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Unoriginalism's Law Without Meaning. Review Essay Of: Original Meanings: Politics and Ideas in the Making of the Constitution. by Jack N. Rakove

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Review Essays

UNORIGINALISM'S LAW WITHOUT MEANING

ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION. By Jack N. Rakove.[1] New York: Alfred A. Knopf. 1996. Pp. 439. Hardcover, $35.00.

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It is curious and depressing that there continues to be a vigorous debate about how we ought to interpret the law. Interpretation is so fundamental, yet there is no method that commands widespread acceptance. The proverbial honest Joe faces a profound dilemma—how does he follow the law if he cannot grasp its meaning or predict what the prosecutor or the court will make of it?

Originalism's advocates claim that it supplies the one, true interpretive method for honest Joe and for everybody else. As explained by Judge Robert H. Bork, originalism consists of discerning how a law "would have been understood at the time" it was enacted by uncovering its "public understanding," as "manifested in the words used" in the text and in contemporaneous, secondary materials.[3]

Professor Jack Rakove's book is, in part, one eminent historian's contribution to the debate about originalism. As a Stanford University professor whose writings have centered on the

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2. Associate Professor, Boston University School of Law. Thanks to Jonathan Boonin, Nelson Lund, Michael S. Paulsen, Steven Smith, and John Yoo, for their excellent comments.

3. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (The Free Press, 1990).

Constitution's ratification era, Rakove's opinions about the Constitution's original meanings might be entitled to special deference. Indeed, Rakove and other historians could function as the Constitution's high priests, deciphering its most cryptic provisions.

Yet Rakove turns his back on originalism. According to Rakove, originalism relies on a history where definitive conclusions are hard to reach and on a language that is ambiguous; it hinges on dubious notions of collective intent; it facilitates the judiciary's propensity for political judgments; it is undemocratic; it precludes revisions in light of our nation's experiences; and it holds evolved moral sensibilities hostage to ancient and incomplete meanings.

This Review critiques Rakove's critique of originalism. When a reputed historian takes up cudgels against originalism, even die-hard originalists must pay heed. In some respects, Rakove is right on the money—originalist interpretation is no walk in the park and, despite our best efforts, it may not always yield definitive meanings. Moreover, originalism seemingly caters to the beliefs of dead, white males and appears to be undemocratic. What Rakove fails to grasp, however, is that much of his considerable intellectual firepower is misdirected; originalism is not the culprit. As a mode of interpretation, it cannot be charged with creating many of the problems Rakove catalogs. In reality, Rakove's problems lie with the Constitution and the very concept of law. Whether he knows it or not, Rakove does not think much of our Constitution.

After considering Rakove's objections, this Review outlines an immodest claim about originalism: the use of ordinary, original meanings is a fundamental background rule of construction (the "Default Rule"). Absent a statement or an indication to the contrary, we use ordinary, original meanings to construe virtually *all* communications. Thus, even though the Constitution does not contain a rule of construction, it nevertheless relies on the Default Rule. Likewise, statutes rely on the Default Rule unless they provide otherwise.

Apart from the Default Rule's explanatory power, only originalism makes sense of the lawmaking process where lawmakers constrain posterity by carefully selecting words that have a finite set of meanings. Moroever, absent originalism we must question why we would bother to recognize an institution as a lawmaker and its words as law if we simultaneously reserve the

right to construe the law's words without regard to their original meanings. Put simply, without originalism we have to believe that lawmakers codify words but not meaning *and* we have to suppose that we sensibly can recognize some set of words as law, but supply our own meaning. These propositions are absurd and that is why we all are (or should be) originalists.

I. RAKOVE ON ORIGINALISM

We ought to judge Rakove's book by whether he realizes his two objectives. Rakove amply fulfills his first objective of exploring "how Americans created a national polity during the Revolutionary era." (p. xiii) The middle nine chapters of the eleven chapter book consider issues central to the Constitution's drafting and ratification: the events leading up to the Philadelphia convention, the debates in the conventions, and several critical subjects such as federalism, republican government, separation of powers, and individual rights. Rakove is an excellent raconteur and one suspects that he received the Pulitzer Prize in history for these chapters. Though Rakove reaches no definitive conclusions about the Constitution's original meanings, he does provide a wonderful account of the Constitution's framing and ratification. The book is an ideal starting point for originalists because it provides a needed historical context and highlights important historical sources.

