71] Under this meta rule, an interpretive rule should be followed if there is just slightly more evidence supporting it than the alternative interpretive rule. Thus, we do not believe that it is necessary to have a consensus before following an interpretive rule any more than it is necessary to have a consensus on the meaning of a word in the Constitution before following the better attested meaning. In the case of either a word or a rule, a consensus, of course, should be followed, but in the absence of a consensus one should follow the better view.

A final issue worth mentioning here involves the different kinds of evidence that are part of the inquiry as to what the interpretive rules were. One type of evidence involves the background rules for determining what

---

[68] *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 990 (2009).

[69] MCGINNIS & RAPPAPORT, *supra* note 6, at 142.

[70] *Id.*

[71] *Id.*

the interpretive rules were. For example, we argue below that the Founders' generation would have considered the common law method for determining the interpretive rules.[72]

Another type of evidence turns on an examination of the Constitution. Perhaps the principal dispute between the Jeffersonians and the Federalists was the type of document the Constitution was. The Jeffersonians argued it was essentially a compact or treaty between the states, and therefore, the existing interpretive rule that applied to treaties, which narrowly construed grants of state sovereignty, should be applied.[73] The Federalists, by contrast, contended that the Constitution was the fundamental law of the people.[74] Therefore, they believed that the conventional rules did not allow for that interpretive rule to be applied. Thus, this disagreement between the Jeffersonians and the Federalists was not about whether the conventional interpretive rules applied, but what type of document the Constitution was. This latter issue was to be decided largely based on an examination of the Constitution itself.

C. Our Preliminary View of the Emergence and Content of the Original Interpretive Rules

Our discussion in this Part has explained how one would determine what the interpretive rules are. But our discussion has proceeded at an abstract level, discussing the meta interpretive rules and how they should function. While we believe the abstractness of the discussion is appropriate, we also believe that, in explaining our approach, it would be helpful to examine the matter from a more concrete perspective that takes into account the actual history and institutions involved. Here, then, we discuss how we believe the process actually operated to form the original interpretive rules. Of course, it is not possible for us to fully describe or defend our account of the process, but that is not the point of the discussion. Instead, it is to more fully describe the process so as to communicate how it worked.

Our basic point here is to show how the people at the time would have thought of the conventional interpretive rules and how that understanding would have led them to resolve disagreements about those rules. We argue that the constitutional interpretive rules grew out of the statutory interpretive rules that existed in England during the eighteenth century. Those statutory interpretive rules were understood as common law rules. The constitutional interpretive rules largely followed those statutory interpretive rules as

---

[72] *See infra* notes 92–95 and accompanying text.

[73] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 927–30 (1985).

[74] Rozann Rothman, *The Ambiguity of American Federal Theory*, 8 PUBLIUS 103, 109 (1978).

applied to the special circumstances of constitutions—first the state constitutions and then the Federal Constitution. Significantly, then, in determining what the conventional interpretive rules for the Constitution were, and for resolving disagreements about those rules, we believe that the traditional common law method as applied to discovering the interpretive rules should be employed.

1. The Development of the Constitutional Interpretive Rules

The original interpretive rules for the Constitution grew out of the statutory interpretive rules in England and in the colonies in the eighteenth century.[75] The interpretive rules of the time were generally those, in Blackstone's *Commentaries* and other places, that sought the meaning of the statute based on its intent as expressed in the text understood in context.[76]

As Blackstone indicates, maxims of interpretation generally were common law rules.[77] The rules were not enacted by statute, but instead were based on the customs and practices of the courts when interpreting statutes. While these statutory interpretive rules were common law rules, we believe that they contributed to the meaning of the statute. When a statute was enacted, it had the meaning that the statutory interpretive rules at the time as applied to the statute would have yielded. While it is possible that the common law interpretive rules would have changed over time, the meaning of the statute would not have, because it would be given the meaning as of the time of its enactment.[78]

When the Colonies declared independence in 1776, they began the process of enacting constitutions. Thus, the question arose—What interpretive rules should be applied to these new state constitutions? While a full exploration of this matter has yet to be written, we believe that it is clear that the new state constitutions were understood to be interpreted

---

[75] Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1246, 1252 (2007); *see also* Powell, *supra* note 73, at 914–16.

[76] 1 WILLIAM BLACKSTONE, COMMENTARIES 59–61 (George Sharswood ed., J.B. Lippincott 1893).

[77] *Id.* at 67.

[78] Our position here differs significantly from that of Professors William Baude and Stephen Sachs. We agree with them that the English statutory interpretive rules were common law rules. But we believe that the interpretive rules established a fixed meaning of the statute that the common law should not have been able to modify, even if the statutory interpretive rules changed. This understanding is the only one that conforms to the idea that the statutes take priority over the common law. Under the contrary view, the common law could modify the meaning of statutes. Professors Baude and Sachs, by contrast, believe that the meaning was controlled by the statutory interpretive rules and therefore if those rules changed, the meaning of the statute would change. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1140 (2017). That said, they do believe that changes in the common law rules should not, as a matter of common law, apply retrospectively to statutes enacted prior to those changes. *Id.*

primarily in accord with the statutory interpretive rules, because courts regularly applied such rules to cases concerning state constitutions.[79]

It is not surprising that statutory interpretive rules would have been applied to the constitutions, because the constitutions were so similar to the statutes enacted by Parliament and the state legislatures. Both statutes and constitutions were enacted by a representative and deliberative body, established law that was binding on the government and the public, and were to be interpreted by judges.[80]

It is true that the constitutions were enactments of a particular kind that might differ from statutes in certain respects. And therefore, it is possible that the interpretive rules governing the constitutions might, at times, diverge from the statutory interpretive rules. In our view, one can divide the constitutional interpretive rules into three categories. First, some of the constitutional interpretive rules were identical to the rules that applied to statutes.[81] Second, some of the constitutional interpretive rules were statutory interpretive rules, but rules that only applied to certain types of statutes. For example, the constitutions were relatively short documents—they were not codes. Hence, Chief Justice John Marshall's statement that it is a Constitution we are interpreting, not a code,[82] was merely an application of the statutory interpretive rules for interpreting a statute based on its length and level of detail.[83]

The third category involves constitutional interpretive rules that are distinct from statutory interpretive rules. These interpretive rules are not applied to any type of statute. Thus, in these cases, it is hard to treat the

---

[79] McGinnis & Rappaport, *supra* note 12, at 1383.

[80] Another similarity is that statutes in England and constitutions in the United States were deemed to be enacted by the sovereign—the King-in-Parliament in England and the people in the United States. *See* Natelson, *supra* note 75, at 1252. Of course, many Americans rejected the Blackstonian view that the King-in-Parliament had sovereign authority. *See* John V. Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. HIST. IDEAS 95, 102 (1971).

[81] For example, both statutory and constitutional interpretive rules would have followed Blackstone's rule that the meaning of the enactment was to be sought initially based on the words of the enactment. *See* BLACKSTONE, *supra* note 76, at 59.

