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Constitutional Interpretation and History: New Originalism or Eclecticism?

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ABSTRACT

The goal of originalism has always been purity. Originalists claim that their methods cleanse constitutional interpretation of politics, discretion, and indeterminacy. The key to attaining purity is history. Originalist methods supposedly discern in history a fixed constitutional meaning. Many originalists now claim that the most advanced method—the approach that reveals the purest constitutional meaning—is reasonable-person originalism. These new originalists ask the following question: When the Constitution was adopted, how would a hypothetical reasonable person have understood the text? This Article examines historical evidence from the early decades of nationhood to achieve two goals. First, it demonstrates that reasonable-person originalism is incoherent at its historical core. As an interpretive method, originalism cannot achieve its stated goal: to identify fixed and objective constitutional meanings. Contrary to originalist claims, historical research uncovers contingencies and contexts. More specifically, the evidence shows that reasonable-person originalism is historically unjustified. Early in the nation's history, neither lawyers nor laypersons would have suggested that constitutional interpretation should be based on the views of a hypothetical reasonable person. Second, the Article demonstrates that the historical evidence instead supports an alternative conception of constitutional interpretation. In the early decades, numerous Americans—including framers, Supreme Court justices, and constitutional scholars—used an eclectic or pluralist approach to constitutional interpretation. Depending on the case, an eclectic interpreter considered a shifting variety of factors, including original meaning, framers' intentions, practical consequences, and judicial precedents.

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INTRODUCTION

The goal of originalism has always been purity. Originalists claim their methods cleanse constitutional interpretation of politics, discretion, and indeterminacy.[1] The key to attaining purity is history. Originalist methods supposedly discern in history a fixed constitutional meaning.[2] And when judges and scholars can discern a fixed meaning, then constitutional interpretation becomes objective, possibly even mechanical.[3]

1. *Accord* Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 701 (2009); *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–52 (1994).

2. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004). Lawrence Solum refers approvingly to this key point as "the fixation thesis." Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011).

3. Randy Barnett writes:

> "[N]ew originalism" shares with the originalism of the 1980s—and all other forms of originalism—the core propositions that (a) the textual meaning of a written constitution is fixed at the time its language is enacted, and (b) this fixed meaning should remain the same until it is properly changed. The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials.

Advances in originalist theory, therefore, demand greater purity.[4] For instance, critics emphasized that early originalist method ('old originalism'), which focused on framers' intentions, engendered ambiguity and complexity because the various framers aimed for diverse goals.[5] Consequently, 'new originalists' claimed that a focus on original public meaning achieved greater purity by overcoming such problems. Rather than concentrating on the framers, constitutional interpreters were to discern how the ratifiers and the wider public understood the constitutional text.[6] Yet, critics soon demonstrated that this emphasis on original public meaning also raised numerous problematic questions.[7] For instance, what if the founding-era public was largely ignorant of the Constitution and its meaning?[8] What if eligible voters at the time were apathetic?[9] Such difficulties led to a further refinement of originalist method. Many originalists now claim that the most advanced method—the approach that reveals the purest constitutional meaning—is reasonable-person originalism. These new originalists ask the following question: How would a hypothetical reasonable person, when the Constitution was adopted, have understood the text?[10]

Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009).

4. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003) (stating that originalism is "working itself pure"); *see generally* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (celebrating advances in and a growing consensus around originalist research).

5. For examples of early originalism, see generally RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

6. ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1998); ROBERT BORK, THE TEMPTING OF AMERICA 143–44 (1990).

7. Robert W. Bennett, *Originalism and the Living American Constitution*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 78, 104–05 (2011) (identifying numerous questions).

8. *See* Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625 (2012).

9. Only approximately four percent of the population voted in the ratification elections. LESLIE PAUL THIELE, THINKING POLITICS 87 (1997).

10. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621–22 (1999); *see also* Kesavan & Paulsen, *supra* note 4, at 1132, 1138; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009) [hereinafter *Methods*]; John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007) [hereinafter *Principles*]. While Solum does not expressly invoke a

In the words of Gary Lawson and Guy Seidman, "an all-star roster of originalist scholars" have "endorsed reliance upon the reasonable person in constitutional interpretation."[11]

New originalists have justified their interpretive methods with four main rationales.[12] First, they argue that originalism has no competition. There is no legitimate alternative method of constitutional interpretation.[13] And as Justice Scalia put it: "You can't beat somebody with nobody."[14] Second, they argue that the writtenness of the Constitution necessitates originalism. The Constitution is written law and should be interpreted accordingly.[15] Third, they argue that popular sovereignty requires originalism.[16] Only originalism, Scalia insists, is "compatible with the nature and purpose of a Constitution in a democratic system."[17] Finally, they argue that history demonstrates that new originalism is grounded in the framing era. In his book on the history of originalism, Johnathan O'Neill stated that "[t]he originalist approach was present in American constitutional law and thought since the country's founding."[18]

Not all reasonable-person originalists articulate the historical justification in precisely the same way. Randy Barnett draws extensively

reasonable person, he comes close: "So when we read the Constitution of 1789, our question should be, 'How would an *ordinary American citizen* fluent in English as spoken in the late eighteenth century have understood the words and phrases that make up its clauses?'" Solum, *supra* note 2, at 3 (emphasis added). For more extensive narrative histories of originalism, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 720–24 (2011).

11. Lawson & Seidman, *supra* note 10, at 48–49 n.11.

12. In this paragraph, I cite some new originalists who are not necessarily reasonable-person originalists.

13. Barnett, *supra* note 10, at 617; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989).

14. Scalia, *supra* note 13, at 855.

15. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303–04 (2007); Barnett, *supra* note 10, at 629–36; Calabresi & Prakash, *supra* note 1, at 551–52.

16. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 154 (1999); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34–35 (2000).

17. Scalia, *supra* note 13, at 862.

18. O'NEILL, *supra* note 10, at 5. O'Neill argued, though, that "by the 1930s [originalist] conceptions of constitutional authority and legitimate interpretation had been marginalized." *Id.*; *see* Matthew J. Franck, *The Original Originalist*, NAT'L REVIEW, Jan. 28, 2013, at 28, 30 (maintaining that Robert Bork's originalism was the accepted method of constitutional interpretation from the founding until the 1930s).

from James Madison to show the errors of old originalism: Madison and the other framers did not believe their own subjective intentions were relevant to constitutional meaning. Yet, Barnett adds, Madison maintained that the "true meaning" of the Constitution was its "public meaning," as determined by "the established rules of interpretation."[19] Meanwhile, Lawson and Seidman provide a more protracted historical justification.[20] They begin by describing the Constitution as "an instruction manual for a form of government."[21] Given this premise, one must interpret the Constitution in accord with originalism, they argue, because it supposedly provides the only reasonable method for following constitutional instructions.[22] Even so, one must still determine which originalist method to follow: What type of originalism harmonizes best with a lawyer's (rather than a historian's) use of history? The historical materials demonstrate that many people contributed to the framing and ratification of the Constitution. If a constitutional interpreter attempts to discern the meaning of the text by examining the thoughts or intentions of all these people, or even a small segment of them—such as the framers or the delegates to the state ratifying conventions—then the interpreter inevitably becomes entangled in the brambles of historical ambiguity.[23] A historian might relish such ambiguity, but a lawyer (or judge) needs to follow the constitutional instructions. Thus, Lawson and Seidman conclude: the "[h]istorical facts" show that the only originalist method a lawyer can use to avoid these brambles is reasonable-person originalism.[24] "The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution."[25]

19. Barnett, *supra* note 10, at 625–26. Barnett was drawing from an earlier article: H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). To be clear, Barnett did not rely on history as the primary justification for new originalism. Barnett, *supra* note 10, at 617–48. Barnett, though, does repeat this historical argument in his book. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 94–100 (2004).