Rakove also considers whether originalism is the proper means of construing the Constitution. (p. xiii) He says no. Establishing his bona fides as someone who regards originalism as rather objectionable and even silly, he begins with very revealing objections. Tucked away in a footnote is his claim that originalism is "in some fundamental sense anti-democratic" because it subordinates the judgment of "present generations to the wisdom of their distant (political) ancestors." (p. xv, n.*) Along similar lines, Rakove insists that originalism must be wrong because the founding generation "would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience that we have accrued since 1789." (p. xv) Further, while originalism supposedly rests on the dubious "belief—or legal fiction—that most clauses of the Constitution possessed a clear meaning at their inception," (p. 340) the "real problems of reconstructing coherent intentions and understandings from the evidence of history raise serious questions about the capacity of originalist forays to yield the definitive conclu-

sions that the advocates of this theory claim to find." (p. xv, n.*) His only compliment is entirely back-handed. He admires originalism only when it supports the outcomes he favors. (p. xv, n.*) Indeed, this occasional ability to generate desired results, "may be as good a clue to the appeal of originalism as any other." (p. xv, n.*) Oddly enough, Rakove somehow believes such comments betray his "ambivalen[ce]" towards originalism. (p. xv, n.*) One wonders what Rakove says about theories he openly disdains.

Rakove properly highlights the limitations of history (and thus originalism). Historians "may think they are writing objective accounts of definable phenomena. But in practice . . . there can be no single story of any event. . . . [T]he composition of any narrative history requires decisions as to perspective and dramatic structure that differ little from the imaginative contrivances of the novelist." (p. 6) Moreover, the "framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree." (p. 6) Because of these difficulties, the belief that the Constitution had some "fixed and well-known meaning" must "dissolve[] into a mirage." (p. 6) Reading all this, one wonders whether the Pulitzer Prize for Literature would have been more appropriate!

Notwithstanding this hand-wringing, Rakove redeems his craft (if not originalism). "[W]hat is most remarkable" is "not how little we understand but how much." (pp. 6-7) We might reach inconclusive conclusions on occasion or wish that we had more materials, but "the origins of the Constitution are not 'buried in silence or veiled in fable.'" (p. 7) Thus, Rakove brushes aside concerns of history, language, and collective action and draws numerous conclusions about the motivations and actions of the framers, ratifiers, and anti-federalists. Yet he never retracts his sharp methodological criticisms of originalism.

Despite his dim view of originalism, Rakove classifies its various strains. He defines "original meaning" jurisprudence as an attempt to recover the meaning of words used in the Constitution at the time of ratification. (p. 7) "Original intent" methodology searches for the intentions of those who acted with "purpose and forethought"—the Philadelphia framers. (p. 8) "Original understanding" can be used to "cover the impressions and interpretations of the Constitution formed by its original

readers" in the ratification phase. (p. 8) Rakove admits these distinctions might "seem labored or overly precise." (p. 8) Indeed, it is hard to see why "intent" applies to the drafters, but "understanding" concerns the ratifiers and the general public. Drafters clearly had "understandings" regarding various provisions; otherwise, why go to the trouble of using certain words rather than others? Likewise, ratifiers undoubtedly "intended" to have particular provisions interpreted in one manner rather than another. Finally, it is unclear how Rakove distinguishes "original meaning" from "original understanding." A more useful classification distinguishes textualism (what matters is the original meaning of the text) from intentionalism (what matters is what the drafters and/or the ratifiers said about the text).[4]

Nonetheless, these distinctions matter to Rakove because he contends that originalism's most persuasive claim to legitimacy rests on the Constitution's particular ratification process. Originalism

> insists that original meaning should prevail . . . because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787-88. The Constitution derives its supremacy . . . from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundations of representation. (p. 9)

In other words, the intentions of the framers and post-ratification interpretations do not matter as the "understanding of the ratifiers is the preeminent and arguably sole source for reconstructing original meaning." (p. 9)

In laying down originalist rules of the road, Rakove seems to relish his privileged role in a quest that he ultimately rejects as a fool's errand. While "historians have little stake in ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding," (p. 9) they can be expected to "guard their professional terrain jealously" against those who make suspect or bogus historical claims "with dogmatic certitude." (p. 10) Historians can provide originalism a methodological rigor that it currently sorely lacks. (p. 11)

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4. See Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 557 (1994).