[82] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Chief Justice Marshall's rule had been applied by others at the time of the Constitution, including by Edmund Randolph. *See infra* notes 111–113.

[83] For another example, as discussed below, the Federal Constitution used a system of enumerated powers that differed from the approach employed by state constitutions. Thus, Attorney General Edmund Randolph believed that a stricter approach should be employed to finding implied powers of the federal government. *See infra* note 115 and accompanying text. As discussed earlier, one might simply see this as the application of the traditional statutory and constitutional interpretive rules applied to an instrument that was written differently—having an enumerated powers structure—but some might view this as a distinct federal constitutional interpretive rule.

constitutional interpretive rule as a species of a statutory interpretive rule. Instead, it makes sense to describe it as distinctively constitutional.

In this situation, the constitutional interpretive rules get their content by applying the existing common law approach. Under the common law, one would look to existing practices to determine what rules to apply.[84] One would start with the closest analogy to the constitution to determine the interpretive rules. And since statutes were so similar to constitutions, the common law would largely apply the statutory interpretive rules to constitutions. But if the constitution were different enough from statutes in some respect, it would make sense to apply a distinctive interpretive rule to the constitution. Thus, whether there was a distinctive constitutional interpretive rule and its particular content would be determined based on the common law method.

As a means of exploring this third category of distinctively constitutional interpretive rules, we can discuss several rules that might fall into this category. First, one can imagine a situation where statutes were understood as documents written in the language of the law, but constitutions were understood as written in ordinary language. The constitutional interpretive rules would then, in contrast to the statutory interpretive rules, interpret the constitutional language as ordinary language.

Second, one can imagine applying an interpretive rule for treaties to the Constitution that was not applied to statutes. In his Bank Speech, James Madison referenced the rule that the meaning of the parties to the instrument is a proper guide to its meaning, which was a traditional rule of treaty interpretation.[85] Madison appeared to believe that in certain respects the Constitution was more like a treaty than a statute.[86]

Third, one can imagine applying the contemporary exposition rule, which was a traditional statutory interpretive rule, to the Constitution in a different way than it may have applied to statutes. Under the traditional rule, interpretations of the statute by certain authoritative people were deemed relevant evidence as to the meaning of the statute.[87] Under what appears to be the majority view, the legislative history of one of the houses was not deemed to fall under this rule.[88] By contrast, there is some evidence, which is discussed below, that when a ratifying convention as a whole proposed an

---

[84] More generally, the common law approach would look to precedent, custom, and reason. *See infra* note 92 and accompanying text (discussing the common law as based on precedent, custom, and reason).

[85] 2 ANNALS OF CONG. 1896 (1791) (remarks of Rep. James Madison).

[86] For further discussion, see *infra* note 122 and accompanying text.

[87] *See infra* Section III.C.

[88] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 935–36 (2017).

amendment to the Constitution, that proposal might be understood as an interpretation of the document by a body with official duties. Thus, it would be treated as a contemporary exposition of the document.[89]

One can see how each of these rules might be applied to constitutions even though they were not applied to statutes. But while they are potentially applicable, we have strong doubts, especially as to the first two, that they represent distinctive constitutional interpretive rules that applied to the Constitution. First, we reject that the first and second of these rules were actual constitutional interpretive rules. We have shown in other work that the Constitution was written in the language of the law and therefore an ordinary language interpretive rule is inappropriate.[90] Moreover, we also believe that Madison's application of a treaty interpretive rule was not properly applied to the Constitution and in the early years was a distinctively minority view.[91]

Second, it is not clear to us that the first and the third of these rules actually represent distinctive constitutional interpretive rules rather than the application of the statutory interpretive rules to statutes or enactments of a particular kind. The contemporary exposition rule, as applied to the state ratifying conventions, is arguably merely the application of the existing rule to different circumstances, not a different interpretive rule. And the ordinary language interpretive rule is arguably merely an application of the more general interpretive rule that a document should be interpreted based on the language in which it was written.

But even if one regards these rules as distinct constitutional interpretive rules, the only one that we believe has strong evidence that it actually would have been properly applied to the Constitution is the contemporary exposition rule. Thus, there may be distinctive constitutional interpretive rules, but they are likely—as we argue below—of limited significance.

2. How Uncertainties About the Interpretive Rules Would Have Been Resolved

We are now in a position to understand how issues about the interpretive rules would have been understood at the time. We address this first in terms of the legal materials—that is, by looking at the legal materials

---

[89] It is not clear why the ratification convention would have been treated differently from the legislative house. One possible reason is that the convention was making an up-or-down decision on a constitution that was already written. By contrast, a legislative house would normally be writing legislation or, if it received a bill from the other house, could propose an amendment to the bill. Thus, the convention was more in the position of an early executive or judicial official who was implementing a law he could not modify.

[90] *See* McGinnis & Rappaport, *supra* note 12, at 1368–1400 (amassing evidence that the Constitution is written in the language of the law).

[91] *See infra* note 122 and accompanying text.

that people at the time would have considered when determining the common law in a specific area. Then, we move on to how the original public meaning and original intent approaches would apply these legal materials.

It is useful to examine how the legal materials would have been employed at the time because interpreters would have applied the interpretive rules that had been applied to statutes and the state constitutions to the Federal Constitution.

To the extent that those interpretive rules were unclear—if, for example, there was uncertainty about whether an interpretive rule was applicable—the interpreters would have decided the matter as they would have decided any other question that was addressed by the common law—by reference to precedent, to custom, and to the reason of the law.[92] First, they would have looked to the prior decisions of the courts on this question, considering both the number of decisions adopting a position as well as the reputations of the judges and courts that took the position. Second, they would have looked to customs and practices. This would have included reference to statements made by legislators and those learned in the law when interpreting statutes and constitutions. Third, they would have looked to the reason of the law. This would include a variety of matters, including practices and decisions in analogous areas as well as judgments about the results of applying different rules as assessed by the existing values of the society.[93]

It is important to stress that the interpretive rules that would have applied to the Constitution—whether or not they were deemed also to be common law rules—would have been the rules that existed at the time of the Constitution's enactment. Thus, in determining what interpretive rules were applied to the Constitution, an interpreter would not look to later decisions (except to the extent that they cast light on the earlier rules) and would not look to rules of the society at later times. If the interpreter were to do that, they would not be employing the interpretive rules at the time, but interpretive rules that developed later.[94]

---

[92] BLACKSTONE, *supra* note 76, at 67, 69–70; Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 931–935 (2013) (discussing the traditional common law as consisting of custom, reason, and precedent).

[93] Nelson, *supra* note 92, at 934.

