APPLYING THE FOUNDERS' ORIGINALISM[*]

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The 1787 Federal Convention drafted, and the ratifiers approved, the United States Constitution under the assumption that it would be applied using then-prevailing methods of documentary interpretation. Modern efforts to apply novel "interpretive theories"—including newly-crafted originalist theories—to the Constitution are unfaithful to the instrument. The Founders would have responded to different interpretive methods by wording the Constitution differently.

The then-prevailing method of documentary construction (other than for real estate conveyances) was to seek and apply the subjective "intent of the makers." If convincing proof of subjective intent was not available, Founding-era lawyers resorted to what we call "original public meaning."

In the context of the Constitution, the "intent of the makers" was the understanding of the ratifiers. Ascertaining the subjective understanding of large groups (such as the ratifiers) is not as difficult as some commentators believe. From their wide experience with both public and private law, leading Founders were familiar with the process. This essay employs illustrations to demonstrate the point. The essay further explains the kinds of evidence that are more and less probative of the ratifiers' understanding.

I. A LESSON FROM ALEXANDER HAMILTON

The records from the Constitution's framing and ratification make clear that all sides understood the Constitution would be construed using then-

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prevailing Anglo-American rules for interpreting legal documents. The authors of *The Federalist*, for example, repeatedly employed standard rules of interpretation, although they often did not refer to those rules by their formal names.[1]

In *Federalist* No. 83, Hamilton criticized how Antifederalists had employed the legal maxim "*Inclusio unius est exclusio alterius.*"[2] As lawyers both then and now know, this maxim—"the inclusion of one implies the exclusion of another"—is a guide for reading lists or enumerations. It means that the presence of some items on a list implies the exclusion of others. Hamilton explained why he believed Antifederalists were misusing this and other canons, and he proceeded to demonstrate "their proper use and true meaning."[3]

Although the Virginia Plan[4] would have created a central government with very broad and indefinite authority, the Federal Convention's Committee of Detail instead adopted a list of specific powers, and the convention eventually adopted this approach.[5] Hamilton employed *inclusio unius* to demonstrate that the powers of the new federal government would be limited to those enumerated:

> The plan of the convention declares that the power of Congress, or, in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.[6]

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[1] *E.g.*, THE FEDERALIST NO. 32 (Hamilton) (employing the concepts of the negative pregnant and repugnancy) & NO. 41 (Madison) (applying the rule against superfluity).

[2] This is the most common modern formulation of the principle. During the Founding era, it often was expressed differently for different purposes. *E.g.,* THOMAS BRANCH, PRINCIPIA LEGIS ET AEQUITATIS 19 (1753) ("*Designatio unius est exclusio alterius, et expressum facit cessare tacticum*"); ANONYMOUS ("A GENTLEMAN OF THE MIDDLE TEMPLE"), THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY (2d ed., 1751) ("*Designatio unius personae est exclusio alterius; et expressum facit cessare tacitum*"). The corollary that a list of exceptions did not include unlisted items was expressed by "*Exceptio probat regulam de rebus non exceptis*" and "*Exceptio unius est exclusio alterius*." *Id.* at 107.

[3] THE FEDERALIST NO. 83 (Hamilton).

[4] 1 FARRAND'S RECORDS 20 (May 29, 1787) (James Madison).

[5] 2 *Id.* at 181 (Aug. 6, 1787) (James Madison); U.S. CONST. art. I, § 8.

[6] THE FEDERALIST NO. 83. Hamilton's last clause is an English-language restatement of yet another rule of construction: "*Verba accipienda sunt cum effectu*"—Words must be taken as having effect. GROUNDS AND RUDIMENTS, *supra* note 2, at 343.

In a world in which the *inclusio unius* rule did not exist, the framers would almost certainly would have written the Constitution differently. For example, instead of beginning the enumeration of congressional powers with "The Congress shall have Power to . . . ," they might have written, "The Congress shall have the following powers *and no others*, unless otherwise stated in this Constitution."

In modern times, commentators have urged the courts to apply new interpretive methods to the Constitution, including variations of living constitutionalism and newly-crafted forms of originalism.[7] Yet asking the courts to alter the Founding-era rules of constitutional interpretation—long after the Founders can change the constitutional text in response—is a sleight of hand fundamentally unfaithful to the Constitution. A commentator who proposes abandoning the Founders' interpretive methods when construing the Founders' words is really asking the courts to write a new Constitution.

