The Founders' Hermeneutic: The Real Original Understanding of Original Intent

ROBERT G. NATELSON*

This Article addresses whether the American Founders expected evidence of their own subjective views to guide future interpretation of the U.S. Constitution. The Article considers a range of evidence largely overlooked or misunderstood in earlier studies, such as contemporaneous rules of legal interpretation, judicial use of legislative history, early American public debate, and pronouncements by state ratifying conventions. Based on this evidence, the Article concludes that the Founders were "original-understanding originalists." This means that they anticipated that constitutional interpretation would be guided by the subjective understanding of the ratifiers when such understanding was coherent and recoverable and, otherwise, by the Constitution's original public meaning.

---

* Professor of Law, The University of Montana.

I am grateful to the following people: The administration and staff of the Bodleian Law Library and Dr. Norma Aubertin-Potter, Chief Librarian of the Codrington Library at All-Souls College, all at the University of Oxford, and to Dr. Vanessa Hayward, Keeper of the Middle Temple Library, London, and her staff, for opening their collections and their hospitality to me; Professor Kurt T. Lash, Loyola Law School, for his comments on an earlier draft; Professor Stacey Gordon, Phil Cousineau, and Bob Peck of the Jameson Law Library at The University of Montana; Charlotte Wilmerton, The University of Montana, for her secretarial assistance; Sarah Morath, The University of Montana School of Law Class of 2007, for research assistance; and—although he may be unaware of my debt to him—John Sexton, now President of New York University and then dean of the NYU School of Law, for bringing my attention to H. Jefferson Powell's work many years ago.

This Article was written with the assistance of a grant from The University of Montana School of Law. My deep appreciation goes to Elizabeth J. Natelson, for her editing and support.

All Latin-to-English translations are my own.

TABLE OF CONTENTS

I. INTRODUCTION

This Article re-examines the controversial question of whether the American Founders[1] believed their own subjective understandings should guide future interpretation of the United States Constitution,[2] or whether they

[1] As used in this Article, the term "Founders" includes delegates to the federal constitutional convention, leading figures in the ratification conventions, and others who contributed significantly to the public debate, including leading Anti-Federalists. The term "founding generation" is employed to describe the participating public generally.

[2] *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once in this Article, including most of the prior treatments of this subject. The sources and short form citations used are as follows:

- ANNALS OF CONGRESS (Joseph Gales, Sr. ed., 1798–1824), *available at* http://memory.loc.gov/ammem/amlaw/lwac.html (last visited Sept. 17, 2007)

[hereinafter ANNALS].
- Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991) [hereinafter Baade, *Original Intent*].
- Hans W. Baade, *"Original Intention": Raoul Berger's Fake Antique*, 70 N.C. L. REV. 1523 (1992) [hereinafter Baade, *Fake Antique*].
- MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (5th ed. 1786).
- Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).
- THOMAS BLOUNT, A LAW-DICTIONARY AND GLOSSARY (3d ed. 1717) [hereinafter BLOUNT, DICTIONARY].
- MAURICE C. BOND, GUIDE TO THE RECORDS OF PARLIAMENT (1971).
- DANIEL J. BOORSTEIN, THE AMERICANS: THE COLONIAL EXPERIENCE (1958).
- THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS FROM THE RESTORATION TO THE PRESENT TIME (Richard Chandler ed., 1742–44) (fourteen volumes).
- LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley reprint 1967) (1832) [hereinafter BANK HISTORY].
- EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1628–44) [hereinafter COKE, INSTITUTES].
- JOHN COWELL [or "Cowel"], A LAW DICTIONARY OR THE INTERPRETER (1777) [hereinafter COWELL, DICTIONARY].
- TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW (3d ed. 1783) [hereinafter CUNNINGHAM, DICTIONARY].
- THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Gaspare J. Saladino eds., 1976–2006) (multiple volumes projected; not all completed) [hereinafter DOCUMENTARY HISTORY].
- JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols; 1941 ed. inserted in 2 vols.) (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].
- THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) (four volumes) [hereinafter Farrand].
- ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST].
- CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF (1677).
- GILES JACOB, A NEW LAW-DICTIONARY (8th ed. 1762) [hereinafter JACOB, DICTIONARY].
- SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (no pagination) [hereinafter JOHNSON, DICTIONARY].
- LORD KAMES (HENRY HOME), PRINCIPLES OF EQUITY (1778) (two volumes).
- Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).
- LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988).
- JOHN LILLY, THE PRACTICAL REGISTER: OR A GENERAL ABRIDGMENT OF THE LAW (2d ed. 1745) (two volumes).
- Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988).
- Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper*

thought constitutional construction should be guided only by objective public meaning or some other hermeneutic standard. This is a historical question, and in this Article, I treat it as such. I do not argue that one standard of interpretation is better or worse than another. I explore the Founders' views on the matter and report the results.

Previous commentary on the issue has been fairly extensive.[3] Interest seems to have been encouraged by the issue's implications for modern constitutional interpretation. For example, Professor H. Jefferson Powell, whose influential article concluded that the Founders would have thought subjective intent irrelevant,[4] went beyond the historical material to argue that his conclusion impaired the legitimacy of traditional originalism.[5] Not

---

Clause, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Necessary and Proper*].

- Robert G. Natelson, *The General Welfare Clause and the Public Trust*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*].
- Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73 (2005) [hereinafter Natelson, *Establishment Clause*].
- Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489 (2003) [hereinafter Natelson, *Retroactivity*].
- H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1531–39 (1987) [hereinafter Powell, *Modern Misunderstanding*].
- H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) [hereinafter Powell, *Original Understanding*].
- JACK N. RAKOVE, ORIGINAL MEANINGS (1996).
- BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) (two volumes).
- THE STUDENT'S LAW-DICTIONARY (1740).
- A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND FROM THE YEAR M,DC,LXVIII TO THE PRESENT TIME (John Torbuck ed., 1742) (twenty-one volumes).
- CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (1742–57 & 1794) (twenty-four volumes).
- THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (3d ed. 1724).
- JOHN WORRALL, BIBLIOTHECA LEGUM ANGLIAE (1788).

[3] *E.g.*, Powell, *Original Understanding*, *supra* note 2. *See also* RAKOVE, *supra* note 2, at 339–65 (all concluding or suggesting that subjective intent was not to be considered); Baade, *Fake Antique*, *supra* note 2; Baade, *Original Intent*, *supra* note 2.

But see Berger, *supra* note 2, at 327 & 337 (stating that intent should control); Kay, *supra* note 2, at 263 ("Almost no one doubts that the constitution-makers wanted their intentions for the constitutional rules to govern at least some cases."); Lofgren, *supra* note 2, at 79 (concluding that ratifier intent should control).

[4] Powell, *Original Understanding*, *supra* note 2.

[5] *See, e.g.*, Powell, *Original Understanding*, *supra* note 2, at 948 n.331 ("To be faithful to the interpretive intentions of the generation of the framers, the modern intentionalist would have to abandon his or her intentionalism and adopt the common law view of the "intention" of a statute, or disavow the legitimacy of any extratextual

surprisingly, defenders of traditional originalism, such as Harvard's Raoul Berger, have claimed that history supported their own position.[6] Perhaps that is why the scholarly exchange over what should have been purely a historical question has been marked by the bitterness of political strife.[7]

It is true, of course, that one's chosen interpretive method can affect the outcome of constitutional disputes. Results can change according to whether a court applies originalism or some other method. Results also can change, although in a lesser number of cases,[8] if a court applies one version of originalism rather than another. In the wake of Professor Powell's conclusions, many originalists shifted from applying the Founders' subjective "intent" or "understanding" to an approach that subordinates their subjective views to the Constitution's "original public meaning."[9] The Ex Post Facto Clauses[10] offer an illustration of how this shift can affect results: A judge applying an originalist "objective public meaning" standard to the

---

interpretation in the manner of the anti-hermeneutical traditions of British Protestantism and European rationalism, or accept the substantive constitutional doctrines of compact and state sovereignty that grew out of the original intentionalism of the Virginia and Kentucky Resolutions.").

One can infer that this article was written (and selected by *Harvard Law Review*) partly to challenge the originalism then being promoted by Edwin Meese, President Reagan's attorney general. Reflective of the consequentialist mindset in legal scholarship is the fact that during my discussions of this thesis with legal audiences, participants were far more interested in whether the Founders' interpretive view would produce results they liked than in the historical evidence.

[6] *E.g.*, Berger, *supra* note 2, at 336.

[7] For example, in an article essentially accusing Professor Berger of incompetence, Professor Baade added: "As a long-time admirer of this splendid (let it be said) old man now in his ninety-second year of age, I must follow my sincere *ad multos annos*, *magister* with a regretful *si tacuisses*"—in other words, he would have wished Professor Berger a long life if Berger had only shut up. Baade, *Fake Antique*, *supra* note 2, at 1543. The general tenor of Berger's response is captured in the title of his rejoinder: *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993).

[8] Kay, *supra* note 2, at 234 ("As a practical matter, an approach which relies on ordinary meanings will usually result in the same interpretation that would follow from original intentions adjudication."). One example is the original force of the word "commerce" in the Commerce Clause. *See* Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 845 (2006).

[9] *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003) (noting the trend from original intent to original understanding to original meaning); *id.* at 1127–33 (promoting "original public meaning textualism"); *id.* at 1136–48 (providing a fuller summary of this "purification" of originalism, with a list of some of the personalities involved, beginning with Professor Powell).

[10] U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

Ex Post Clauses might well conclude that they banned all retroactive statutes, civil[11] as well as criminal. On the other hand, a judge applying an originalist subjective understanding standard would be guided by the Founders' eventual pact that the Ex Post Facto Clauses would prohibit retroactive criminal statutes only.[12]

A more colorful, if more academic, example of how differing originalist standards can alter results lies in the question of whether the original, unamended Constitution permitted a woman to be elected President. Public-meaning analysis suggests (although it only suggests) that the answer was "no."[13] But a court applying the Founders' subjective understanding might well conclude the contrary.[14]

---

[11] *Cf.* E. Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) ("In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.").

[12] Natelson, *Retroactivity*, *supra* note 2, at 517–27 (2003) (explaining how most advocates of the Constitution represented the Ex Post Facto Clauses as banning only retroactive criminal legislation, as well as the response during and after ratification). I have shown previously how similar processes of refinement affected other provisions of the Constitution. Natelson, *Establishment Clause*, *supra* note 2 (explaining how the founding generation reached agreement on freedom of religion and federal establishment); Natelson, *Necessary and Proper*, *supra* note 2, at 292–314 (showing how the terms "necessary and proper" were given specific content during the ratification process).

[13] *See* Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 796–97 (1983) (arguing that originalism might bar a woman from being President while acknowledging unfamiliarity with the ratification debates). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 24 (3d ed. 2006) (reporting Saphire's argument).

[14] A subjectivist would take account of the following facts:

(1) When the Constitution was drafted and ratified, some women could vote, particularly in New Jersey, *see* N.J. CONST. art. IV (1776) (giving the franchise to "all inhabitants" meeting certain age and property qualifications), *discussed in* Judith Apter Klinghoffer & Lois Elks, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUBLIC 159 (1992).

(2) While there were gender-specific references in early working papers, 2 FARRAND, *supra* note 2, at 139 (Committee of Detail) (showing deletion of "manhood" as a qualification for electors); *id.* at 150 (showing as a basis for drafting that the Congress would consist of "two separate and distinct Bodies of Men," but also showing the resultant draft to be more gender-neutral); *id.* at 163 (reporting a committee draft that would have required that Congress "consist of two separate and distinct Bodies of Men"); *id.* at 157 (also referring to "men"), these were all removed in the final version, which retained only the pronoun "he"—the traditional pronoun of indefinite gender.

(3) The Constitution's gender-neutrality was actively mentioned in the debate, in which Anti-Federalists claimed a woman might be elected President. *See* Hugh Henry Brackenridge, *Cursory Remarks*, *in* 1 SCHWARTZ, *supra* note 2, at 521 (satirizing this

The choice of interpretive method has an additional practical implication as well: Founding-era subjective intent jurisprudence carried with it a doctrine the common law courts called *equitable construction*, which increased judicial discretion in some cases. The doctrine is explained in Part IV.F.[15]

My own interest in the topic had nothing to do with modern outcomes. It arose because I thought that someone needed to "get the history right." The placement of previous commentary in some of the nation's most prestigious law reviews should not induce us to overlook its serious defects of historical method, including neglect of crucial historical evidence,[16] erroneous and selective use of sources,[17] and anachronism.[18]

This Article seeks to "get the history right." After this Introduction (Part I), it falls into five more Parts: Part II shows that the founding generation assumed that the Constitution (with some allowance for the nature of the

---

argument).

See also BOORSTEIN, *supra* note 2, at 186–88 (explaining that the status of women in America was higher than in Europe).

[15] *Infra* Part IV.F (discussing equitable construction). *Cf. Brutus*, N.Y.J., Mar. 20, 1787, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 431, 433; *Brutus*, N.Y.J., Jan. 31, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 512, 514 (describing how equitable construction could be applied to the Constitution).

Professors John F. Manning and William N. Eskridge have clashed on whether the Founders intended equitable construction of statutes to continue in the new republic. *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" In Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) and John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001). Of course, that is a different question from the Founders' expectations about constitutional interpretation.

[16] One could cite numerous examples, but here are four: (1) *None* of the commentators addressed *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), the first relevant American case, discussed *infra* Part III. (2) *None* of the commentators apparently consulted any of the legal dictionaries used at the time of the Founding, *i.e.*, JACOB, DICTIONARY, *supra* note 2; BLOUNT, DICTIONARY, *supra* note 2; COWELL, DICTIONARY, *supra* note 2; CUNNINGHAM, DICTIONARY, *supra* note 2; WILLIAM RASTALL, TERMES DE LA LEY (mult. eds.); STUDENT'S LAW-DICTIONARY, *supra* note 2. (3) *All* commentators seem to have missed the line of eighteenth century cases utilizing legislative history, discussed *infra* Part IV.D. (4) *All* commentators seem to have missed the resolutions of the state ratifying conventions based on interpretative understanding, discussed *infra* Part V.D.

[17] The erroneous or selective use of sources has been noted by some participants. *See, e.g.*, RAKOVE, *supra* note 2, at 341 (repeating the conclusion that Powell, *Original Understanding*, *supra* note 2, shows "a cavalier approach to evidence that weakens his argument").

[18] Anachronism is attributing historical evidence to the wrong time period. *See infra* notes 157–62 and accompanying text (discussing an instance of anachronistic use of evidence).

instrument, of course) would be interpreted through methods of documentary construction long established in the Anglo-American legal tradition. Part III confirms what other commentators have found: that an inquiry into the "intent of the makers" was central to documentary construction. Part IV shows that, where recoverable, the "intent" sought was the makers' *subjective* intent, not merely a meaning artificially deduced from the words of the document. Part IV further explains why some very influential writers have been misled on this point. Part V discusses the founding generation's own application of these traditional rules to the Constitution by, for example, formal adoption of resolutions at state ratifying conventions. Part VI is a brief conclusion.

II. ANGLO-AMERICAN LAW AND THE CONSTITUTION

Most of the leading Founders were lawyers, but beyond that there was a "pervasiveness of legal competence among American men of affairs."[19] Men knew the law and they understood the settled Anglo-American principles of documentary construction. I say "Anglo-American principles of documentary construction" because, for most purposes, English and American law formed a unified system, and American courts relied on English sources freely and without reserve.[20]

Commentators who otherwise have agreed on little, have agreed that the Founders expected the Constitution to be read in light of Anglo-American law.[21] As well they should, for the evidence in support is overwhelming. The text of the Constitution refers to such Anglo-American legal institutions as

---

[19] BOORSTEIN, *supra* note 2, at 205. *See generally id.* at 197–205 (discussing the lack of specialization among lawyers and widespread legal knowledge among non-lawyers); LOUIS B. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES 15, 1607–1763 (1957) ("The Maryland planters prided themselves on their familiarity with the principles and practice of law, for legal knowledge was regarded as a necessary accomplishment of a gentleman."); *id.* at 7, 11–12 (discussing legal and legally-related activities among men of affairs); *id.* at 128 ("[E]very man had to be his own lawyer.").

[20] *See* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 565–67 (1938) (describing the reception of common law into America and its role as the basis for American constitutional instruments). Accordingly, this Article cites English and American cases indiscriminately.

[21] *E.g.*, Powell, *Original Understanding*, *supra* note 2, at 894; Berger, *supra* note 2; Raoul Berger, *"Original Intent:" A Response to Hans Baade*, 70 TEX. L. REV. 1535 (1992); Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 625–26 (1997); Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517 (1997). *Cf.* LEVY, *supra* note 2, at 10 ("The one point on which nearly everyone agreed, during the [1791] bank controversy, was that the Constitution should be construed according to conventional rules of interpretation.").

common law, equity, admiralty,[22] and jury trial;[23] and it employs various Anglo-American legal terms of art: habeas corpus,[24] necessary and proper,[25] and Corruption of Blood.[26] Moreover, during the framing and ratification of the Constitution, participants repeatedly resorted to Anglo-American legal sources to define the meaning of words. At the federal convention, for example, the delegates discussed the common-law meaning of such terms as "felony" and "ex post facto."[27]

Participants in the framing and ratification utilized Anglo-American norms of documentary construction to predict how constitutional phrases might later be interpreted. During the federal convention, the delegates considered the effect of the maxim that criminal laws are to be construed narrowly on a proposed congressional power to define and punish crimes on the high seas.[28] During the ratification debates both advocates[29] and opponents[30] discussed the likely effect on future constitutional interpretation

---

[22] U.S. CONST. art. III, § 2, cl. 1 (referring to law, equity, and admiralty).

[23] *Id.* art. III, § 2, cl. 3 (preserving jury trial in criminal cases).

[24] *Id.* art. I, § 9, cl. 2 (limiting suspension of the writ of habeas corpus).

[25] *Id.* art. I, § 8, cl. 18 (stating that Congress shall have power to adopt "necessary and proper" laws to effectuate its other powers). *See also* Natelson, *Necessary and Proper*, *supra* note 2 (identifying this as a phrase of contemporaneous agency law, and explaining that the word "necessary" indicated incidental powers and "proper" probably referred to fiduciary standards).

[26] U.S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

[27] 2 Farrand, *supra* note 2, at 316 (James Madison) (reporting James Wilson and John Dickinson, over the partial objection of Madison, agreeing that the term "felony" was "sufficiently defined by [the] Common law"); *id.* at 448–49 (James Madison) (reporting Dickinson consulting Blackstone on the meaning of "ex post facto").

[28] *Id.* at 315 (James Madison) (reporting the discussion).

[29] *E.g.*, THE FEDERALIST NO. 32, *supra* note 2, at 156 (Alexander Hamilton) (discussing negatives pregnant); *id.*, NO. 78, at 404–05 (Alexander Hamilton) (discussing competing maxims); 3 ELLIOT'S DEBATES, *supra* note 2, at 240 (reporting the comment of George Nicholas at the Virginia ratifying convention, stating that, after impeachment and removal, officers will be subject to prosecution at common law); *id.* at 299 (reporting Edmund Pendleton as appealing "to the Constitution, and the spirit of the common law").

[30] Anti-Federalists made much of how the Constitution might be abused by judges misapplying Anglo-American interpretive techniques to it. *See, e.g.*, *Timoleon*, N.Y. J., Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 534–35 (creating a fictional judicial opinion, complete with legal maxims, to allow the federal government to suppress freedom of conscience and of the press); *Brutus*, N.Y. J., Dec. 13, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 422–23 ("It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution."); *Brutus*, N.Y. J., Jan. 31, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 512, 514 (discussing effect of equitable

of standard Anglo-American constructional rules.[31] The state ratifying conventions proposed several amendments based on then-prevailing practices of common law and equity.[32] Debaters in the First Congress explicitly applied Anglo-American rules of construction to the Constitution;[33] and whatever their views on other issues, they all acknowledged that those rules should be applied.[34] We come to the question, therefore, of what those rules

---

jurisprudence on future constitutional interpretation).

For a somewhat different Anti-Federalist take, see *Agrippa XVI*, MASS. GAZETTE, Feb. 5, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 863, 863–64 (recognizing that documents were, according to legal rules, interpreted according to their intent, but fearing that the Constitution erroneously might not be).

There were occasional Anti-Federalist hints that the Constitution would open the door to application in America of the Roman Civil Law, *see Brutus* (XIV), N.Y. J., Feb. 28, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 255, 257–58; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Dec. 18, 1787, *reprinted in* THE ANTI-FEDERALIST, at 201, 215 (Herbert J. Storing, ed. 1985), but these views were not prevalent, even among Anti-Federalists.

[31] *But see* Lofgren, *supra* note 2, at 88–89 (arguing that Hamilton opposed applying common law methods and maxims to the Constitution, because in THE FEDERALIST, *supra* note 2, at 431, Hamilton said the rules of statutory construction are rules of common sense, and that even if the Anti-Federalists' use of those rules were correct, "they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction." *Id.* at 431.).

But of course the use of words in their natural and obvious sense was itself a rule of construction. 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (stating that in the construction of statues "[w]ords are generally to be understood in their usual and most known signification"); *see also* Bell v. Knight, (K.B. 1677) 2 Mod. 182, 182–83, 86 Eng. Rep. 1013, 1013.