[94] *See* Mike Rappaport, *When Common Law Rights are Constitutionalized*, LAW & LIBERTY (Oct. 29, 2014), https://www.lawliberty.org/2014/10/29/when-common-law-rights-are-constitutionalized [https://perma.cc/YCN8-QYNR]. In deciding what the interpretive rules were, we claim that the interpreters would use the common law method. But we have argued that there is good reason to believe that the constitutional interpretive rules would not be common law rules. So, the question arises why the interpreters would use the common law method. While we discuss this issue in a different article, the short answer is the interpreter will be determining the content of the formerly common law rules as of the time of the Constitution's enactment. The content of that rule will need to be discerned by common law

This discussion has described how interpreters would use the legal materials to determine the interpretive rules that applied to the Constitution. We can now move to the original public meaning and original intent approaches for determining the interpretive rules. Under the original public meaning approach, one looks to how a reasonable and knowledgeable person at the time would have answered the question. Such a hypothetical person would look to the legal interpretive rules that the common law would have applied to statutes and the state constitutions and then would apply them, with such adjustments as the common law indicated, to the Constitution.

The original intent approach reaches much the same conclusion. Under the original intent approach, because the enactors would have intended for the Constitution to be interpreted using legal interpretive rules, one would look to the conventional methods for determining the interpretive rules for a constitution.[95] Those methods were the common law methods for determining the interpretive rules for a constitution. As with the original public meaning approach, the original intent approach looks to the common law as the guide to applying the statutory and state constitutional interpretive rules to the Constitution.

Thus, we conclude that the original intent and original public meaning approaches to constitutional interpretation would both direct interpreters to follow the conventional rules applicable at the time. We also suggest that methods were available to determine the appropriate content of those rules. We now turn to illustrate how these methods work in practice and how the conventional rules at the time enjoyed substantial consensus even among those who disagreed on substantive constitutional questions.

III. ILLUSTRATING LEGAL INTERPRETIVE RULES

This Part examines questions about specific interpretive rules—both the rules for interpretation and the meta rules for determining the interpretive rules. Within the space provided for this Essay, we cannot definitively defend any proposition dependent on historical evidence, but we can illustrate our suggested methods for resolving such questions. We focus on evidence from the early debate over the Bank of the United States, the most contested constitutional issue in the years immediately after the ratification

methods. Just as an interpreter will need to consider the previously common law characteristics of a common law rule incorporated into the Constitution, such as the Confrontation Clause, so must the interpreter consider those previous common law characteristics of an interpretive rule assumed by the Constitution. Under this approach, the content of the rule will be discerned through common law methods as of the date of the Constitution's enactment. But those common law methods will not be used to consider subsequent values and circumstances, since that would be discovering a new common law rule.

[95] *See supra* Section I.C.2.

of the Constitution. We then supplement that evidence with that offered by prior scholarship—both by others and by ourselves.

This Part suggests, even if it does not prove, two important propositions about how to find the content of the interpretive rules. First, there was substantial agreement that the Constitution was to be interpreted according to conventional interpretive rules. Second, while some have argued that there was great disagreement on the rules to be applied,[96] we find substantial consensus. And even if there was some disagreement about particular interpretive rules, it occurred within a broader consensus of how to determine what the interpretive rules were.

Then, we illustrate how to evaluate whether some methods of legal interpretation were or were not accepted as conventional rules. In particular, we argue it was not a conventional rule to determine the meaning of the Constitution through the substantive intent of the Philadelphia Convention.[97] Moreover, the better view is that it was not the conventional rule to determine the meaning of the Constitution through the substantive intent of members of state ratifying conventions. On the other hand, it is possible that inferences from the actions formally taken by a state ratifying convention as a whole provided evidence of what the Constitution meant, because these actions represented early expositions of its meaning—itself a long-standing conventional interpretive rule. But that rule is very different from looking at the substantive intent of the enactors. It is not evidence of intent but evidence of the meaning of the Constitution's text. And it is only one interpretive rule among many and thus only one factor in determining textual meaning.

The debate about passing a bill authorizing the Bank of the United States provides an important window into the content of the original methods.[98] It occurred immediately after the Constitution was enacted, and thus the debate most likely captured the conventional methods of interpretation deemed applicable at the time of the Constitution's enactment—the relevant time period for interpreting the original Constitution and the Bill of Rights. It engaged a wide spectrum of opinion, pitting nationalists, who saw the Bank as essential to sustaining a flourishing

---

[96] Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 154 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)).

[97] By substantive intent, we mean the intent of the Framers or, in the case of the state conventions, the ratifiers as to the meaning of substantive provisions of the Constitution. That intent is normally accessed through the legislative history of the respective conventions.

[98] Professor Lee Strang has used these same debates to cast doubt on the claim that constitutional construction, as opposed to interpretation, was a conventional approach at the time of the Constitution's enactment. *See* Lee J. Strang, *An Evaluation of Historical Evidence for Constitutional Construction from the First Congress' Debate over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193, 202, 206 (2018).

republic, against those more interested in preserving state power, which they saw as closer to the people and less liable to corruption than national institutions, like the Bank. It occurred under the most intense public scrutiny of any constitutional issue in the Early Republic.[99] It sustained attention from some of the most important political and legal thinkers of the time, including James Madison, Thomas Jefferson, Alexander Hamilton, and Edmund Randolph.[100] What is remarkable is that, despite their political disagreements, we can gather a fair amount of consensus on important interpretive issues. This is particularly the case when we emphasize the contributions of Hamilton and Randolph, who, as practicing lawyers, could be expected to best recognize what rules were deemed applicable to a document written in the language of the law.

This last Part builds on our prior work on the language of the law, which also discussed how to find the conventional interpretive rules. That work canvassed debates over the Constitution in both courts and Congress and found the application of familiar canons of interpretation.[101] We also concluded that Federalists and Antifederalists did not disagree so much on the positive questions of what conventional interpretive rules of interpretation would be applied, but rather on the normative question of whether that application was desirable.[102]

A. Following Conventional Interpretive Rules

The Bank debate displays a consensus that the Constitution was to be interpreted in accordance with the conventional interpretive rules.[103] The rules deemed applicable were the rules applied to documents that were thought analogous to a federal constitution, like a statute or a state constitution. Legal analysis at the time suggested that such rules might sometimes be modified in light of the differences between the Constitution and the analogous documents.[104]

Hamilton's opinion was most explicit on the obligation to employ established rules. He stated that the intention of the Constitution "is to be

---

[99] *Id.* at 200.

[100] *See* discussion *infra* Section III.A.

[101] McGinnis & Rappaport, *supra* note 12, at 1393–96.

[102] *Id.* at 1399.

[103] We are not the only scholars to observe this agreement. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988) ("The one point on which nearly everyone agreed, during the [1791] [B]ank controversy, was that the Constitution should be construed according to conventional rules of interpretation.").

[104] *See infra* notes 110–114 and accompanying text.

sought for in the instrument itself, according to *the usual and established rules of construction.*"[105]

In his opinion on the Bank, Jefferson also did not question the application of conventional rules to the Constitution.[106] He, in fact, applied a rule of interpretation, the rule against surplusage, as the fulcrum of his argument that permitting a constitutional power of incorporation would require such a liberal construction of federal powers as to make the enumeration superfluous. And he introduced this rule by touting it as "established."[107]

In debates over the Bank in Congress, participants often based their arguments on conventional rules. Elbridge Gerry, a Representative from Massachusetts and a former member of the Philadelphia Convention, is the most explicit in stating that conventional interpretative rules should be followed.[108] Gerry lays out each of Blackstone's rules for statutory interpretation before applying the rule to the question of the Bank's constitutionality.[109] Gerry's approach is particularly significant, because, although Gerry supported the Bank, he was an Antifederalist who in fact had refused to sign the Constitution. Yet, like the Federalist Hamilton, he too believed in interpreting the Constitution according to the conventional rules.