II. THE FOUNDERS' LEGAL AND PRIVATE LAW BACKGROUND

The Constitution is a legal instrument: "the supreme Law of the Land."[8] Although it often is claimed that the document was written to be understood by the layperson, what is true in that claim is true only because the 18th-century American public was unusually literate in legal matters.[9]

Most of those who drafted the Constitution were lawyers or, like James Madison, otherwise learned in the law. Most of its leading advocates and expounders during the ratification debates also were lawyers or (like Madison and Tench Coxe) otherwise learned in the law. The lawyers prominent in expounding the Constitution during the ratification debates included, among others, Roger Sherman and Oliver Ellsworth of Connecticut; John Dickinson of Delaware; Alexander Hamilton and John Jay of New York; James Iredell of North Carolina; James Wilson of Pennsylvania; and Edmund Randolph, Edmund Pendleton, and John Marshall (the future Chief Justice) of Virginia. In Vermont, the principal advocate and expounder of

[7] *See* Johnathan O'Neill, *A Deeper Originalism: From Court-Centered Jurisprudence to Constitutional Self-Government*, 24 FEDERALIST SOC'Y REV. 366, 367-72 (describing newly-crafted versions of "originalism").

[8] U.S. CONST. art. VI, cl. 2.

[9] Edmund Burke famously expounded on the legal literacy of Americans in his *Speech on Conciliation with the Colonies* (Mar. 22, 1775), https://press-pubs.uchicago.edu/founders/documents/v1ch1s2.html ("In no country perhaps in the world is the law so general a study"—and more to like effect).

the new Constitution was Nathaniel Chipman, then his state's chief justice. These lawyers presented the public with extensive, and almost entirely consistent, representations of the Constitution's actual meaning.[10]

Commentators without significant private law experience can miss much in their readings of the Constitution.[11] This is because most of the Founders had extensive experience in private law subjects such as leasing, other forms of conveyancing, contracts, trusts and estates, and commercial law—and this experience influenced greatly how they thought about constitutional issues and interpreted constitutional language.[12]

For example, while serving as president of his state's ratifying convention, Virginia Chancellor Edmund Pendleton drew constitutional lessons from the jurisprudence of real property conveyancing and inheritance.[13] During the North Carolina ratifying convention, James Iredell (like Marshall, a future Supreme Court Justice) illustrated the scope of the Constitution's enumerated powers by comparing the document to a private power of attorney.[14] Noah Webster and Massachusetts ratifier William Cushing employed the same metaphor.[15] An essayist writing under the name of "Conciliator" illustrated the concept of enumerated powers with the analogy of merchants delegating authority to the captain of a trading ship headed for

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[10] The Federalist representations on the limits of federal power are collected in Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003), and in the following articles by the same author: *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FEDERALIST SOC'Y REV. 60 (2018); *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC'Y REV. 92 (2019); and *The Meaning of "Regulate Commerce" to the Constitution's Ratifiers*, 23 FEDERALIST SOC'Y REV. 307 (2022).

[11] I've found that my three decades practicing and teaching private law subjects have greatly enhanced my understanding of the Founders' thinking. *See, e.g.,* Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52-83 (2010) (reporting that the Necessary and Proper Clause reflected then-common language in private law as well as public law documents). Unfortunately, a common career path for constitutional law professors is to enter academia within a few years after graduating from law school, often with no significant private law experience whatsoever.

[12] This also may help explain the popularity of John Locke's contractarianism among the Founders.

[13] Edmund Pendleton to Richard Henry Lee (Jun. 14, 1788), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1623, 1625 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976-present) [hereinafter DOCUMENTARY HISTORY].

[14] 30 DOCUMENTARY HISTORY, *supra* note 13, at 360.

[15] "Giles Hickory" (Noah Webster), N.Y. AM. MAGAZINE, Mar. 1, 1788, *in* DOCUMENTARY HISTORY, *supra* note 13, at 345, 346; William Cushing, *Undelivered Speech in the Massachusetts Convention*, c. Feb. 4, 1788, *in* DOCUMENTARY HISTORY, *supra* note 13, at 288, 289.