Moreover, Hamilton then proceeded to apply the same maxims (correctly, Hamilton said) to the Constitution. THE FEDERALIST NO. 78, *supra* note 2, at 431–32. *See also id.* NO. 32, at 156 (discussing negatives pregnant); *id.* NO. 78, at 404–05 (discussing competing maxims).

[32] *E.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 177 (setting forth proposals of the Massachusetts ratifying convention for amendments requiring indictment by a grand jury and preserving jury trial "in actions at common law"); 3 *id.* at 658 (setting forth the proposals of the Virginia ratifying convention for certain amendments based on protections in English law); 4 *id.* at 243–44 (reporting same at the North Carolina ratifying convention).

[33] *E.g.*, 1 ANNALS, *supra* note 2, at 551 (Rep. James Jackson of Georgia) (applying the constructional preference against redundancy to the Constitution); 2 *id.* at 1998–2002 (Rep. Elbridge Gerry) (applying William Blackstone's list of rules of construction to the Constitution); *id.* at 1945–46 (Rep. James Madison) (listing various rules of construction that should be applied to the Constitution).

[34] *Cf.* LEVY, *supra* note 2, at 10 ("The one point on which nearly everyone agreed, during the [1791] bank controversy, was that the Constitution should be construed

had to say about how documents were to be construed.

III. "INTENT" IN THE ANGLO-AMERICAN INTERPRETIVE TRADITION

In searching maxims of Founding-Era constitutional interpretation, the sort of precedent most directly on point would be contemporaneous cases construing American state constitutions during the years after Independence and before ratification of the federal Constitution. While there were few such cases,[35] one such case—*Commonwealth v. Caton*[36]—spoke to our issue.

The Virginia Supreme Court of Appeals decided *Caton* in 1782. The case report memorializes separate concurring opinions from three judges, all of whom were significant Founders. The lead opinion was that of George Wythe, America's first law professor, later a delegate to the federal constitutional convention and chairman of the committee of the whole at the Virginia ratifying convention. The second opinion was authored by Edmund Pendleton, later chairman of the Virginia convention. The third was by John Blair, another delegate to the federal convention. According to the report, Blair spoke for the remaining five judges.[37] Among those remaining five, three may be accounted Founders of the second rank: Paul Carrington and Richard Cary, delegates to the Virginia ratifying convention,[38] and James Mercer, a former delegate to the Continental Congress.[39] Arguing the case

---

according to conventional rules of interpretation.").

In a discussion of the thesis of this paper at Georgetown Law Center in March, 2007, several participants defended the "original public meaning" over the "original understanding" approach to constitutional interpretation by arguing that the interpretive norms for a constitution should be different than for other documents, since a constitution is an expression of a social compact and other documents are not. Perhaps that is correct as a normative matter, but I have found no evidence whatsoever that Founders made such an interpretive distinction, and—as discussed *infra passim*—a plethora of evidence to the contrary.

[35] *See generally* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 473–97 (2005) (discussing some of these cases). *See also* Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787) (holding law void as violating state constitution).

[36] 8 Va. (4 Call) 5 (1782). *Caton* has been a case of some note. *See, e.g.*, Davison M. Douglas, *Foreward: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1119 (2006) (referring to the role of Tucker in urging judicial review in "the famous case of *Commonwealth v. Caton*"). A Westlaw search of the query "commonwealth /3 caton" in the Westlaw "journals and law reviews" database conducted on June 25, 2007 resulted in 67 citations, not a low number for a Confederation-Era case. The notoriety of the case renders puzzling the fact that none of the commentators on our issue have addressed it.

[37] *Caton*, 8 Va. (4 Call) at 20.

[38] 3 ELLIOT'S DEBATES, *supra* note 2, at 565–66 (listing delegates).

[39] 15 J. CONT. CONG. 1445 (showing James Mercer as a member of a standing committee of Congress beginning in October 1779).

for the Commonwealth was yet another leading Founder, then-Attorney General Edmund Randolph, later chief spokesman for the Virginia Plan at the federal convention and for the Constitution at the Virginia convention.[40]

John Caton, Joshua Hopkins, and John Lamb had been convicted of treason. The Virginia house of delegates had purported to grant a pardon, but the state senate had not concurred. The question before the court was whether the pardon purportedly granted by the house without senate consent had constitutional force. The defendants' legal counsel argued that the words of the state constitution justified the house action, and "[t]hat the words of the constitution, and not conjectures drawn from the supposed meaning of the framers of it, should give the rule."[41] His argument made strategic sense, for, as literally written, the constitution did seem to empower the house of delegates to pardon in this case.[42]

Yet, all of the eight judges rejected the literal wording of the state constitution and sided with Randolph's argument that the "spirit" (underlying intent)[43] of the constitution should govern. Wythe's opinion referred to the "genius of our institutions"[44] and to what was "intended by the framers of the constitution."[45] (The "framers" of the Virginia constitution were also the ratifiers or "makers," since the convention that had drafted the document also

---

[40] For Randolph's life and career, see JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY (1974).

[41] *Caton*, 8 Va. (4 Call) at 7.

[42] *See* VA. CONST. (1776) (unsectioned):

> But [the governor] shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.

The law in this instance had withdrawn the power to pardon from the governor and council. The defendants argued that by the terms of the document, therefore, they could be pardoned "by resolve of the House of Delegates." Randolph argued, and the court agreed, that the latter phrase did not modify "except where . . . the law shall otherwise particularly direct," but only the (more distant!) phrase, "except where the prosecution shall have been carried on by the House of Delegates." *Caton*, 8 Va. (4 Call) at 6–7.

[43] *Infra* note 59 and accompanying text (showing the identity of "spirit" with "intent").

[44] *Caton*, 8 Va. (4 Call) at 9. *See* JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (giving the first definition of "genius" as "[t]he protecting or ruling power of men, places, or things"). In Latin, the word denotes a guardian spirit (*cf.* the English word *genie*).

[45] *Caton*, 8 Va. (4 Call) at 10 ("Such monstrous consequences could not have been intended by the framers of the constitution. For what motive could the convention, when providing for the public safety, have had for an arrangement, which might impair, but could not increase, it?").

had ratified it.[46]) Pendleton appealed to the "makers of the constitution,"[47] and argued for construction "according to the spirit and not by the words of the constitution."[48] Blair's view was that "it would be absurd to suppose that it was *intended*, by the constitution, that the act of the whole legislature should be repealed by the resolution of one branch of it, against the consent of the other."[49]

This reliance on the makers' intent for purposes of documentary construction—sometimes even at the expense of the literal wording—reflected the norm in Anglo-American jurisprudence. The courts consistently sought the "intent of the makers," in interpreting royal charters,[50] letters [powers] of attorney,[51] wills,[52] grants,[53] and statutes adopted by the King-in-

---

[46] *See* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/states/va05.htm ("This constitution was framed by the convention which issued the preceding Declaration of Rights, and was adopted June 29, 1776. It was not submitted to the people for ratification.").

[47] *Caton*, 8 Va. (4 Call) at 18.

[48] *Id.* at 19.

[49] *Id.* at 20 (emphasis added).

[50] *E.g.*, Whistler's Case, (K.B. 1613) 10 Co. Rep. 63a, 65a, 77 Eng. Rep. 1021, 1024 ("[S]uch construction as will make the true intention of the King expressed in his charter take effect, is for the King's honour, and stands with the rules of law . . . ."); Bracken v. Visitors of William and Mary College, 7 Va. (3 Call) 573 (1790) (construing college charter).

[51] *E.g.*, 1 BACON, *supra* note 2, at 199 (stating that a letter of attorney is interpreted to effectuate the intent of the parties).

[52] *E.g.*, Wild's Case, (K.B. 1599) 6 Co. Rep. 16b, 16b, 77 Eng. Rep. 277, 278 (noting that the intent of the testator is to be followed if "manifest and certain, and not obscure or doubtful"); Letheullier v. Tracey, (Ch. 1754) Amb. 220, 221, 27 Eng. Rep. 146, 146 (reporting argument of William Murray, who was then Attorney-General and later became Chief Justice Lord Mansfield, that the intent of the testator should be followed). *See also* 2 WILLIAM BLACKSTONE, COMMENTARIES *379:

> THAT the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit. [For the maxims of law are, that "*verba intentioni debent inservire*;" and, "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore] the construction must also be *reasonable*, and agreeable to common understanding.

Professor Powell used part of the foregoing quotation to argue that Blackstone favored construction of wills according to an objective, "reasonable" meaning rather than according to subjective intent. Powell, *Original Understanding*, *supra* note 2, at 896–97. But he omitted from the quotation the material I have set off in brackets. With the Latin translated, the second and third sentence read as follows: "For the maxims of law are, that 'the words should serve devotedly the intent' and, 'We interpret documents with indulgence because of the simplicity of the common folk.' And therefore the construction must also be reasonable, and agreeable to common understanding." Thus, the entire quotation sends a message different from that of Powell's selected portion.

Parliament.[54]

The statutory category is particularly instructive, since parliamentary enactments were the closest analogues to American constitutions—because of their public character, because Parliamentary supremacy allowed them to function as constitutional law,[55] and because they were drafted in the short, open-textured structure characteristic of American constitutions.[56]

A statute was said to consist of two elements—the words and the intent. As the foregoing discussion of *Commonwealth v. Caton* illustrates,[57] the term "intent" had several synonyms, including "sense,"[58] "spirit,"[59]

---

[53] *E.g.*, 2 BACON, *supra* note 2, at 665 ("GRANTS are to be construed according to the Intention of the Parties . . . ."); Wright *ex dimiss.* Plowden v. Cartwright, (K.B. 1757) 1 Burr. 282, 285, 97 Eng. Rep. 315, 316 (holding that deeds are to be construed liberally to carry out the intent) (Mansfield, C. J.); Case of Alton Woods, (Exch. 1595) 1 Co. Rep. 26b, 49a, 76 Eng. Rep. 64, 111 ("[I]n many cases the King's grant *ex certa scientia & mero motu*, shall be construed beneficially for the patentee, but such words shall never produce a violent or strainable construction, or any construction which is against the intent and purpose of the King in his grant . . . ."). *See also* Attorney-General v. Mayor of Coventry, (Ch. 1700) 2 Vern. 397, 23 Eng. Rep. 856 (reporting House of Lords reversal of a case decided by Chief Justice Holt, where he had insisted that a deed be construed on its language alone, with extrinsic evidence of contrary intent excluded).

One qualification was that intent was not followed if it violated a positive rule of law, Baldwin's Case, (C.P. 1589) 2 Co. Rep. 18a, 76 Eng. Rep. 430; Shelley's Case, (K.B. 1579–81) 1 Co. Rep. 88b, 76 Eng. Rep. 199, and the words of grants may have been accorded more respect than those of other instruments. Englefield's Case, (Exch. 1591) 7 Co. Rep. 11b, 14a–14b, 77 Eng. Rep. 428, 433 ("[T]he grant of the Queen shall be taken according to her express intention comprehended in her grant, and shall not extend to any other thing by construction or implication, which doth not appear by her grant that her intent did extend to."). These qualifications were not followed in statutory interpretation. *Infra* Part IV.B.

[54] The King was seen as part of the legislature. 1 WILLIAM BLACKSTONE, COMMENTARIES *50–51. *See also* HATTON, *supra* note 2, at 2 (noting that statutes were made by agreement of "the King or Queen of *England*, having Regal Authority, the Lords Spiritual and Temporal, and the Commons lawfully assembled").

[55] 1 WILLIAM BLACKSTONE, COMMENTARIES *53 (stating that legislature was supreme).

[56] *Cf.* Gwynne v. Burnell, (H.L. 1839–40) West. 342, 363, 9 Eng. Rep. 522, 529 (Coleridge, J) (stating, in defense of his strict reading of a nineteenth century statute, that nineteenth century enactments did not have the "generality and conciseness" of older measures, which could be interpreted more freely); McCullough v. Maryland, 17 U.S. 316, 407 (1819) (Marshall, C.J.) (making a similar point about the U.S. Constitution).

[57] *Supra* notes 43–49 and accompanying text.

[58] *E.g.*, Stowel v. Lord Zouch, (C.P. 1569) 1 Pl. Com. 353, 363, 75 Eng. Rep. 536, 551 (stating that acts of Parliament consist of both words and sense).

[59] Miller v. The Ship Resolution, 2 U.S. (2 Dall) 1, 4 (Fed. Ct. App. 1781) (equating the "spirit" of an ordinance with its "intention").

"meaning,"[60] "will of the legislature,"[61] "reason,"[62] and the Latin word for reason, "*ratio*."[63]

As between words and intent, intent was said to be more important. The classic statement of this point appeared in a much-quoted passage by Edmund Plowden, probably the most highly regarded commentator on statutory interpretation in England and America.[64] Plowden had written:

> [I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, *viz.* of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*. ["For the reason of the law is the soul of the law."] And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.[65]

---

[60] *See, e.g.*, WOOD, *supra* note 2, at 8 ("Statutes must be interpreted by reasonable Construction, according to the Meaning of the Legislators.").

[61] *E.g.*, 1 KAMES, *supra* note 2, at 362.

[62] *E.g.*, WOOD, *supra* note 2, at 9 (setting forth the interpretative maxim, "The Reason of a Law is the Life of the Law").

[63] The references to reason and *ratio* are prolific. *See, e.g.*, WOOD, *supra* note 2, at 8–9 (setting forth several maxims of construction using the term *ratio*).

[64] John Dickinson singled out Plowden, among only four others, as commentators he was studying while at the Middle Temple. H. Trevor Colbourn (ed.), *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, 86 PA. MAG. OF HIST. & BIOGRAPHY 241, 417 (1962) (setting forth the content of Dickinson's letters from London to his parents). His references are: to Coke, *id.* at 257, 422, 441, 451; Plowden, *id.* at 257, 423, 451; William Salkeld, *id.* at 451, and Peyton Ventris, *id.* at 451. He also mentions Littleton—perhaps Coke's commentary on his work, which is the first volume of COKE, INSTITUTES, *supra* note 2. *Id.* at 423.

For the contemporaneous American citations to Plowden, see, *e.g.*, Chew's Lessee v. Weems, 1 H.& McH. 463 (Md. Prov. Ct. 1772), *reversed on other grounds*, *id.* (Md. Ct. App. 1775) (citing notes of Daniel Dulaney, a leading colonial lawyer, relying on Plowden's interpretive theories); Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 397 (Julius Goebel ed. 1964) (reproducing papers in which Hamilton, later both a constitutional convention and state ratifying convention delegate, cited Plowden); GEORGE C. GROCE, JR., WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION 32 (1937) (mentioning the citation of Plowden in the law practice of Johnson, another constitutional convention and state ratifying convention delegate).

[65] Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 465, 75 Eng. Rep. 688, 695 (reporter's commentary).

Because of the primary position of sense-spirit-meaning-will-reason-intent, judges construing statutes applied the letter only if and insofar as those words served the intent.[66] "*Qui haeret in litera*," proclaimed an oft-repeated maxim, "*haeret in cortice*"[67]—"He who sticks to the words sticks [merely] to the bark." The principle was adopted by Blackstone[68] and by American courts.[69]

---

[66] *See, e.g.*, HATTON, *supra* note 2, at 14–15 ("[W]hen the intent is proved, that must be followed; *Ut verba serviant intentioni & non intentio verbis*; [as the words serve the intention and not the intention the words] which is allowable in all laws; for the words are the Image of the law, and the meaning is, the substance or body of the matter . . . ."); Rex v. Buggs, (K.B. 1694) Skin. 428, 90 Eng. Rep. 190 (apparently rejecting the argument of the prosecution that the words of a statute should control over the intent); Malloon v. Fitzgerald, (K.B. 1683) 3 Mod. 28, 87 Eng. Rep. 17 (argument of prevailing counsel):

> There are three things of which the law makes an equal interpretation, viz. uses, wills, and Acts of Parliament, in which if the intention of the parties and of the law-makers can be discerned, the cases which severally fall under the direction of either shall be governed by the intention, without respect to the disagreeing words, nay sometimes the law will supply the defect of words themselves. *The books are full of authorities where constructions have been made of Acts of Parliament according to the intent of the makers, and not according to the letter of the law.*

Id. at 20 (emphasis added). *See also* Johnson v. Hocker, 1 U.S. (1 Dall.) 406, 408 (Pa. 1789) ("The intention of the Legislature must be collected from the words which they have used, *unless a different meaning can be manifestly shewn*.") (emphasis added); Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 415 (Julius Goebel ed., 1964) (stating that the role of the court is to give effect to the intention of the legislature); Respublica v. Betsey, 1 U.S. (1 Dall.) 469, 478 (Pa. 1789) (Rush, J., concurring) (stating that in statutory construction the courts sometimes contradict the text); Edrich's Case, (C.P. 1603) 5 Co. Rep. 118a, 118b, 77 Eng. Rep. 238, 239 (holding that the words of a statute are followed "when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow"). *Compare* Hill v. Grange, (C.P. 1556) 1 Pl. Com. 164, 173, 75 Eng. Rep. 253, 267 ("[I]f the words fully answer the cause of making the statute, and remedy the mischief intended, and have a direct tendency thereto in their sense and meaning, then in such sense they ought to be taken, and in no other.").

[67] 4 BACON, *supra* note 2, at 647 ("Such Construction ought to be put upon a Statute, as may best answer the Intention which the Makers had in View; for *qui haeret in Litera, haeret in cortice*."); 1 COKE, INSTITUTES, *supra* note 2, at 365b ("[T]his case is out of the Letter of the Statute . . . *Sed qui haeret in litera haeret in cortice*; and this Case being in the same mischief, is therefore within the remedy of the Statute, by the intendment of the makers of the same . . . ."); Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 467, 75 Eng. Rep. 688, 699 (reporter's commentary); WOOD, *supra* note 2, at 9 n.h (setting forth the maxim).

[68] 2 WILLIAM BLACKSTONE, COMMENTARIES *379 (although speaking of private documents).

[69] Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 395 (Julius Goebel ed. 1964) (citing maxim in statutory context).

The strength of the practice of elevating statutory intent over statutory words is shown by the English and American courts' decision to create only a single exception to it: Explanatory statutes, unless doubtful,[70] were to be construed by their words alone, and not to be extended.[71] In 1789, the Pennsylvania Supreme Court summarized the implications: "There can be no exposition against the direct letter of an explanatory statute, which admits there may be against an original statute."[72]

IV. WAS "INTENT OF THE MAKERS" SUBJECTIVE OR OBJECTIVE?

In his influential article on the subject,[73] Professor Jefferson Powell observed that, in contemporaneous usage, the word "intent" could refer either to the author's purpose[74] or to a more objective meaning deducible from the

---

See also Respublica v. Betsey, 1 U.S. (1 Dall.) 469, 478 (Pa. 1789) (Rush, J., concurring) (stating that evidence of meaning of a non-explanatory statute may be received even if it contradicts the letter).

[70] Godfrey v. Wade, (C.P. 1625) Jones, W. 31, 35, 82 Eng. Rep. 17, 19; 19 VINER, *supra* note 2, at 517.

[71] 4 BACON, *supra* note 2, at 650 ("The Sense of Words used in an Explanatory Statute ought not to be extended by an equitable Construction: But their Meaning, the Explanatory Statute being a legislative Construction of the Words used in a former Statute, ought to be strictly adhered to."); Case out of Court of Wards, (C.P. 1626) Cro. Car. 33, 34, 79 Eng. Rep. 633 ("[F]or that is a Statute of Explanation, and shall be construed only according to the words, and not with any equity or intendment . . . ."); Case of Fines, (K.B. 1602) 3 Co. Rep. 84a, 87b–88a, 76 Eng. Rep. 824, 837 ("[T]he Act of 32 H. 8. being an Act which explains and expounds the Act of 4 H. 7. as to the fine by the tenant in tail, should not be taken by any strained construction against the letter, for then it would be requisite to have another new Act to make an explanation and exposition on the explanation and exposition which was made by the former Act and so *in infinitum*.").

[72] Respublica v. Betsey, 1 U.S. (1 Dall.) 469, 478 (Pa. 1789) (Rush, J., concurring).

Several years *after* ratification, the South Carolina Court of Common Pleas rejected extrinsic evidence of legislative intent in favor of the long-established meaning of a statutory term. The case is notable because John Rutledge, a leading Founder, was Chief Justice at the time and wrote the opinion. Ex'rs of Rippon v. Ex'rs of Townsend, 1 Bay 445, 1 S.C.L. 445 (S.C. Com. Pl. Gen. Sess. 1795). That the losing attorney felt free to introduce legislative history suggests that courts at least sometimes considered it. The court's rejection of the evidence in *Rippon* is explainable both by its apparently unconvincing nature (it directly contradicted the universally-understood meaning of a legal term) and by the fact that, as the court emphasized, the statute was a commercial one, with significant reliance interests involved.

[73] Powell, *Original Understanding*, *supra* note 2, at 894–95.