In his final chapter, Rakove focuses on the debates in Congress and post-ratification writings to discern the founding generation's view of original intent. Rakove concludes that originalism was not "legitimate" until the winter of 1796, when the House debated the Jay Treaty and James Madison explicitly endorsed attempts to find meaning in the Constitution through resort to the debates in the state conventions. Given Rakove's conclusion that what matters is the Constitution as understood by the *ratifiers*, (p. 9) one wonders why Rakove does not discern the meaning of the Constitution prior to its ratification with respect to the fundamental question of how it should be interpreted.[5]

In the end, although Rakove dismisses originalism, he attempts to improve originalist analysis. If originalists persist in their folly, *i.e.*, utilizing an anti-democratic theory that seeks definite meanings when there are none and that does not permit revisions to the Constitution in light of our nation's experience, historians can maintain a watchful eye to ensure that originalists do not fabricate a biased and flawed "law office history." (p. 11) (quoting Leonard Levy) Put another way, originalists not only subscribe to a highly dubious theory, they often are rather inadequate practioners of it.

II. CRITIQUING RAKOVE'S ORIGINALISM

Originalism withstands Rakove's slings and arrows. Some criticisms are true, but irrelevant. Others miss their mark entirely and instead hit the very concept of law. At times, Rakove misunderstands originalism; at other times, he misdescribes it. A wag might charge that Rakove flays originalism by using a flawed "history department law."

Consider Rakove's many methodological attacks. Reconstructing the historical meanings of words that were used over 200 years ago is daunting. It is hard enough to fathom statutes passed last year. Perhaps we ought to repudiate any methodology that forces us to sift through musty documents only to reach dubious conclusions. But Rakove has hoisted himself with his

5. Rakove does relate some episodes when individuals discussed the proposed Constitution and intimated that pre-ratification discussions might have an effect on future interpretations. (pp. 342-47) Notwithstanding his admonition to uncover "original meanings," he does not attempt to uncover the original meaning of the Constitution's words as they relate to interpretation. His efforts largely focus on what people said post-ratification.

own historian's petard. If he may draw many fascinating conclusions about what the founding fathers desired or detested, originalism's quest for the original meaning of a word or phrase cannot be dismissed so breezily. After all, Rakove's musings about the Revolutionary Era are based *solely* on his reconstruction of the meanings of ancient words. Given the problems he identifies, perhaps Rakove could discuss dates and names, but much less could be said about motives, intentions, personalities—the stuff which makes history come alive. Yet Rakove somehow believes that he can salvage history while savaging originalism. He cannot have it both ways. With respect to making sense of ancient words, history and originalism either sink or swim together.

Rakove might regard history as fundamentally different because only originalism supposedly rests on the belief that "most clauses of the Constitution possessed a clear meaning at their inception." (p. 340) This is a straw man. Originalism simply does not rest on a theory of definite meanings; it only requires an ability to determine which of several possible meanings better reflects the most natural reading of the word or phrase when the text was ratified. Not surprisingly, Judge Bork has admonished that we cannot expect perfection; rather we should strive to do "the best we can do," which, as he puts it, must be regarded as good enough.[6] Along similar lines, Justice Antonin Scalia has remarked that to do a "perfect" job on the meaning of "Executive Power" one would have to spend "thirty years and 7,000 pages."[7] If we cannot draw relative conclusions, let alone make definitive interpretations, originalism may have nothing to contribute to a given dispute. But such a result does not mean that originalism is wrong or useless generally, any more than it would make history pointless generally; it just means that not everything will be as easy as we would like it to be and recourse to some other decision making process will be necessary.[8]

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6. Bork, *Tempting of America* at 163 (cited in note 3). Rakove takes a gratuitous swipe at Judge Bork for being an originalist who never has bothered to roll up his sleeves and dirty his hands. But originalism's validity and Judge Bork's arguments do not rest on whether Judge Bork or anyone else has labored over the original meaning of the Republican Guarantee Clause or some such provision. One does not need to do originalism to appreciate its claim of legitimacy.

7. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852 (1989).

8. Originalism should not be rejected merely because it sometimes will not assist us choose amongst many possible meanings. Any theory of interpretation must be open to the possibility that it will fail to yield a superior interpretation from time to time. Indeed, because we sometimes encounter legal questions that we cannot answer with any degree of certainty, we ought to be highly suspicious of any theory that insists that it provides all the answers.

Yet rare is the case when all is in equipoise or when absolutely no meaning comes to the fore. In fact, in the universe of questions that could arise about the Constitution, most are resolvable by resorting to original meanings.[9] Because scholars focus on the more difficult (and hence more interesting) questions, this tends to be obscured. Surely no one doubts that there was some nearly universal understanding about the import of the presidential age requirement. Similarly, there can be only one president at a time.[10] These examples may seem trivial, but they illustrate some of the many questions that originalism helps resolve conclusively.