China.[16] Two Pennsylvania essayists—a Federalist and an Anti-Federalist—enlisted analogies from farm leasing to draw different conclusions about the advisability of a bill of rights.[17] Very many participants on both sides of the ratification debates discussed the Constitution and government in terms of agency, guardianship, and trusts.[18]

The fundamental principles for interpreting public and private documents seem to have been much the same during the Founding era[19]—although as Hamilton pointed out in *Federalist* No. 83[20] and Marshall indicated in *McCulloch v. Maryland*,[21] the nature of a document could affect how those principles were applied.[22]

III. THE "ORIGINAL LEGAL FORCE"

To read the Constitution in its proper interpretive environment, one should examine it as an objective and careful lawyer would have done shortly after ratification—that is, just after May 29, 1790, the day the thirteenth

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[16] "Conciliator," PHILA. INDEP. GAZETTEER, Jan. 15, 1788, *in* 38 DOCUMENTARY HISTORY, *supra* note 13, at 256-57.

[17] "Reflection I," PA. CARLISLE GAZETTE, Mar. 12, 1788, *in* 38 DOCUMENTARY HISTORY, *supra* note 13, at 368 (Federalist); "Thoughts at the Plough," PA. CARLISLE GAZETTE, Apr. 9, 1788, *in* 38 DOCUMENTARY HISTORY, *supra* note 13, at 406, 407 (Anti-Federalist).

[18] *See generally* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

[19] There were, however, non-fundamental differences, such as the deference granted the sovereign in public charters.

[20] *See supra* note 6 and accompanying text.

[21] 17 U.S. 316, 407 (1819).

[22] Chief Justice Marshall's admonition that "we must never forget that it is a constitution we are expounding" sometimes is understood as laying down fundamentally different rules for constitutions than for other documents. Actually, Marshall was seeking the same goal that lawyers sought when interpreting other documents: the "intent of the makers." *McCulloch*, 17 U.S. at 416 ("The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the *intention of those who gave these powers*. . .") (italics added).

Marshall's admonition was merely that the *inclusio unius* rule applied with less force in constitutions than in statutes. This is because constitutions tend to be less detailed than statutes, so the omission of a detail from a list in a constitution is weaker evidence of the makers' intent than an omission in a statute. But far from rejecting the *inclusio unius* rule, Marshall gave a version of it a starring role in Marbury v. Madison, 5 U.S. 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

state, Rhode Island, ratified the document.[23] For interpreting the Bill of Rights, the relevant date is December 15, 1791.

Our "objective and careful lawyer" should be one playing an impartial role, perhaps as a judge, as an arbitrator, or as a legal counsel presenting a formal opinion on the current state of the law. A lawyer in such a role examines a document, statute, or other writing to determine its probable *legal force*—its likely legal effect, as opposed to what anyone would like it mean. An objective and careful lawyer interpreting a constitutional term immediately after its ratification would deduce that term's then-current legal force. From our standpoint 235 years later, this is the *original legal force*.

Admittedly, even in 1790, objective and careful lawyers may have disagreed about the meaning of some of the Constitution's provisions. For example, reasonable lawyers could differ on whether Congress's power under the Times, Places, and Manner Clause[24] should be strictly construed: the words of the clause and the ratification history each argue for different answers.[25] But the areas of disagreement would have been far smaller than they are today. By way of illustration, few—if any—objective lawyers would have concluded that the General Welfare Clause[26] grants Congress power to regulate anything it chooses to regulate (as the more extreme Antifederalists claimed) or to spend money for any "general Welfare" purpose (as Hamil-

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[23] This insight is not new with me. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

For an evidentiary deadline, one also can choose June 21, 1788, the day New Hampshire became the ninth (and thus decisive) state to ratify, or even January 21, 1791, the day Vermont ratified. On most issues, it makes very little difference. However, evidence of the Constitution's meaning to the ratifiers arising after the First Federal Congress adjourned on March 3, 1791, generally is much less useful: by then, memories had faded and alliances and incentives had changed.

[24] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[25] *See generally* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010) (stating that the ratification history of the Clause argues for strict construction).

[26] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States.").

ton later contended in his *Report on Manufactures*).[27] The Constitution's language coupled with the prevailing law, interpretive rules, and the representations of its sponsors were too recent and too clear.