[74] *Cf.* JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "intent" in part as "[a] design, purpose," and giving an example of the subjective use as "his intent toward our wives"); CUNNINGHAM, DICTIONARY, *supra* note 2 (unpaginated) (defining "intent" in subjective ways); JACOB, DICTIONARY, *supra* note 2 (unpaginated) (referring to the

document—the "intent of the statute" or "intent of the act."[75] He further argued that when Founding-Era judges referred to "intent," they used *only* the latter definition, "a product of the interpretive process rather than something locked into the text by its author."[76] Powell concluded, therefore, that modern readers are misled when they read Founding-Era references to maker "intent"—that, while we think of the word subjectively, the founding generation meant only the product of professional textual interpretation.[77]

A comprehensive review of the legal sources does not support the latter conclusion. On the contrary, the evidence shows that jurists did prefer to consider the makers' subjective intent, if recoverable. This evidence falls into six categories:

(1) the usual or necessary meaning of words,
(2) the common Founding-Era analogy between construction of statutes and construction of wills,
(3) an eclectic approach to evidence of intent,
(4) the use of legislative history,
(5) the use of rules of construction in explicating statutes, and
(6) the procedure followed in "equitable construction" cases.

Each of these categories is discussed successively below.

A. *The Usual or Necessary Meaning of Words*

Although a judge or lawyer could use the phrase "intent of the statute" to mean the objective meaning of the law, the reported cases are replete with expressions whose more natural implication is of subjective intent. These

---

"*Intent* of Parties" in the definition of "Intendment of Law"); THE STUDENT'S LAW DICTIONARY, *supra* note 2 (unpaginated) (using both subjective and objective meanings of "intent" in the definition of "intendment").

[75] *See* JOHNSON, DICTIONARY, *supra* note 2 (unpaginated) (defining "intent" also as "meaning"); CUNNINGHAM, DICTIONARY, *supra* note 2 (unpaginated) (defining "intendment of law" as "meaning"); COWELL, DICTIONARY, *supra* note 2 (unpaginated) (defining "Intendment of Law" as "Intention, and true Meaning of Law"); BLOUNT, DICTIONARY, *supra* note 2 (unpaginated) (defining "Intendment of Law" in part as "Intention or true Meaning of the Law"); Gibbs v. Gibbs, 1 U.S. (1 Dall.) 371, 374 (Pa. Com. Pl. 1788) (using the phrases "intent of the act" and "intent of the bankrupt law"); Ingells v. Bringhurst, 1 U.S. (1 Dall.) 341, 345 (Pa. Com. Pl. 1788) (using the phrase "intent of the law"); *Brutus*, N.Y. J., Dec. 13, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 422, 424 (using the phrase "meaning and intent of the constitution" in this objective sense, collected from the words).

[76] Powell, *Original Understanding*, *supra* note 2, at 899.

[77] Powell, *Modern Misunderstanding*, *supra* note 2, at 1533–35.

expressions include "intent of the makers,"[78] "true intent of the makers,"[79] "will of the legislature,"[80] and "Meaning of the Legislators."[81] In many instances, moreover, the context demonstrates that the sort of intent or meaning the speaker is referring to could *only* be subjective. Consider Sergeant Saunders' exposition in *Partridge v. Strange*[82]—

> For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and *the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes*. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words . . . .[83]

Similarly, in *Gerard's Case*, then-Justice Blackstone observed of a statute: "The truth probably was, that *it did not occur to the legislators* when they framed the present Act."[84] William Petyt could have been speaking only of subjective intent when, in his treatise on Parliament, he pointed out why Parliament adopted explanatory statutes: When "the subtle and nice Wits of learned Lawyers" obscured the true Parliamentary intent behind a law, the legislators, "who best knew their own Sense and Meaning," passed explanatory statutes "to direct and guide the Judges."[85] In the Virginia case of *Commonwealth v. Caton*[86] discussed above,[87] St. George Tucker, an

---

[78] *E.g.*, Wimbish v. Tailbois, (C.P. 1550) 1 Pl. Com. 38, 57, 75 Eng. Rep. 63, 92.

[79] Heydon's Case, (Exch. 1584) 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 658.

[80] 1 KAMES, *supra* note 2, at 362. *See also id.* at 339.

[81] *E.g.*, WOOD, *supra* note 2, at 8 (explaining that "[s]tatutes must be interpreted by reasonable Construction, according to the Meaning of the Legislators."). *See also* Simon v. Metivier, (K.B. 1766) 1 Bl. W. 599, 600, 96 Eng. Rep. 347, 347 (Mansfield, C.J.) ("[W]hat the Legislature meant, is the rule both at law and equity; for, in this case, both are the same. The key to the construction of the Act is the intent of the Legislature . . . .").

[82] (C.P. 1553) 1 Pl. Com. 77, 75 Eng. Rep. 123.

[83] *Id.* at 82, 75 Eng. Rep. at 130 (emphasis added).

[84] Gerard's Case, (C.P. 1777) 2 Bl. W. 1123, 1129, 96 Eng. Rep. 663, 665 ("The silence of the Legislature may be interpreted either way; as well by supposing the Parliament were apprized of this inherent privilege, and therefore thought it unnecessary to name it, as by supposing the Parliament tacitly meant to exclude it. The truth probably was, that it did not occur to the legislators when they framed the present Act.") (emphasis in text added).

[85] WILLIAM PETYT, JUS PARLIAMENTARIUM 55 (2d ed. 1741). *See also id.* at 57 ("That to meet with all subtle Imaginations, the Parliament, as being the Highest Court and Seat of Justice, and who best knew their own Sense and Meaning, wisely provided an explanatory Act, to direct and guide the Judges of *Westminster Hall*, How they ought to expound that Statute in time to come.").

[86] 8 Va. (4 Call) 5 (1782).

eminent legal scholar, argued in his role as an advocate that the relevant quest was for subjective intent: "Yet the reasons offered, *as I am informed by an honourourable* [sic] *member of the G.C. [General Convention]* that it was the Intention of the Constitution to have as few Obstacles as possible in the way to mercy . . . ."[88]

B. *The Analogy Between the Construction of Statutes and the Construction of Wills*

Courts in England and America repeatedly stated that construction of statutes followed the same rules as construction of wills,[89] where the task (to a greater extent than in construction of conveyances[90]) was supremely that of enforcing the intent of the maker.[91] A Pennsylvania court phrased the comparison in a 1788 case:

> In the construction of statutes, the same principle should be observed, which prevails with respect to Wills; and the intent and meaning of the Legislature in the former, ought to be as carefully sought after, and as faithfully pursued, as the intent and meaning of the Testator in the latter.[92]

---

[87] *Supra* notes 36–49 and accompanying text.

[88] *Quoted in* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 491 (2005) (emphasis added).

[89] Respublica v. Betsey, 1 U.S. (1 Dall.) 469, 475, 478 (Pa. 1789) (Rush, J., concurring) (stating that in statutory construction, as in construction of wills, Judges sometimes apply evidence of intent that contradicts the words); Lewis v. Maris, 1 U.S. (1 Dall.) 278, 287 (Pa. 1788); *Re* Drummond, (H.L. 1751) Fost. 88, 92, 168 Eng. Rep. 44, 46 (reporting argument of prevailing counsel that "Acts of Parliament, like wills, are to be construed according to the plain obvious intent of the makers"); Malloon v. Fitzgerald, (K.B. 1683) 3 Mod. 28, 33, 87 Eng. Rep. 17, 20 (reporting argument of prevailing counsel); Butler and Baker's Case, (K.B. 1591) 3 Co. Rep. 25a, 27b, 76 Eng. Rep. 684, 690 ("[T]his case doth consist on construction of an Act of Parliament, and of a will or testament, both which are always construed and expounded according to the intent and meaning of the parties thereto, and not by any strict or strained construction.").

[90] *See supra* note 53.

[91] *E.g.*, Fisher v. Nicholls, (K.B. 1701) 3 Salk. 394, 394, 91 Eng. Rep. 892, 892 ("[I]n wills the construction is more favourable to fulfil the intent of the testator, than it is in deeds or other conveyances executed by him in his lifetime . . . .").

[92] Lewis v. Maris, 1 U.S. (1 Dall.) 278, 287 (Pa. 1788) (McKean, C.J.). Thomas McKean was also a leading figure in the ratification of the Constitution: the second most important Federalist spokesman at the Pennsylvania ratification convention after James Wilson. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 481 (Wilson referring to "my honorable colleague," McKean, at the Pennsylvania ratifying convention); *id.* at 529–42 (reporting a speech by McKean at the same convention). For even clearer wording, too long to cite here, discussing how the actual intent of dying testators is enforced contrary

Matthew Bacon's *Abridgment* prescribed, "In Deeds, the Rule of Construction is, That the Intention must be directed by the Words, but in Wills, the Words must follow the Intent of the Devisor."[93] Yet the "intent" the courts sought in wills cases was clearly subjective: Bacon wrote that the court should come "as near to the *Mind and Intent* of the Testator as may be."[94] Much of the language in wills cases is compatible only with a subjective meaning of testator intent,[95] and in construing wills the courts admitted parol evidence of the testator's subjective intent to supplement or even contradict the words.[96]

C. *The Broad Range of Evidence Used by Founding-Era Jurists to Deduce Intent*

Some scholars have claimed that the courts could not have been engaged in a genuine search for subjective intent because they excluded most extrinsic evidence of intent, particularly legislative history.[97] This claim is, however, in error. The courts were eclectic rather than restrictive in admitting evidence of intent, and on occasion they did consider legislative history.

The "sages of the law," Plowden observed, deduced intent "sometimes

---

to the words, see Nurse v. Yerworth, (Ch. 1674) 3 Swans. 608, 613, 619–20, 36 Eng. Rep. 993, 995, 997.

[93] 5 BACON, *supra* note 2, at 522.

[94] *Id.* at 521 ("[A] Will must have a favourable Interpretation, and as near to the *Mind and Intent* of the Testator as may be.") (emphasis added).

[95] *See, e.g.*, Nurse v. Yerworth, (Ch. 1674) 3 Swans. 608, 36 Eng. Rep. 993:

> [I]t is plain the testator when he made his will was not ignorant that he had a child *in ventre sa mere*, for it was born within a month; and it is as plain he meant to provide for it when he gave his lands to the heirs of his body begotten or to be begotten. It falls out [*i.e.*, turns out] in law that this is no sufficient description . . . . But then the trust of the term, as far as equity hath power over it, ought not to attend the inheritance, where it is carried away by a rigorous construction for want of a legal expression of his intent, but ought, in conscience, to go to the child according to the true and natural meaning of the testator . . . .

Id. at 613, 36 Eng. Rep. at 995. *See also id.* at 619, 36 Eng. Rep. at 997 (discussing how the courts effectuate the intent of a dying testator); University of Oxford Case, (K.B. 1610) 10 Co. Rep. 53b, 57b, 77 Eng. Rep. 1006, 1012 (referring to the "minds and intentions of those who are parties").

[96] *E.g.*, Earl of Stamford v. Hobart, (H.L. 1710) 3 Br. P.C. 31, 1 Eng. Rep. 1157; Bagshaw v. Spencer, (Ch. 1748) 1 Wils. K-B 238, 238, 95 Eng. Rep. 594, 594–95 ("A Court of Equity is sometimes obliged to depart from the words of a will in order to direct a conveyance to be made which will answer the intention of the testator."). *See also* 1 ANONYMOUS ("A GENTLEMAN OF THE MIDDLE TEMPLE"), A GENERAL ABRIDGMENT OF CASES IN EQUITY 245 (4th ed. 1756).

[97] *E.g.*, Powell, *Original Understanding*, *supra* note 2, at 898.

by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances."[98] What Plowden called "foreign circumstances," we would call extrinsic evidence. According to contemporaneous case reports and secondary works, Anglo-American courts examined such "foreign circumstances" as:

- usages in general,[99] including usages of words;[100] usages in trade;[101] in the military and in war;[102] among public officers;[103] and among lawyers,[104] clergy,[105] and other parties;[106]

---

[98] *See* 1 Pl. Com. at 205, 75 Eng. Rep. at 315 (reporter's commentary); 4 BACON, *supra* note 2, at 648 ("The Intention of the Makers of a Statute is at sometimes to be collected from the Cause or Necessity of making a Statute; at other Times from other Circumstances. Whenever this can be discovered, it ought to be followed with Reason and Discretion in the Construction of the Statute, although such Construction seem contrary to the Letter of the Statute.") (citing numerous cases).

[99] Stevens v. Duckworth, (Exch. 1664) Hardr. 338, 340, 145 Eng. Rep. 486, 487 ("*[U]sus optimus magister & interpres*") (use is an excellent teacher and interpreter); 2 COKE, INSTITUTES, *supra* note 2, at 25 ("Hereby it appeareth [that I may observe it once and for all] that the best expositors of this and all other statutes are our bookes [*sic*] and use or experience"). *See also* 19 VINER, *supra* note 2, at 527 (reciting the same proposition).

[100] *See, e.g.*, Bell v. Knight, (K.B. 1677) 2 Mod. 182, 86 Eng. Rep. 1013:

> These were the blowing-houses intended by the Parliament to be excepted, and no other; for if smiths forges had been meant thereby, those would have been inserted in the proviso as well as the other things therein-mentioned. Words are to be taken in a common understanding; and if a traveller should enquire for a blowing-house, nobody would send him to a smith's forge.

Id. at 182–83, 86 Eng. Rep. at 1013 (emphasis omitted).

[101] *See* Stevens v. Duckworth, (Exch. 1664) Hardr. 338, 340, 145 Eng. Rep. 486, 487 (reporting argument of counsel based on usage in tavern trade).

[102] Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 398 (Julius Goebel ed., 1964) (stating that Congress "knew too well the practice of war"); The Soldier's Case (C.P. 1627) Cro. Car. 71, 71, 79 Eng. Rep. 663, 663 (discussing the role of a military "conductor").

[103] Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 465, 75 Eng. Rep. 688, 696 (discussing prior usages of under-sheriffs in reporter's commentary).

[104] *See, e.g.*, Walton v. Willis, 1 U.S. (1 Dall.) 351, 353 (Pa. 1788) (holding as persuasive "the usage ever since the passing those Acts of Assembly (as we have been informed)"). The words "we have been informed" suggest, of course, that the judges were provided with extrinsic evidence rather than finding the usage in a book or precedent.

[105] *E.g.*, Pemble v. Stern, (K.B. 1667) 2 Keb. 213, 214, 84 Eng. Rep. 133, 134 (making note of real estate holdings among clergy).

[106] Kite and Queinton's Case, (K.B. 1589) 4 Co. Rep. 25a, 26a, 76 Eng. Rep. 931, 934 (noting the widespread use of copyhold tenure); Buckley v. Thomas, (C.P. 1555) 1 Pl. Com. 118, 127, 75 Eng. Rep. 182, 196 (referring, in discussion of legislative intent, to

- previous history,[107] practices,[108] and trends[109] at or before the time of the statute's adoption, including property values;[110] contemporaneous social problems ("mischiefs") addressed by the enactment;[111] and the comparative frequency of particular "mischiefs";[112]
- commentary by "sages of the law," especially (although not exclusively) by writers who lived close to the time the statute was adopted;[113]
- stray observations by the King made on other occasions that might shed light on the purpose of a statute;[114]
- evidence as to the identity of the corporation Parliament intended to

---

the common practice of inserting in leases "a clause of distress for rent reserved").

[107] Stowel v. Lord Zouch, (Exch. 1569) 1 Pl. Com. 353, 369, 75 Eng. Rep. 536, 560 (reporting arguments of counsel in which they survey the history of fines as an aid to interpreting the intent of the legislature).

[108] Bishop of Chester v. Freeland, (K.B. 1625) Ley. 71, 78, 80 Eng. Rep. 638, 643 (discussing prior leasing practices of Catholic bishops addressed by statute); 1 KAMES, *supra* note 2, at 384 (explaining purpose of a statute based on prior practice).

[109] Ryall v. Rowles, (H.L. 1749–50) 1 Ves. Sr. 348, 374, 27 Eng. Rep. 1074, 1090 (discussing relative frequency of bankruptcy at the time legislation was adopted compared to time of the case).

[110] Howell v. Wolfert, 2 U.S. (2 Dall.) 75, 77 (1790) (taking notice of the value of life estates).

[111] Stradling v. Morgan, (Exch. 1561) 1 Pl. Com. 199, 203, 75 Eng. Rep. 305, 311:

> But if a man considers where the mischief lay before the statute, and what it was that the Parliament intended to redress, he will thereby perceive that the intent of the makers of the Act was only to punish the treasurers, receivers, and ministers of the King, and not of common persons, for from the former only the mischief grew.

See also 1 COKE, INSTITUTES, *supra* note 2, at 381b ("[T]hat construction must be made of a statute in suppression of the mischiefe, and in advancement of the remedie, as by this case it appeareth . . . . *Et qui haeret in literâ, haeret in cortice*, as often before hath been said."); 19 VINER, *supra* note 2, at 527; 4 BACON, *supra* note 2, at 647.

[112] *E.g.*, Bole v. Horton, (C.P. 1673) Vaugh. 360, 374, 124 Eng. Rep. 1113, 1120 (defining the scope of a statute partly by the relative frequency of certain occurrences); *In re* Barnet, 1 U.S. (Dall.) 152, 153 (Pa. Com. Pl. 1785) ("A contrary construction would defeat the general intention of the Legislature, as in most cases those debtors who escape from their creditors, go out of the state."); *cf.* Dive v. Maningham, (C.P. 1550) 1 Pl. Com. 60, 63, 75 Eng. Rep. 96, 101 (opining that "statutes are not made to remedy such rare mischiefs, but common mischiefs").

[113] *Infra* notes 205, 230.

[114] *E.g.*, Thistlethwait v. Danvers, (K.B. 1668) 2 Keb. 389, 389, 84 Eng. Rep. 244, 244 ("The design of the Act was to prevent the ruine [*sic*] of families by running in debt on a heat . . . . and as King James said, men are not so easily drawn to part with ready money . . . .").

affect when the statute misnamed the corporation;[115]
- previous legislation;[116]
- the composition of government previous to, during, and after the enactment;[117]
- the likely practical consequences of alternative interpretations,[118] and, as already noted,
- legislative history.[119]

D. *Judges' and Lawyers' Use of Legislative History*

1. *Examples of Use of Legislative History*

Although for reasons outlined below, jurists did not refer to legislative history often,[120] they used it enough to show that they were seeking the

---

[115] University of Oxford Case, (K.B. 1613) 10 Co. Rep. 53b, 57b, 77 Eng. Rep. 1006, 1012; EDMUND PLOWDEN, COMMENTARIES OR REPORTS at "The Table," *Intent* and *Intendment* (Catharine Lintot & Samuel Richardson ed., 1761) (unpaginated) (referring to cases "Where the Intent of the Party may be made to appear by the Evidence of collateral Circumstances"); Partridge v. Strange, (C.P. 1553) 1 Pl. Com. 77, 85, 75 Eng. Rep. 123, 136 ("As if I have two manors of D. and I levy a fine of the manor of D. circumstances may be given in evidence to prove what manor I intend.").

[116] *See, e.g.*, Talbot v. Hubble, (K.B. 1740) 7 Mod. 326, 331–32, 87 Eng. Rep. 1270, 1273 (employing several prior statutes).

[117] *E.g.*, Respublica v. Chapman, 1 U.S. (1 Dall.) 53 (Pa. 1781) (examining the governance of Pennsylvania before, during, and after a statute).

[118] *E.g.*, Graff v. Smith's Adm'rs, 1 U.S. (1 Dall.) 481, 483 (Pa. Com. Pl. 1789) ("If it were otherwise, they would prove no fund at all; for the devisee, or heir, knowing that if judgments were obtained, he should lose his land, would, in every instance, where he apprehended debts beyond the amount of the personal estate, immediately sell them, and thereby entirely defeat the intent of the Legislature, in making them a fund for the payment of debts."); Preston v. Lord Ferrard, (H.L. 1720) 4 Br. P.C. 298, 301, 2 Eng. Rep. 202, 204 ("On the other side, it was argued . . . to be the intent of the legislature by the said act of Parliament, to give the Lord Chancellor of Ireland a discretionary power . . . for otherwise, the true intent of the act would easily be evaded."); Regina v. Simpson, (K.B. 1716) 10 Mod. 341, 344, 88 Eng. Rep. 756, 757 ("It is true, that where an Act of Parliament is plain, consequences are not to be regarded; for that would be to assume a legislative authority. But where an Act of Parliament is doubtful, there the consequences are to be considered . . . ."); Barnes v. Hughes, (K.B. 1669) 1 Vent. 8, 8–9, 86 Eng. Rep. 6, 7 ("And only leave it to be punished by indictments and informations, which certainly was never the intent of the statute, and would be very mischievous; for if the offender goes out of the county after the offence committed, he cannot be punished . . . .").

[119] *Infra* Part IV.D.