Rakove's critique of originalism's supposed reliance on collective intentions makes a valid point, but presses it entirely too far. When a group passes a law all that can be said definitively is that they agreed to a particular set of words in a specific order. As Rakove claims, perhaps all we know with absolute certainty about the Constitution is that the ratifying conventions preferred it to the Articles of Confederation. (p. 11) But the more sophisticated originalist does not believe it necessary to draw authoritative conclusions about collective intentions. We need not believe that every framer and ratifier consciously thought about a particular question and that they all came to the same conclusion. We only need suppose that the words chosen more likely convey one meaning rather than others and that groups of people can communicate meaningfully with others. This is something we do everyday when we interpret various communications. Indeed, we do not throw up our hands when considering a group's communication; rather we attempt to make sense of it using ordinary, original meanings.

As Rakove correctly points out, the intentions of the framers, *simpliciter,* are irrelevant in terms of understanding the law. The first inquiry must be what counts as law. If we say that only a particular set of words is part of the law, we necessarily exclude other sets of words. We also except from the ambit of law what people who wrote the law think that they wrote when there is no statutory basis for these understandings. Intentions without a basis in the text do not matter because we have made an antecedent decision that what counts as law is the text.[11] When

9. See Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 414 (1985).

10. See Calabresi and Prakash, 104 Yale L.J. at 555-56 (cited in note 4).

11. The concept of text as law is not the only possible recognition theory. However, it is arguably the best as it enables interpreters to identify "law" and distinguish it from other communications. In our federal system, the mechanisms of bicameralism and pres-

the text is law, the desires, fears, and floor statements of the legislators are not.[12]

If all this is true, why do originalists extensively quote the founding fathers? An originalist who draws conclusions from such statements is not making claims about what all the framers or ratifiers thought. Rather, she seeks to make sense of the text by surveying how its words were used in common parlance. Indeed, the framers' or ratifiers' comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean. Likewise, other writings and contemporaneous dictionaries furnish clues as to meanings. But remember: what was said contemporaneously matters only insofar as it sheds light on what the text might mean. A text has everyday meanings that exist apart from the sometimes unfounded expectations of its authors.[13] The critique of collective intentions simply does not doom the project of making the best sense of language drafted and ratified by groups.

Because of the real problems of history and language, perhaps originalism's proponents make too much of its ability to constrain judges. It cannot bind like the laws of physics. Because words lack inherent meanings, usage defines them.[14] (p. 8)

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entation help us differentiate congressional laws from other legislative communications. Without such an ability to distinguish some forms of communication from others, we could not separate those that we ought to treat as law from those sets of words that are not law.

Someone like Professor Raoul Berger would disagree rather forcefully with the claim that intentions are not part of the law. "'The intention of the lawmaker is the law,' rising even above the text." Raoul Berger, *Federalism: The Founders' Design* 15-16 (U. of Oklahoma Press, 1987) (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903)). In practice, intentionalism and textualism will often converge, given that legislators generally accurately discuss their legislative handiwork. However, there are instances where the legislators have not paid sufficient attention to the text or where they are merely playing games with future interpreters.

12. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547 (1983) (contending that it makes no sense to search for a collective intent or design in law). See also *In re Sinclair*, 870 F.2d 1340, 1341-44 (7th Cir. 1989) (text trumps legislative history).

13. For instance, certain framers and ratifiers may have thought that they delegated to Congress the power to constitute state courts as federal courts, thereby bypassing presidential nomination and Senate confirmation, but the text itself belies this interpretation. See Saikrishna B. Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 2031 (1993) (discussing those who thought that state judges could be legislatively appointed as federal judges as under Articles of Confederation); see generally, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 227 n.3 (collecting cites that discusses instances in which intent varies from meaning).

14. In a seeming concession to originalists, Rakove asserts that language cannot be

Given varied uses, words tend to have many meanings which vary with context and often change over time. The resulting play-in-the-joints enables judges to succumb to their own biases.