20. Lawson & Seidman, *supra* note 10, at 51–70.

21. *Id.* at 53.

22. *Id.* at 51–53.

23. *Id.* at 61–67.

24. *Id.* at 61.

25. *Id.* at 48. "[T]he touchstone is . . . the hypothetical understandings of a reasonable person [from 1788] who is artificially constructed by lawyers." *Id.*

Historical inquiry, it might be said, is doubly important to reasonable-person originalists, as it is both the crux of the interpretive method and one of its key justifications.[26] Thus, this Article examines historical evidence from the early decades of nationhood with two goals in mind. First, the Article demonstrates that reasonable-person originalism is incoherent at its historical core. As an interpretive method, originalism cannot achieve its stated goal: to identify fixed and objective constitutional meanings. Contrary to originalist claims, historical research uncovers contingencies and contexts.[27] More specifically, the evidence shows that reasonable-person originalism is historically unjustified. Early in the nation's history, neither lawyers nor laypersons would have suggested that constitutional interpretation should be based on the views of a hypothetical reasonable person. Second, the Article shows that the historical evidence supports an alternative conception of constitutional interpretation. In the early decades, numerous Americans—including framers, Supreme Court justices, and constitutional scholars—used an eclectic or pluralist approach to constitutional interpretation, an approach that some scholars might categorize as a flexible pragmatism.[28] Depending on the case, an eclectic interpreter considered a shifting variety of factors, including original meaning, framers' intentions, practical consequences, judicial precedents, and so forth. To be clear, eclecticism is closely related to what is currently called "living constitutionalism," which emphasizes that the meaning of the Constitution "evolves, changes over time, and adapts to new circumstances, without being formally amended."[29] That

26. The same is true for some other originalists as well. Keith Whittington happily reports that, with the emergence of new originalism, constitutional controversies now "are primarily *historical* debates, which is where originalists claimed the constitutional argument should be." Whittington, *supra* note 2, at 608 (emphasis in original). Many constitutional issues thus revolve around "detailed historical research." *Id.*

27. History inevitably shows how individuals reacted to their political, social, and cultural surroundings and could have acted differently, especially if their contextual environments had shifted. JACK N. RAKOVE, ORIGINAL MEANINGS 9–10 (1996); Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. BOOKS, Feb. 18, 1988, at 33.

28. *E.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY (2010); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). "Pragmatist constitutional adjudication is eclectic and uncertain: it takes into account multiple sources, and rarely produces an unequivocal answer." *Id.* at 29.

29. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010); *see* Bennett, *supra* note 7 (defending living constitutionalism).

is, an eclectic interpretive approach is likely to generate changing or variable constitutional understandings. My historical argument, however, focuses on showing that early Americans used multiple interpretive approaches—hence, eclecticism—rather than showing that they believed in the evolution of constitutional meaning.

To facilitate attaining its two goals, this Article focuses on the widely-cited coauthors, John O. McGinnis and Michael B. Rappaport, who have unequivocally adopted reasonable-person originalism.[30] "[T]he focus of originalism," they assert, "should be on how a reasonable person at the time of the Constitution's adoption would have understood its words and thought they should be interpreted."[31] They sharply distinguish reasonable-person originalism from other originalist approaches while also defending it vigorously.[32] Moreover, their primary defense of originalism is historical. More so than other theorists, McGinnis and Rappaport dig deeply into the historical materials in their effort to justify reasonable-person originalism.[33]

30. *See supra* note 10 (identifying reasonable-person originalists). For examples of citations and discussions of McGinnis and Rappaport, see Barnett, *supra* note 2, at 71 n.14; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 454–55 (2007)Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 886–87 (2008);Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1241 n.1 (2011).

31. *Principles*, *supra* note 10, at 374.

32. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) [hereinafter *Good*]; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008) [hereinafter *Pragmatic*] (McGinnis and Rappaport published an earlier version of this essay: John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. COLLOQUY 68 (2007)); *Methods*, *supra* note 10; *Principles*, *supra* note 10. McGinnis and Rappaport have also published articles explaining the problematic relationship between originalism and precedent. John O. McGinnis & Michael B. Rappaport, *Originalism and Precedent*, 34 HARV. J.L. & PUB. POL'Y 121 (2011) (shorter version of an earlier article: John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009)).

33. Gary L. McDowell, perhaps, has articulated the most comprehensive historical justification for originalism. GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (2010). But McDowell elides the difference between old and new originalism. Throughout much of the book, he emphasizes the intentions of the framers, see, e.g., *id*. at 312 (discussing Marshall and framers' intentions), but then at the end, he claims to have been discussing original public meaning. *Id*. at 324, 331.

Finally, it is worth highlighting that the Supreme Court has granted certiorari in the controversial recess appointments case, *NLRB v. Canning*. 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (June 24, 2013) (No. 12-1281). In the lower court decision, the D.C. Circuit followed new originalism, repeatedly cited one of Rappaport's articles, and held uncon-

Part I of this Article elaborates reasonable-person originalism. It first explains how McGinnis and Rappaport use history to justify and describe their brand of originalism, and then explains why they believe a reasonable-person approach advances beyond other forms of originalism. Part II criticizes reasonable-person originalism by showing that it must fail as a method of constitutional interpretation. Part III, the heart of the Article, demonstrates that reasonable-person originalism is, quite simply, ahistorical. Drawing on a wide range of historical sources, from newspapers to legal treatises, this Part shows that the reasonable person (or reasonable man) was not a commonly invoked legal standard during the founding era. These sources further reveal that early constitutional interpreters were eclectic rather than narrowly originalist. One cannot fairly conclude that the founders and other early Americans were reasonable-person originalists (or any other type of originalists) without ignoring large chunks of historical evidence. Part IV is a brief conclusion.

I. ELABORATING REASONABLE-PERSON ORIGINALISM

A. Justification

McGinnis and Rappaport justify reasonable-person originalism with a complex four-step argument that intertwines history with pragmatism. They summarize their argument as follows:

> First, entrenched constitutional provisions that are desirable should take priority over ordinary legislation, because such entrenchments operate to establish a beneficial framework of government and rights. Second, appropriate supermajority rules tend to produce desirable entrenchments by generating constitutional provisions that are widely supported and are likely to produce net benefits. Third, appropriate supermajority rules have generally governed the passage of the Constitution and its amendments. Finally, this argument for the desirability of the Constitution requires that judges interpret the document based only on its original meaning because those at the

stitutional President Obama's recess appointments to the National Labor Relations Board. *Canning v. NLRB*, 705 F.3d 490 at 503, 515 (D.C. Cir. 2013) (citing Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005)).