Note that "original legal force" is not the same as "original public meaning." A text's original public meaning is how an impartial, informed member of the public would have read the text when adopted. But as an initial matter at least, Founding-era lawyers usually did not seek the views of a theoretical impartial observer. They sought the subjective understanding of those who rendered the document legally effective. They called this the "intent of the makers."[28]

IV. THE INTERPRETIVE GOAL OF THE FOUNDING-ERA LAWYER

As we have seen, the canons of construction played a significant role in 18th-century documentary interpretation—probably a more significant role than in modern jurisprudence.[29] But the canons of construction were not self-justifying. They were merely aids for arriving at the ultimate goal for interpreting legal documents—real estate conveyancing documents (deeds) often excepted. That goal was to reconstruct the "intent of the makers."[30] For the most part, the goal was the same both at law and in equity.[31]

The "makers" were the parties whose approval rendered the instrument

[27] *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures* (Dec. 5, 1791), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007.

[28] *See* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (documenting the Founding-era interpretive methods). The discussion immediately following relies on that article, except where otherwise stated.

[29] *Cf.* 1 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 6 (10th ed. 1772) ("[Maxims] are of the same Strength as Acts of Parliament when once the Judges have determined what is a Maxim."). An early American court accepted this view in *State v.* —, 2 N.C. 28, 1 Hayw. 29 (1794) ("And maxims being foundations of the common law, when they are once declared by the Judges, are held equal in point of authority and force to acts of Parliament.").

[30] Deeds and other real estate conveyancing documents represented a partial exception to this interpretive standard, because the courts had adopted fixed meanings for particular phrases, irrespective of the makers' intent. *See, e.g.*, GROUNDS AND RUDIMENTS, *supra* note 2, at 209 (quoting Edward Coke). Thus, the phrase "and his heirs" denoted a fee simple. Similarly, under the Rule in Shelley's Case, a life estate followed by remainders in the life tenants' heirs granted a fee simple remainder to the life tenant. In cases like these, the parties' intent was irrelevant. Contracts under seal ("covenants") also were governed by some objective standards.

[31] GROUNDS AND RUDIMENTS, *supra* note 2, at 80 ("Equity is to execute the intent of the parties."); *id.* at 181 ("Law regards the intent of the parties.").

legally binding. For a will, the maker was the testator; for a contract, the signatories; for a charitable gift, the donor; and for a statute, the lawmakers.[32] For the Constitution, the makers were not the framers, but the ratifiers.[33]

The makers' "intent" was their subjective understanding of the document's terms. In the 16th century, this standard was elucidated at length by Edmund Plowden, a highly influential case reporter. The standard continued to prevail throughout the 17th and 18th centuries. Accordingly, Branch's *Principia*, published in 1753, featured Edward Coke's version of the maxim, "*Verba intentioni, non e contra, debent inservire.*"[34] (The words should serve the intention, not the contrary).[35] In search of the subjective intent behind a document, courts admitted all sorts of extraneous evidence.[36]

Only if evidence of the makers' intent was unavailable or unclear did the interpreter default to what we now call "original public meaning." Original

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[32] *Id.* at 42 (contracts), 209 (wills), 29-31 (charitable gifts), & 190 (statutes); RICHARD FRANCIS, MAXIMS OF EQUITY 42 (3d ed. 1746) (devises), 45 (trusts), 59 (wills), 71 (court decrees), 7 (second numerical series) ("It is the Honour and Glory of a Court of Equity, to reduce all Acts into Execution as near as possible to the Intention of the Parties."); 1 BLACKSTONE'S COMMENTARIES *91 ("[T]here is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.").

[33] *See, e.g.*, 37 DOCUMENTARY HISTORY, *supra* note 13, at 360 (quoting Elbridge Gerry in the First Federal Congress: "The constitution derived no authority from the first convention; it was concurred in by conventions of the people, and that concurrence armed it with power, and invested it with dignity."); 27 *id.* at 158 (quoting Charles Cotesworth Pinckney in the South Carolina legislature as affirming that "The Constitution takes its effect from the ratification."). *Cf. McCulloch*, 17 U.S. at 403:

> The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof . . . From these conventions, the constitution derives its whole authority.

[34] BRANCH, *supra* note 2, at 118.