[120] *Infra* Part IV.D.2.

subjective intent behind statutes.[121] An early example is *Earl of Leichester v. Heydon* (1571),[122] in which the court recited legislative processes that were "well known, the affair happening but of late time"[123] and which "may be sufficient to discover [reveal] to us the intent of the makers of the Act."[124] Forty years later, in *Wickham v. Wood* (1611),[125] the Court of Exchequer divined Parliamentary intent partly by referring to the identity of the statute's drafter.[126] In *Ash v. Abdy* (1678),[127] Chancellor Nottingham, construing the newly adopted Statute of Frauds,[128] observed that he "had some reason to know the meaning of this law; for it had its first rise from me, who brought it in the bill into the Lords' House, though it afterwards received some additions and improvements from the Judges and the civilians."[129]

To be sure, some jurists were skeptical about the value of legislative history. Sir John Eardley Wilmot was assigned as a special commissioner to judge a 1762 case dealing with the civil rights of religious dissenters.[130] Apparently, one of the parties had offered to the court as evidence the

---

[121] While *in theory* one might argue that legislative history was explored not to determine the minds of the legislature, but what members of the public might have thought, the argument is a strained one. It also takes no account of the fact that most legislative history was of the sort not widely known to the public. Those who argue that subjective intent was irrelevant to interpretation understand that their theory rests largely on the assumption that the courts did not consider legislative history. *See, e.g.*, Baade, *Original Intent*, *supra* note 2, at 1006 (tying together subjective legislative intent and "consideration of legislative history").

[122] (K.B. 1571) 1 Pl. Com. 384, 75 Eng. Rep. 582.

[123] *Id.* at 398, 75 Eng. Rep. at 602 ("[F]or if [Parliament] had intended to have attainted any others, they would have sent for them, and have heard their answer, and have examined the matter, which they did not do, as it is well known, the affair happening but of late time; and this may be sufficient to discover to us the intent of the makers of the Act.").

[124] *Id. See also* Rex v. Gage, (K.B. 1722) 8 Mod. 63, 65, 88 Eng. Rep. 51, 52–53 (reconciling successive statutes to effectuate legislative intent); and Bonham's Case, (C.P. 1610) 8 Co. Rep. 107a, 120a, 77 Eng. Rep. 638, 656 (discussing reasons for and background of successive statutes).

[125] (Exch. 1611) Lane. 113, 145 Eng. Rep. 343.

[126] *Id.* at 116, 145 Eng. Rep. at 346 (proceeding "after [*i.e.*, according to] the intent of the statute, which was penned by Hales Justice of the Common Pleas.").

[127] (Ch. 1678) 3 Swans. 664, 36 Eng. Rep. 1014. In Pepper v. Hart, [1993] A.C. 593 (H.L.), the House of Lords formally weakened the English rule against considering parliamentary intent. In a lead opinion, Lord Browne-Wilkinson cited *Ash* to show that, prior to the middle of the nineteenth century, English courts did consider such intent. *Id.* at 630.

[128] 1677, 29 Car. 2, c.3 (Eng.).

[129] 3 Swans. at 664–65, 36 Eng. Rep. at 1014.

[130] Evans v. Harrison, (Comm'n Errors 1762) Wilm. 130, 130, 97 Eng. Rep. 51, 51–52. Wilmot later served as Chief Justice of the Court of Common Pleas (1766–71).

parliamentary conference on a bill peripheral to the one under consideration *sub judice*. Wilmot discounted the evidence because of doubts about its probative value in that case:

> [B]oth the bill and the [legislative] conference proceeded from a factious party spirit in both Houses, when questions were started and tossed about from one side to the other, without considering the relevancy of them, but only how far they would annoy and perplex one another: and if it had been the result of the coolest and most mature deliberation, it only manifests the apprehensions of the Houses at that time . . . .[131]

He added a broader dictum: "Parliamentary doubts, debates, or conferences, ought to have no weight in directing judicial determinations."[132]

However, Sir John's reservations did not carry the day. Eighteenth century lawyers continued to cite legislative history, and judges continued to use it. Illustrative was *Millar v. Taylor*,[133] decided by the Court of King's Bench in 1769, during the tenure of Chief Justice Mansfield.

Millar was an unusual case. It was the first during Mansfield's service on the bench (1756–1788) in which the justices found themselves divided.[134] English booksellers (who generally were publishers as well as booksellers) had induced Parliament to adopt a copyright statute. The issue before the court was whether the time-limited statutory copyright had superseded, or merely supplemented, a pre-existing perpetual common law copyright. Counsel for the party arguing for supersession cited the Journals of both the House of Lords and of the House of Commons to show that during Parliamentary consideration of the measure, a committee of the Commons had changed the wording of the bill in a way that implied supersession. Opposing counsel contended that the Journal reports were not good evidence.

A deeply fractured court ruled that common law copyright survived the Parliamentary enactment. Two of the justices cited Parliamentary history.

---

[131] *Id.* at 159, 97 Eng. Rep. at 62.

[132] *Id.* Chief Justice John Willes expressed a more qualified textualism:

> When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words.

Colehan v. Cooke, (K.B. 1742–43) Willes. 393, 397, 125 Eng. Rep. 1231, 1233. Chief Justice Willes is not to be confused with the Justice Willes referred to *infra* notes 137–44 and accompanying text.

[133] (K.B. 1769) 4 Burr. 2303, 98 Eng. Rep. 201.

[134] *Id.* at 2395, 98 Eng. Rep. at 250 (reporting: "Lord Mansfield . . . said [t]his is the first instance of a final difference of opinion in this Court, since I sat here. Every order, rule, judgment, and opinion, has hitherto been unanimous").

Yates, a dissenter, relied heavily upon it.[135] Lord Mansfield, who was in the majority, also referred to it.[136] Only Justice Willes, in his concurring opinion, expressed reservations about legislative history:

> The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign.[137]

Given the position of two other justices in the case, it is somewhat surprising to find that some scholars argue that Justice Willes' remarks prove a general practice of rejecting legislative history.[138] Yet Justice Willes' statement was *dicta* and utterly unsupported by argument or authority.[139] It was also ambiguous, for one can read it as banning all use of legislative history ("The sense must be collected from what it says when passed into law") or, on a theory of *ratione cessante, cessat ipsa lex*, as excluding only "the history of changes . . . in the house in which it took its rise," but not excluding legislative history known to all three branches of Parliament.[140] Further, Justice Willes himself clearly did not view his sentiment as binding, for later in his opinion he fished for legislative intent in exactly the same parliamentary waters he had purported to shun.[141] Finally, as the court's

---

[135] *Id.* at 2390–91, 98 Eng. Rep. at 248.

[136] *Id.* at 2405, 98 Eng. Rep. at 256 (Mansfield, C.J.) ("An alteration was made in the committee, to restrain the perpetual into a temporary security.").

[137] *Id.* at 2332, 98 Eng. Rep. at 217.

[138] *E.g.*, Baade, *Original Intent*, *supra* note 2, at 1008.

[139] *See* Pepper v. Hart, (1993) A.C. *593, 630 (stating that "[t]he exclusionary rule was probably first stated by Willes J.").

[140] 1 WILLIAM BLACKSTONE, COMMENTARIES *50–51 (explaining that "the legislature of the kingdom is entrusted to three distinct powers . . . first, the king; secondly, the lords . . . and, thirdly, the house of commons."). *See also id.* at *85; Rex and Regina v. Knollys, (K.B. 1694) 2 Salk. 509, 510, 91 Eng. Rep. 434, 435 (Holt, C.J.) (holding that "the Parliament consists of the King, the Lords Spiritual and Temporal, and the Commons").

[141] *See* 4 Burr. 2333–34, 98 Eng. Rep. at 217–18:

> The preamble is infinitely stronger in the original bill, as it was brought into the House, and referred to the committee.
>
> But to go into the history of the changes the bill underwent in the House of Commons.—It certainly went to the committee, as a bill to secure the undoubted property of copies for ever. It is plain, that objections arose in the committee, to the generality of the proposition; which ended in securing the property of copies for a term; without prejudice to either side of the question upon the general proposition as to the right.
>
> By the law and usage of Parliament, a new bill cannot be made in a committee:

most junior justice,[142] he wrote only for himself,[143] and his opinion on legislative history was not adopted as authority in subsequent eighteenth century sources.[144]

On the contrary, judicial use of legislative history *increased* somewhat after *Millar*, probably a result of the increased availability of such material.[145] In 1774, the House of Lords rejected the *Millar* holding in its decision in *Donaldson v. Beckett*,[146] a case in which the prevailing counsel had cited legislative history.[147] The following year, Chief Justice Mansfield discussed legislative history at some length while expounding a statute governing oaths.[148] High English courts also considered and responded to

---

> a bill to secure the property of authors could not be turned into a bill to take it away. And therefore this is not to be supposed, though there had been no proviso saving their rights.

[142] *Id.* at 2309–10, 98 Eng. Rep. at 205.

[143] *Id.* at 2309, 98 Eng. Rep. at 205 ("The Judges delivered their opinions separately, and at large; the junior Judge beginning, and so proceeding upward to the Lord Chief Justice.").

[144] It is absent from the *fin de siècle* edition of Viner's *Abridgment*. 19 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 510–28 (1793) (listing rules of statutory construction), and from the 1806 supplement volume. 6 ANONYMOUS, AN ABRIDGMENT OF THE MODERN DETERMINATIONS IN THE COURTS OF LAW AND EQUITY, BEING A SUPPLEMENT TO VINER'S ABRIDGMENT (1806). *See also* 4 BACON, *supra* note 2, at 644–53 (failing to include Justice Willes' rule among the rules of construction in the work's 1786 edition).

[145] *See infra* Part IV.D.2.

[146] Donaldson v. Beckett, (H.L. 1774) 2 Br. P.C. 129, 1 Eng. Rep. 837.

[147] *Id*. at 140, 1 Eng. Rep. at 843:

> To this end, the history of the bill, as it stands upon the Journals of the House of Commons, together with the account of the conference with the Lords, will clearly evince, that the legislature were not employed in securing an antecedent property, but expressly declared, "That authors and booksellers had the sole property of books vested in them by that act, for the terms therein mentioned." *Vide* the [House of Commons] Journals, 12th December 1709, when the booksellers petition was presented; also their second petition, 2d February 1709.—14th March 1709, Resolved, that the title be, "A bill for the encouragement of learning, by vesting the copies in the authors or purchasers etc."—5th April, the bill returned from the Lords. 5th April 1710, a conference with the Lords, and Mr. Addison, one of the Commons. [Reported in the House of Lords Journal.]

[148] Atcheson v. Everitt, (K.B. 1775) 1 Cowp. 382, 390–91, 98 Eng. Rep. 1142, 1147:

> With regard to the exception against the testimony of Quakers in criminal prosecutions, it was occasioned by a strong prejudice in the minds of the great men who passed the stat. 7 & 8 Wm. 3, c. 34. I have looked into the debates of those days, and find that every step and clause of the Act was fought hard in the House of Commons, and carried by small majorities. I know not whether the exception came

arguments from parliamentary history in cases decided in 1776,[149] 1778,[150] 1789,[151] and 1794.[152] Jurists thereby affirmed that subjective Parliamentary

---

> in by way of amendment, but I think it did. It was first a temporary Act, for seven years only. By stat. 13 Wm. 3, c. 4, it was continued for eleven years; and in the year 1713 there was an application to the House of Commons to make it perpetual, but it was rejected. An application was afterwards made to the House of Lords, who passed the bill, and it went down to the House of Commons; but they would not give it even a first reading. The whole history of the Act may be seen in a very incorrect work, which never received the author's finishing hand: I mean Dr. Swift's Four Last Years of Queen Anne; and it is observable that Dr. Swift commends the House of Commons for the opposition they gave to the Act.

[149] Savage v. Smith, (C.P. 1776) 2 Bl. W. 1102, 1102–03, 96 Eng. Rep. 650, 650 (referring to the Lords Journal to determine the enactment date of a statute).

[150] *See* Gosling v. Lord Weymouth, (K.B. 1778) 2 Cowp. 844–45, 98 Eng. Rep. at 1393 (reporting the defendant's counsel's argument in part as follows: "Mr. Wood contra, for the defendant . . . entered into the history of the Act, and said, several amendments were made by the Lords, and particularly that they struck out that part which related to the alteration of the process as against them; and that, as the Act now stands, peers could only be proceeded against during the times mentioned in the Act, in the same manner, as out of time of privilege, before the Act"). The defendant lost on unrelated grounds.

[151] In Rex v. Pasmore, (K.B. 1789) 3 T.R. 199, 230, 100 Eng. Rep. 531, 547, the defendant's counsel argued:

> [A]nd as far as legal history may be applied in the discovery of their ideas upon the subject, it is notorious that that Act of Parliament was passed in consequence of the decision in the cases of *Banbury*, and of other corporations just before that time, and the obvious necessity of Parliamentary interference in respect of the political use which was made of the law, as it was then acknowledged on all hands to be.

In his opinion, Justice Buller offered a fairly detailed rendition of legislative history:

> And I am of opinion that, whenever a corporation is reduced to such a state as to be incapable of acting or continuing itself, it is dissolved . . . . This point has been very much discussed in Parliament as well as in Westminster-Hall. And great weight is due to *The Tiverton case*; not so much on account of the opinions which were given by the Crown lawyers as of the consequences of them . . . . Among Mr. J. Clive's manuscripts, which are a collection of cases by several Judges, this case of *Tiverton* is mentioned; and it says, "On the mayor's absenting himself, and no election made on the charter day, it was the opinion of the Attorney and Solicitor General [apparently expressed in Parliament –ed.], and seemed to be the general opinion, that the corporation was dissolved. And accordingly upon application to the King a new charter was granted. Note, a bill passed in Parliament this sessions to prevent corporations from being dissolved by the mayor, &c. absenting themselves on the day of election: and when this bill was read in the House of Commons, Mr. Jefferys and Mr. West upon the debate were of opinion that corporations could not be dissolved by such an act of the mayor; and there were several lawyers of the same opinion. Sed quære." So that there is no doubt from the beginning of the note, and the quære which is added to the latter part of it, what was considered as the best opinion at that time.

Id. at 245–46, 100 Eng. Rep. at 555–56.

intent played a legitimate role in statutory construction.

2. *Why Modern Scholars Have Been Misled*

Three factors have misled scholars into concluding that the English courts excluded legislative history during the Founding Era. The first is Justice Willes' concurrence in *Millar v. Taylor*.[153] The second is the assumption that the later English rule banning the use of legislative history was in force during the Founding Era.[154] The third is the belief that judges did not resort to legislative history, and so it must have been legally inadmissible.[155]

As we have seen, however, *Millar* does not stand for the proposition that legislative history is inadmissible; in fact, at least two—and arguably three—justices in that case utilized it.[156] The assumption that the recent[157] English rule banning parliamentary history was in force during the Founding Era is also incorrect, for that rule was not adopted until 1840,[158] and even after that date it was not invariably followed.[159] Its adoption may have been brought on by an alteration in the style of parliamentary statutes:[160] Enactments

---

[152] *See, e.g.*, Earl of Lonsdale v. Littledale, (H.L. 1794) 5 Br. P.C. 519, 523, 2 Eng. Rep. 836, 839 reporting this argument of counsel:

> And what they considered as the most convincing proof that the peers did not mean to give a jurisdiction, by original bill against them was, that the bill originally sent up to the Lords by the Commons, at the parts above marked, had the words "Peer of this realm, or lord of parliament;" and the lords struck out those words — *vide* Journals of the House of Commons, vol. 13, 567.

[153] *Supra* notes 137–43 and accompanying text.

[154] *Cf.* Baade, *Fake Antique*, *supra* note 2, at 1525 (relying, after citing *Millar*, on late nineteenth and twentieth century sources for support for the rule).

[155] *E.g.*, Baade, *Original Intent*, *supra* note 2, at 1011–12 (arguing that since legislative history was readily available, its non-use must have been due to a non-recourse rule). *See also* Powell, *Original Understanding*, *supra* note 2, at 898.

[156] *See supra* notes 135–40 and accompanying text.

[157] The House of Lords weakened the non-recourse rule somewhat in *Pepper v. Hart*, (H.L. 1991) 1 A.C. 593, 3 W.L.R. 1032.

[158] Regina v. Capel, (Q.B. 1840) 12 AD&E 381, 411, 113 Eng. Rep. 857, 868 (Lord Denman, C.J.) (adopting such as rule without citing previous authority).

[159] South Eastern Ry. Co. v. Ry. Comm'rs and the Mayor and Corp. of Hastings, (Ct. App. 1881) 50 L.J., Q.B. 201, 203 (Selbourne, L.C., noting the Court of Appeal's failure to apply it in an 1878 case). *See also* Pepper v. Hart, (H.L. 1991) 1 A.C. 593, 630, 3 W.L.R. 1032 (noting that "even in the middle of the [nineteenth] century the rule was not absolute").

[160] Gwynne v. Burnell, (H.L. 1839–40) West. 342, 363, 9 Eng. Rep. 522, 529–30 (Coleridge, J.):

before 1800 tended to be open-textured—much like the United States Constitution—while during the nineteenth century they had come, in the language of Chief Justice Marshall, to partake more "of the prolixity of a legal code,"[161] where parliamentary intent was more likely to be expressed. A contributing cause to the rule change may have been a fire that in 1834 destroyed almost all the records of the House of Commons except the official journals;[162] future analyses of parliamentary history therefore would be affected by the coincidence of which records happened to survive. Whatever the reason for the rule change in 1840, it is a clear anachronism to project the later evidentiary rule into the Founding Era.

Finally, we have seen that the assumption that contemporaneous English courts did not cite legislative history is erroneous.[163] To be sure, such citations were rare, but the reason was not judicial inadmissibility. The causes lay elsewhere.

The first cause was that separation of powers in Britain was highly imperfect. Judges often participated in parliamentary deliberations while the Chancellor, and sometimes the Chief Justice, presided over the House of Lords.[164] Judges construing a recent statute usually had no need to consult formal legislative history, for they likely participated personally in its adoption. If they had not so participated, then the small size of Britain's ruling class made it likely they knew those who had.[165]

> I am not unmindful of the dicta to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and whenever acts of parliament shall again be framed with the generality and conciseness with which the legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve; but it is enough to say, that it is wholly inapplicable to a modern [*i.e.*, nineteenth century] statute, in which the legislature is careful to express all it intends in so many words . . . .

[161] McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.); *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 12 (8th ed. 1915) (Liberty Fund reprint 1982) (noting, in a portion of the text published in 1885, the "cumbersomeness and prolixity" of nineteenth century English statutes).

[162] BOND, *supra* note 2, at 4.

[163] *See supra* Part IV.D.1.

[164] *See, e.g.*, [24 Geo. iii] HOUSE OF LORDS J. 26 (1783) (Chief Justice Mansfield presiding over the House of Lords).

[165] *E.g.*, Ashe v. Abdy, (Ch. 1678) 3 Swans. 664, 36 Eng. Rep. 1014 (discussed at notes 169–71 and accompanying text); Aumeye's Case, (C.P. 1305) Y.B. 33–35 Edw. 1 (Rolls Series) 83, *summary also available at* http://www.bu.edu/law/faculty/scholarship/yearbooks/ (discussed in Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151, 1157 (1993)) (quoting a judge as telling counsel that the judges knew the statute better than he did, because they made it).

If the statute was older, legislative history might prove helpful if available, but in fact it was often difficult to access. The House of Lords Journal did not exist before 1510 nor the Commons Journal before 1547.[166] During much of the time before the American Founding, "there was no systematic way of preserving [Parliamentary] papers,"[167] and many had disappeared, including several volumes of the Lords Journal.[168] Even the surviving portion of the Lords Journal was kept only in manuscript until 1767.[169] Until 1717 it remained entirely unindexed, and a general printed index was not authorized until 1776.[170] Assuming one could overcome such difficulties, one might find the Lords Journal useful for researching judicial decisions[171] (although not proper evidence of the validity of a judgment or statute after enrollment),[172] but of little value for legislative deliberations. As a mere minute book, the Journal's entries almost exclusively consisted of attendance records, royal messages, and short notations on the introduction, readings, and passages of bills. There was virtually no recording of floor debates. It reduced lengthy discussions to snippets such as "It was moved 'To commit the Bill.' Which being objected to; After long Debate, The Question was put thereupon?

---

[166] BOND, *supra* note 2, at 3–4.

[167] P. FORD & G. FORD, A GUIDE TO PARLIAMENTARY PAPERS 23 (1955). Included in this category would have been procedure papers, committee debates and reports, returns, bills, reports of royal commissions, and so forth. *Id.* at 2–20 (describing various kinds of parliamentary papers).

[168] BOND, *supra* note 2, at 28. The lost volumes dated from 1514 to 1598.

[169] *Id.* at 31.

[170] *Id.* at 32.

[171] *See, e.g.*, Re Earl Ferrers, (H.L. 1760) Fost. 139, 168 Eng. Rep. 69 (discussing journal entries of Earl of Danby's case; Fost. at 139, 168 Eng. Rep. at 69, and Fost. at 146, 168 Eng. Rep. at 72).

[172] Rex v. Countess Dowager of Arundel, (Ch. 1615) Hob. 109, 111, 80 Eng. Rep. 258, 260 (holding that enrollment and affixation of the Great Seal superseded any evidence of statutory invalidity in the journal), *followed by* Rex and Regina v. Knollys, (K.B. 1694) 2 Salk. 509, 511, 91 Eng. Rep. 434, 436 and 1 Raym. Ld. 10, 15, 91 Eng. Rep. 904, 907, *reported sub nom*. King and Queen v. Knowles, 12 Mod. 55, 88 Eng. Rep. 1162.