In his opinion on the Bank, Randolph is less explicit about the relevance of conventional interpretive rules, but he did implicitly try to follow conventional rules of interpretation as adapted to a new kind of document—the Federal Constitution. He compared the Federal Constitution to two types of enactments—legislative enactments and state constitutions—both documents with conventional legal interpretive rules. He then determined how to apply these rules to the Federal Constitution by considerations that would adapt them better to capture the Constitution's meaning. In his comparison of a constitution to a statutory enactment, Randolph stated:

> There is a real difference between the rule of interpretation, applied to a law and a constitution. The one comprises a summary of matter, for the detail of which numberless laws will be necessary; the other is the very detail. The one is,

---

[105] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank (Feb. 23, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 101 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley 1967) (1832) [hereinafter BANK HISTORY] (emphasis added).

[106] Opinion of Thomas Jefferson, Secretary of State, on the Same Subject (Feb. 15, 1791), *in* BANK HISTORY, *supra* note 105, at 91–92.

[107] *Id.* As we note below, Jefferson also does appeal to the Framers' intent, but this is not the principal basis of his argument, and he does not declare it is an established rule. *Id.*

[108] 2 ANNALS OF CONG. 1946 (1791) (remarks of Rep. Elbridge Gerry).

[109] *Id.* at 1946–50.

> therefore, to be construed with a discreet liberality, the other, with a closer adherence to the literal meaning.[110]

Randolph thus compared a constitution to a statute,[111] but suggested that the conventional rules should be applied with the recognition of the difference between a detailed statutory code and a constitution. Indeed, despite concluding that congressional authorization of a national bank was unconstitutional, he recognized that the difference in the amount of detail included in a provision should make a difference in the interpretive rule, much like Chief Justice Marshall's famous position in *McCulloch v. Maryland*.[112] The Constitution is to be interpreted much like a statute, but because it is not a detailed code, allowances in interpretation must be made for the lesser amount of detail in its expression.[113] Hamilton agreed with this aspect of Randolph's position, further supporting the idea that this was the adaptation of a conventional rule.[114]

Randolph then compared the Federal Constitution to a state constitution, but again suggested that the rules should be applied to the Federal Constitution with recognition of an important feature of the Federal Constitution. He stated: "But, when we compare the modes of construing a State and the Federal constitution, we are admonished to be stricter with regard to the latter, because there is a greater danger of error in defining partial, than general powers."[115] In other words, because the limitations imposed on the federal government by the enumerated powers must be preserved, focusing only on the difference in the amount of detail in the respective enactments ignores the salience of enumeration and may misconstrue the Constitution's meaning. Hamilton disagreed with Randolph on this point. While he did not respond directly to Randolph's interpretive observation, he emphasized another difference that he saw between federal

---

[110] Opinion of Edmund Randolph, Attorney General of the United States, to President Washington (Feb. 12, 1791), *in* BANK HISTORY, *supra* note 105, at 86–87.

[111] Samuel Chase, another well-known lawyer and future Supreme Court Justice, had made the same comparison in a case a year earlier. *See* Donaldson v. Harvey, 3 H. & McH. 12, 19 (Md. 1790) ("In expounding the [F]ederal [C]onstitution, the same rules will be observed which are attended to in the exposition of a statute.").

[112] 17 U.S. (4 Wheat.) 316, 407 (1819) ("[I]t is *a constitution* we are expounding.").

[113] *Id.* On the proper interpretation of Marshall's statement, see John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 761.

[114] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 105, at 99. We address elsewhere Hamilton's apparent objection to use of certain conventional rules of interpretation. *See* MCGINNIS & RAPPAPORT, *supra* note 6, at 128 n.51.

[115] Opinion of Edmund Randolph, Attorney General of the United States, to President Washington, *supra* note 110, at 87.

and state constitutions, namely that the government created by the former faces greater crises.[116]

Disagreement between Hamilton and Randolph on how to apply conventional interpretive rules should not detract from their agreement on the method of discovering rules. They both begin with the conventional interpretive rules for analogous enactments and reason, in a common law method, about the degree to which they should be modified in being applied to the Federal Constitution. Indeed, it is likely that their greatest disagreement was not a disagreement about the nature of the rules, but of fact—whether the power of incorporation was so substantial that it would have been expressly mentioned if it had been given.

Madison also proceeded as if there were applicable conventional interpretive rules. Indeed, before engaging in specific legal analysis he lists five rules, which he describes as "preliminaries to a right interpretation":

> An interpretation that destroys the very characteristic of the Government cannot be just.
>
> Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.
>
> In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.
>
> Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.
>
> In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.[117]

All of Madison's rules are either conventional or derived from either a conventional rule or drafting considerations applied to a constitution. Three of the rules Madison applies were conventional.[118] And another can be

---

[116] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 105, at 99 ("But the reason of the *rule* forbids such a distinction. This reason is, the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of national, than of State administration. The greater danger of error, as far as it is supposeable, may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation.").

[117] 2 ANNALS OF CONG. 1896 (1791).

[118] For instance, Madison's first rule—that an interpretation that destroys a characteristic of government cannot be just—flows directly from the rule *ut res magis valeat, quam pereat*, i.e., that one should not interpret an enactment to void its essence. *See* 1 BLACKSTONE, *supra* note 76, at 89. As applied to the Federal Constitution, one of whose essential structures was the enumerated powers, it meant that an interpreter had to avoid a gloss that destroyed those limitations. Madison's third rule of consulting the meaning of the parties, if reasonable, is recommended in EMMERICH DE VATTEL, THE LAW OF NATIONS

derived from a conventional rule.[119] His last—roughly, the more important the power the more likely it is to be expressed—is similar to Randolph's structural consideration in interpreting the Constitution to give weight to its enumerated powers. It reflects the conventional view that great, as opposed to incidental, powers in charters of corporations or government would be expressly stated.[120]

The most important point is that even though Madison was not a practicing lawyer[121] and his views on conventional legal rules might be accordingly somewhat discounted, he appeared generally, like all other participants in the Bank debate, to be relying on the best adaptation of what he views as conventional rules to find the Constitution's meaning on a difficult question.

But Madison did appear to be something of an outlier. At times, with his references to "the parties," Madison appears to consider the interpretation of treaties in addition to statutes as a good analogy for the Constitution in determining the content of the conventional rules.[122] Moreover, he sometimes does not simply parrot conventional rules but rather restates them, as with his first and last rule, in a way that applies them directly to the Constitution.[123] Gerry criticized this approach, arguing that "as they are not sanctioned by law exposition, or approved by experienced judges of the law, they cannot be considered as a criterion" for interpretation.[124] For Gerry, as we have seen, directly applying Blackstone's express conventional rules for statutory interpretation remains the best guide.