> time of the enactment used only that meaning in deciding whether to adopt the Constitution.[34]

The first three steps of this argument explain the desirability of our Constitution from a pragmatic and historical standpoint. McGinnis and Rappaport justify constitutional fidelity. The crux of their position is that supermajority enactment requirements are apt to produce pragmatically beneficial legislative-constitutional rules—that is, a "good constitution,"[35] likely to promote "the welfare of the people."[36] Thus, the historical ratification of the original Constitution and its subsequent amendments pursuant to such supermajority requirements as imposed by Articles VII and V has endowed Americans with a Constitution worthy of admiration and devotion.[37] In other words, history and pragmatism together point toward fidelity. "The essence of our argument,"[38] McGinnis and Rappaport write, "is that the strict supermajoritarian rules that governed the Constitution's enactment make it socially desirable."[39] Constitutional provisions, therefore, should take priority over ordinary legislative enactments, which are adopted pursuant to "mere majoritarian" requirements.[40]

34. *Principles*, *supra* note 10, at 374; *see Pragmatic*, *supra* note 32, at 919–20 (reiterating these four points).

35. *Good*, *supra* note 32, at 1698.

36. *Id.* McGinnis and Rappaport have defended their emphasis on the importance of supermajoritarian adoption requirements in additional essays. *E.g.*, John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67 (2008); John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 102 NW. U. L. REV. COLLOQUY 18 (2007) (replying to Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Debate Between Originalists and Non-originalists*, 101 NW. U. L. REV. COLLOQUY 113 (2007)); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

37. U.S. CONST. art. V (establishing official amendment process); U.S. CONST. art. VII (establishing initial ratification process); *Good*, *supra* note 32, at 1720–33. McGinnis and Rappaport recognize an obvious criticism of their argument: because women and African Americans were excluded from democratic participation during the original ratification (and much of the nation's subsequent history), the Constitution was not in fact adopted pursuant to a supermajoritarian process. They respond initially (in my opinion, inadequately) by arguing largely that the eventual grants of suffrage to women and African Americans overcome this potential obstacle to their originalist argument. *Pragmatic*, *supra* note 32, at 932–35. They subsequently expanded their response by arguing that, given these defects in the original supermajoritarian processes, originalism still presents the best interpretive approach. *Good*, *supra* note 32, at 1753–64.

38. *Pragmatic*, *supra* note 32, at 920.

39. *Id.*

40. *Id.* McGinnis and Rappaport's argument, in this regard, overlaps with Bruce Ackerman's dualist constitutional theory, distinguishing ordinary legislative actions from constitutional

Significantly, the fourth step of McGinnis and Rappaport's argument is the only one focused on constitutional interpretation. It is primarily historical, though linked to their (historical and pragmatic) argument for constitutional fidelity, embodied in the first three argumentative steps. McGinnis and Rappaport emphasize that Americans chose to adopt the Constitution and its amendments pursuant to the required supermajority processes in light of the contemporary meanings of the various constitutional provisions—that is, in light of the respective constitutional meanings at the times of ratification. Because commonly accepted contemporary (or original) public meaning prompted ratification, McGinnis and Rappaport reason, judges should interpret the Constitution in accord with that original meaning.[41]

This conclusion leads to an additional crucial question: How would Americans, at the various times of ratification, but especially during the original founding era, have discerned the respective constitutional meanings? McGinnis and Rappaport answer: Americans would interpret "the [constitutional] provisions based on commonly accepted meanings and the interpretive rules of the time."[42] Some constitutional provisions would have been clear and some ambiguous, but either way, Americans would have interpreted them—and would have assumed they would be interpreted in the future—"based on familiar interpretative rules."[43] Consequently, McGinnis and Rappaport maintain that appropriate rules for constitutional interpretation must be discovered through historical research. Only history can reveal the original interpretive methods that Americans would have used during ratification. And the historical evidence, according to McGinnis and Rappaport, reveals that a reasonable American during the founding era would have interpreted the Constitution pursuant to widely accepted *legal* interpretive rules. A reasonable or "competent speaker of the language,"[44] they explain, would have given "legal meaning priority over

moments. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–10 (1991). Yet, contrary to Ackerman, McGinnis, and Rappaport strongly reject the possibility of amending the Constitution outside of the supermajoritarian process imposed by Article V. *Good*, *supra* note 32, at 1741–48.

41. *Pragmatic*, *supra* note 32, at 925–26.

42. *Id.* at 925

43. *Id.* at 926.

44. *Methods*, *supra* note 10, at 765.

ordinary meaning"[45] when interpreting the Constitution because, after all, the Constitution was a legal document.[46] Moreover, the legal interpretive rules "were broadly originalist in the modern sense of the term."[47] McGinnis and Rappaport write: "Based on our review of the different types of [historical] evidence, we suggest that all of these roads likely lead to Rome. In other words, the bulk of the evidence points to some form of originalism."[48]

In sum, McGinnis and Rappaport conclude that constitutional interpretation should manifest the views of a reasonable person applying the original interpretive methods (contemporaneous with ratification). Thus, a complete though cumbersome descriptive label for McGinnis and Rappaport's interpretive approach would be 'original-methods reasonable-person originalism.' To avoid such an ungainly appellation, however, I will continue to call it 'reasonable-person originalism.'[49] Regardless of the label, McGinnis and Rappaport's originalism is historical through and through. First, McGinnis and Rappaport insist that history must justify any legitimate interpretive approach. "Even if a particular interpretive theory could be shown to be the best philosophical account of meaning," they emphasize, "that account would not show that this particular theory should be employed. If that philosophical approach was not followed by the enactors, then employing it to interpret the Constitution will produce a different meaning than the one the enactors expected."[50] To be sure, "policy or philosophical considerations" might help one appreciate the advantages and disadvantages of competing interpretive approaches, but such considerations cannot be determinative.[51] Only history can reveal "the correct approach" to constitutional interpretation.[52] Second, McGinnis and Rappaport insist not only that history must justify the general inter-

45. *Id.*

46. *Id.*

47. *Id.* at 786.

48. *Id.* at 788; *see id.* at 769–70 (elaborating the historical evidence).

49. McGinnis and Rappaport sometimes explicitly refer to their approach as "original methods originalism." *E.g.*, *Good*, *supra* note 32, at 1696; *Methods*, *supra* note 10, at 751.

50. *Methods*, *supra* note 10, at 787.

51. *Id.*

52. *Id.*

pretive approach—that is, originalism—but also that history must reveal the precise contours of that method. They emphasize: "The content of the original interpretive rules depends on historical facts: what were the interpretive rules deemed applicable by the enactors?"[53] And in the end, this historical focus on the original interpretive rules leads McGinnis and Rappaport to their specific conclusion. Reasonable-person originalism is the only legitimate method for interpreting the Constitution.