[35] Professors McGinnis and Rappaport conclude that, based on the 1791 congressional debate over the constitutionality of the Bank of the United States, the Founders did not believe that interpretation should be guided by the subjective intent of either the framers or the ratifiers. John O. McGinnis & Michael P. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019). I agree with respect to the framers. But as for the ratifiers, I find the longstanding conventions of Anglo-American law more persuasive than quotations from a single post-ratification event.

[36] Natelson, *Founders' Hermeneutic*, *supra* note 28, at 1261-62 (listing kinds of evidence).

public meaning served as a substitute for proof of actual intent, or as circumstantial evidence of that intent.

Professors McGinnis and Rappaport observe that, at the time of the Founding, "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."[37] But this is true because parliamentary debates were closed to the public until the mid-18th century, and even after that, useful legislative history remained scarce.[38] So Plowden and other interpreters were forced into hypothetical constructs such as this one:

> [W]hen you peruse a statute . . . suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present.[39]

The point remains, however, that substitutes for subjective intent were used only when good evidence of the actual intent was not available or convincing.

To better understand the Founding-era interpretive process, it may be helpful to employ private law analogies, much as lawyers of the time might have done. Consider the following illustration:

> *Illustration #1*: In 1782, Jeremiah Seller and Ebenezer Buyer enter into a contract for the sale and delivery of 25 Widgettes—small items that can be delivered on horseback. The Widgettes arrive spoiled. Buyer argues that the contract required them to be delivered by express rider. Seller argues that the contract did not so require and that the U.S. Post Office, then a notoriously inefficient operation,[40] should suffice.

Both modern and 18th-century courts would examine evidence to see if there was a collective subjective understanding on the matter—what we now call a "meeting of the minds." This evidence might include the contract's words, previous dealings, and prevailing custom. It might also include parol evidence, if sufficiently persuasive.

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[37] McGinnis & Rappaport, *Unifying*, *supra* note 35, at 1416.

[38] Natelson, *Founders' Hermeneutic*, *supra* note 28, at 1268-73.

[39] Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 467, 75 Eng. Rep. 688, 699 (reporter's commentary). *See also id.* at 466, 75 Eng. Rep. at 698 (saying that one should fill in a statute's gaps "*quod etiam legislator, si adesset, admoneret*"—that is, "with what the legislator, if he were present, would advise").

[40] Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause*, 7 BRIT. J. AM. LEGAL STUDIES 1, 6, 27-31 (2018).

If evidence of a subjective meeting of the minds was not available, not persuasive, or hopelessly contradictory, a court might impose a disposition likely approximating what the parties would have intended had they considered the issue. (This might even result in rescission.) In private law scholarship, an objective construct of this kind sometimes is called a *hypothetical bargain*.[41]

Notice the similarity between the hypothetical bargain, Plowden's imaginary discussion with members of Parliament, and the modern notion of "objective public meaning." Notice also that both in the Founders' methodology and in private law, imposing the objective construct—hypothetical bargain or original public meaning—is the *last* step, not the first.

To be sure, in the real world of constitutional interpretation, applying objective meaning instead of subjective intent is usually (not always) harmless. Less harmless, however, is the procedure followed by commentators who seek the "real" Constitution in the alleged intent of (or bargain at) the drafting convention.[42] This is because the relevant intent or understanding is that of the makers, not of the scriveners. The "intent of the framers" is relevant only insofar as it sheds light on the probable understanding of the ratifiers, and alleged bargains made behind closed convention doors were not part of that understanding. In the words of the Founding-era maxim, "*Intention secret must give way to the legal intent*."[43]

V. Back to Hamilton

From the viewpoint of an objective, careful Founding-era lawyer, the probative value of different writings by the same author may vary. In *Federalist* No. 83, Hamilton represented the meaning of the Constitution to people weighing whether to accept it. Because, in addition to publication in

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[41] *E.g.*, David Charney, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815 (1991). *See also* Robert G. Natelson, Modern Law of Deeds to Real Property 513-74 (1992) (summarizing the operation of private law, including "bargain simulating rules" [hypothetical bargains] and "bargain-stimulating rules" [rules designed to prod the parties into their own settlement]).

[42] *E.g.*, John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1048 (2014) (claiming that the second part of the Necessary and Proper Clause was negotiated at the constitutional convention "to declare and to incorporate into the Constitution the doctrines of implied and inherent powers that Wilson, Robert Morris, Gouverneur Morris, Alexander Hamilton, and other prominent nationalists at the constitutional convention had advocated throughout the previous decade").