Beyond the Bank bill, there is very substantial evidence that interpreters at the time believed that the Constitution should be interpreted according to

---

§ 270, at 247 (Abraham Small 1817), as a rule for interpreting treaties. Madison's fourth rule of consulting contemporary interpretation applies to interpreting treaties, *id.* § 272, at 248–49, and statutes alike. *See* Bamzai, *supra* note 88, at 933–35 (collecting references to the canon of contemporaneous exposition).

[119] The provenance of Madison's rule about an unclear provision being "triable by its consequences" is somewhat less clear. But Madison's use of the term "consequence" later in his speech may make the relation of his statement to conventional rules clearer. There, he argues that if the Bank were permitted to be incorporated, the government could incorporate a whole range of institutions, leading to unlimited power. 2 ANNALS OF CONG. 1897 (1791). That consequence would be inconsistent with the enumerated powers. Thus, an interpreter "tries consequences" by considering whether the consequences are consistent with the structure of the Constitution.

[120] *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1751 (2013) (practice confirmed that "great powers" were not included within those powers granted by the Necessary and Proper Clause).

[121] *See* Mary Sarah Bilder, *James Madison, Law Student and Demi-lawyer*, 28 LAW & HIST. REV. 389, 389–91 (2010).

[122] 2 ANNALS OF CONG. 1896 (1791).

[123] *Id.*

[124] 2 ANNALS OF CONG. 1946 (1791) (remarks of Rep. Gerry). Gerry then relied on rules of Blackstone. *See id.* at 1946–50.

conventional rules. Professor Jefferson Powell showed that applying conventional rules was the method of interpreting legal enactments in the English legal system that formed the legal background of the American constitutional system.[125] He also extended his analysis to show that in famous constitutional debates in the Early Republic, including those involving the Virginia and Kentucky Resolutions, the constitutional interpreters embraced what they believed to be the conventional rules.[126] In our work, we have shown that both Supreme Court Justices and members of Congress, many of whom were not jurists, regularly applied conventional rules to interpret the Constitution.[127] Even many of those who have disagreed with Professor Powell about the nature of the rules applied to the Constitution have followed this approach of considering what were the conventional rules applied to enactments and how early interpreters adapted them to the Constitution.[128]

In later debates about the Constitution, people agreed that conventional rules should be applied, even as the issue of the appropriate legal analogy to the Constitution was more sharply joined. After the debate over the Bank bill, Jeffersonians began to dispute what had previously been the predominant analogy of statutes and state constitutions by expressly suggesting that the Constitution resembled a compact or treaty among nations.[129] This characterization of the Union allowed Jeffersonians to employ the traditional common law interpretive rule that grants of powers by a sovereign should be narrowly construed. This was the basis of their argument in a wide range of disputes—arguing for the Virginia and Kentucky Resolutions,[130] against the capacity of individuals to sue states in federal court,[131] and against the constitutionality of the Bank of the United States when that dispute reached the Supreme Court.[132]

The Federalists opposed the characterization of the Constitution as a compact. Most famously, Chief Justice Marshall argued that the Constitution was a delegation of authority from the people of the United States to the national government.[133] But, even if one believes, as we do, that the Federalists had the better of the analogy and that the Jeffersonians were innovating, this kind of debate remains consistent with the consensus in favor

---

[125] *See* Powell, *supra* note 73, at 896–98.

[126] *Id.* at 926–31.

[127] *See* McGinnis & Rappaport, *supra* note 12, at 1381–94.

[128] This is true for instance of Professor Robert Natelson, *see infra* note 148 and accompanying text.

[129] Powell, *supra* note 73, at 926–28.

[130] *Id.*

[131] McGinnis & Rappaport, *supra* note 12, at 1388.

[132] *See* David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 17–18 (2015).

[133] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819).

of following conventional rules. Jeffersonians and Federalists were arguing about what interpretive rules were relevant, and that question depended on the nature of the document in question. Moreover, a variety of conventional rules applied to both compacts and statutes, with the result that even Jeffersonians and Federalists were not in systematic disagreement on which rules to apply.[134]

B. The Substantive Intent of the Philadelphia Convention Was Not a Conventional Rule

There is very substantial evidence that supports the proposition that an approach appealing to the substantive intent of the Framers as constitutive of the Constitution's meaning was not a conventional interpretive rule. Both Hamilton and Randolph agreed that appeals to the legislative history of the Philadelphia Convention were not an acceptable method. Madison's speech also did not include it among his rules for interpretation. Jefferson was the only outlier, and even he did not deploy the Framers' intent as the mainspring of his argument.

Hamilton expressly contrasted a view of following substantive intent with the established rules of construction:

---

[134] The evidence in the Bank debate and other evidence we have previously canvassed does not support those scholars, like Professor Caleb Nelson, who argue that that there can be no legal conclusion reached on what is the basic approach to applying conventional legal interpretive rules. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 576 (2003) ("[W]e have identified early support for at least four different approaches to constitutional interpretation: (1) reading the Constitution as a layman might, (2) deriving special canons of construction from the Constitution's unique nature and purpose, (3) borrowing preexisting rules for the interpretation of statutes, and (4) borrowing preexisting rules for the interpretation of treaties or compacts."). First, all the participants in the Bank debate appealed to legal interpretive rules, and thus, they did not read the Constitution as a layman might. *See supra* notes 104–114 and accompanying text. Second, as we have discussed above, the key analogy was to conventional rules interpreting statutes and occasionally to what may be regarded as superstatutes—state constitutions. *See supra* note 80 and accompanying text. While Madison seemed to suggest an analogy to treaties and compacts, his was a unique perspective in the Bank bill debate. *See supra* note 125 and accompanying text. Although this analogy subsequently became more popular with Democratic-Republicans, later views should be discounted in favor of earlier ones. We also find little support for "special canons of construction" derived from the Constitution's unique nature, although we do not rule out that there be some such rules in addition to those conventional rules applied typically to statutes. While, as we have noted, some participants in the Bank debate did take account of the Constitution's salient features, *see supra* notes 110 and 116 and accompanying text, like the relative amount of detail in the Constitution, such considerations helped apply conventional rules in a way that captured the meaning of the document.

Our disagreement stems from our interpretive theory as well as from the evidence. Some scholars decline to reach a legal conclusion on what interpretive rules should be applied once they have shown that the historical record contains different approaches or different rules. Nelson, *supra*, at 576. For reasons we have discussed, *see supra* note 68 and accompanying text, we think the correct meta rule is to choose the interpretive rules better represented in the historical record.

> The Secretary of State will not deny, that, *whatever may have been the intention of the framers of a constitution*, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. *Nothing is more common than for laws to express and effect more or less than was intended*.[135]

And note that Hamilton made this statement in a confident manner that suggested no fear of substantial contrary evidence.