More importantly, originalism will never constrain judges (or any other interpreter) because no theory can accomplish this hopeless task. A judge dedicated to a particular theory in the abstract may betray it in specific cases. Even a judge committed to deciding cases in line with her personal preferences may occasionally conclude that the text constrains her. Thus, Rakove's lament that the Supreme Court's originalism "offers little reason to think" that it will render faithful and accurate originalist interpretations is not damning at all. (p. 11) Like every other theory, originalism has no answers for bad faith, bias, and other human frailties.[15]

Originalism overcomes Rakove's non-methodological attacks as well. Some of his complaints reflect a surprising lack of sophistication about the law—here I guard the lawyer's turf. Consider his criticism that originalism is anti-democratic because it supposedly insists that the past should control the present. Originalism is not the culprit—Rakove's beef is with the Constitution. It is undemocratic. As widely understood (and celebrated), the Constitution establishes a framework that cannot be altered by mere majority vote in the legislature, still less by a public opinion poll. Indeed, our Constitution serves no more important function than the creation of certain rules which are meant to prevent future simple legislative majorities from taking certain actions. Without this feature, *i.e.*, the ability to constrain future majorities, we do not have our Constitution.[16]

As alluded to above, Rakove has confused the Constitution with a particular interpretive method. When Rakove charges that originalism would "convert the Constitution into a brittle shell incapable of adaptation to all the changes that distinguish the present from the past," (p.xiii) he barks up the wrong tree. Originalism, by itself, has *nothing* to say about how constitutions

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infinitely malleable. (p. 368) He is wrong here; he was right earlier. Because usage defines, language *is* infinitely malleable. Words or phrases lack an absolute "true" definition. All definitions can be temporary ones as usage may drag a definition far afield.

15. See Scalia, 57 U. Cin. L. Rev. at 863-64 (cited in note 7).

16. Rakove sometimes appreciates antidemocratic constitutions. He queries "why morally sustainable claims of equality should be held captive to the extraordinary obstacles of Article V or subject to the partial and incomplete understandings of 1789 or 1868." (p. 368) When we have the judicial creation of rights on the basis of nothing more than "morally sustainable claims," we have a profoundly undemocratic process whereby judges strike down the actions of elected officials.

(or laws generally) ought to be altered. It favors neither the sensibilities of dead white males nor the Zeitgeist of the moment. Nor is it either pro- or anti-democratic. Originalism is merely a theory of interpretation.

Indeed, originalism could permit all sorts of modifications, if the law being interpreted permitted such modifications. Thus, if the Constitution's original meaning sanctioned judicial emendation and lawmaking, then a faithful originalist would find such practices proper. Similarly, originalism could privilege the sensibilities of mostly dead brown, black, yellow, and white males as applied to the U.N. Declaration of Human Rights. Likewise, if a constitution provided that, "the majority shall make any and all laws that it wishes," originalism, as applied to that constitution, would be profoundly hyper-democratic. Indeed, many are enamored by the notion that our Constitution contains imprecise language precisely because the founding generation wished to bequeath us a "living" Constitution. This is an originalist claim, *i.e.,* a contention that the Constitution's original meaning permits each generation to construe it as that generation sees fit. All these examples demonstrate that if one wishes to criticize an interpretive mode, one must distinguish the methodology from any particular text to which it could be applied.[17] Originalism cannot be blamed because the Constitution is undemocratic and seems like a brittle shell that reflects the outdated world views of propertied, white males.[18]

Rakove's primary problem is that he approaches the law as a historian. Although Rakove appears to understand that what matters is the original meaning of legal text, his historian's bent predominates. Rakove recounts events in the time-honored tradition of the historian less concerned about the meaning of legal text and more concerned with ideas.[19] In fact, Rakove steadfastly refrains from examining the original meanings of any con-

17. As Professor Gary Lawson points out, our decision to accept the legitimacy of a law may depend upon how we construe it. But we ought not misconstrue something in order to find it legitimate. Better to construe the law properly and then accept or reject it. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 Geo. L.J. 1823, 1831-32 (1997).

18. Twenty seven amendments suggest that the shell is not *so* brittle.

19. His historian's training perhaps led him to some rather severe misunderstandings of originalism. For instance, originalism is not "about the relation between . . . two constitutions," one the historical constitution, as originally understood, and the other the "working constitution comprising the body of precedents, habits, understandings, and attitudes that shape how the federal system operates at any historical moment." (p. 339-40) The theory of many constitutions, each one reflecting a period's convenient construction, is the very antithesis of originalism as applied to our Constitution.

stitutional provision, notwithstanding his book's title. Knowing that so many complex and mutually conflicting ideas lie behind the Constitution and that text often results from grudging compromise, Rakove concludes that originalism is fraught with difficulties. If he truly understood that only text and meanings are law, however, he would have construed the Constitution's text as he construed other ancient texts—using ordinary, original meanings.[20]

Of course, merely criticizing Rakove will not yield converts for originalism. Originalists must establish why the pursuit of original meanings is the proper means of interpreting the law. Standing on the shoulders of others, I briefly sketch some arguments below.