[43] Branch, *supra* note 2, at 48; Grounds and Rudiments, *supra* note 2, at 151.

newspapers, *The Federalist* served as a handbook for pro-Constitution arguments at the ratifying conventions of Virginia, North Carolina, and Rhode Island, many ratifiers learned of its content. It therefore is useful evidence of the ratifiers' understanding of the Constitution's meaning.

By contrast, an objective and careful Founding-era lawyer would be unaware of Hamilton's later positions, such as those in his December 1791 *Report on Manufactures*[44] and his "direct tax" arguments in *Hylton v. United States* (1796).[45] Because these were unknown to the ratifiers, they could not form part of the ratification bargain.

VI. THE PLURALITY OBJECTION

The plurality objection to seeking the subjective understanding of the Constitution-makers is that it is impossible to reconstruct collective subjective understandings because there were so many of them: There were 1,648 delegates in the first fourteen ratifying conventions. (North Carolina held two.) There were another 109 in Vermont.

However, the plurality objection assumes that finding the "intent of the makers" requires more than it really does. Courts have been deducing legislative intent for centuries, and to my knowledge no one has suggested that the interpreter must catalogue the individual subjective thoughts of every lawmaker. As Professors McGinnis and Rappaport observe, "we are not aware of a single instance where anyone has argued—or even raised the issue—that a formally passed law had no meaning because the requisite common intent was missing."[46] All that is really necessary is a critical mass of evidence pointing in the same general direction that is not persuasively contradicted.

Let's examine this with another private law scenario:

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[44] *Report on Manufactures*, *supra* note 27.

[45] 3 U.S. 171 (1796). Hamilton's argument in *Hylton* and the opinions of the Justices in that case often are cited as evidence for the original meaning of the term "direct Tax." But they have little probative value compared to the wealth of pre-ratification evidence on the subject. *See* Robert G. Natelson, *Clarifying the Uncertainty over Direct and Indirect Taxes in* Moore v. United States, THE VOLOKH CONSPIRACY (July 12, 2024), https://reason.com/volokh/2024/07/12/clarifying-the-uncertainty-over-direct-and-indirect-taxes-in-moore-v-united-states/; Robert G. Natelson, *More Evidence that "Direct Taxes" Include Levies on Wealth and Income*, THE VOLOKH CONSPIRACY (July 19, 2024), https://reason.com/volokh/2024/07/19/more-evidence-that-direct-taxes-include-levies-on-wealth-and-income/.

[46] McGinnis & Rappaport, *Original Methods*, *supra* note 23, at 760.

> *Illustration #2*: Ms. Able contracts to sell Blackacre to Mr. Baker. Blackacre includes land and a dwelling. The home on Blackacre features beautiful drapery on the living room windows. Does the sale include the drapery?

To answer this question, a Founding-era judge would seek the makers' intent. Assuming no positive rule of law mandated the result, an easy case would be one in which the parties discussed the issue and then agreed in writing that the drapery would, or would not, pass with the house. That would be a particularly active form of "intent."

But almost as easy would be a case in which the issue was not mentioned in negotiations but the written contract addressed it. If both parties signed the contract, even if they did not read it thoroughly, that would be evidence of a more passive—but still controlling—version of "intent." Notice that "intent" in this case can be thought of as mutual understanding, agreement, or consent, and in the ensuing discussion, I frequently use the last of those terms.

A similar passive version of consent would be present if both parties had remained silent when the seller's broker represented, "Of course, Mr. Baker, as part of this sale, you will receive the beautiful living room drapes."[47]

Consent can be even more passive while remaining just as real. Consider a fact pattern that real estate practitioners will find familiar:

> *Illustration #3*: Ms. Able contracts to sell Blackacre to Mr. Baker. Blackacre includes land and a dwelling. The home on Blackacre features beautiful drapery on the living room windows. Able drafts the sales contract and excludes the drapery. Baker glances over the main terms of the contract—price, property address, financing terms—but doesn't read the rest. But because he wants Blackacre very badly, he says to himself, "Okay, well, whatever . . . ."