B. An Advance

The thrust of McGinnis and Rappaport's argument is that history justifies using reasonable-person originalism as well as specifying its precise contours as an interpretive method. But they also underscore that reasonable-person originalism represents an advance over other originalist methods. When old originalism, focused on the framers' intentions, first emerged, its jurisprudential appeal arose from its claim to objectivity.[54] Old originalism appeared to overcome the complexities and ambiguities that crippled various nonoriginalist methods, which emphasized sources as diverse as moral principles, societal consensus, and natural law.[55] Yet, critics soon demonstrated that old originalism, too, led to indeterminacy. A multimember group such as the framers, critics pointed out, does not have a stable and determinate intention.[56] An individual might have a single discernible intent, but a group does not. Group members are likely to entertain varied intentions. Thus, soon after ratification Alexander Hamilton argued that the Constitution imbued Congress with the power to charter a national bank, while James Madison disagreed.[57]

53. *Good*, *supra* note 32, at 1735.

54. *E.g.*, Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

55. For a summary of nonoriginalist methods and an explanation of their inevitable indeterminacy, see JOHN HART ELY, DEMOCRACY AND DISTRUST 43–72 (1980).

56. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–18 (1980).

57. *Compare* ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY OF THE BANK (Feb. 23, 1791), *reprinted in* GREAT ISSUES IN AMERICAN HISTORY 164 (Richard Hofstadter ed., 1958) [hereinafter HAMILTON, OPINION] *with* JAMES MADISON, SPEECH IN CONGRESS OPPOSING THE NATIONAL BANK (Feb. 2, 1791), *reprinted in* JAMES MADISON: WRITINGS 480 (Library of America 1999) [hereinafter MADISON, SPEECH].

Difficulties such as these provoked originalists to move on to new originalism. Constitutional interpreters, according to new originalists, should focus on original public meaning rather than original intent. Framers' intent might be indeterminate, but original meaning could nonetheless provide an objective ground for constitutional interpretation.[58] New originalists thus believed they had laid the indeterminacy problem to rest. Yet, once these new originalists began to investigate the public meanings of particular provisions more deeply, they encountered a familiar problem. Original public meaning might be based on how delegates to the various state ratifying conventions had understood the constitutional text, or it might be based on how the people who voted for those delegates had understood the text. Either way, if original public meaning equated with actual (original) understanding—either that of the ratifiers or that of the people—then the indeterminacy problem once again reared its ugly head, like a zombie in a Hollywood movie, but now there were many more zombies rampaging around. Thirty-nine framers signed the original Constitution.[59] The number of ratification delegates was far larger: 1,649 delegates attended the state ratifying conventions, with 1,072 voting in favor of ratification.[60] And, of course, the number of people voting in the ratification elections (choosing the delegates) was far larger still. How could one discern a single coherent original public meaning when historical evidence might demonstrate that different ratifiers (or different people) had understood the Constitution differently?[61] Actual original understanding proved just as problematic as framers' intentions.

Unsurprisingly, then, advocates for reasonable-person originalism, including McGinnis and Rappaport, emphasize that a reasonable-person standard overcomes the indeterminacy problem.[62] Instead of inquiring into the actual understandings of the ratifiers or the people, a

58. *See* Colby, *supra* note 10, at 720–21 (describing the development of originalism).

59. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 1, 586–90 (Max Farrand ed., 1966 reprint of 1937 rev. ed.) [hereinafter *Records*].

60. *See* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 467–69 (listing votes at the state ratifying conventions).

61. *Cf.*, Walter Benn Michaels, *A Defense of Old Originalism*. 31 W. NEW ENG. L. REV. 21, 23 (2009) (criticizing new originalism).

62. *See* Colby, *supra* note 10, at 722–24 (describing the movement to reasonable-person originalism).

constitutional interpreter conceptualizes how a reasonable person, at the time of ratification, would have understood the Constitution.[63] Unlike a diverse group of people, such as the ratifiers, a reasonable person can be hypothesized to have a single understanding for any particular constitutional provision, thus revealing a coherent and determinate original meaning. McGinnis and Rappaport add that reasonable-person originalism improves on other forms of originalism in another, though related, way. Some new originalists, such as Keith Whittington and Jack Balkin, argue that ambiguous constitutional provisions allow judges (or other governmental officials) to exit constitutional interpretation and to engage in an alternative activity: constitutional construction.[64] As typically posited, construction is more creative and open-ended than interpretation because it is untethered from the usual constraining rules of interpretation. Balkin, for instance, insists that he is a new originalist, yet he finds that construction leads to the constitutional protection of a woman's right to choose whether to abort.[65]

McGinnis and Rappaport argue that their reasonable-person originalism obviates any need to exit from constitutional interpretation.[66] Whittington, Balkin, and other constructionists enter their construction sites because they see no other legitimate means for resolving constitutional ambiguities.[67] As McGinnis and Rappaport explain, constructionists believe that, in some cases, "original meaning runs out"[68]—some constitutional provisions are irredeemably "ambiguous or vague"[69]—and "therefore the judge (or other official) must decide the matter based on nonoriginalist considerations."[70] A judge, in such a case, is encouraged to decide based on non-legal "normative standards rather than legal methods."[71]

63. Lawson & Seidman, *supra* note 10, at 61–67; *Methods*, *supra* note 10, at 758-65.

64. JACK M. BALKIN, LIVING ORIGINALISM 3–6, 256–68 (2011); WHITTINGTON, *supra* note 16, at 5–11.

65. Balkin, *supra* note 15.

66. *Methods*, *supra* note 10, at 752–53, 772–76.

67. *E.g.*, WHITTINGTON, *supra* note 16, at 5, 206–07.

68. *Methods*, *supra* note 10, at 773.

69. *Id.* at 772.

70. *Id.* at 773.

71. *Id.*

McGinnis and Rappaport repudiate this view and the distinction between interpretation and construction for two reasons. First, a judge who follows reasonable-person originalism, McGinnis and Rappaport argue, never needs to decide cases pursuant to non-legal or "extraconstitutional norms."[72] Why so? Because the reasonable-person interpretive standard can resolve all textual ambiguities. "[W]hen constitutional language appears ambiguous or vague,"[73] McGinnis and Rappaport write, then the originalist judge should "choose the most probable interpretation available with the aid of interpretive rules—norms internal to the enterprise of originalism."[74] Reasonable-person originalist method, in other words, can lay bare a satisfactorily fixed and objective constitutional meaning in all cases. Thus, just as reasonable-person originalism can overcome the indeterminacy that infected framers'-intent originalism and actual-understanding originalism, reasonable-person originalism can also erase any potential constitutional ambiguities that might otherwise engender construction. Second, McGinnis and Rappaport reject constitutional construction because it is not historically justified. "[A]dvocates of construction have not provided evidence that anyone embraced construction at the time of the Constitution's enactment, and we have been able to find none."[75] McGinnis and Rappaport had declared that they could not support any interpretive theory that was not grounded in the historical materials—and apparently, they meant it.[76] Ultimately, their historical research always leads them back to reasonable-person originalism, which they therefore deem the only legitimate interpretive method.[77]

72. *Id.* Deciding pursuant to *legal* rules or standards is a virtue in itself, according to reasonable-person originalists. Lawson and Seidman argue that the "reasonable person" is a legal construct that is thoroughly familiar to lawyers and judges. Thus, reasonable-person originalism reestablishes lawyers and judges rather than historians as the preeminent experts in constitutional interpretation. Lawson & Seidman, *supra* note 10, at 48–51, 79–80.