Gerry also rejected reference to the Framers' intent both implicitly and explicitly: implicitly, by arguing for interpretation according to Blackstone's rules; explicitly, by rejecting reliance on subjective intent.[136]

Randolph also disavowed the Framers' intent:

> An appeal has been also made by the enemies of the bill to what passed in the federal convention on the subject. But ought not the constitution to be decided on by the import of its own expressions? What may not be the consequence if an almost unknown history should govern the construction?[137]

The import of its own expressions, in fact, roughly captures what we moderns might call public meaning originalism. It is particularly significant that Hamilton and Randolph, preeminent lawyers of their day, agree in dismissing substantive intent while disagreeing about the ultimate question of the constitutionality of the Bank.

Madison himself did not include reference to subjective intent in any of the five rules discussed above—rules that he describes as "preliminaries to a right interpretation."[138] While he does refer to a decision of the convention to reject a charter for the canal, he simply calls it an "impression," and it does not form part of his legal analysis.[139] Moreover, when two members of Congress argued that Madison's impression of the Federal Convention had no legal relevance,[140] Madison was conspicuously silent about this criticism

---

[135] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 105, at 101 (emphasis added).

[136] 2 ANNALS OF CONG. 1952–53 (1791).

[137] Edmund Randolph, Attorney General's Opinion: No. 2 (Feb. 12, 1791), *in* BANK HISTORY, *supra* note 105, at 89–90.

[138] 2 ANNALS OF CONG. 1896 (1791) (remarks of Rep. Madison).

[139] *Id.* ("In making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it. He had entertained this opinion from the date of the Constitution. His impression might, perhaps, be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected.").

[140] *Id.* at 1952 (remarks of Rep. Gerry) ("The gentleman from Virginia [Madison] has endeavored to support his interpretation of the Constitution by the sense of the Federal Convention; but how is this to be obtained? By applying proper rules of interpretation? If so, the sense of the Convention is in favor of the bill; or are we to depend on the memory of the gentleman for a history of their debates, and from thence to collect their sense? This would be improper . . . ."); *id.* at 1955 (remarks of Rep. John Vining) ("[B]ut granting that the opinion of the gentleman from Virginia had been the full sense of the members

in a rebuttal speech that contested other points.[141] Thus, his statement about the sentiment of the Philadelphia Convention is best viewed as one of personal opinion not relevant to legal interpretation, thus implicitly supporting the legal views of Hamilton and Randolph.[142]

Jefferson did appeal to the intent of the Philadelphia Convention—to its rejection of a power of incorporation in connection with building canals, which was the appeal that Hamilton rejected as impermissible in his own opinion.[143] But Jefferson was the outlier on this issue—not supported by any of the other major disputants on the Bank, not even by Randolph or Madison, who agreed with his ultimate position. And even Jefferson did not make this his principal argument. Instead, his main contention was one rooted in a traditional rule of interpretation, that of antisurplusage: interpreting the Constitution so loosely as to give it the implied power would treat the enumeration of powers as redundant.[144]

Other evidence also supports the view that consulting the legislative history of the Philadelphia Convention was not deemed a rule of interpretation at the time of the Constitution. Previous scholarship has provided substantial argument that consulting the substantive intent of the enacting legislature was not done.[145] While sometimes the term intent was used, this use was a legal term of art that signified the intent of the document to be gleaned from its words and its objective purpose, not the subjective

---

of the Convention, their opinion at that day, he observed, is not a sufficient authority by which for Congress at the present time to construe the Constitution."). The only other Congressman to have referenced the proceedings of the Federal Convention also deprecated their relevance in favor of interpreting the Constitution according to "general principles." *Id.* at 1929 (remarks of Rep. William Smith).

[141] *See id.* at 1956–60 (remarks of Rep. Madison).

[142] Moreover, when a member of the House attempted to argue that the House's responsibilities for treaties could be ascertained by reference to arguments from the proceedings of the Convention, James Madison himself rejected this appeal, stating that he "did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question." 3 ANNALS OF CONG. 776 (1796) (remarks of Rep. Madison). Thus, it appears that this incident confirms our view that Madison's reference to the Philadelphia Convention was not part of his legal analysis and more generally that it was a not a generally accepted rule to refer to the legislative history of the Philadelphia Convention.

[143] Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, *supra* note 106, at 92 ("It is known that the very power now proposed as a *means*, was rejected *as an end* by the convention which formed the constitution . . . .").

[144] *Id.* ("It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all others useless. Certainly no such universal power was meant to be given to them. It was intended to lace them up straitly within the enumerated powers; and those without which, as means, those powers could not be carried into effect.").

[145] *See* Powell, *supra* note 73.

intent of the drafters.[146] Sometimes interpreters did refer to the spirit of the document, but as Blackstone's gloss on this interpretative rule shows, reference to spirit authorizes a resort to the objective purpose or cause of the legislation, not the subjective intent contained in its legislative history.[147] The practice of jurists in the Early Republic was similar. They did not generally focus on the legislative history of the Philadelphia Convention, even as they applied other conventional interpretive rules.[148]

C. The Substantive Intent of the Ratifiers Was Not a Conventional Interpretive Rule

The debate over the Bank also does not support the notion that it was a conventional rule to consider the substantive intent of participants at state conventions as constitutive of the meaning of the Constitution. Instead, the debate suggests that material from the ratifying conventions had at most a more limited role. First, material from state conventions was used as a

---

[146] *Id.* at 895 ("[T]he 'intent' of the maker of a legal document and the 'intent' of the document itself were one and the same; 'intent' did not depend upon the subjective purposes of the author.").

[147] *See* 1 BLACKSTONE, *supra* note 76, at 91 n.37. Chief Justice Marshall referred to this as a rule of interpreting the statute against the mischief it was designed to eliminate. *See* Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 959 (2000) (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–29 (1819) ("[S]ince the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.")).

[148] We recognize that Professor Robert Natelson has argued in favor of substantive intent as an interpretive rule at the time of the enactment of the Constitution. *See* Natelson, *supra* note 75. We do not have space to describe fully our grounds of disagreement. But we believe that he often fails to recognize that the terms "intent" and "spirit" were used not to mean subjective intent but rather something more akin to objective intent or purpose, as Professor Jefferson Powell and others have noted, *see* Powell, *supra* note 73, at 895. Second, some of his evidence comes from long before the Framing, when subjective intent may have been used, but closer to the time of the Framing, text began to supersede subjective intent as to the source of objective meaning. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV 1, 52–54, 85–102 (2001). And we think there are substantial problems with his evidence for the use of legislative history closer in time to the Framing. For instance, he relies substantially on arguments of attorneys, *see* Natelson, *supra* note 75, at 1266–68, 1267 nn.149–52, but if these claims are not reflected in jurists' opinions, they may as easily cut against the acceptance of subjective intent as a conventional interpretive rule. And most of the judges writing for a majority that Professor Natelson quotes as referring to parliamentary debates mention these records for reasons other than to find the meaning of a statute. *See, e.g.*, R v. Pasmore (1789) 100 Eng. Rep. 531 (KB) (referring to comments in Parliament to determine preexisting law); Savage v. Smith (1776) 96 Eng. Rep. 650, 650 (CP) (referring to the Lords' Journal to determine the enactment date of a statute). Finally, the weight of modern commentators who have studied this issue is against Professor Natelson's view. *See, e.g.*, Bamzai, *supra* note 88, at 935–36 (arguing, as the most recent source, that reference to subjective intent was a minority view). And we would add that Professor Bamzai shows that even these references were instances of the contemporary interpretation of a text. *Id.* at 935–37. That is, jurists did not resort to subjective intent to define what the meaning of a statute is but rather only as one rule of evidence for what a text meant.

contemporary interpretation of the text of the Constitution proposed by the Federal Convention. Thus, it was not a canvassing of intent but of evidence about the interpretation of a text laid down by others. Second, it was one rule among many of evidence about the text and thus only one factor in interpretation. Finally, only formal actions of an entire convention, like the passage of proposed amendments, not individual comments of the ratifiers, had substantial support as to contemporary interpretation.