As long as the unread terms do not contain unfair surprises, they are part of Baker's subjective intent and consent.[48]

If evidence of Baker's consent is absent or insufficient, the court might

[47] The Founding-era maxim was *Qui tacet consentire videtur* ("He who is silent appears to consent."). BRANCH, *supra* note 2, at 93; GROUNDS AND RUDIMENTS, *supra* note 2, at 289.

[48] Robert G. Natelson, *Consent, Coercion, and Reasonableness in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41 (1990) (explaining how courts use the "reasonableness" standard when deciding whether to enforce boilerplate; the standard results in enforcement of boilerplate in the absence of unfair surprise, duress, or destruction of the parties' essential bargain).

determine whether the drapery qualifies as a "fixture." Whether an item is a fixture depends on such factors as how firmly it is connected to the property, how well adapted it is (generally determined from the extent of physical or other damage that would be caused by its removal), and any prevailing local customs or general expectations.

Fixture rules are simply specialized canons of documentary construction. Like other canons, they reflect how parties usually act and, therefore, they can serve as evidence of the parties' understandings. A local custom that draperies remain with the house—assuming no agreement to the contrary—would suggest passive consent (sometimes called "acquiescence") by the seller to include drapery in the sales price.

But where there is no common understanding on the matter at all, the law of fixtures serves another function: It imposes a hypothetical bargain on the parties—the arrangement they probably would have agreed to if they had thought about the matter. Again, this is the private law analogue to "original public meaning." But it's the last resort in interpretation, not the first.

Now let's expand the fact pattern to introduce other parties:

> *Illustration #4*: The Able General Partnership, an entity with many voting partners, owns Blackacre. On the property is a large complex of pre-furnished apartments. Able General Partnership contracts to sell to Baker General Partnership, which also has many voting partners. As a result of one of those inexplicable oversights that afflict real estate transactions, the contract does not mention furniture. Is the furniture included in the price?

To resolve this question, we do not need direct evidence of the subjective intent of every partner. Certain kinds of circumstantial evidence tend to prove passive consent by all. Circumstantial evidence might include an express agreement by the sellers' and buyers' respective agents, prevailing customs, and the sellers' formal representations that the furniture is included. Or the evidence might show that the partners of the Baker firm eagerly accepted the principal terms and reacted to the rest with a "Whatever . . . ."

If such evidence is insufficient to show at least tacit consent, then prevailing customs, prevailing expectations, and other elements of the law of fixtures enable the court to impose a hypothetical bargain. But, again, as the last resort, not the first.

VII. THE PLURALITY OBJECTION AND THE CONSTITUTION'S

RATIFICATION

Seeking the "makers' intent" of larger groups—such as a legislature or a ratifying convention—is a more elaborate process than reconstructing most private law bargains, but the general principles are the same. In the case of the ratification of the Constitution, a facilitating factor is the consistency of the Federalists' representations of meaning throughout the country and throughout the ratification debates. Certainly there were some minor variations—for example, Edmund Randolph's backtracking on the meaning of the Necessary and Proper Clause late in the Virginia ratifying convention.[49] By and large, however, the same messages were promulgated in Virginia in 1788 as in the Pennsylvania ratifying convention in 1787 and in the Rhode Island convention in 1790.

These were the messages that the general public ultimately accepted, with the proviso that a Bill of Rights be added soon after the Constitution became effective.

Of course, the Antifederalists disagreed with these messages. For example, when the Federalists claimed the Constitution granted only enumerated powers, Antifederalists responded that it granted plenary authority. What is crucial, though, is that when the ratifiers chose whom to believe about the meaning of the Constitution, they chose the Federalists.

As in the real estate illustrations set forth above, for a delegate to consent to Federalist representations, it was not necessary for a delegate to say so explicitly. Occasionally, it was not even necessary to hear the representation before voting. In my book, *The Original Constitution*, I addressed one such scenario:

> Sometimes one hears this claim . . . : "We can't recover the Constitution's original force because ratification records from Delaware, New Jersey, and Georgia contain little information about their conventions' understandings." It is correct that the ratification records from those states are scanty. All three states ratified early and unanimously, without a great deal of discussion. But the claim is incorrect because it fails to consider other evidence. This other evidence consists of the public record of opinion molders in those states during the period immediately following their conventions. The record shows that those states' opinion molders expressed no dissatisfaction with how the Constitution was being

[49] 10 DOCUMENTARY HISTORY, *supra* note 13, at 1353 (reporting Randolph's change of position).