III. A DEFAULT THEORY OF INTERPRETATION

How should we interpret the Constitution? Ordinarily, an originalist begins any inquiry with text. The Constitution, however, does not address how interpreters should go about divining its meaning; it lacks a handy decoder ring. Perhaps recognizing this, Rakove searches for answers by examining how individuals construed the Constitution in post-ratification political disputes. He also might believe that the Constitution's failure to designate an interpretive mode reflects a lack of consensus that forces us to look elsewhere. In other words, precisely because the Constitution does not prescribe an interpretive theory, we must supply and justify our own.

But it is far more likely that the failure to specify an interpretive mode suggests implicit agreement. Without at least a general consensus as to how the Constitution would be construed post-ratification, the founding generation would have drafted and ratified text but not any means of ferreting out meanings. Text, divorced from meanings, would be mere gibberish. Surely it is much more probable that when they drafted and ratified the Constitution, there was some commonly understood means of interpreting it. There might not have been una-

20. I admit the possibility that my statements about Rakove's book could be well off the mark. If Rakove's critique of originalism is sound, it is entirely possible that I have misapprehended his book's original meaning. After all Rakove's book was written at least over two years ago, probably underwent a collective editing process, and is undoubtedly susceptible of a broad range of interpretations, depending on the bias of the reader.

nimity on what particular provisions meant, but there must have been some unspoken interpretational consensus.

Indeed, some rules are so self-evident that they need not be expressed. For instance, I need not designate a particular mode of interpretation for the benefit of readers. Nor need I declare that English should be used to understand this Review. The reader automatically knows how to read it. Construction of the law is no different.

The Constitution's very creation indicates that there was an implicit background rule of construction, the same rule that underlies all laws and almost all forms of communication: construe words using their ordinary, original meanings (the "Default Rule"). Indeed, when we construe cookbooks, contracts, or conversations, we unconsciously apply the Default Rule. Like the air surrounding us, we reflexively rely upon it. On rare occasions, say when we read poetry or fiction, we abandon the Rule. But these notable exceptions prove the Rule: we typically construe words using their ordinary, original meanings.[21]

The Default Rule is so universal that even Rakove adopts it and quite clearly expects that we adopt it in reading his book. As noted, when he draws conclusions about intents and events, Rakove is an originalist and a very good one at that. Most readers would not tolerate a historian who interpreted ancient diaries, letters, and documents as though they had been written yesterday. If we want to make sense of such documents, we must construe them using the proper meanings—their ordinary, original meanings. Likewise, Rakove undoubtedly expects his readers to adopt the Rule in making sense of his book.

Assuredly, the framers and the ratifiers did not textualize explicitly their commitment to the Default Rule. This is hardly surprising—it is, after all, a background rule. It is understood even when left unsaid. In the same way that the Constitution implicitly compels the use of the English language and the conventions of reading text left to right and top to bottom, the Constitution also "constitutionalized" the Default Rule. Accordingly, the Constitution's very existence as law reflects a

21. Laws, recipes, and traffic directions can be seen as sets of instructions that ordinarily mean to convey a finite set of meanings. To use the instructions, we would use the Default Rule. If we choose not to use such meanings, we are no longer interpreting the recipe (or the law or the traffic directions), but instead making up our own. See Lawson, 85 Geo. L.J. at 1831-32 (cited in note 17). See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231 n.1 (1994).

commitment to original meanings. By saying nothing, it embraces the Default Rule.

Even if one rejected the notion of a Default Rule, originalism should be accepted for another reason: it makes the best (perhaps the only) sense of the lawmaking process in which lawmakers enact text *and* meanings. Laws exist to set rules for the future and thus future constructions are of paramount concern to lawmakers. Indeed, a law exists to guide the conduct of relevant individuals until it is changed in a legitimate manner. No binding rule can be established, however, if an interpreter feels bound only to the text and not to particular meanings. If the law's meaning is allowed to change over time without an actual change in its language pursuant to recognized means, the lawmakers have not legislated anything.