During the debate over the Bank, Madison elaborated most on how material from the convention might be used. As noted above, Madison's speech stated that in interpreting the Constitution, "[c]ontemporary and concurrent expositions are a reasonable evidence of the meaning of the parties."[149] He then discussed three kinds of "contemporary expositions."[150] First, he said that "[t]he explanations in the State Conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated."[151] Madison thus thought this proposition to be universally embraced. He then quoted "sundry passages" from speakers who supported this position at the conventions.[152] Second, he noted that the explanatory declarations and amendments of the Conventions were to the same effect.[153] Third, he claimed that the amendments proposed and ratified by the states, i.e., the provisions we now know as the Bill of Rights, "proceeded on a rule of construction, excluding the latitude now contended for."[154]

Thus, Madison himself provided powerful confirmation that he did not believe that the Constitution was constituted by the substantive intent of the ratifying conventions. Not only did he label these materials contemporary expositions of a text already written, he sees exposition at the ratifying conventions as similar in kind to inferences from what we now know as the Bill of Rights. These references to the Bill of Rights could hardly represent expressions of substantive intent, rather than evidence of what a text meant, because the Constitution had already been enacted at the time the amendments were proposed in Congress.

But even this use of material from conventions may have been something of an innovation, even if one that arguably flowed from a conventional rule. While the use of contemporary interpretation was a

---

[149] 2 ANNALS OF CONG. 1896 (1791).

[150] *Id.* at 1901.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

conventional rule known by writers like Sir Edward Coke,[155] the majority view was that this referred to interpretations of statutes already enacted, not to interpretations in the process of being enacted.[156] Thus, Madison's use again shows how interpreters at the time attempted to adapt conventional rules to the new circumstances of the Constitution—in this case of a text proposed by one convention and then ratified by another set of conventions that provided an opportunity for exposition of the text given by the first convention.[157]

Hamilton's opinion also used inferences from actions at the ratifying convention as a mode of interpretation to support his view that Congress was understood to have the constitutional power to create companies so long as these were not monopolies. He stated:

> It is remarkable that the State conventions who had proposed amendments in relation to this point, have, most, if not all of them, expressed themselves nearly thus: Congress shall not grant monopolies, nor *erect any company* with exclusive advantages of commerce! Thus, at the same time expressing their sense, that the power to erect trading companies, or corporations, was inherent in Congress, and objecting to it no further than as to the grant of *exclusive* privileges.[158]

The best way to understand Hamilton's position is that he thought inferences from amendments and declarations of *an entire convention* were contemporary expositions of the Constitution to be treated as evidence of its meaning. He cannot have seen them as expressions of substantive intent, because he, as we have seen, expressly rejected substantive intent.[159]

Randolph also addressed the use of evidence from a convention to interpret the Constitution. He clearly opposed using statements from particular ratifiers as contemporary expositions. He stated:

> The opinions too of several respectable characters have been cited, as delivered in the state conventions. As these have no authoritative influence, so ought it to be remembered, that observations were uttered by the advocates of the

---

[155] *See supra* note 118 and accompanying text (citing secondary literature describing support for this rule, including statements of Coke).

[156] Bamzai, *supra* note 88, at 935–36.

[157] *See supra* note 89 (discussing reason why the ratifying conventions might have been treated differently than legislative houses for purposes of contemporary exposition).

[158] Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 105, at 111.

[159] *See supra* note 135 and accompanying text. Professor Charles Lofgren sees this statement as reliance on intent rather than contemporary exposition. *See* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 112 (1988). We think Professor Lofgren is wrong because he fails to distinguish subjective intent from contemporary exposition, which is a general problem with his article's analysis.

> constitution, before its adoption, to which they will not, and, in many cases, ought not to adhere.[160]

Randolph seems to be trying to distinguish official—in his words, "authoritative"—actions, like resolutions of a convention, which might have weight as contemporary expositions, from mere private opinions, which do not have interpretive weight. Thus, it appears that Randolph would have probably agreed with Hamilton that inferences from the official actions of a whole convention might be considered as contemporary exposition of the Constitution.

Thus, what emerges from the Bank debate is a rejection of relying on evidence of substantive intent from the state conventions to help determine the meaning of the Constitution. Instead, to the extent that evidence from the conventions was relevant, it appeared to count as contemporary exposition of the Constitution. One can divide the circumstances when such evidence might be relevant into three categories. First, the contemporary exposition might be contained in an action endorsed by the convention as a whole. The evidence appears strong that such interpretations were considered relevant.[161] But because the conventions took relatively few collective actions beyond assenting to the Constitution, as a practical matter their contribution to contemporaneous exposition is likely to be modest.

Second, the contemporary exposition might be contained in isolated statements by particular delegates to the ratifying conventions. Here, the evidence again appears strong that such individual statements would not have been deemed relevant.[162] Finally, the contemporary exposition might represent a large number of statements made by delegates to the conventions that all took the same position. Here, the evidence is mixed as to whether such statements would have been considered relevant.[163]

---

[160] Opinion of Edmund Randolph, Attorney General of the United States, to President Washington, *supra* note 110, at 90.

[161] Both Hamilton and Madison relied on interpretations in these circumstances. *See supra* notes 89, 149–154, 158–159. Randolph's argument that statements by persons with no authoritative influence should not count also suggests the inference that he would have thought an official statement by a convention as a whole would have been relevant. *See supra* note 110.

[162] Randolph maintained that such statements were not entitled to weight. *See supra* note 160. Madison's reliance on official actions of the conventions as well as a large number of statements that were universally embraced also suggests the possibility that he would have distinguished isolated statements by particular delegates. *See supra* notes 149–154. Hamilton's reliance on only the official actions of the convention and his failure to discuss isolated statements is also consistent with his rejection of the relevance of these isolated statements. *See supra* notes 158–159.

[163] Here Randolph argued these statements were not entitled to weight, see *supra* note 160, but Madison disagreed. *See supra* notes 110, 149–154. Hamilton did not address the issue. *See supra* note 105.