Arundel, is easily misread. The Chancellor did not hold that the Parliamentary Journals were useless once enrollment had occurred. He held that the validity of a completed statute was determined by the Parliament roll, not the Journals. However, "[t]he journal is of good use for the observation of the generalty and materiality of proceedings and deliberations as to the three readings of any bill, the intercourses [*sic*] between the two Houses, and the like." Hob. 111, 80 Eng. Rep. at 260. What is confusing is that the court immediately added: "but when the Act is passed, the journal is expired." But courts' and counsels' subsequent resort to the Parliamentary Journals shows that they deemed the journals had expired only as evidence of statutory validity, not as to evidence of statutory meaning.

[*sic*] It was resolved in the Negative. ORDERED, That the said Bill be rejected."[173]

Early editions of the Commons Journal were even terser: the first 82 years fit within a single volume.[174] In 1666, the Commons closed its Journal to all but Members.[175] It was reproduced in printed form in 1742, but the reproductions were for Members' eyes only.[176] The Commons Journal was opened to the public in 1762,[177] but its content continued to be sparse.[178]

Other sources of legislative history usually were unavailable or inadequate. For a time, official clerks took notes of Members' speeches, but *publication* of such material was a serious breach of parliamentary privilege.[179] In 1628, the Commons ordered a halt to this note-taking entirely, and in 1714 the Lords did the same.[180] To be sure, with the rise of freedom of the press in the late seventeenth century, reports of parliamentary proceedings began to appear in newspapers and magazines. Both Houses were outraged and moved to stop it. In 1693, the Lords issued a resolution against publication of its debates, and apparently several violators were punished.[181] The Commons issued various condemnatory resolutions between 1642 and 1738.[182] Distress in the latter House was understandable because of the history of royal retaliation against Members whose arguments displeased the Crown, but this concern long survived the actual danger.[183] More importantly, perhaps, English politicians, like politicians always, were sensitive to the possibility of being "misrepresented." The 1738 unanimous

---

[173] This sample comes from the entry for Dec. 18, 1783. [24 Geo. iii] Lords J. at 26 (1783). It is quite typical.

[174] Copies of the Commons Journals from inception until 1699 are available at British History Online, http://www.british-history.ac.uk/source.asp?gid=43.

[175] BOND, *supra* note 2, at 206.

[176] *Id.*

[177] *Id.*

[178] *See, e.g.*, 37 H.C. JOUR. 148–51 (proceedings of Feb.18, 1779); *id.* at 621–24 (proceedings of Feb. 24, 1780); *id.* at 839–41 (proceedings of May 5, 1780); 38 *id.* at 515–18 (proceedings of Jun. 14, 1781); *id.* at 911 (proceedings of Mar. 28, 1782).

[179] BOND, *supra* note 2, at 36.

[180] *Id.*

[181] 10 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, Apr. 25, 1738, at http://www.british-history.ac.uk/report.asp?compid=37804#s5 (quoting several members of the Commons as pointing out that the House of Lords had punished printers who had reproduced its proceedings).

[182] BOND, *supra* note 2, at 36. *See also* 4 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 347 (1762) (stating that "Debates in the House of Commons ought not be divulged without the Order of the House").

[183] *See Reporter's Commentary* to Benyon v. Evelyn, (C.P. 1664) Bridg, O. 324, 124 Eng. Rep. 614 at Bridg. O. App. 621, 124 Eng. Rep. 780 (outlining the relevant history).

resolution of the Commons declared:

> That it is a high Indignity to, and a notorious Breach of the Privilege of this House, for any News-Writer, in Letters or other Papers, (as Minutes, or under any other Denomination) or for any Printer or Publisher, of any printed News Paper of any Denomination, to presume to insert in the said Letters or Papers, or to give therein any Account of the Debates, or other Proceedings of this House, or any Committee thereof, as well during the Recess, as the Sitting of Parliament; and that this House will proceed with the utmost Severity against such Offenders.[184]

Fortunately, the privilege of any one session of the Commons expired with that session, so in theory such fulminations did not prevent permanent publication of their proceedings.[185] But even as late as 1740, privately-collected records of Parliament consisted only of scattered, incomplete, and scarce volumes that either focused on a single issue or covered a whole session like a journal—with few speeches reported and those "greatly abridged."[186] Some volumes were published long after the proceedings they reported.[187]

During the early 1740s, two printers issued multi-volume collections of parliamentary debates.[188] These were brave attempts, but did not display the sort of quality necessary to inspire judicial confidence. The material they collected was limited by the flawed nature of the sources.[189] Parliamentary

---

[184] 10 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, Apr. 25, 1738, at http://www.british-history.ac.uk/report.asp?compid=37804#s5.

[185] *See generally* WORRALL, *supra* note 2, at 121–22 (listing volumes covering parliamentary proceedings available in 1788).

[186] 1 TORBUCK, *supra* note 2, at i–ii. *See also* WORRALL, *supra* note 2, at 121–22 (listing volumes covering Parliamentary proceedings available in 1788).

[187] Anchitell Grey's *Debates* covered the period October 1667 until April 1671, but these volumes were not published until 1769. *See* ANCHITELL GREY, GREY'S DEBATES OF THE HOUSE OF COMMONS (1769), *available at British History Online*, http://www.british-history.ac.uk/source.asp?pubid=260. *But see* WORRALL, *supra* note 2, at 121 (listing Grey's work as covering 1667 to 1694, and being published in 1763; the discrepancy does not, of course, alter the statement in the text). THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH (Simons d'Ewes ed., 1682), *available at* http://www.british-history.ac.uk/source.asp?pubid=313, ended coverage in 1601 but was not published until 1682. HISTORICAL COLLECTIONS: OR, AN EXACT ACCOUNT OF THE PROCEEDINGS OF THE FOUR LAST PARLIAMENTS OF Q. ELIZABETH (Heywood Townshend ed., 1680) *available at* http://www.british-history.ac.uk/source.asp?pubid=314, was not published until 1680, although Elizabeth died in 1603.

[188] CHANDLER, *supra* note 2; TORBUCK, *supra* note 2.

[189] BOND, *supra* note 2, at 37 (noting that in one standard source, only 40 hours of debate in both houses was recorded for all of 1770). The debaters were sometimes not even named. *See, e.g.*, 2 CHANDLER, *supra* note 2, at 465–67 (reporting only short

reporting retained a reputation for being unreliable and often fictitious.[190]

In 1768 systematic reporting of parliamentary debates finally began, and three years later all controls on reporting ceased.[191] This change may have encouraged the modest increase in forensic citation during the 1770s and 1780s.[192] Certainly, one can see the consequences in the length of the reports: The collections issued in the 1740s had covered the eighty years in twenty-one volumes; by contrast, the *Parliamentary Register* was able to devote twenty-two volumes to the period 1780–1787.[193] By the time of the Founding, however, a solution to the problem had not yet arrived. Not until 1803 did professional newspaper reporters win the privilege of sitting in a special location in the Commons' galleries, and not until 1831 did they have a place in the Lords' galleries.[194] One need not posit a "no recourse" rule[195] to explain why eighteenth century jurists rarely resorted to a statute's history in Parliament.

E. *The Use of the "Rules of Construction"*

As is true today, eighteenth century courts frequently employed "rules" (actually, guidelines) of construction in their search for intent. Some modern commentators argue that the use of rules of construction supports the conclusion that the courts were seeking only objective intent.[196] It is true that one virtue of rules of construction is that they help erect a good substitute for subjective intent when subjective intent is not recoverable. But another virtue is that they help deduce subjective intent when it is recoverable.[197]

Naturally, courts interpreting a statute began with the words of the statute.[198] Many issues of statutory construction were resolved from the

---

statements by respective debaters, identified by the letters "A" through "K").

[190] BOND, *supra* note 2, at 36–37. *See also* Atcheson v. Everitt, (K.B. 1775) 1 Cowp. 382, 390–91, 98 Eng. Rep. 1142, 1147 (Mansfield, C.J.) (cautioning about possible unreliability of a report of parliamentary proceedings).

[191] BOND, *supra* note 2, at 36.

[192] *See supra* notes 142–52 and accompanying text.

[193] WORRALL, *supra* note 2, at 121.

[194] *See* BOND, *supra* note 2, at 36.

[195] Baade, *Original Intent*, *supra* note 2, at 1011–12 (arguing that since legislative history was readily available, its non-use must have been due to a "no recourse" rule).

[196] *E.g.*, Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 78 (1994) (arguing that because only three of the legal maxims collected by Plowden specifically referenced intent of the makers, most maxims were serving other purposes).

[197] ROBERT G. NATELSON, MODERN LAW OF DEEDS TO REAL PROPERTY 90–91, 181–82 (1992) (describing role of rules of construction).

[198] Edrich's Case, (C.P. 1603) 5 Co. Rep. 118a, 118b, 77 Eng. Rep. 238, 239

words alone, just as many constitutional questions can be answered from the words of the Constitution (*e.g.*, if a Vice President dies, how is a successor chosen?).[199] But resorting first to the words is fully consistent with a search for subjective intent.[200]

When multiple readings were possible, an applicable rule of construction was that courts should adopt the reading that reconciled all parts of the statute.[201] This rule, like other textual guidelines, was seen as most likely consistent with the intent of the makers.[202] Similarly, cases and commentators admonished lawyers to read a statute's preamble, because it was a "[k]ey to open the Mind of the Makers."[203] And a proviso inconsistent

---

(holding that the words of a statute are followed "when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow").

[199] *See* U.S. CONST. amend. XXV, § 2 (providing for presidential nomination of a new Vice President, followed by confirmation by both houses of Congress).

[200] Kay, *supra* note 2, at 234–35 ("The best evidence of the enactors' intent is the language they used."); *cf.* Lofgren, *supra* note 2, at 80 (stating of the Constitution's drafters that "a desire for clarity in language is not antithetical to recognition that future interpreters might resort to subjective or historical intent to clarify any remaining obscurities").

[201] 1 WILLIAM BLACKSTONE, COMMENTARIES *89 ("One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat*."); Lincoln College's Case, (C.P. 1595) 3 Co. Rep. 58b, 59b, 76 Eng. Rep. 764, 767 ("[T]he office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself; *nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit* . . . ." The maxim means "for no one could understand correctly some part before he shall have read through the entire thing again and again.").

See also Stowel v. Lord Zouch, (C.P. 1569) 1 Pl. Com. 353, 365, 75 Eng. Rep. 536, 554 ("[W]hen one branch in an Act is obscure, it is usual for those who expound the Act to examine the other branches: for we may often find out the sense of a clause by the words or intent of another clause. And so here the intent of the Legislature in this point . . . may be well perceived by other branches.").

[202] Rex v. Bishop of London and Lancaster, (K.B. 1693) 1 Shower. K.B. 441, 491, 89 Eng. Rep. 688, 713 (Eyre, J.) ("And constructions of statutes are to be made of the whole Acts, according to the intent of the makers, and so sometimes are to be expounded against the letter, to preserve the intent . . . .") (Eyre, J.); 19 VINER, *supra* note 2, at 526 ("It is the most natural and genuine Exposition of a Statute to construe *one Part* of the Statute *by another Part of the same Statute*, for that best expresses the Meaning of the Makers . . . ."); 1 COKE, INSTITUTES, *supra* note 2, at 381a ("First, that it is the most naturall [*sic*] and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.").

[203] 4 BACON, *supra* note 2, at 645 ("It is in the general true, that the Preamble of a Statute is a Key to open the Mind of the Makers, as to the Mischiefs which are intended to be remedied by the Statute."); HATTON, *supra* note 2, at 53 (reporting: "and Justice *Dyer* saith, that the Preface is the Key to open the intent of the Makers of Acts of Parliament; and Civilians say, that *Cessante statuti prooemio cessat ipsum statutum*" [If

with earlier statutory language controlled because "it speaks the last intention of the makers . . . ."[204]

Other rules of statutory construction assisted the search for the makers' intent. Constructions by those learned in the law generally were more persuasive than lay constructions, because those learned in the law could "approach nearest to . . . [the] minds" of the makers.[205] This rule of construction, like all the others, would yield on the showing of a contrary intent.[206] When a statute was unclear as to whether it altered the common law, the statute should be construed not to do so, because the King-in-Parliament (guided by experienced lawyers, such as the attorney general and solicitor general) was presumed to know the common law: "Legislators are presumed to speak the language of the law. They certainly who make laws, must know what the legal import of words is . . . ."[207] So if legislators

---

the statute's preamble ceases to be applicable, the statute itself ceases]).

See also 1 COKE, INSTITUTES, *supra* note 2, at 79a ("[T]he rehearsall or preamble of the statute is a good meane to finde out the meaning of the statute, and as it were a key to open the understanding thereof [*sic*]."); Stevens v. Duckworth, (Exch. 1664) Hardr. 338, 345, 145 Eng. Rep. 486, 489 (reporting counsel as arguing that "the preamble, which introduceth the sense and meaning of the statute, expresseth the mischief that was before, and which was intended to be redressed; and the case in question is not within the mischief.").

[204] Attorney-General v. Waterworks Company of Chelsea, (Exch. 1731) Fitzg. 195, 195, 94 Eng. Rep. 716, 716.

[205] c 1 Pl. Com. 77, 75 Eng. Rep. 123:

> For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters [argument of king's sergeant, apparently in an advisory capacity].

Id. at 82, 75 Eng. Rep. at 130.

See also HATTON, *supra* note 2, at 29–30 (stating that the sages of the law are experts in interpretation); 2 COKE, INSTITUTES, *supra* note 2, at 181 ("Now this that hath been said doth agree with our books, and therefore it is *benedicta expositio*, when our ancient authors, and our yeare books, together with constant experience doe agree [*sic*] . . . .").

[206] *See, e.g.*, Hore v. Gates, (K.B. 1734) 2 Barn. K.B. 381, 381–82, 94 Eng. Rep. 567, 567 (reporting two justices as favoring one side because the "lawmakers they said must be supposed to have understood the law and the course of the Court, which is part of it; and therefore they doubted whether the Legislature intended that the plaintiff should be barred of his cause of action" while two others "were of a contrary opinion, and thought that the intent of the Legislature must be to require the plaintiff to put in his demand within the six years, and not to allow him to do it in the vacation after").

[207] Roper v. Radcliffe, (H.L. 1714) 10 Mod. 230, 234, 88 Eng. Rep. 706, 708; *rev'd*

wanted to change the law—rather than merely re-state it, as they sometimes did[208]—good practice was to so specify.[209] The latter canon was applied particularly to penal statutes, which, unlike civil statutes, generally were not extended by equity to comply with some larger legislative purpose.[210] Yet the words of penal statutes still were "construed beneficially according to the Intent of the Legislators."[211] Further, if the evidence of legislative intent was strong enough, judges sometimes extended even penal enactments beyond the apparent sense of their words.[212] When legislative intent showed that the

---

on other grounds (H.L. 1714) 5 Bro. P.C. 260, 2 Eng. Rep. 731.

[208] On the two kinds of Parliamentary statutes, see 1 WILLIAM BLACKSTONE, COMMENTARIES *86:

> Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been . . . . Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever.

See also 2 COKE, INSTITUTES, *supra* note 2, at 307 ("To know what the common law was before the making of any statute (whereby it may be known whether the act be introductory of a new law, or affirmatory of the old) is the very lock and key to set open the windowes [*sic*] of the statute . . . ."); 4 BACON, *supra* note 2, at 647 (repeating similar language and citing Plowden, Coke's *Institutes*, Coke's *Reports*, and Hobart).

[209] Arthur v. Bokenham, (C.P. 1708) 11 Mod. 148, 88 Eng. Rep. 957:

> The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration; for if the Parliament had had that design, they would have expressed it in the Act.

Id. at 150, 88 Eng. Rep. at 958.

Cf. Murray v. Eyton, (C.P. 1680) Raym. Sir T., 338, 355, 83 Eng. Rep. 176, 184–85 ("[W]here the drift and sole intent of an Act of Parliament is most plainly discerned," then contrary rules of law must yield); Thornby v. Fleetwood, (C.P. 1711) 1 Com. 207, 216, 92 Eng. Rep. 1036, 1041 (reporting similar principle by King's sergeant).

[210] WOOD, *supra* note 2, at 541. *See also* Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 396 (Julius Goebel ed., 1964) (citing maxim).

[211] WOOD, *supra* note 2, at 541; 2 LILLY, *supra* note 2, at 649 (stating that penal statutes "shall not be extended by Equity: But the Words may be construed beneficially, according to the Intent of the Makers").

[212] Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 468, 75 Eng. Rep. 688, 699

enactment was designed as a remedial one, that intent overrode normal deference to the common law.[213]

As one of the "makers" of statutes,[214] the King or Queen's intentions had to be considered. Hence, in absence of language to the contrary, the rule was that laws were not construed so as to weaken royal prerogatives because, in the normal course of events, the sovereign would want to protect those prerogatives.[215] Also, usually serving legislative intent was the rule that statutory words were interpreted in their common law sense,[216] or in the

---

("[E]quity knows no difference between penal laws and others, for the intent, (which is the only thing regarded by equity . . .) ought to be followed and taken for law, as well in penal laws as in others."); Partridge v. Strange, (C.P. 1553) 1 Pl. Com. 77, 82, 75 Eng. Rep. 123, 131 (reporting advisory argument of king's sergeant that, "upon like reason a penal statute shall be extended by equity, if the intent of the makers of it may be so perceived"); Reniger v. Fogossa, (Exch. 1550) 1 Pl. Com. 1, 10, 75 Eng. Rep. 1, 15 (reporting similar argument of counsel).

[213] *E.g.*, Wimbish v. Tailbois, (C.P. 1550) 1 Pl. Com. 38, 53, 75 Eng. Rep. 63, 85 (construing statute liberally so it be not "in vain, for it would [otherwise] provide only for that which was provided for before"); James v. Tutney, (K.B. 1639) Cro. Car. 532, 533, 79 Eng. Rep. 1061, 1061–62 (Croke, J.) (construing a statute liberally to effectuate its intent); New River Company v. Graves, (Ch. 1701) 2 Vern. 431, 432, 23 Eng. Rep. 877, 877 (interpreting a statute "in a liberal sense" to effectuate "the intent of the act"). *Cf.* Bedell v. Constable, (C.P. 1664) Vaugh. 177, 179, 124 Eng. Rep. 1026, 1027 ("When an Act of Parliament alters the common law, the meaning shall not be strained beyond the words, *except in cases of publick utility, when the end of the Act appears to be larger than the enacting words*.") (emphasis added); 4 BACON, *supra* note 2, at 650 ("It is the Duty of Judges to put such Construction upon a Statute, as may redress the Mischief; guard against all subtle Inventions and Evasions for the Continuance of the Mischief *pro privato Commodo*; and give Life and Strength to the Remedy *pro bono publico*, according to the true Intent of the Makers of the Law.").

[214] *See supra* note 54 and accompanying text.

[215] Willion v. Berkley, (C.P. 1562) 1 Pl. Com. 223, 75 Eng. Rep. 339:

> And because it is not an Act without the King's assent, it is to be intended that when the King gives his assent, he does not mean to prejudice himself or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects. And so inasmuch as the Act is made by the subjects, who, it is to be presumed, would not restrain the King, and also by the King himself, who cannot be presumed to mean to restrain himself, the expositors of Acts heretofore have well collected from the intent of them, that the King should be exempted out of the general words of restraint, unless he is expressly named and restrained.

Id. at 239–40, 75 Eng. Rep. at 366.

[216] 19 VINER, *supra* note 2, at 513 ("When an act of parliament *makes use of a known term in the law* generally, it shall receive the same sense that the common law takes it in, and no other."); 2 LILLY, *supra* note 2, at 648 ("In the Construction of Statutes, the Reason of the Common Law gives great Light . . . ."); Levinz v. Will, 1 U.S. (1 Dall.) 430, 434 (Pa. 1789) ("Where, indeed, the expressions in an act of assembly are in *general terms*, they are to receive a construction that may be agreeable to the rules of

sense in which they were normally used,[217] or in accordance with custom.[218] But if greater evidence of intent was to the contrary, then intent prevailed.[219]

Professor Hans Baade has suggested that the maxims "*optimus interpres legum consuetudo*"[220] and "*contemporanea expositio est fortissima in lege*"[221] embodied rules diverging from the search for intent. The reason for his conclusion becomes clear when he says that the two "seem at war with each other."[222] He apparently read the maxims to mean, respectively, "the best [*optimus*] interpreter of laws is custom" and "contemporaneous exposition is strongest [*fortissima*] in law." How can two different methods each be strongest or best? How can intent be all-important if either custom or contemporaneous exposition is?

The answers to both questions lie in the fact that in Latin, adjectival

---

common law, in cases of a similar nature."); Fermor's Case, (Ch. 1602) 3 Co. Rep. 77a, 77b–78a, 76 Eng. Rep. 800, 803 ("[I]f any doubt be conceived on the words or meaning of an Act of Parliament, it is good to construe it according to the reason of the common law . . . ."); Milborn's Case, (C.P. 1587) 7 Co. Rep. 6b, 6b, 77 Eng. Rep. 420, 420 ("And as it hath elsewhere been often said, it is a good exposition of a statute to expound it according to the reason of the common law."); Stowel v. Lord Zouch, (C.P. 1569) 1 Pl. Com. 353, 363, 75 Eng. Rep. 536, 551 ("And the way to apprehend the sense is to consider the common law, which is the ancient of every positive law . . . .").