What is the alternate explanation of lawmaking? That lawmakers enact a law using a particular set of words rather than others, but with no expectation that future government actors will feel constrained to construe the law using the original meanings. Lawmakers do not gather in solemn proceedings and enact a statute using carefully chosen words, but then contemplate that the statute will float away untethered to any particular meanings, let alone language. For example, suppose that at the behest of domestic auto manufacturers, Congress passed a statute that prohibited car importation but permitted bicycle importation. Surely a Commerce Department official or a federal judge should not permit car importation merely because, through the passage of time, cars were now considered bicycles in common parlance or because an executive or a judge thought that changed circumstances warranted a relaxation of the car ban. If this sort of "interpretation" regularly occurred, it would make lawmaking an utter waste of time.[22]

Indeed the framers and drafters certainly did not usher in our Constitution without some implicit understandings of what that document meant when enacted and how it ought to be interpreted in the future. Consider a particularly odious provision. Congress could not ban the importation of slaves until 1808.[23] As Rakove observes, this ban was included at the behest of the delegates from southern States as a way of precluding future

22. Thankfully, most legal issues are decided using the Default Rule. Members of Congress, knowing this, do not view their jobs as exercises in futility.

23. U.S. Const., Art I, § 9, cl. 1.

commercial legislation.[24] (pp. 85-88) But these delegates would not have demanded this limitation had they believed that a future interpreter legitimately could circumvent it by insisting that the meaning of "prohibit" or "year" had changed over time or that some powerful moral claim took precedence. These delegates understood that the Constitution was supposed to be interpreted in the future in the same manner as it was interpreted when it was enacted.[25]

Similar claims could be made about other provisions. The founding generation certainly did not include an interstate commerce clause, but somehow intend to permit a future federal judge to declare that the federal government *could not* regulate commerce among the several states. Likewise, it is impossible to believe that the First Amendment protected political speech when enacted but that the passage of time, changed meanings, or changed circumstances permits a faithful interpreter to deny protection to a speech criticizing the government.

Assuredly lawmakers can leave questions and issues open. For instance, lawmakers can use a word that lacks a commonly understood meaning. In such circumstances, Rakove is right to suggest that the law's meaning, in some sense, will be liquidated over time through practice and case law. (pp. 159-60 [quoting Federalist No. 38]) But it is unlikely that a constitution systematically will be left open-ended with no discernible meanings. Constitution-makers want to establish a system they (and their constituents) favor and thus they have ample reason to include the necessary language. Indeed, a constitution methodically designed to establish nothing durable begs the question of why anyone bothered. Future generations do not need permission to do what is expedient.

Originalism thus makes the best sense of the lawmaking enterprise. Legislating or constitution-making is not merely an exercise in stringing together various letters and symbols; rather it is about setting rules of conduct for the future using a particular set of words with a finite set of meanings. In other words, we should embrace originalism not because the framers or ratifiers might have wanted as much. We should embrace it because the

24. U.S. Const., Art I, § 8, cl 3.

25. Undoubtedly, the founding fathers knew that future interpreters might stray from the Default Rule. Like all lawmakers, they had the difficult task of hoping for the best from future interpreters, but preparing for the worst.

concept of lawmaking is incomprehensible outside of attempting to discern what the law meant when it was written.[26]

Still, one may question why we ought to accept the Default Rule of construction if the Constitution does not expressly *codify* it. Even if the founding generation believed that they were codifying words *and* meanings, we need not feel fettered by uncodified beliefs. We can adopt our own rules regarding interpretation. Perhaps we can accept the Constitution, reject the supposed implicit Default Rule, and avoid being chained to archaic and unhelpful meanings.

While this strategy may seem plausible at first blush, it actually is incoherent. When we accept some text as law, we also commit to the law's original meanings. When we accept some text as law, we necessarily concede that the law binds us as a society. The law curtails the freedom of some and/or cedes benefits or privileges to others. Because we have agreed to be bound by the law, we acknowledge the legitimacy of such rules until some authorized lawmaker changes the law in a sanctioned manner.