73. *Methods*, *supra* note 10, at 773.

74. *Id.*

75. *Id.*

76. *Id.* at 787.

77. *Id.* at 773.

II. REASONABLE-PERSON ORIGINALISM AS INTERPRETIVE METHOD: THE COMPLEXITY OF HISTORY

As McGinnis and Rappaport depict reasonable-person originalism, it has two great virtues. First, as an interpretive method, it eradicates complexity and indeterminacy. The reasonable-person standard cuts through the convolutions that riddle other interpretive approaches, whether originalist or otherwise. Second, reasonable-person originalism is historically grounded in the adoption of the original Constitution and its amendments. This Part critiques the methodological claim. The next Part focuses on the historical evidence.

All forms of originalism appeal to history to resolve constitutional ambiguities. Instead of more present-minded and apparently open-ended interpretive approaches—which originalists typically dump together in a sack called 'nonoriginalism'—originalists claim that history, in some shape or form, can reveal a fixed and objective constitutional meaning. Constitutional interpretation is purified. Politics and indeterminacy are banished from judicial decision-making. In this regard, reasonable-person originalism is no different from other originalisms.[78] The reasonable person of the founding era, discovered through historical research, will tell us, today, what the Constitution means—or so McGinnis and Rappaport (and other reasonable-person originalists) profess.

A rather large obstacle, however, blocks reasonable-person originalism—an obstacle that McGinnis and Rappaport (and other originalists) conveniently ignore. Namely, historical thinking leads to complexity rather than to univocal and determinate factual nuggets.[79] When a historian confronts a textual document, he or she does not seek to understand its surface meaning because, from the historian's standpoint, any such surface meaning is either insignificant or nonexistent. Texts, to historians, "are slippery, cagey, and protean, reflecting the uncertainty and disingenuity of the real world."[80] A text is never

78. *See* Barnett, *supra* note 3, at 660 (describing core propositions of all originalisms).

79. Gordon S. Wood, *Comment*, *in* Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49 (Amy Gutmann Ed., 1997).

80. SAM WINEBURG, HISTORICAL THINKING AND OTHER UNNATURAL ACTS 66 (2001). For a historian's critique of the new originalism, see Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*,

merely or *simply* what is "set down on paper."[81] Thus, when examining a text, a historian seeks to appreciate and reconstruct its surrounding "social context."[82] If successful, the historian can begin to glimpse the subtexts, the meanings hidden below the surface of the document—meanings that often are far more important than any superficial ones floating on the surface. A historian who ignores subtext is likely to skew or warp the significance of a document.

From the historian's standpoint, then, reasonable-person originalists attempt to use "history without historicism."[83] Historicism stresses that all human actions, thoughts, and events occur in a context of contingent and changing social, cultural, and political arrangements.[84] The contexts and the contingencies engender, for a historian, the subtexts, the layers of underlying meaning. But originalists disregard context, contingency, and subtext. Originalists, that is, use history without a "historicist sensibility" or historical understanding.[85] They want to find a fixed objective meaning when a historical text, such as the Constitution—especially, the Constitution, which forged a nation in a political crucible—is roiling with subtexts. Originalists resemble naive students rather than historians. While historians seek "to engage" with a text, situating it "in a social world" and digging for subtexts, students instead view texts more simply, as "serving as bearers of information."[86] For instance, most historians consider the source of a text—who said or wrote it—to be crucial, a marker to locate early in the journey toward textual understanding. But for a student, the source is usually, at

23 YALE J.L. & HUMAN. 295 (2011). For a historian's explanation of the many difficulties confronting even the best historians, *see* DAVID HACKETT FISCHER, HISTORIANS' FALLACIES (1970).

81. WINEBURG, *supra* note 80, at 66–67; *see* Cornell, *supra* note 80, at 299 n.18 (explaining "that texts are complex historical constructions, not magic mirrors into the past").

82. WINEBURG, *supra* note 80, at 67.

83. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 (2008); *see* Cornell, *supra* note 80, at 334–37 (criticizing the historical work of new originalists).

84. G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 506 (2002); Wood, *supra* note 27.

85. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 6 (1991); *see* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 107–18 (2013) (summarizing historians' criticisms of originalism).

86. WINEBURG, *supra* note 80, at 76.

most, an afterthought at the end of the journey, a mere final fact to mention about a text.[87]

McGinnis and Rappaport act as if they can extract a semantic meaning from the Constitution regardless of the political contexts of the framing and ratification, regardless of the particular political views of the various speakers and writers. Their means of extraction is the reasonable person: In McGinnis and Rappaport's hands, the reasonable person supposedly filters out all the contexts and contingencies, all the complexities and ambiguities, leaving the text with a raw and accessible objective meaning. Yet, at the close of the constitutional convention, Benjamin Franklin emphasized that the proposed Constitution was thoroughly political. "[W]hen you assemble a number of men to have the advantage of their joint wisdom," he said,[88] "you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected?"[89]

Given this, one should recognize that many of the framers—the delegates to the Philadelphia (constitutional) convention—were not necessarily the most esteemed political leaders or intellectuals in their respective states. When Thomas Jefferson described the named delegates as "an assembly of demi-gods,"[90] he was being either hyperbolic or overly influenced by the atypical Virginia delegation (which included James Madison, George Mason, George Wythe, and the iconic George Washington).[91] Other observers more reasonably described the collection of delegates as a somewhat average cross-section "of ability, integrity, and patriotism."[92] Many appointments to the state delegations occurred because of convenience when, for instance, more desirable or accomplished individuals were unavailable or otherwise declined to participate, sometimes due to skepticism about the political

87. *Id.* at 76–77.

88. Benjamin Franklin, *Speech at the Conclusion of the Constitutional Convention* (Sept. 17, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 3, 4 (Bernard Bailyn ed., 1993).

89. *Id.*

90. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 39 (1913) (quoting Jefferson).

91. *Id.* at 14–18.

92. *Id.* at 40.

goals.[93] Was "the sole and express purpose" of the Philadelphia convention truly to amend the Articles of Confederation and retain a confederacy of strong state governments—as Congress had resolved[94]—or was it instead to scrap the Articles and replace it with a new constitutional document that would institute a powerful central government? When asked why he had refused to join the Philadelphia convention, Patrick Henry declared, "I smelt a Rat."[95]

Even so, in the end, Franklin fully endorsed the final Philadelphia document not because it was perfect; he explicitly confessed that he did "not entirely approve" of it.[96] Rather, Franklin concluded that, in his view of the current political circumstances, first, a new constitution was necessary, and second, the proposed document was likely the best that could be attained.[97] If anything, then, Franklin's observations seem to caution against efforts to distill a pure semantic meaning from the constitutional text, as if the politics could be extracted from its content. Indeed, during the ensuing debates over ratification, when some Antifederalists called for a second convention—one that might produce a better constitutional document—Federalists resisted partly because they knew the proposed document had arisen from numerous hard-fought political compromises. The Federalists worried that the political alignments that had finally produced the Constitution might not be replicated at a second convention.[98]

When it comes to history and politics, though, McGinnis and Rappaport want to have their cake and eat it, too (or they want their history without the historicism).[99] They want to claim that their reasonable-person originalism is historically grounded. From their vantage, it is historically justified and specified because the evidence supposedly shows that, during the founding era, public meaning would have been discerned through such an interpretive method. Yet, McGinnis and

93. *Id.* at 14–41.