[217] Sheppard v. Gosnold, (C.P. 1672) Vaugh. 159, 169, 124 Eng. Rep. 1018, 1023 ("Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus & norma loquendi* [the law is the normal way of speaking] is govern'd by usage. And the meaning of things spoken or written must be, as it hath constantly been receiv'd to be by common acceptation."). *See also* 2 LILLY, *supra* note 2, at 649 (stating that "long Usage is a just *Medium* to expound [a statute] by").

[218] Molyn's Case, (Exch. 1598) 6 Co. Rep. 5b, 6a, 77 Eng. Rep. 261, 261 ("*consuetudo est optima interpres legum*"); 4 BACON, *supra* note 2, at 653 ("If a Statute be penned in dubious Terms, Usage is a just Rule to construe it by; for *Jus et norma loquendi* [the law is the normal way of speaking] is governed by Usage, and the Meaning of Words spoken or written ought to be allowed to be as it has constantly been taken to be . . . .").

[219] *Sheppard*, Vaugh. at 170, 124 Eng. Rep. at 1023 ("But if usage hath been against the obvious meaning of an Act of Parliament, by the vulgar and common acceptation of the words, then it is rather an oppression of those concern'd, than an exposition of the Act, especially as the usage may be circumstanc'd."); 4 BACON, *supra* note 2, at 653 ("But if the Usage have been, to construe the Words of a Statute contrary to their obvious Meaning, such Usage is not to be regarded . . . .").

[220] The maxim appears as "*consuetudo est optima interpres legum*," [custom is the [*optima*] interpreter of the law], in *Molyn's Case*, 6 Co. Rep. at 6a, 77 Eng. Rep. at 261. *See also* 2 COKE, INSTITUTES, *supra* note 2, at 18.

[221] *See* 2 COKE, INSTITUTES, *supra* note 2, at 136 ("And this exposition agreeth with Britton, who wrote soon after this statute, (& *contemporanea expositio est fortissima in lege*) . . . ."); *see also id.* at 11; WOOD, *supra* note 2, at 8 ("*Contemporanea Expositio in Lege est Fortissima*.").

[222] Baade, *Fake Antique*, *supra* note 2, at 1536–37.

superlatives need not be translated as English superlatives. They can, and very often do, simply mean "very [adjective]." Here, the maxims are better translated as "a very good interpreter of laws is custom" and "contemporaneous exposition is very strong in law."[223] That is why a court considering the maxim regarding custom could say that, "While custom is of great authority, it never, however, prejudices the truth."[224] Similarly, both Lord Coke and Thomas Wood paraphrased the same maxim as saying merely that custom or usage is a *good* interpreter of law.[225] Obviously, custom and contemporaneous exposition could not *both* be the best way of interpreting a statute, but they could both have been very good ways.

They were both good ways precisely because they pointed to the intent of the makers. We have seen that custom and usage could be employed to shed light on intent.[226] Contemporaneous exposition was persuasive because, in the words of eighteenth century digester Matthew Bacon, people who lived near the time the statute was passed "were best able to judge of the Intention of the Makers."[227]

As should seem obvious by now, when courts sought "intent" they sought the original intent at the time the statute was adopted.[228] That is why usage under the statute that began contemporaneously with its enactment was

---

[223] I previously have commented on the centrality of Latin to constitutional interpretation. *See* Natelson, *General Welfare*, *supra* note 2, at 15 & n.72 (2003). That language is even more necessary to interpretation of pre-1791 case reports and treatises, which were heavily laden with Latin. Without a knowledge of that tongue, the reader has no access to significant portions of the cases or to many important legal maxims.

[224] Molyn's Case, (Exch. 1598) 6 Co. Rep. 5b, 6b, 77 Eng. Rep. 261, 262 ("*Quod licet consuetudo est magnae authoritatis nunquam tamen praejudicat veritati*.").

[225] *See* 1 COKE, INSTITUTES, *supra* note 2, at 81b (emphasis added); WOOD, *supra* note 2, at 9.

[226] *Supra* notes 99–106 and accompanying text.

[227] 4 BACON, *supra* note 2, at 648 ("Great Regard ought in construing a Statute to be paid to the Construction which the Sages of Law, who lived about the Time or soon after it was made, put upon it; because they were best able to judge of the Intention of the Makers.").

[228] Rex v. Bishop of London, (K.B. 1694) 1 Shower. K.B. 493, 495, 89 Eng. Rep. 714, 715 (applying Coke's admonition that "in any construction of Acts of Parliament, the original intent and meaning of the makers of the law is to be observed"); Magdalen College Case, (K.B. 1615) 11 Co. Rep. 66b, 73b, 77 Eng. Rep. 1235, 1245 ("[I]n Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed . . . ."). *Cf.* Abbot of Strata Mercella's Case, (K.B. 1591) 9 Co. Rep. 24a, 28a, 77 Eng. Rep. 765, 772 ("And when such ancient grant is general, obscure, or ambiguous, it shall not be now interpreted as a charter made at this day, but it shall be construed as the law was taken at the time when such ancient charter was made, and according to the ancient allowance on record.").

persuasive.[229] Later views of the statute's intent, even by the same makers, were of no moment unless Parliament adopted an explanatory statute.[230] A commonly-cited model of statutory interpretation shows further how the search for the subjective intent of the makers dominated statutory interpretation. The model prescribed three[231] or four[232] steps to be taken in construing a statute. According to the formulation in Thomas Wood's *Institute*, the first step was to determine "What the Common Law was before the making of the Statute."[233] Although this step did not *necessarily* reference the subjective intent of the makers, it was certainly consistent with, and probative of, that intent. The second step was to ask, "What was the

---

[229] Walton v. Willis, 1 U.S. (1 Dall.) 351, 353 (Pa. 1788) ("[T]he reason of the law, and the usage ever since the passing those acts of assembly (as we have been informed) will warrant a more extensive and beneficial interpretation of them.").

[230] HATTON, *supra* note 2, at 29–30:

> [A] great part of them, are by election, namely all of the Lower House, and then by the law Civil, the Assembly of Parliament being ended, *Functi sunt officio* [They are finished in their duty], and their Authority is returned to the Electors so clearly, that if they were altogether assembled again for interpretation by a voluntary meeting, *Eorum non esset interpretari* [It would not be for them to interpret]. For the Sages of the Law whose wits are exercised in such matters, have the interpretation in their hands, and their Authority no man taketh in hand to control . . . .

See also Partridge v. Strange, (C.P. 1553) 1 Pl. Com. 77, 82, 75 Eng. Rep. 123, 130 (stating that the intent cannot be gathered from dispersed legislators). On construction of explanatory statutes, *see supra* notes 70–72 and accompanying text.

[231] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *87 ("There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy . . . .").

[232] Heydon's Case, (Exch. 1584) 3 Co. Rep. 7a, 76 Eng. Rep. 637:

> And it was resolved by them [the justices], that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Heydon's Case, (Exch. 1584) 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638. *Accord* 19 VINER, *supra* note 2, at 526; 2 LILLY, *supra* note 2, at 646.

[233] WOOD, *supra* note 2, at 9.

Mischief or Defect not provided for by the Common Law."[234] An Exchequer decision tells us that this is an inquiry into "what it was that the Parliament intended to redress."[235] The third step was to inquire, "What Remedy the Statute has appointed to Cure the Mischief or Defect."[236] Presumably this could be answered from the face of the statute alone. Finally, the interpreter was to ask "The true reason of the remedy"—"to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."[237]

F. *How the Courts Proceeded in Equitable Construction Cases*

"Equitable construction"[238] or construction according to the "Law of Reason"[239] were names given to a method of interpreting statutes whose language diverged from the legislative intent. The method was followed by courts of law as well as courts of equity.[240]

The legislature's underlying intent, even when not expressed, was deemed part of the statute. As Chancellor Hatton wrote, "[S]uch cases are taken for understood, and what is understood is not out of the Law."[241] Lord Kames (Henry Home) added that if the "will of the legislature is not justly expressed in the statute,"[242] the court's task was to apply the statute in

---

[234] *Id.*

[235] Stradling v. Morgan, (Exch. 1561) 1 Pl. Com. 199, 203, 75 Eng. Rep. 305, 311.

[236] WOOD, *supra* note 2, at 9.

[237] *Heydon's Case*, 3 Co. Rep. at 7b, 76 Eng. Rep. at 638. *See also* Magdalen College Case (K.B. 1615) 11 Co. Rep. 66b, 73b, 77 Eng. Rep. 1235, 1246 (setting forth similar wording).

[238] *See, e.g.*, Fulmerston v. Steward, (K.B. 1555) 1 Pl. Com.101, 109–10, 75 Eng. Rep. 160, 171–72 (discussing practice of expanding or diminishing the coverage of statutes on equitable grounds); Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (Pa. 1786) ("Where the intention of the legislature or the law is doubtful, and not clear, the judges ought to interpret the law to be, what is most consonant to *equity*, and least *inconvenient*.").

[239] HATTON, *supra* note 2, at 31.

[240] The Earl of Oxford's Case, (Ch. 1615) 1 Ch. Rep. 1, 12, 21 Eng. Rep. 485, 488 (stating that courts of law as well as equity engage in equitable construction); Simon v. Metivier, (K.B. 1766) 1 Bl. W. 599, 600, 96 Eng. Rep. 347, 347 (Mansfield, C.J.) (stating that process is the same both at law and in equity).

[241] HATTON, *supra* note 2, at 31.

[242] 1 KAMES, *supra* note 2, at 362. *See also id.* at 339:

> And yet the words of a statute correspond not always to the will of the legislature; nor are always the things enacted proper means to answer the end in view; falling sometimes short of the end, and sometimes going beyond it. Hence to make statutes effectual, there is the same necessity for the interposition of a court of equity, that there is with respect to deeds and covenants.

accordance with that will. In this regard, the judge was to put himself in the place of the lawmaker.[243] For American[244] as well as English lawyers, the process was as described by Edmund Plowden: "[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."[245]

Lord Kames listed three situations where a statute's language might not coincide with the underlying intent, thereby justifying equitable construction. The first was where the language was ambiguous[246] or otherwise obscure.[247] Subservience to intent would dictate how that language was construed, whether broadly or narrowly.[248] In *Helmore v. Shuter* (1678),[249] for example, the question before the Court of King's Bench was whether the Statute of Frauds should be applied only prospectively, or retrospectively as

---

[243] *Cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 303 (1881) (writing of contracts, "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered").

[244] Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 397–98 (Julius Goebel ed., 1964) (citing Plowden's formulation); Chew's Lessee v. Weems, 1 H. & McH. 463, 500 (Md. Prov. Ct. 1772), *reversed*, *id.* (Md. Ct. App. 1775) (reproducing notes of Daniel Dulaney, citing Plowden's formulation).

[245] 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 ("*[C]um de toto genere lex dicit, atque aliquid iis in rebus contra generalem legis comprehensionem existit, tum percommodè accidit ut quâ parte scriptor legis aliquid prætermiserit ac peccaverit omnino . . . id quod prætermissum sit corrigatur, quod etiam legislator, si adesset, admoneret . . . .*") (When the law speaks to the entire subject matter and something arises within its scope but against the general sense of the law, then it is valuable to correct any part in which the writer of the law has made an omission and certainly erred . . . as the legislator himself, if he were present would advise . . . .").

[246] 1 KAMES, *supra* note 2, at 362.

[247] *Cf.* Respublica v. Betsey, 1 U.S. (1 Dall.) 469, 478 (Pa. 1789) (Rush, J., concurring) ("Where the terms and letter of a statute are obscure and difficult, we must resort to the intent."); Wimbish v. Tailbois, (C.P. 1550) 1 Pl. Com. 38, 57, 75 Eng. Rep. 63, 92 ("[I]f the terms and letter of any statute are obscure and difficult to be understood, we ought to have recourse to the intent of the makers, and thereby we shall come at the meaning of the letter.").

[248] *Cf.* The Ship Anna, 1 U.S. (Dall.) 197, 206 (Pa. 1787) (conforming construction of words to the intent of the legislature); Harcourt v. Fox, (K.B. 1693) 1 Shower. K.B. 506, 519–20, 89 Eng. Rep. 720, 726 ("[T]he words of the Act herein are certainly to be construed most favourably to answer the intent of the law makers, and they are to have the largest construction that they can bear, in order to advance that intent.").

[249] (K.B. 1678) 2 Shower. K.B. 16, 89 Eng. Rep. 764.

well. The words could be read both ways. According to the case report:

> Scroggs Chief Justice, Wylde and Jones Justices (Twisden Justice absent) said, they believed the intention of the makers of that statute was only to prevent for the future, and that it was a cautionary law; and if a motion were made in the House of Lords concerning it, they would all explain it so . . . .[250]

Observe the hypothetical placement of the question before the legislature (or at least the Lords), as recommended by Plowden.[251] It does not appear that this form of "equitable construction" is qualitatively different from normal statutory construction.

The second situation calling for equitable construction, according to Kames, was when the words "fall short of will"[252]— that is, the evidence of legislative intent showed the words to be under-inclusive.[253] Coke noted that under-inclusiveness might arise because certain events had not been foreseen or because enumerating all possible cases was impractical,[254] and, of course,

---

[250] *Id.* at 17, 89 Eng. Rep. at 765.

[251] *Supra* note 245 and accompanying text.

[252] 1 KAMES, *supra* note 2, at 362.

[253] *Cf.* HATTON, *supra* note 2, at 28–29 ("For when the words express not the intent of the Makers, the Statute must be further extended than the bare words . . . ."). *See also* Levinz v. Will, 1 U.S. (1 Dall.) 430, 434 (Pa. 1789) ("In doubtful cases, therefore, we may enlarge the construction of an act of assembly, according to the *reason and sense* of the law-makers, either expressed in other parts of the act itself, or *guessed* by considering the *frame and design of the whole*.") (emphasis in original); Rex v. Parish of St. Peter in Malden, (K.B. 1689) Carth. 28, 90 Eng. Rep. 621 (expanding constructive notice to parish-officers because they had notice sufficient within the intent of the statute, although not within the letter); Arthur v. Bokenham, (C.P. 1708) 11 Mod. 148, 161, 88 Eng. Rep. 957, 963 ("Therefore in doubtful cases we may enlarge the construction of Acts of Parliament according to the reason and sense of the law-makers . . . .").

[254] 1 COKE, INSTITUTES, *supra* note 2, at 24b ("*Equitie* is a construction made by the judges, that cases out of the letter of a stat. yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the Statute provideth: and the reason hereof is, for that the Law-maker could not possibly set downe all cases in expresse termes [*sic*] . . . .") (citing equitable maxims); WOOD, *supra* note 2, at 8 ("[Statutes] may be construed according to Equity; especially where They give Remedy for Wrong; or are for Expedition of Justice, or to prevent Delays; for Law-makers cannot comprehend all Cases."). As Lord Kames pointed out, this echoed a rule of classical Roman law. 1 KAMES, *supra* note 2, at 374; JUSTINIAN, DIGEST, 1.3.12–13 (citing the need to extend reach of statutes and senatorial degrees in accordance with the makers' "opinion" [*sententia*] because all items cannot be enumerated within them). *See also* Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 416-17 (Julius Goebel ed., 1964) ("The Court is therefore bound to conclude, that such a consequence was not foreseen by the Legislature, to explain it by equity, and to disregard [the statute] in that point *only*, where it would operate thus unseasonably.").

it might result also from a simple drafting error.

The most controversial form of equitable construction arose in Kames' third situation: "Where the means enacted reach unwarily beyond the end purposed by the legislature"[255]—in other words, where subsequent unforeseen events proved the statute to be over-inclusive. In that case, the "maxim in the law of England" was that "a case out of the mischief, is out of the meaning of the law, though it be within the letter."[256] In such a case, the court would reconcile the statute to the makers' general intent by reducing the statute's scope.[257] This reduction was controversial, because by this procedure the court effectively invalidated part of a statute enacted by the sovereign voice of Parliament. Yet Chancellor Hatton maintained that if there were no consistent applications of language and intent—that is, if language and intent were mutually exclusive—the court could void the entire enactment.[258]

---

[255] 1 KAMES, *supra* note 2, at 383. *See also* Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 465, 75 Eng. Rep. 688, 695 ("[S]ometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to its discretion . . . .").

[256] 1 KAMES, *supra* note 2, at 389. *Cf.* 2 LILLY, *supra* note 2, at 648 ("Where a Mischief is to be remedied by a Statute, the Remedy in the Exposition of the Statute is to be applied according as the Mischief doth require.").

[257] *See, e.g.*, Lushington v. Dose, (C.P. 1739) 7 Mod. 304, 305, 87 Eng. Rep. 1256, 1257 (substituting bail for personal recognizance, as effectuating intent of the legislature); Lincoln College's Case, (C.P. 1595) 3 Co. Rep. 58b, 59b–60a, 76 Eng. Rep. 764, 767–68 (reducing the scope of a statute voiding grants); Willion v. Berkley, (C.P. 1562) 1 Pl. Com. 223, 231, 75 Eng. Rep. 339, 351 ("And [Justice] Anthony Brown said, although the saving had not been in the Act, yet it should have been implied by the intent of the makers . . . ."); Stowel v. Lord Zouch, (C.P. 1569) 1 Pl. Com. 353, 364–65, 75 Eng. Rep. 536, 554 (limiting the statute's coverage of "heirs" to adult heirs);Additionally, the court in *Eyston v. Studd* noted:

> [T]he intent of statutes [is] more to be regarded and pursued than the precise letter of them, for oftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the Act, and the best way to construe an Act of Parliament is according to the intent rather than according to the words.

Eyston v. Studd, (C.P. 1574) 2 Pl. Com. 459, 464, 75 Eng. Rep. 688, 694.

[258] HATTON, *supra* note 2, at 18–19 ("[F]or as Civilians say, *In dubio hæc legis præsumitur esse sententia quam verba ostendunt*. [In cases of doubt the opinion of the law is presumed to be what the words show.] But if the words and mind of the Law be clean contrary, that Law or Statute is void. *Ubi manifeste pugnant legis voluntas & verba, neutrum sequendum est. Verba quia non congruunt menti, mens quia non congruit verbis*." [When the will and words of the law clearly are inconsistent, neither is followed—the words because they do not square with the intent and the intent because it does not square with the words.]). *See also id.* at 21 (describing the results of such an

The courts seldom, if ever, invalidated a statute wholesale, but they frequently overrode particular words in the service of general intent.[259] One such development was the courts' constriction of the literal language of recording statutes. That language granted priority to *all* purchasers taking subsequent to unrecorded interests, but the courts nevertheless denied priority to those purchasers who took with notice of the prior interest. Thus, in *Lord Forbes v. Deniston*,[260] the House of Lords apparently agreed with counsel for the holder of the prior interest that, the clear words of the statute notwithstanding, it "was never intended to prejudice any deed or lease fairly obtained, where actual possession [and therefore notice to later purchasers] always went along with it."[261]

A corresponding category of cases consisted of those construing the Statute of Frauds.[262] Courts frequently disregarded the literal words of the statute so as not to undermine Parliament's subjective purposes in passing it.[263] Lord Mansfield described this practice as follows:

> The question is singly upon the Statute of Frauds, whether the contract is void by the provisions of that positive law. The object of the Legislature in that statute was a wise one; and what the Legislature meant, is the rule both at law and equity; for, in this case, both are the same. The key to the construction of the Act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it; more instances have indeed occurred in Courts of Equity than of Law, but the rule is in both the same. For instance, where a man admits the contract to have been made, it is out of the statute; for here there can be no perjury. Again; no advantage shall be taken of this statute to protect the fraud of another. Therefore, if the contract is executed, it is never set aside. And there are

---

error by Parliament as follows: "And though there be no Court higher to convince or pronounce upon the error, yet when the matter is plain, every Judg [*sic*] may esteem of it as it is, and being void, is not bound to allow it for good and forcible.").

[259] 19 VINER, *supra* note 2, at 514 (stating that "Exposition of a Statute may be *contrary to the general words*.") (emphasis in original); Rex v. Bishop of London, (K.B. 1693) 1 Shower. K.B. 441, 491, 89 Eng. Rep. 688, 713 ("[C]onstructions of statutes are to be made of the whole Acts, according to the intent of the makers, and so sometimes are to be expounded against the letter, to preserve the intent . . . ."); Stradling v. Morgan, (Exch. 1561) 1 Pl. Com. 199, 205, 75 Eng. Rep. 305, 314 ("[F]rom hence we may see that statutes are often taken contrary to the generality of the words . . . . the Judges have granted the view, because they took the intent of the makers of the Act to be so . . . .").

[260] (H.L. 1722) 4 Br. P.C. 189, 2 Eng. Rep. 129.

[261] *Id.* at 192, 2 Eng. Rep. at 131. The case was so interpreted by 19 VINER, *supra* note 2, at 514.

[262] 1677, 29 Car. II, c. 3, 320–21.