A law cannot bind us, however, if we merely submit to the lawmaker's words unconnected to any particular meanings. If the text's meaning can change over time, only our interpretive ingenuity and imagination constrain us. Indeed, to embrace the legitimacy of words as law without their original, ordinary meanings is to embrace nothing. If we adopt meanings that have no relationship to the original, ordinary meaning but that are instead adopted for convenience, morality, or necessity, one must question why we recognized the underlying words as law in the first instance. Our decision to recognize text as law serves no purpose since we stand ready to supply any meaning we desire. Thus, a non-originalist must believe that she can accept some words as law, but not the notion that the lawmaker codified meanings; she can supply her own. This is akin to a litigant believing that he can submit to the jurisdiction of the court but reserve the right to interpret the court's judgment as he sees fit.[27]

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26. This argument about law is very similar to Steven Smith's indictment against some "mindless" theories of interpretation. He claims that certain theories of lawmaking do not pay sufficient attention to the lawmaker. Without some concept of lawmaker, however, we have "law without mind" which makes the meaning of law the product of historical accident. See Steven D. Smith, *Law Without Mind*, 88 Mich. L. Rev. 104 (1989). Likewise, when we examine law from a non-originalist perspective, we exalt the interpreter and subordinate the lawmaker because the non-originalist must believe that the lawmaker only enacts text and not meanings.

27. A non-originalist judge might believe that Article III authorizes her not only to

Until now, I have tried to argue that originalism is constitutionally compelled because it is an implicit Default Rule, because the lawmakers enact laws with certain meanings to bind future actors, and because our decision to accept some lawmaker's text as law makes no sense without originalism. Suppose for a moment, however, that the Constitution explicitly provided that original meanings were not to be used in its future construction. If the Constitution provided that "no provision contained herein need be interpreted by reference to original meaning," would such a provision sever the supposedly unseverable connection between original meaning and legal text? Not at all! To the contrary, we would construe this rule of construction using the Default Rule, and then proceed to construe the rest of the document applying the original meaning of the rule of construction provision (and accordingly interpret the rest of the document any old way we like). The Default Rule remains operative until we construe text as setting a new rule of construction.[28]

Examples will prove useful in understanding these propositions. Suppose we stumbled upon a hitherto undiscovered constitutional article that prohibited the federal government from "rakoving" the people. If we concoct our own meaning for this unfamiliar word, we render the prior act of lawmaking meaningless and substitute our judgments for the lawmakers. The lawmakers included the provision to protect the people from only certain federal actions. Likewise, when we attach our own meanings, we call into question our prior determination to recognize some finite set of words as the law. Why bother acknowledging some words as the law, if we feel free to declare that the law will mean whatever we would have it mean notwithstanding the meaning(s) attached by the legislators? To be sure, given the obscurity of the term, we might not be able to reconstruct *any* original meaning for this provision. Nevertheless, at least we would be engaging in the proper inquiry.[29]

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interpret the Constitution, laws, and treaties, but to amend them as well. As noted earlier, if Article III contained such authority as a matter of original meanings, then a judge who amended while "interpreting" would be well within her rights. But most judges who amend profess to be interpreting only. More importantly, I do not believe that such views of the judicial role are sound interpretations of Article III as an original matter.

28. If we found mere non-textual, intentionalist evidence that the framers and ratifiers did not want us to apply originalism, an originalist committed to the text as law would still embrace originalism. An originalist who believes that the text is law would not feel bound to honor such statements because such statements have no textual basis.

29. Would not we abandon originalism as being silly if we systematically could not construe the Constitution's words? Not at all. We should not reject originalism merely

Reflect upon another example. If Congress drafted our laws in German, we naturally would expect that judges would employ German in order to make sense of these statutes. Once a judge (or any interpreter) understood the law to be written in German, it would make a mockery of that law if the judge construed it as though it was in English or Sanskrit. Likewise, once a court knows that it is dealing with a 200-year-old document, it ought to adopt the language of 200 years ago to construe that document. To interpret the Constitution using modern English or using idiosyncratic definitions is to use the wrong language.

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Rakove misapprehends originalism's attraction. Originalism is somewhat persuasive to Rakove because originalism supposedly rests on the notion that the sovereign people adopted the Constitution. (p. 9) But the Constitution should be construed using the Default Rule not merely because it is an expression of popular sovereignty. If that were the originalism's special claim, it would have no claim to legitimacy in construing laws lacking a popular sovereignty foundation. Originalism's appeal actually stems from its comforting familiarity—it is a method we constantly employ everyday to construe all sorts of communications. If we are to depart from the Default Rule, surely there must be some evidence that the communication in question demands such unusual measures. Originalism also makes sense of the lawmaking process and our decision to accept text with meanings as the law. Ultimately, only originalism reflects our understanding that law consists of words and meanings. When we reject originalism, we repudiate that understanding and embrace the existence of law without meaning.

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because it cannot make sense of gibberish. We would be better off amending the law itself.