94. *Resolution of Congress* (Feb. 21, 1787) *reprinted in Records*, *supra* note 59, at 13, 14.

95. FARRAND, *supra* note 90, at 15 (quoting Henry).

96. Franklin, *supra* note 88, at 3.

97. *Id.* at 3–5.

98. PAULINE MAIER, RATIFICATION 67–68 (2010).

99. *See* Colby, *supra* note 10, at 715 (arguing that new originalists, in general, want "to have their cake and eat it too").

Rappaport also want to invoke the reasonable person as a legal standard that filters out the messy historical contexts and leaves only the pure semantic constitutional meaning. Thus, McGinnis and Rappaport maintain that judges, by applying reasonable-person originalist methods, can purge discretion and politics from constitutional decision making.

But as the historian David Fischer has explained, "historical truths are never pure, and rarely simple."[100] Specifically, what constitutes reasonableness—or the viewpoint of a reasonable person—is not a timeless and universal principle, but rather is the product of an array of specific contemporary circumstances.[101] If one truly wanted to construct a reasonable (or typical) person from the founding era, then presumably one would start digging into evidence about numerous actual people from that epoch.[102] How did people relate to and interact with others? With family members? With strangers? How did people work? Were they subsistence farmers or involved in commercial transactions? How were they educated? Were they literate? How important were religious beliefs? How about gender and race? Should the researcher limit the investigation to white Protestant propertied males because they were the primary voters? With so many variables—and there are many others—the assiduous researcher would probably conclude that founding-era people were too diverse to be reduced into a hypothetical reasonable person. Any construct of a single reasonable person would represent a gross and misleading oversimplification. But suppose the researcher decided that all these variables are irrelevant. All that matters is how a reasonable person from the founding era understood legal documents. Nonetheless, the researcher would still need to dig into evidence about how people from that era actually understood legal documents. Any statements of ostensibly abstract interpretive rules, wherever found (for instance, in judicial opinions, in legal

100. FISCHER, *supra* note 80, at 40.

101. *See* Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY & THEORY 3, 4 (1969) (rejecting "the claim that the text itself should form the self-sufficient object of inquiry and understanding").

102. Even Solum, who advocates for the new originalist "fixation thesis," SOLUM, *supra* note 2, at 4, acknowledges that "the best evidence [of conventional semantic meanings] would be the outcome of [a] large-scale empirical investigation of the ways that words and phrases were used in ordinary written and spoken English." *Id.* at 10.

treatises, in legislative declarations, or in the debates over constitutional ratification), would have to be understood within their respective political contexts: contexts that would flood the rules with subtexts until they washed away any abstract rules. Of course, this approach leads back to the complexities and indeterminacies that riddled framers'-intent (old) originalism and actual-understanding (new) originalism: How can originalists aggregate diverse individual views into a single and unified constitutional meaning?

McGinnis and Rappaport claim that they can somehow skirt these problems by focusing on a reasonable person applying legal interpretive rules from the founding era. But if McGinnis and Rappaport detach their reasonable person from actual persons (and actual understandings of the Constitution), where do they find evidence of their hypothetical person? Their reasonable person looks fictional rather than factual. Indeed, from this perspective, how can McGinnis and Rappaport claim that history fixes constitutional meaning when they drain historical sensibility from their interpretive method? When closely examined, their reasonable-person originalism devolves into an easily manipulated method that invites constitutional interpreters (such as Supreme Court justices) to project their political preferences into the reasonable-person construct.[103] In the words of the legal historian Saul Cornell, reasonable-person originalism turns "constitutional interpretation into an act of historical ventriloquism."[104] The reasonable person is a dummy who speaks words uttered by the originalist scholar or judge. Instead of being grounded in history, as McGinnis and Rappaport claim, reasonable-person originalism runs aground and wrecks on the complexities of historicism.[105] Like other

103. *See* Cornell, *supra* note 80, at 335 (emphasizing the danger of manipulating of evidence).

104. *Id.* at 301.

105. Solum attempts to evade such historians' critiques of new originalism by maintaining that philosophers and originalist scholars, on the one hand, and historians, on the other hand, conceptualize meaning differently. For this reason, according to Solum, historians' arguments do not undermine the fixity of textual meaning identified by philosophers and originalist scholars. SOLUM, *supra* note 2, at 56–58. Solum, however, does not acknowledge that his approach invokes a philosophically controversial conception of language and meaning. It is not universally accepted in either philosophy or other fields. Daniel Levin, *Book Review*, 22 LAW & POLITICS BOOK REV. 385 (2012) (reviewing ROBERT W. BENNEETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011)); *see* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel

forms of originalism, reasonable-person originalism fails to lead us to a fixed and objective constitutional meaning.[106]

III. A HISTORY OF THE REASONABLE PERSON AND CONSTITUTIONAL INTERPRETATION

This Part examines historical evidence to show that, first, the reasonable person was not an accepted legal standard at the time of the founding (or for many years afterward), and that, second, constitutional interpretation during the founding era and subsequent decades was eclectic. Unsurprisingly, then, given their general failure to appreciate the rich complexity of historicist thinking, McGinnis and Rappaport reach specific conclusions inconsistent with history.

Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) (describing textual meaning as dialogic and dynamic from a philosopher's perspective); Skinner, *supra* note 101, at 4–6 (criticizing, from an intellectual historian's perspective, the notion that a pure semantic meaning can be discerned directly from a text).

106. *See* Cross, *supra* note 85, at 119–94 (explaining empirical study concluding that, in practice, originalism does not seriously constrain justices); BENNETT, *supra* note 7, at 107 (criticizing reasonable-person originalism for assuming, without normative basis, that "language should be understood as used with care and consistency"). Reasonable-person originalism has additional problems. For instance, while the reasonable person is a familiar legal construct, at least nowadays, the construction of a reasonable person during the founding era requires historical research. Consequently, reasonable-person originalism, like other types of originalism, might ultimately make historians better than lawyers as constitutional interpreters. No less an originalist than Justice Scalia has admitted that originalist research might be "a task sometimes better suited to the historian than the lawyer." Scalia, *supra* note 13, at 857. Moreover, even if the reasonable person is today a familiar legal construct, many critics still find it problematic. Feminists began criticizing the reasonable man standard in the 1970s and 1980s, until the reasonable person standard widely replaced it. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 465–67 (1997); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20–22 (1988). Still, many criticize the reasonable person standard for a variety of reasons. Bernstein, *supra*, at 465–67; Bender, *supra*, at 21–24; *see* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 72–73 (2007) (noting criticisms); *cf.*, Ellison v. Brady, 924 F.2d 872, 878–81 (9th Cir. 1991) (adopting a "reasonable woman" standard for statutory sexual harassment claims); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012) (arguing for a normative rather than positive conception of the reasonable person).