[263] 1 KAMES, *supra* note 2, at 392–94.

many other general rules by way of exception to the statute.[264]

As the foregoing demonstrates, the courts justified equitable construction not merely as a desirable exercise of judicial discretion, but as a necessary concomitant of following the legislature's general intent: "[E]quity is synonymous to the meaning of the legislator."[265]

G. *A Response:* The Earl of Oxford's Case

Sometimes the courts did speak and act as if they were constructing an objective statutory "intent" rather than following the legislature's subjective intent.[266] This occurred in two related kinds of cases: (1) Where there was no available evidence of subjective intent other than the words of the enactment and other legal materials,[267] and (2) where the court knew the legislature's general intent, but there was no specific intent because a subsequent state of facts had not been foreseen. In the first case, the best the court could do was to re-construct the statute's probable public meaning. In the latter, it could only extrapolate from the general to the specific, in the manner of equitable construction. The court might describe its interpretation as serving "law" or "reason" rather than intent.[268]

It is clear that following such an approach in the *absence* of evidence of subjective intent is not inconsistent with honoring subjective intent when evidence of it was available. However, Professor Baade has suggested *The Earl of Oxford's Case*[269] as evidence that the courts did disregard subjective

---

[264] Simon v. Metivier, (K.B. 1766) 1 Bl. W. 599, 600, 96 Eng. Rep. 347, 347 (Mansfield, C.J.).

[265] Rex v. Williams, (K.B. 1757) 1 Bl. W. 93, 95, 96 Eng. Rep. 51, 52 (Mansfield, C.J.).

[266] *E.g.*, Lord Mountjoy's Case, (K.B. 1589) 5 Co. Rep. 3b, 5a–5b, 77 Eng. Rep. 52, 55 ("[A]ll Acts of Parliament, as well private as general, shall be taken by a reasonable construction to be *collected out of the words of the Acts themselves*, according to the true intent and meaning of the makers of the Act.") (emphasis added); Countess of Sussex and Worth's Case, (K.B. 1582) 4 Leo. 65, 67, 74 Eng. Rep. 733, 734 (reporting argument of losing counsel that intent is to be gathered only from the words of the statute and does not include any "private intent"). *Arthur v. Bokenham*, (C.P. 1708) 11 Mod. 148, 161, 88 Eng. Rep. 957, 963, may be read this way because it states that equitable construction is done "according to the reason and sense of the law-makers, expressed in other parts of the Act, or guessed, by considering the frame and design of the whole."

[267] This might be due to practical difficulties with legislative history. *See supra* Part IV.D.2.

[268] *E.g.*, HATTON, *supra* note 2, at 44–45 ("Sometimes Statutes are expounded by Equities, because, Law and Reason, repugn to the open sense of the words, and therefore they are reformed to consonance of Law and Reason.").

[269] *See* Baade, *Fake Antique*, *supra* note 2, at 1533 (quoting The Earl of Oxford's

intent.

The Earl of Oxford's Case contains a dictum attributed to the then-Chancellor, Lord Ellesmere, which runs as follows:

> And the Judges themselves do play the Chancellors [*sic*] Parts upon Statutes, making Construction of them according to Equity, varying from the Rules and Grounds of Law, and enlarging them *pro bono publico*, against the Letter and Intent of the Makers, whereof our Books have many Hundreds of Cases.[270]

Now, if in "Hundreds of Cases" judges as well as chancellors were using equitable construction "against the Intent of the Makers," then the intent of the makers could not be a very important guideline for statutory interpretation.

One taking this statement too literally, however, encounters a dilemma: If Lord Ellesmere was saying that judges and chancellors construe statutes against the *subjective* intent of the makers, then his usage contradicts the claim that courts never employed the word "intent" subjectively when referring to legislative intent. But if Lord Ellesmere was saying that courts and judges construct statutes against the *objective* "intent" (meaning) of the statute, then he was contradicting the claim that courts construed statutes objectively.

A more serious objection to taking the phrase literally is that it is both untrue as a matter of fact (certainly I have not found evidence of "Hundreds" of such cases), and it contradicts scores of judicial and legal accounts of interpretive principle.[271] This includes interpretive principle honored by the court later in the very same opinion, when it construes a statute so as to conform with "the Minds of the Law-makers."[272] In sum, the dictum is problematic enough to make one suspect that the quotation is corrupt—as, indeed, other parts of the case report clearly are.[273]

As for the holding of the *Earl of Oxford's Case*, the court did not apply Parliament's specific intent because there was none. The chancellor granted the Earl of Oxford monetary relief to compensate for the unjust application

---

Case, (1615) 1 Ch. Rep. 1, 12, 21 Eng. Rep. 485, 488).

[270] *Id.* at 12, 21 Eng. Rep. at 488.

[271] *See supra* Part IV.C.

[272] *Earl of Oxford*, 1 Ch. Rep. at 16, 21 Eng. Rep. at 489.

[273] For example, the case report incorrectly describes the span between the 39th regnal year of Henry VIII (1547 or 1548) and the 17th regnal year of Elizabeth I (1575) as 50 years. *Id.* at 1, 21 Eng. Rep. at 485. The report further denominates certain contentions as "the Lord Chancellor's Arguments," which from the structure and placement look much more like the arguments of plaintiff's counsel. *Id.*

of a statute adopted in 1571,[274] strongly implying that this was a situation—certainly an unusual one, created by the Queen herself[275]—that Parliament had not foreseen.[276] The court hewed to the general parliamentary will in the manner suggested by Plowden: "It has ever been the Endeavour of all Parliaments to meet with the corrupt Consciences of Men as much as might be, and to supply the Defects of the Law therein, *and if this Cause were exhibited to the Parliament* it would soon be ordered and determined by Equity . . . ."[277]

V. APPLYING "INTENT OF THE MAKERS" TO THE CONSTITUTION

A. *Who Were the Constitution's "Makers"?*

Part III demonstrated that at the time of the Founding, the Anglo-American legal tradition was to interpret fundamental public laws according to the "intent of the makers." Part IV showed that the courts preferred to follow the makers' subjective intent if that was recoverable. This Part V collects evidence that the founding generation sought to apply these principles to the Constitution itself.

The framers had drafted and transmitted the proposed Constitution to Congress, but once it was in effect,[278] the founding generation considered the ratifiers to be its "makers."[279] As Professor Jack Rakove summarized it:

> The Constitution became supreme law not because it was proposed by the Federal Convention of 1787 but because it was ratified by the state

---

[274] *Id.* at 3, 21 Eng. Rep. at 485.

[275] She improperly allowed a landlord to convey free of a leasehold, resulting in reliance interests by the conveyees and their assigns. *Id.* at 1–2, 21 Eng. Rep. at 485.

[276] *Cf. id.* at 6, 21 Eng. Rep. at 486 ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.").

[277] *Id.* at 11, 21 Eng. Rep. at 487 (emphasis added).

[278] *See A Farmer*, PHILA. INDEPENDENT GAZETTEER., Apr. 18 & 22, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 133, 143 (judging the *unratified* constitution by the "intention of its framers").

[279] *E.g.*, 4 ELLIOT'S DEBATES, *supra* note 2, at 316 (quoting Charles Cotesworth Pinckney in the South Carolina legislature as affirming that "The Constitution takes its effect from the ratification"); 1 ANNALS, *supra* note 2, at 743 (reporting Rep. Elbridge Gerry, in the First Congress, as saying that the Constitution received its authority from the ratification conventions). For Madison's early treatment of the issue, see *infra* Part V.E.2. *See also* U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

> conventions of 1787–1788.[280] By this criterion, the intentions of the framers were legally irrelevant[281] to its interpretation, but the understandings of the ratifiers could provide a legitimate basis for attempting to fix the original meaning of the Constitution.[282]

B. *Establishing a* Terminus Post Quem *for the Ratification Era*

Constitutional interpretation began as soon as the document became public on September 19, 1787.[283] The ensuing debate was largely over interpretation: Anti-Federalists interpreted the General Welfare Clause as granting Congress power to regulate in any way it might deem promotive of the general welfare, while Federalists construed it as a limitation on the taxing power.[284] Anti-Federalists interpreted the Necessary and Proper Clause as granting Congress near-plenary authority, while Federalists countered that it was but a rule of construction.[285] Anti-Federalists interpreted the Constitution as abolishing, or at least endangering, jury trial in civil cases; Federalists denied it.[286] Anti-Federalists interpreted the document as granting Congress the power to suppress free exercise of religion, while Federalists responded that Congress would have no power to regulate religion.[287]

These Ratification Era disputes are evidence of how the founding generation expected the Constitution to be construed. One must, however, delineate what one means by "Ratification Era," since interpretive debates continued well beyond the period during which they were relevant to the question of whether the instrument would be ratified. Generally speaking, the later the date one chooses as a *terminus post quem*, the more evidence becomes available. However, probative value of post-ratification evidence is low for most purposes, because it had no role in persuading the public whether or not to ratify. Other things being equal, the later the evidence the,

---

[280] 1787–90, if one includes North Carolina and Rhode Island.

[281] Not practically irrelevant, however, since leading drafters also served as leading ratifiers, and the understanding of the drafters is probative as to how the ratifiers interpreted the Constitution.

[282] RAKOVE, *supra* note 2, at 18.

[283] *Id.* at 340.

[284] Natelson, *General Welfare*, *supra* note 2, at 35–44.

[285] Natelson, *Necessary and Proper*, *supra* note 2, at 292–315.

[286] *Compare The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Dec. 18 1787, *reprinted in* THE ANTI-FEDERALIST 201, 215–17 (Herbert J. Storing ed., 1985) (stating Anti-Federalist position) *with* THE FEDERALIST NO. 81, *supra* note 2, at 424–25 (Alexander Hamilton) (stating Federalist position).

[287] Natelson, *Establishment Clause*, *supra* note 2, at 90–91.

lower the value, because later evidence is more remote from the Founding.

A proper *terminus* depends partly on the question being considered. For this inquiry, I have selected December 15, 1791, which is when the Bill of Rights became effective. That event largely met the expectations of those seeking amendments and it certainly foreclosed any chance that states would soon withdraw from the Union or join the call of the Virginia and New York legislatures for a new constitutional convention.[288] This date is earlier than the *termini* selected by others who have considered the question,[289] but I think rightfully so. Statements about constitutional interpretive method after that date could be made almost without practical restraint, and are accordingly unreliable. Indeed, the probative value of the evidence drops significantly even before that—after the first session of the First Congress adjourned on September 29, 1789.[290]

C. *Interpretive Methods Leading up to the Ratifying Conventions*

Prominent Americans' references to documentary construction during the years before the ratification conventions comply with the view that instruments should be construed according to the subjective intent of the makers.[291] This is certainly understandable, since English jurisprudence prevailed in the American colonies, and works of political theory popular in America, such as James Burgh's *Political Disquistions*, expounded the same view.[292] For example, John Dickinson wrote in his wildly popular *Farmer*

---

[288] 1 HOUSE J. 28–30 (May 5–6, 1789) (reproducing the Virginia and New York applications).

[289] Professor Lofgren, for example, found a bounty of evidence supporting his (and my) belief that the intent of the ratifiers was controlling, but nearly all after 1791. He missed much of the evidence arising before that date. Lofgren, *supra* note 2, at 93–110.

[290] During the first session of the First Congress, the alignment of political forces remained much the same as that prevailing during the ratification era. Later sessions were characterized by a different alignment. CHARLES C. THATCH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 125–26 (2007) (1923) (pointing out that during the first session of the First Congress, eighteen former members of the Constitutional Convention were in Congress, and political alignments had not yet changed to the different alignment of later sessions).

[291] *See supra* Part IV.

[292] *See, e.g.*, JAMES BURGH, POLITICAL DISQUISITIONS (1774) *reprinted in* THE FOUNDERS' CONSTITUTION 54 (Philip B. Kurland & Ralph Lerner eds., 1986), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch2s6.html. ("All lawful authority, legislative, and executive, originates from the people. Power in the people is like light in the sun, native, original, inherent and unlimited by any thing human. In governors, it may be compared to the reflected light of the moon; for it is only borrowed, delegated, and limited by the intention of the people."). For Burgh's influence on and popularity among the founding generation, see Robert G. Natelson, *The Constitution and*

letters that a law should be judged by the intent of its "authors."[293] Sam Adams commented disapprovingly on how enforcement of the Boston Harbour Act had been "executed with a Rigour beyond the Intent even of the Framers of it."[294] George Wythe and St. George Tucker, two of America's leading legal scholars, contended that the Virginia constitution should be interpreted according to the intent of its framer-ratifiers.[295] James Madison, asked by James Monroe for his interpretation of a provision in the Articles of Confederation,[296] responded with an analysis based on the sponsorship and drafting history of the provision[297] rather than an analysis of the text.[298] An ordinance of the Confederation Congress chartered a Bank of North America and urged the states to adopt laws to effectuate the "true and intent and meaning" of the congressional ordinance, and referring the states to prior congressional resolution—that is to say, legislative history—as evidence of

---

the Public Trust, 52 BUFF. L. REV. 1077, 1120–21 (2004).

[293] *E.g.*, John Dickinson, *Letters from a Farmer in Pennsylvania*, in EMPIRE AND NATION 43 (Forrest McDonald ed.) (2d ed. 1999) (referring to the intent of the "authors" of a law).

[294] SCHWARTZ, *supra* note 2, at 219 (of course, the relevant "Framers" in this case would have been King-in-Parliament, the same entity that gave the Act legal effect). *Compare* "A Farmer," PHILA. FREEMAN'S J., Apr. 16 & 23, 1788 *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 133, 143 (judging the *unratified* constitution by the "intention of its framers").

[295] *See supra* notes 45 (intent) and 88 (subjective intent) and accompanying text.

[296] ARTS. CONFED. art. IX ("The United States in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . .").

[297] Madison argued that state power over Indians who were not "members" of states was limited to the pre-emptive right to buy land:

> My reasons are. 1. That this was the principal right formerly exerted by the Colonies with regard to the Indians. 2. that it was a right asserted by the laws as well as the proceedings of all of them, and therefore being most familiar, wd. be most likely to be in contemplation of the parties[.] 3. that being of most consequence to the States individually, and least inconsistent with the general powers of Congress, it was most likely to be made a ground of Compromise. 4. it has been always said that the proviso came from the Virga Delegates, who wd naturally be most vigilant over the territorial rights of their Constituents.

James Madison to James Monroe, Nov. 27, 1784, *reprinted in* 2 THE FOUNDERS' CONSTITUTION 529 (Philip B. Kurland & Ralph Lerner eds., 1987).

[298] The text would seem to contemplate a wider state power. *See* ARTS. CONFED. art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

that intent and meaning.[299] Finally, the records of the federal convention contain at least two references to interpreting acts according to the anterior intent.[300]

During the ratification debates, Anti-Federalist essayists erected arguments against the Constitution on the assumption that statutes and constitutions should be interpreted according to the subjective intent of the makers. "Agrippa" (John Winthrop of Massachusetts) acknowledged the innocence of the intent behind the provision empowering Congress to regulate the time, place, and manner of election,[301] but warned that intent was sometimes improperly disregarded in practice.[302]

Another Anti-Federalist writer, "Brutus" (who most scholars agree was probably Judge Robert Yates of New York),[303] also acknowledged the role of original intent: "It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution."[304] The concern of "Brutus" was that the courts would impose on the document the same doctrines of equitable construction that they

---

[299] 21 J. CONT'L. CONG. 1190 (Dec. 31, 1785) ("*Resolved*, that it be recommended to the legislature of each State, to pass such laws as they may judge necessary, for giving the foregoing ordinance its full operation, agreeably to the true intent and meaning thereof, and according to the recommendations contained in the resolutions of the 26th day of May last.").

[300] *See, e.g.*, 1 FARRAND, *supra* note 2, at 243 (James Madison) (quoting the New Jersey Plan's statement that penalties for violations of "regulations shall be adjudged by the Common law Judiciarys of the State in which any offence contrary to the true intent & meaning of such Acts" is committed); *id.* at 315 (a reference to "intention of the parties" crossed out).

[301] 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 choosing Senators.").

[302] "Agrippa," MASS. GAZETTE, Feb. 5, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 863–64:

> I appeal to the knowledge of every one if it does not frequently happen, that a law is interpreted in practice very differently from the intention of the legislature. Hence arises the necessity of acts to amend and explain former acts. This is not an inconvenience in the common and ordinary business of legislation; but it is a great one in a constitution.

Observe that Agrippa was *not* claiming that intent should be or normally was disregarded, but that the public might regret ratification if it were.

[303] *See Editor's Note*, 13 DOCUMENTARY HISTORY, *supra* note 2, at 411 (discussing the identity of "Brutus").

[304] N.Y. J., Dec. 13, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 422–23.

applied to statutes.[305]

Federalist spokesmen quarreled with how Anti-Federalists manipulated this rule of interpretation,[306] but not with the rule itself.[307] Alexander Hamilton referred to the Constitution as arising from the "intention of the people," as opposed to "the intention of their agents,"[308] with the former to be enforced over the latter. He contended that Anti-Federalists were distorting the "intention" behind the document, and that the proper "intention" controlled.[309] That the "intention" referred to here was at least partly subjective is shown by the Federalists' sensitivity to materials that could become the basis for legislative history. Hamilton pointed out that contemporaneous discussions could be used by future generations to elucidate the Constitution, so Anti-Federalists should be careful about what they said in the newspapers.[310] Obviously, such warnings made sense only if people were assuming that ratification history was a legitimate tool for interpretation.

D. *During the Ratifying Conventions*

We have seen how Parliamentary proceedings became increasingly available to the public in the latter part of the eighteenth century.[311] A parallel development occurred in America. In 1766, Massachusetts became the first colony to open a public gallery in its legislative hall, and by 1787, American legislative proceedings were widely reported.[312] The conclave that

---

[305] *Brutus*, N.Y. J., Jan. 31, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 512, 514–15; *see also Brutus*, N.Y. J., Mar. 20, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 431–33 ("This [Supreme] court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it.").

[306] *E.g.*, THE FEDERALIST NO. 83, *supra* note 2, at 430–31 (Alexander Hamilton).

[307] *See supra* note 34 and accompanying text.

[308] THE FEDERALIST NO. 78, *supra* note 2, at 404 (Alexander Hamilton).

[309] *E.g.*, THE FEDERALIST NO. 32, *supra* note 2, at 156 (Alexander Hamilton):

> If this was the intention, why was it not left, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

[310] RAKOVE, *supra* note 2, at 343 (citing Federalist warnings that exaggerated Anti-Federalist charges might turn out to be self-fulfilling prophecies); *see also infra* notes 312–13 and accompanying text (discussing Federalist concern with the state of the ratification record in Pennsylvania).

[311] *Supra* notes 189–91 and accompanying text.

[312] GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS

drafted the Constitution was an anomaly in remaining closed, but the state ratifying conventions were conducted very much in the light of day, and their proceedings were a matter of public record. Delegates sensed that if the Constitution became effective, the interpretations adopted at the ratification conventions would govern, or at least affect, the document's practical meaning.

Various pieces of evidence tell us that this is so. At the Pennsylvania convention, Anti-Federalists demanded that their formal objections to the Constitution (based largely on their interpretation of the instrument) be inserted in the official convention journal.[313] Anti-Federalist spokesman Robert Whitehill explained that "A public [news]paper is of a transient and perishable nature, but the Journals of this house will be a permanent record for posterity, and if ever it becomes a question, *upon what grounds we have acted*, each man will have his vote justified by the same instrument that records it."[314] Certainly the "grounds" upon which delegates acted would include their understanding of particular provisions in the document they were considering.

Federalist Benjamin Rush opposed insertion of Anti-Federalist objections in "proceedings of the Convention" that would be "stamped with authenticity."[315] James Wilson opposed insertion because he did not want the objections to "derive from our countenance a stamp of authenticity."[316] Clearly, both sides saw the convention records—a species of legislative history—as a basis for future constitutional decision making.[317]

At the North Carolina convention, Judge James Iredell recognized that the ratification record could be lost, and that such an event could prove deleterious. If, he warned his fellow delegates, future interpreters did *not* have access to the current debate, they might misconstrue a bill of rights.[318] Iredell's clear implication was that the history of the ratification debate should be preserved as a beneficial interpretive tool.

In three other states, ratifying conventions rendered explicit their understanding that ratifying intent was controlling. Each one formally approved a declaration that their approval was based on specified

---

DIFFERENT 253–54 (2006).

[313] *See* Lofgren, *supra* note 2, at 91–92.

[314] 2 DOCUMENTARY HISTORY, *supra* note 2, at 377 (emphasis added).

[315] *Id.* at 372.

[316] *Id.* at 377.

[317] *Cf. supra* Part III.D (discussing judicial use of legislative history in the Founding Era).

[318] 2 ELLIOT'S DEBATES, *supra* note 2, at 149 (warning that future generations, "long after all traces of our present disputes were at an end," might misconstrue the addition of a bill of rights).

constitutional interpretations. In South Carolina, the convention accompanied its ratification resolution with a statement that "[t]his Convention doth also declare that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union."[319] The convention also proposed embodying that rule of construction in an amendment,[320] but the understanding was not made contingent on amendment.