The evidence from the Bank debates provides confirmation of what one would conclude for other reasons. First, as discussed above, there was no tradition of relying on the statements of legislators from legislative history in the sovereign parliament as constitutive of the meaning of a statute or much evidence of relying on it as a contemporary exposition of meaning.[164] It would thus have been odd to resort to legislative history of conventions for interpreting the meaning of the text, even assuming that the state conventions were the sovereign enactors of the Constitution. Second, there were thirteen separate state conventions.[165] Even beyond the aggregation problem of finding the intent of a multimember body, discussed above,[166] finding the intent of the state conventions would raise the even more difficult problem of aggregating the state conventions.

Third, it counts as some evidence that no enactor said that it was their intent that mattered to interpretation. Instead, those at the Convention behaved as if what mattered was the language of the text that they were to ratify. When they debated the meaning of the text, they debated it as if the meaning was already fixed and something to be clarified through resort to conventional rules of interpretation.[167] They were thus acting self-consciously as contemporary interpreters of text—which is the way Madison himself understood them.

Our understanding of the use of statements from the ratifying conventions is even consistent with a much later statement of Madison's sometimes wrongly deployed as support for the relevance of substantive intent:

---

[164] *See supra* note 81 and accompanying text.

[165] *See* Akhil Reed Amar, *Our Forgotten Constitution*: *A Bicentennial Comment*, 97 YALE L.J. 281, 284 (1987).

[166] *See supra* Section I.C.3.

[167] *See, e.g.*, Patrick Henry, Remarks at the Virginia Convention (June 20, 1788), *available at* https://consource.org/document/journal-notes-of-the-virginia-ratification-convention-proceedings-1788-6-20 [https://perma.cc/TNM8-UY6Z] (complaining that a clause of the Constitution about jury trials is written in technical terms that poor people will not understand); George Mason, Remarks at the Virginia Convention (June 17, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_1s14.html [https://perma.cc/ET96-HPZ3] (arguing against Edmund Randolph that ex post facto clause should be interpreted as ordinary language); Phanuel Bishop, Remarks at the Massachusetts Convention (Jan. 16, 1788), *available at* https://consource.org/document/newspaper-report-of-massachusetts-ratification-convention-debates-1788-1-16 [https://perma.cc/K6AZ-V7LN] (noting that the clause providing congressional authority over state elections would have been written differently if the Framers had intended to control state elections only if states failed in their duty to run them); Thomas McKean, Remarks at the Pennsylvania Convention, (Nov. 28, 1787), *available at* https://consource.org/document/jasper-yeates-notes-of-the-pennsylvania-ratification-convention-1787-11-28 [https://perma.cc/BKD7-FJZ9] (applying the canon of *expressio unius* to explicate meaning of Congress's powers under the Constitution).

> [T]he legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned [and] proposed the Constitution, but *in the sense attached to it by the people* in their respective State Conventions where it rec[eived] all the authority which it possesses.[168]

Madison does not say the intent of ratifiers is relevant. While he rejects using the intent of the Philadelphia Convention, what is relevant from the state conventions is the "sense attached to it by the people."[169] And the exposition contemplated seems to be collective, that of "the people," which is likely collected in the actions of the whole convention, like proposed amendments or declarations or at least the substantially universal sentiments reflected there. Nor does he say that this exposition is definitive. Instead, it is "a key," not "the key," to unlock disputed meanings.[170] It comports with his rule on contemporary expositions annunciated three decades before—one factor in reaching the correct interpretation of text.[171]

One implication of the lack of support by either the Framers or ratifiers for the use of substantive intent is an indirect argument for interpretive intent. That is, assuming that one believes that intent is the right way to give meaning to the Constitution, the lack of support for substantive intent makes interpretive intent the more likely method by which those creating the Constitution would have given this intuition effect.

But even more importantly, our analysis shows how we can investigate the historical record to determine whether originalism should embrace a particular method. It is not that one will always have complete confidence in the content of a rule, any more than one will have complete confidence in the meaning of a word or provision in the Constitution, but the same process of sifting patiently through history will allow one to reach a view as to what is the better view.[172]

---

[168] Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447–48 (Max Farrand ed., 1911) (emphasis added).

[169] *Id.*

[170] *Id.*

[171] *See supra* notes 117, 149–154 and accompanying text.

[172] After this Essay was first submitted, *The Second Creation: Fixing the American Constitution in the Founding Era* by Professor Jonathan Gienapp was published. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018). The basic argument of the book is that the Constitution of 1789 was "uncertain," *see id.* at 9, and "incomplete," *see id.* at 215, and that those who debated its meaning in the Early Republic self-consciously exercised discretion in its interpretation. It includes a chapter titled "The Rules of the Constitution," which discusses the debate over the Bank of the United States. *Id*. at 202–47. In this chapter, Professor Gienapp argues that advocates and opponents of the Bank approached constitutional interpretation in fundamentally different ways. *Id.* Some thought the Constitution could not be "reduced to a set of rules." *Id.* at 225. Others thought that that boundaries of the Constitution did set determinate rules. *Id.* Given the space limitations and timing,

CONCLUSION

The debate over original intent and original public meaning has launched scores of law review articles. In this Essay, we propose the basis of a truce rooted in the original interpretive rules. The best versions of original meaning and original intent rely on these rules as they would be understood by a legally informed observer at the time they are enacted. As a result, the content of these rules would be similar, if not the same. The famous debate over the Bank of the United States provides substantial evidence that it was common ground to interpret the Constitution according to the conventional rules. It also offers confidence that historical analysis allows us to discover the content of those rules, which, in turn, inform our understanding of the Constitution itself.

---

it is beyond our capacity to respond fully, but we have two brief observations on this chapter that are connected to our own focus on the extent that there was agreement on a set of interpretive rules.

First, Professor Gienapp draws inferences from arguments of participants to make assertions that advocates and opponents of the Bank differed on the content and existence of legal interpretive rules. *See, e.g.*, *id.* at 214. But he does not systematically canvass the use of legal interpretive rules in the Bank debate, as we do in this Essay, and thus fails to recognize the substantial convergence among participants on interpretive rules to fix the meaning of the Constitution. This failure prevents Professor Gienapp from seeing that their principled differences may not have been so much on the nature of the rules or the discretion needed to interpret the Constitution but how to apply the rules to the facts. For instance, even if participants largely agreed on the rules, they could and did disagree on how important a power it was to create a national bank and thus how likely that power was to have been included in the text rather merely than implied. If that was the case, then differences on the constitutionality of the Bank would have been just an instance of disagreement about a particular issue—a commonplace of original scholarship.

Second, in our view, Professor Gienapp does not persuasively show that the Bank advocates thought they had discretion over the meaning of the constitutional text or over the appropriate rules to be applied. The alternative view is that advocates simply thought that the Constitution gave Congress broad authority to implement enumerated objectives within a meaning that was nevertheless fixed. This view is compatible with the assertions of the Bank advocates that he quotes. *See, e.g.*, *id.* at 214–15 (comments of Theodore Sedgwick and Elbridge Gerry). It was the view embodied in Chief Justice Marshall's defense of the Bank. *See* McGinnis & Rappaport, *supra* note 113, at 761. In other words, the broad authority reflected the fixed meaning of the Constitution. It did not emerge through the discretion of the interpreters.