A. Introduction to Historical Evidence

Jurists and scholars in the latter decades of the eighteenth century and the early years of the nineteenth century viewed 'reason' as a principle internal to the law, including natural law.[107] Judges would invoke the faculty of reason to discern the law and guide decision-making. Consequently, judges would sometimes ask whether the law was reasonable. Occasionally, though infrequently, a judge would invoke a "reasonable man" (or 'prudent man'), but judges did not generally conceive of these terms as manifesting a legal standard of judgment, liability, or otherwise.[108]

Whereas today, lawyers and judges often invoke the reasonable person as a generalized legal standard establishing an individual's duty of care in a wide variety of circumstances, jurists during the early decades of nationhood discerned duties of care as established in the status-relationships of the disputants.[109] The common law attached a specific duty of care to many occupations.[110] For example, innkeepers owed a particular duty of care to protect lodgers, while ferrymen owed a duty of safe transportation to travelers.[111] In civil liability (tort) cases, structured around common law writs or forms of action, such as trespass or trespass on the case, judges (or juries) would be unlikely to conclude that a defendant was negligent, but might conclude that the defendant neglected to fulfill a duty in accordance with his distinct status.[112]

Starting early in the nineteenth century and increasing during the middle and later decades of the century, these cases gradually transformed. Judges began to invoke reason in the guise of the reasonable

107. ALAN CALNAN, A REVISITIONIST HISTORY OF TORT LAW 157, 213–18, 275 (2005); *see* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 49–82 (2000) (discussing the importance of natural law during this era); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 51 (1960) (linking "right reason" with natural law).

108. An online search in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, uncovered no recorded instances of members of Congress using the terms "reasonable man" or "prudent man" during the first six congresses, running from 1789 to 1801.

109. CALNAN, *supra* note 107, at 279.

110. *Id.* at 235.

111. *Id.* at 235.

112. G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 685 (1977).

or prudent man, initially in contractual cases and subsequently in tort cases. The growing commercialization, industrialization, and urbanization of nineteenth-century American society led to increased interactions among strangers and increased numbers of accidents (caused especially by railroads and other machines), which sparked the development of tort law separate from contract. Judges in tort cases, then, began to develop a general standard of care for determining liability.[113] In both tort and criminal law, judges developed the reasonable man as "an objective, universally applicable standard by which everyone's actions could be measured."[114] Thus, reasonableness—the care that a reasonable or prudent man would exercise in the specific factual circumstances—became "an external standard of responsibility."[115] (The 'reasonable *person*' replaced the "reasonable *man*" as a predominant legal standard only in the late-twentieth century.[116])

To clarify, reason informed the judicially developed concept of the reasonable man, but the late-eighteenth and early-nineteenth century concept of reason differed from the later concept of the reasonable man. As will be shown in the next sections of this Article, reason was a general principle that permeated the legal system as a whole during the earlier decades, while the reasonable man became a generalized standard of liability or guilt imposed on individuals in society during the later decades.[117] Thus, in constitutional law during early nationhood, jurists and scholars might invoke reason as a guide to interpretation, but they would not have asked how a reasonable man would have understood the constitutional text. Early judicial opinions and legal treatises reveal an eclectic or pluralist approach to constitutional interpretation; no single interpretive method dominated. Early judges and scholars invoked not only reason, but also the text, constitutional

113. CALNAN, *supra* note 107, at 241–76; White, *supra* note 112, at 685–90; *see* E.F. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 201–04 (1965) (discussing Lemuel Shaw's division of negligence from intentional torts).

114. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 98 (1989). Given the increased degree of interactions among strangers—rather than individuals in fixed-status relationships—a more problematic alternative approach was to assign liability (or guilt) based on an individual's subjective state of mind.

115. CALNAN, *supra* note 107, at 275.

116. Bernstein, *supra* note 106, at 465–67; Bender, *supra* note 106, at 20–22.

117. CALNAN, *supra* note 107.

structure, framers' intentions, original public meaning, and so on.[118] Yet, no judge or scholar maintained that constitutional meaning should be ascertained pursuant to a reasonable-man standard.

B. Newspapers and the Reasonable Man

Newspapers from the founding era reveal that "reasonable man" and 'prudent man' were commonly used figures of speech connoting a man of ordinary intelligence—an average man who could appreciate a persuasive argument. For instance, on May 16, 1786, the *Daily Advertiser*, recounted a fable, *Judges*, which recommended choosing "a prudent man in whom is the fear of God."[119] In the same vein, writers would often invoke a reasonable or prudent man as a rhetorical device to emphasize the acceptability of a statement or proposition. The *Salem Mercury* published an essay, also in 1786, discussing the expenditure of tax monies. It included the following line: "[I]t must therefore be apparent, to every reasonable man, that the large taxes which we have paid have not been applied to the support of civil government."[120]

Americans used these terms so frequently that several newspapers ran a brief essay entitled *Reasonable Man*, which offered a tongue-in-cheek definition of the concept:

> By a reasonable man, I mean him whose words, thoughts, and actions, are regulated in the main by reason. He is no slave to passionate humour, and distinguishes between an opinion and demonstration: he may lean to one side of the question, but is never positive without being certain; and that he is certain is no easy matter for him to believe, as he is sensible what a mixture of obscurity there is, even in our clearest conceptions.[121]

118. *Cf.*, O'NEILL, *supra* note 10, at 12–24 (arguing that lawyers, judges, and theorists followed original intent originalism during early decades).

119. *Judges*, DAILY ADVERTISER, May 16, 1786, at 2.

120. *Address to the People*, SALEM MERCURY, Nov. 11, 1786, at 1. For additional invocations of a reasonable or prudent man, see *Remarks on Manners, Government Law and Domestic Debt of America*, PENNSYLVANIA PACKET, Feb. 21, 1787, at 2 (discussing the prudent man); *Europe, London*, BOSTON GAZETTE, Sept. 13, 1784, at 2 (discussing the reasonable man); *Extract of a Letter from Plymouth*, PENNSYLVANIA MERCURY, Oct. 1, 1784, at 2 (discussing the reasonable man).

121. *A Reasonable Man*, NEW-HAMPSHIRE SPY, Nov. 14, 1786, at 1.