Similarly, the New York convention resolved:

> We the Delegates of the People of the State of New York . . . Do declare and make known
>
> . . . .
>
> That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing Laws at its discretion from time to time to divide such State into convenient Districts, and to apportion its Representatives to and amongst such Districts.
>
> That the Prohibition contained in the said Constitution against *ex post facto* Laws, extends only to Laws concerning Crimes.
>
> That all Appeals in Causes determineable [*sic*] according to the course of the common Law, ought to be by Writ of Error and not otherwise.
>
> . . . .
>
> That the Jurisdiction of the Supreme Court of the United States, or of any other Court to be instituted by the Congress, is not in any case to be encreased [*sic*] enlarged or extended by any Fiction Collusion or mere suggestion;—And That no Treaty is to be construed so to operate as to alter the Constitution of any State.
>
> Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the Explanations aforesaid are consistent with the said Constitution . . . . We the said Delegates, in the Name and in the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution.[321]

The item pertaining to congressional districting was designed to mollify Anti-Federalist worries that Congress might abuse the Times, Places, and

---

[319] SCHWARTZ, *supra* note 2, at 757, *available at* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratsc.htm.

[320] *Id.*

[321] 2 SCHWARTZ, *supra* note 2, at 911–14, *available at* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratny.htm.

Manner Clause[322] to interfere unduly in state regulation of elections.[323] The item involving the Ex Post Facto Clauses represents formal acceptance of Federalist reassurances that those clauses would not interdict retroactive civil laws.[324] The third item apparently was included to clarify that jury fact-finding would survive the federal appeals process.[325] The fourth was to reassure Anti-Federalists that national courts would not use legal fictions to expand their jurisdiction,[326] and the treaty provision sought to clear up the contested issue of whether the federal government could use its authority to make treaties so as to exercise acts of governance not otherwise within its enumerated powers.[327] Yet, New York proposed no amendments dealing specifically with these or any of the other issues in the quoted extract. The understanding of the ratifiers was thought to be sufficient.

Rhode Island's ratification instrument began with a preamble: "We the Delegates of the People of the State of Rhode-Island, and Providence Plantations . . . do declare and make known,"[328] and then followed the preamble with a set of interpretive understandings. Among these were declarations that public officials are the people's "trustees and agents,"[329] that constitutional denial of specific powers to Congress should not imply that others were granted, and that freedom of religion and the integrity of the militia would be protected. All arose from Anti-Federalist objections and the responsive Federalist representations. Most were not incorporated into the

---

[322] U.S. CONST. art. I, § 4, cl. 1.

[323] *See* 2 ELLIOT'S DEBATES, *supra* note 2, at 325–29 (reporting debate at the New York ratifying convention).

[324] Natelson, *Retroactivity*, *supra* note 2, at 520–21.

[325] New York Anti-Federalists had argued that the Supreme Court's appellate jurisdiction over fact, U.S. CONST. art. III, § 2, cl. 2, would endanger jury verdicts; *e.g.*, *Brutus*, N.Y. J., Feb. 28, 1788; *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 255, 257–58.

[326] *Brutus*, N.Y. J., Jan. 31, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 512–16 (explaining how, on pretextual grounds, the English Court of Exchequer had expanded its jurisdiction and warning that similar expansions of federal court jurisdiction could occur if the Constitution were ratified).

[327] During the ratification debates, for example, Anti-Federalists argued that through the use of the treaty power, Congress could establish a national religion. Natelson, *Establishment Clause*, *supra* note 2, at 94. Thus, the tenor of the New York resolution contradicts the holding in *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that the treaty power may be used to act on matters not otherwise within the federal government's sphere).

[328] *Ratification of the Constitution by the State of Rhode Island; May 29, 1790*, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, at 310–11 (Dept. of State 1894), *available at* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/const/ratri.htm.

[329] *Id.*

proposed amendments set forth later in the ratification instrument.

After the interpretive understandings, the Rhode Island ratification instrument added:

> Under these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments hereafter mentioned, will receive an early and mature consideration, and . . . speedily become a part thereof; We the said delegates, in the name, and in the behalf of the People, of the State of Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution.[330]

There would have been no point in adding this material unless the delegates believed it would be considered when the Constitution was construed. In other words, these actions are utterly inconsistent with the notion that the Constitution should be interpreted without regard to the subjective intent of the makers.

E. *Debates in the First Congress*

1. *Introduction*

The proceedings during the opening months of the First Congress are a form of early usage under the Constitution.[331] Unlike most other post-ratification evidence, they can have significant probative value: even though eleven states had approved the Constitution, the new government's future remained highly uncertain since North Carolina and Rhode Island had refused to ratify and the legislatures of both Virginia and New York were issuing an Article V call[332] for a new federal convention.[333] Members of Congress were not free, as they later were, to adopt purely fictional or self-serving constitutional interpretations without regard to whether the new governmental system would survive.

As Professor Louis J. Sirico recently documented, debates in the First

---

[330] *Id.* at 315.

[331] *Supra* notes 99–106 and accompanying text (mentioning the rule of usage in Anglo-American legal interpretation); *see also supra* note 290 (explaining why evidence from the first session of the First Congress is more probative of ratifier understanding than evidence from later sessions of that Congress).

[332] U.S. CONST. art. V (stating in part as follows: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . .").

[333] 1 HOUSE J. 28–30 (May 5–6, 1789) (reproducing the Virginia and New York applications).

Congress show extensive reliance on the makers' intent as a method of constitutional interpretation.[334] The applications for a new constitutional convention from the Virginia and New York legislatures were based on constructions of the Constitution rendered during those states' ratification conventions.[335] Virginia Congressman Alexander White argued for an interpretation of the financial powers of the Senate consistent with what the ratifiers would have accepted.[336] The floor debates in the House of Representatives (those in the Senate were still closed) over the Bill of Rights, removal of federal officers, and the Bank of the United States all reflect the same view.

2. *The Bill of Rights Debate*

The debate over Representative James Madison's proposed Bill of Rights began in June, 1789, and continued intermittently for the next three months. Several of Madison's amendments were designed in whole or in part to resolve interpretative disputes over the likely effect of the Constitution. All of these were adopted. They became the Seventh Amendment, which guaranteed jury trial in civil cases;[337] the Ninth Amendment,[338] a rule of construction designed to prevent enumerated rights from being construed as the only limitations on federal power; and the Tenth,[339] another rule of construction affirming that powers not granted to the federal government were reserved to the states or people.[340]

Members of the House of Representatives repeatedly alluded to the

---

[334] Louis J. Sirico, Jr., *Original Intent in the First Congress*, 71 MO. L. REV. 687 (2006). He confessed that this was "a somewhat surprising revelation." The surprise was due to his assumption—certainly understandable in light of the state of the literature—of the truth of the thesis that legislative history was irrelevant to the Founders' hermeneutic. *Id.* at 688, and *id.* at nn. 6–8.

[335] 1 HOUSE J. 28–30 (May 5–6, 1789) (reproducing the Virginia and New York applications).

[336] *Id.* at 375.

[337] U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *see supra* notes 259 & 291 and accompanying text (mentioning the interpretive debate over jury trials).

[338] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[339] *Id.*, amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[340] *See* Natelson, *Necessary and Proper*, *supra* note 2, at 314 (explaining the role of the Ninth and Tenth Amendments as tempering the Necessary and Proper Clause).

proceedings and outcome of the state ratifying conventions. They did this in recognition, in the words of Representative Elbridge Gerry, that "The Constitution derived no authority from the first [federal] convention; it was concurred in by conventions of the people, and that concurrence armed it with power and invested it with dignity."[341] Members of Congress referred back to the ratification conventions, not only as evidence of public desires[342] but also as evidence of how the Constitution was likely to be interpreted in the absence of amendments. For example, Madison explained that the need for a guarantee of freedom of religion arose because of how some of the conventions had interpreted the Necessary and Proper Clause:

> Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion . . . .[343]

Later, in defending exclusion of the word "expressly" from what became the Tenth Amendment, Madison alluded to the Virginia ratifying convention, where participants had interpreted the Constitution as allowing Congress (again, through the Necessary and Proper Clause) to exercise incidental as well as express powers.[344] No congressman argued that interpretations at ratifying conventions were impermissible sources of interpretive authority.

---

[341] 1 ANNALS, *supra* note 2, at 743.

[342] *E.g.*, *id.* at 464, quoting Rep. Elbridge Gerry as stating:

> The conventions . . . have ratified this constitution, in full confidence that their objections would at least be considered . . . . The ratification of the constitution in several States would never have taken place, had they not been assured that the objections would have been duly attended to by Congress. And I believe many members of these conventions would never have voted for it, if they had not been persuaded that Congress would notice them with that candor and attention which their importance requires.

For similar statements, see *id.* at 465 (Rep. Roger Sherman, drawing the opposite conclusion); 466 (Thomas Sumter); 805–06 (Elbridge Gerry) & 806–07 (St. George Tucker); *see also* Natelson, *Establishment Clause*, *supra* note 2 (explaining how Congress attempted to meet public and ratifying convention sentiment on religion).

[343] 1 ANNALS, *supra* note 2, at 758.

[344] *Id.* at 790.

3. *The Congressional Debate over Removal of Federal Officers*

While drafting a bill creating the President's cabinet in May and June of 1789, Congress had to consider whether the Constitution allowed the President to remove executive officers without senatorial consent. The Constitution specifies how officers shall be appointed,[345] but provides no removal mechanism except for conviction after impeachment.[346] Two competing theories in Congress were that the grant of the executive power to the President implied the complete power to remove, and that senatorial consent to appointment implied a requirement of senatorial consent for removal.[347]

Some members of Congress felt uncomfortable trying to resolve what they saw as pre-eminently a judicial question, even though Madison affirmed that the House had "as good a right as any branch of the Government to declare our sense of the meaning of the constitution."[348] Said Abraham Baldwin of Georgia, a former delegate at the federal convention, "I do not like to construe over much. It is a very delicate and critical branch of our duty . . . ."[349] Elbridge Gerry of Massachusetts,[350] Alexander White of Virginia,[351] and James Jackson of Georgia[352] all cautioned against Congress trying to alter the Constitution by construction. In the end, the House had to adopt a construction—although as White said, "subject to the decision of the judges."[353]

---

[345] U.S. CONST. art. II, § 2, cl. 2:

> [The President] . . . with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[346] U.S. CONST. art. I, § 2, cl. 6 (providing for impeachment by the House of Representatives); *id.* at art. I, § 3, cl. 6 (providing for the Senate to try impeachments).

[347] William Smith of South Carolina initially argued that impeachment was the only permitted removal mechanism, but this position did not win much support. 1 ANNALS, *supra* note 2, at 387.

[348] *Id.* at 568.

[349] *Id.* at 578. Professor Powell erroneously cited this remark as on page 556. Powell, *Original Understanding*, *supra* note 2, at 914 n.149 (Several of his citations to the ANNALS are garbled.). More seriously, he omitted the second sentence, leaving the reader with the impression that Baldwin rejected the process of construction entirely.

[350] 1 ANNALS, *supra* note 2, at 523.

[351] *Id.* at 533–36.

[352] *Id.* at 551.

[353] *Id.* at 539.

In this debate to interpret the "intention of the Constitution"[354]—a term not always kept distinct from the subjective intention of the makers[355]—most of the focus was on construction of the text. Yet congressmen on both sides of the question also resorted to evidence that we commonly associate with ratifier understanding. These included (1) the record of ratification history, (2) public records accessible at the time, (3) custom and usage, (4) the writings of "sages," and (5) history prior to or contemporaneous with the Constitution. Specifically:

The record of ratification history. Members of Congress appealed to ratification history. William L. Smith of South Carolina cited *The Federalist* for the proposition that the Senate had to agree to discharge of executive officeholders.[356] *The Federalist* had, of course, been composed to induce the public to ratify the Constitution. Madison urged that the Constitution be construed so as to minimize the force of objections raised in the ratification debates.[357] James Jackson paraphrased remarks by James Wilson, issued in the course of an oration promoting the Constitution at the Pennsylvania ratifying convention.[358] Alexander White emphasized that the federal government was one of enumerated powers, and pointed out that Federalists at his state's ratifying convention strongly represented it as such.[359] White added that the same understanding prevailed in North Carolina.[360] Elias Boudinot of New Jersey urged that the Constitution be interpreted in the way most calculated to minimize the concerns expressed at the state ratifying conventions.[361]

There were fewer references to the federal convention, which had been secret and was not viewed as controlling anyway. Relying on text and prior cases, White drew inferences about the intent of the framers: "This must have been in the contemplation of the gentlemen who formed the constitution. Is it probable they never thought about the manner in which an officer should be displaced . . . ."[362] Richard Bland Lee similarly drew inferences about what

---

[354] *Id.* at 480 (James Madison). *See also id.* at 525 (Egbert Benson of New York saying "the constitution intends").

[355] *E.g.*, *id.* at 539 (Rep. John Page of Virginia) ("This was never the intention of the constitution . . . . The framers of the Government had confidence in the Senate . . . . The constitution also has confidence in the heads of departments . . . .").

[356] 1 ANNALS, *supra* note 2, at 474.

[357] *Id.* at 395 (citing an Anti-Federalist separation of powers argument that he said was raised with success and plausibly grounded).

[358] *Id.* at 577–78.

[359] *Id.* at 535.

[360] *Id.*

[361] *Id.* at 548.

[362] 1 ANNALS, *supra* note 2, at 537. *See also id.* at 538 (noting that "the gentlemen

"the convention intended."[363] Without convention notes, however, both of these gentlemen were really drawing inferences primarily about the document's public meaning and only secondarily about its intent. Abraham Baldwin was the only member of Congress to reference the federal convention proceedings directly, which he could do, since he had been there.[364]

Public records accessible at the time of ratification. Also in the tradition of Anglo-American statutory interpretation, Congressmen made repeated references to practice under then-existing state constitutions,[365] and showing their probable influence on the framers.[366]

Custom and usage. In keeping with common law methods of interpretation,[367] White sought constitutional intent in executive practices "from beyond the Atlantic."[368]

Then-standard works of "sages." Just as English and American judges cited "sages of the law,"[369] Richard Bland Lee of Virginia cited separation of powers as a "maxim in Government by all judicious writers"—presumably thinking of Montesquieu, who was famous as an advocate of separation of powers.[370] Jackson also seems to have been referencing Montesquieu when he reinforced the wisdom of sentiment at the Pennsylvania ratifying convention.[371]

History prior to or contemporaneous with the document being construed.[372] To show that impeachment alone could not be deemed an adequate way of removing federal officers, John Vining of Delaware cited the notoriously drawn-out British impeachment of Warren Hastings.[373] Jackson referred to Lord Mansfield's reluctance to leave the Court of King's

---

who formed the constitution seem not inclined . . . .").

[363] *Id.* at 546.

[364] *Id.* at 578–79. In arguing that references to original understanding were almost absent from this debate, RAKOVE, *supra* note 2, at 349–50, mentions Baldwin's reference to the federal convention and the reading of *The Federalist*, but seems to have overlooked all of the references to the ratification proceedings noted above.

[365] *See, e.g.*, 1 ANNALS, *supra* note 2, at 392 (William L. Smith of South Carolina, citing state practice); *id.* at 534 (Alexander White of Virginia, citing state practices); *id.* at 545 (Richard Bland Lee, justifying separation of powers).

[366] 1 ANNALS, *supra* note 2, at 545 (Richard Bland Lee, referring to the influence of state constitutions and their political wisdom on the framers).

[367] *See supra* notes 99–109 and accompanying text.

[368] 1 ANNALS, *supra* note 2, at 534.

[369] *Cf. supra* note 113 and accompanying text.

[370] 1 ANNALS, *supra* note 2, at 545.

[371] *Id.* at 577–78.

[372] *Cf. supra* notes 107–13 and accompanying text.

[373] 1 ANNALS, *supra* note 2, at 388.

Bench and to contemporaneous political struggles in Sweden.[374] Similarly, White described the wartime conduct of a former governor of Virginia.[375]

4. *The Congressional Debate over the First National Bank*

The debate over the proposed national bank began much later than the Bill of Rights and Federal Officer debates—in February, 1791, shortly before the close of the First Congress. The bank controversy dealt with constitutional interpretation, for it centered on the question of whether the Constitution gave Congress authority to incorporate a bank. However, this debate is only weakly probative of original understanding,[376] since by the time it occurred all thirteen states had ratified the Constitution, and the Bill of Rights had been reported out of Congress and been approved by nine of the necessary ten state legislatures.[377] In other words, the constraints on the constitutional claims of the warring parties were less than they had been when Congress convened nearly two years earlier.

With need for public approval of the Constitution reduced, the participants could differ on the probative value of the federal and state conventions for purely political reasons. This was likely true of the three lawyer-cabinet members from whom President Washington sought opinions. Attorney General Edmund Randolph rejected as authoritative both the proceedings of the federal convention and of the state ratifying conventions.[378] However, he had good personal reason not to call attention to the two conventions, where the records showed his behavior to have been shifting and inconsistent.[379] Secretary of State Thomas Jefferson relied partly on proceedings at the federal convention, for they supported his case against the Bank.[380] Secretary of State Alexander Hamilton rejected evidence from

---

[374] *Id.* at 507.

[375] *Id.* at 537.

[376] *See supra* note 290 (explaining why evidence from the first session of the First Congress is more probative of ratifier understanding than evidence from later sessions of that Congress).

[377] *See* SCHWARTZ, *supra* note 2, at 1171–1203 (reproducing relevant documentation). *See especially id.* at 1201.

[378] Edmund Randolph, *Attorney General's Opinion No. 2*, *reprinted in* BANK HISTORY, *supra* note 2, at 89–90 (rejecting as evidence events at both the federal and state conventions).

[379] *See, e.g.*, Natelson, *Necessary and Proper*, *supra* note 2, at 271–72, 307–08, 311–12 (describing how Randolph, who presented the Virginia Plan to the federal convention and helped draft the Necessary and Proper Clause, then refused to sign the Constitution, then argued for it and for the Necessary and Proper Clause in the Virginia ratifying convention, and finally altered his position somewhat on that Clause).

[380] *Opinion of Thomas Jefferson, Secretary of State*, 1791, *reprinted in* BANK

the federal convention, but cited ratifier understanding, which tended to support his position for the Bank.[381] Members of Congress were mixed in their attitudes toward framer intent as well. John Vining (for the Bank) flatly denied that it was authoritative.[382] Madison (against the Bank) offered evidence of meaning from his recollection of the federal convention,[383] although the context makes it clear that he did not consider such evidence decisive.[384]

The striking fact about the Bank debate, though, is that despite the political differences, no member of Congress questioned the force of ratifier understanding. Madison appealed to that understanding for "the meaning of the parties to the instrument" and relied on "[c]ontemporary and concurrent expositions" as "reasonable evidence of the meaning of the parties."[385] He described pro-Constitution representations made during the state conventions as illustrative of the instrument's meaning:

HISTORY, *supra* note 2, at 91–92, *available at* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/amerdoc/bank-tj.htm (citing the rejection of an incorporation power by the federal convention).

[381] *Opinion of Alexander Hamilton on the Constitutionality of a National Bank*, 1791, *reprinted in* BANK HISTORY, *supra* note 2, at 95, 111, *available at* THE AVALON PROJECT AT YALE LAW SCHOOL, http://www.yale.edu/lawweb/avalon/amerdoc/bank-ah.htm. On ratifier understanding, Hamilton wrote:

> 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.

Opposing the use of framer intent, he wrote:

> [W]hatever 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 elect, more or less than was intended.

BANK HISTORY, *supra* note 2, at 101.

Professors Baade (Baade, *Fake Antique*, *supra* note 2, at 1526), Levy (LEVY, *supra* note 2, at 9), Powell (Powell, *Original Understanding*, *supra* note 2, at 915), and Rakove (RAKOVE, *supra* note 2, at 354) all cited Hamilton's rejection of framer intent, yet none of the four mentioned this endorsement of ratifier intent, even though they appeared in the same document.

[382] *See* 2 ANNALS, *supra* note 2, at 2007 (John Vining, denying the authority of the framers).

[383] *Id.* at 1945.

[384] Madison was trying only to demonstrate that his position on the issue had been reinforced by his recollection. *Accord*, RAKOVE, *supra* note 2, at 352.

[385] 2 ANNALS, *supra* note 2, at 1946.

> The 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.
>
> [Here he read sundry passages from the Debates of the Pennsylvania, Virginia, and North Carolina Conventions, showing the grounds on which the Constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents.][386]

Madison was joined by at least three other disputants, on both sides of the argument, apparently seeking the intent of the ratifiers by citing *The Federalist*.[387]

VI. CONCLUSION

The Founders' hermeneutic—how they expected the Constitution to be construed—rested on the text, of course, but also on the subjective understanding of the ratifiers. Where subjective understanding was not retrievable, the preferred substitute was original public meaning.

The founding generation inherited this view from Anglo-American jurisprudence, which treated "intent of the makers"—subjective intent, where recoverable—as the ultimate guide for statutory construction. Judges and lawyers sought that intent from the text and from a wide range of extrinsic evidence, including legislative history. The records from the Ratification Era richly confirm American acceptance of this approach to constitutional interpretation.

---

[386] *Id.* at 1951.

[387] *Id.* at 1941 (reading from *The Federalist* by James Jackson, a bank opponent), 1977 (reading from *The Federalist* by Elias Boudinot, a bank proponent) and 2002 (reporting claim of Elbridge Gerry, a bank opponent, that Hamilton was dissembling in the same).