> represented. They did not join with Virginia and New York in seeking a new federal convention, and they did not differ appreciably from other Americans in their attitude toward a Bill of Rights.[50]

One might add that the members of the first session of the First Federal Congress (1789) sent from early-ratification states did not differ appreciably in their constitutional understandings from their colleagues representing late-ratification states.

Here is a specific example of this general observation: Late in the ratification process, the question arose of whether the Constitution's Ex Post Facto Clauses banned all retroactive laws or only retroactive criminal laws. The Federalists represented that they banned only the latter, and the instrument by which New York ratified the Constitution recited that specific understanding. To my knowledge, no one who had served in an earlier convention objected to that representation. No one spoke up and said, "Wait, that's not what I thought we were ratifying." In some cases, silence can be good evidence of common understanding.

VIII. WEIGHING EVIDENCE

Some kinds of evidence of the original understanding are better than others. We have seen that Hamilton's advocacy before ratification was complete has more probative power than his advocacy after ratification was complete. In like manner, a widely expressed sentiment, reiterated without contradiction, usually is better evidence than a single remark or a claim repeatedly contradicted. Representations of meaning in accord with existing law or custom are more probative than assertions that contradict existing law and custom. And although, as just illustrated, even silence after a vote can be probative, silence before a vote is better, and explicit consent before a vote even better.

Generally speaking, moreover, representations of meaning from a successful measure's sponsors are more probative than those from unsuccessful opponents. By way of illustration, during the ratification debates, the Federalists represented the Necessary and Proper Clause as merely a rule of construction with no substantive effect.[51] On the other hand, Antifederalists

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[50] ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT 35 (3d ed. 2014).

[51] *E.g.*, FEDERALIST NO. 33 (Hamilton) (saying of the Necessary and Proper and Supremacy Clauses, "They are only declaratory of a truth which would have resulted by necessary and una-

claimed it was a grant of unlimited power to Congress to do anything it wished. Whom do you believe?

Clearly the Federalists. Many of the ratifiers who voted for the Constitution were staunch "states' rights" advocates. Their acceptance of the document is strong evidence that they accepted the Federalist representations.[52]

Such evidence of the ratifiers' understanding is circumstantial. But it is still probative. And it remains even today the kind of material used in construing legal documents.

IX. A Final Word

American lawyers and Americans in general have been arguing about how to interpret the Constitution for decades. Many good faith interpreters seeking the actual meaning of the text are bewildered by what seem like impossible choices and too many considerations.

But the principles of constitutional interpretation are not mysterious, and they should not be alien to any lawyer familiar with private law subjects. The best way to interpret the Constitution is to seek the "intent of the makers"—in the case of the Constitution, the understanding of the ratifiers. The alleged problem of plural intent is readily solvable: lawyers regularly discern collective intent when they construe documents with multiple parties, and the process is not that much different in interpreting the Constitution. When seeking the understanding of the ratifiers, interpreters need not be intimidated by accusations that they are trying to get inside people's heads. In any form of interpretation, we judge subjective intent by looking for evidence of that intent. Such evidence may include, among other mat-

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voidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.").

[52] Other factors persuading us to believe the Federalists on this point are (1) the Antifederalist interpretation of the Necessary and Proper Clause would have rendered the Constitution's enumeration of powers superfluous—thereby violating an important legal maxim, (2) in 18th-century enumerated power documents, the term "necessary" commonly meant "incidental," and (3) to make their case some Antifederalists felt compelled to misquote the Necessary and Proper Clause as authorizing "Laws which shall be *deemed* necessary and proper." *E.g.*, Federal Farmer No. 4, *in* 19 Documentary History, *supra* note 13, at 233 ("the law which may be deemed necessary and proper"). Clauses like that do exist in the Constitution. *See, e.g.*, U.S. Const. art. II, sec. 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures *as he shall judge* necessary and expedient.") (italics added). But the Necessary and Proper Clause was not one of them. Surely some people noticed.

ters, words on a page, background customs, prior and contemporaneous discussions and events, and common legal and factual assumptions.

Originalist interpretation can be difficult because finding and evaluating such evidence is difficult. But it is not magical or mysterious. It is conscientious lawyering applied to the supreme law of the land.