The essay then compared a reasonable man to Socrates, who realized how little he knew. The reasonable man, the essay concluded, confesses "that he knows nothing, not even himself thoroughly."[122]

The common conception of the reasonable or prudent man as being ordinary or average was highlighted in a newspaper essay on friendship and the prudent man published in 1790. "The mediocrity of his abilities raises him above contempt; but are not so eminent as to excite envy. In short, he is a prudent man, who, though he may gain slowly upon the friendship or attachment of his acquaintance, never runs any risque of losing what he does gain."[123] Yet, the reasonable or prudent man was not always conceived of as ordinary. Often, these concepts were conjoined with wisdom, so an article would refer to a "wise and prudent" or "wise and reasonable" man. Thus, "[a] wise and prudent man swallows his grief and waits for the occasion."[124] Occasionally, an article would maintain that reasonableness or prudence are all too rare, as in a 1790 *Hampshire Gazette* piece on taxes and national revenue: "[I]t is only a great and prudent man, who can combine public and private interests, by enriching the national treasury, in such ways as stimulate general industry, and overburden no order of people."[125]

As these examples demonstrate, newspapers generally did not invoke the reasonable or prudent man as a standard of legal judgment or liability. Yet, in theory, the terms could be used in such a manner, and while rare, a couple of suggestive though nebulous instances exist. In a 1788 article discussing the number of years an individual should have resided in a state before being elected to national governmental office, the author wrote, "Every reasonable man must allow that seven years citizenship, which the constitution requires, cannot purge a man of all improper ingredients, as to render him a fit object of comparison with a native citizen."[126] While "reasonable man," here, might be viewed as

122. *Id*. The essay was also published in the *New-York Daily Gazette*, Aug. 2, 1790, at 731; the *Massachusetts Spy*, Sept. 2, 1790, at 2; and elsewhere.

123. *The Tablet*, THE GAZETTE OF THE UNITED STATES, Jan. 2, 1790, at 303.

124. *Wit, and Wisdom of the East*, WEEKLY MUSEUM, Oct. 4, 1788, at 2. For additional examples, see *Miscellany*, *A Crust for Your Jokers*, THE ARGUS, March 2, 1792, at 2 (discussing the "wise and reasonable man"); *Philadelphia*, INDEPENDENT GAZETTEER, March 27, 1789, at 2 (discussing "a wise and prudent man"); *To the Inhabitants of the Town of Boston*, INDEPENDENT CHRONICLE, May 20, 1784, at 1 (discussing "a wise and prudent man").

125. *The Observer*, HAMPSHIRE GAZETTE, Feb. 24, 1790, at 1.

126. *To the Public*, CITY GAZETTE, Nov. 25, 1788, at 2.

a technical term connoting a legal standard, it could just as easily be understood in accord with its ordinary usage as a rhetorical emphasis.[127] The second instance, from 1791, is even more obscure. In a dispute over money, the author posted an advertisement stating that "there is no "reasonable man" would have been irritated at receiving a 'decent and becoming' request of stating to the public what the amount of that sacred deposit was."[128] Again, too, this invocation could be readily understood in accord with ordinary usage as a rhetorical emphasis.

C. Dictionaries

The more typical newspaper uses of "reasonable man" and 'prudent man' correspond with contemporary dictionary definitions.[129] For instance, Samuel Johnson's 1786 *Dictionary of the English Language* provided multiple definitions of "reasonable": "Having the faculty of reason; endued with reason. . . . Acting, speaking, or thinking rationally. . . . Just; rational; agreeable to reason."[130] Similarly, Nathan Bailey's 1790 *Universal Etymological English Dictionary* defined reasonable as "agreeable to the rules of Reason; just, right, conscionable."[131] Bailey gave multiple definitions of "reason," though the one that seems most pertinent to the conception of "reasonable" states: "thinking; that Faculty of the Soul whereby we judge of Things; the Exercise of that Faculty; Argument, Proof, Cause, Matter."[132] Meanwhile, "prudent" is defined as "discreet, wise managing," and "prudence" is "wisdom in managing affairs."[133]

Interestingly, Bailey provided a second definition of "reasonable," which would correspond closely with the only definition given in Giles

127. *Id.*

128. *Messrs. George Decker, Henry Stouffer, & Co.*, MARYLAND JOURNAL, Aug. 19, 1791, at 4.

129. I do not mean to suggest that a contemporary dictionary would provide a definitive meaning for a word or phrase. I include this section merely to provide another source of historical evidence. *See* Cornell, *supra* note 80, at 298 (arguing that founding-era dictionaries "were idiosyncratic products of their authors, who often had ideological and political agendas").

130. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1786 ed.).

131. NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1790 ed.).

132. *Id.*

133. *Id.*; *see also* JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 130 (giving similar definitions of "reasonable" and "reason").

Jacob's 1797 *Law-Dictionary*. "Reasonable Aid [Law Term] a Duty claimed, by the lord of the fee, of his tenants, by his knights service, to marry his daughter."[134] This definitional association of reasonableness, as a legal concept, with a status-based duty is typical (as will be discussed further in the section on case law).[135] Perhaps, more to the point, Jacob's *Law-Dictionary* does not contain (or define) the terms "reasonable man" and "prudent man" Jacob defined "reason" as being inherent to law, which was also fairly typical. "Reason, is the very life of Law; and what is contrary to it is unlawful."[136] Jacob continued in the same vein: "When the reason of the Law once ceases, the Law itself generally ceases; because Reason is the foundation of all our Laws."[137]

D. Case Law: From Reason to Reasonable Man

In the early decades of nationhood, many Americans believed in natural law, which supposedly informed judicial decision making, both in common law and constitutional cases.[138] And significantly, reason was considered to be inherent to natural law. In *Calder v. Bull*, decided in 1798, Justice Samuel Chase equated natural law with reason.[139] He maintained that certain laws, such as one "that takes property from A and gives it to B. . . . is against all reason and justice."[140] In *Fletcher v. Peck*, decided in 1810, Justice William Johnson, concurring, relied even more heavily on natural law, which he equated with reason. Re-

134. GILES JACOB, II THE LAW-DICTIONARY (T.E. Tomlins ed.; London 1797 ed.); *see also* BAILEY, *supra* note 131.

135. *See infra* notes 151–54 and accompanying text.

136. II Jacob, *supra* note 134.

137. *Id.* The *Oxford English Dictionary* (3d ed., March 2012 online version), shows numerous uses of "reasonable man" prior to the founding era, but does not have one legal use until the twentieth century. The 1910 edition of *Black's Law Dictionary* does not have an entry for "reasonable man," even as a sub-entry under "reasonable." HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 994 (2d ed. 1910). *Black's* also does not have "prudent man," even as a sub-entry under "prudence." *Id.* at 963.

138. *See* Feldman, *supra* note 107, at 49–82 (discussing natural law era); McCloskey, *supra* note 107, at 50–51 (discussing natural law era).

139. 3 U.S. 386, 388 (1798) (opinion of Chase, J.).

140. *Id.*

gardless of the Constitution, he explained, he would invalidate the disputed state statute "on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."[141]

In *Calder* and other cases, judges interpreted the law in accord with "reason and justice."[142] Chief Justice John Marshall, writing in the famous 1819 decision, *McCulloch v. Maryland*, invoked the "dictates of reason" as an interpretive guide to the Constitution.[143] In discussing the scope of congressional power under Article III, Marshall stated: "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."[144] Justice Joseph Story explained likewise, that the Constitution "is to have a reasonable construction."[145]

In several early cases, judges used the terms, "reasonable man" and "prudent man," but in accordance with their common or normal usages, as rhetorical devices underscoring the acceptability of a statement or proposition.[146] The 1793 decision, *Chisholm v. Georgia*, illustrates this proposition.[147] Justice James Iredell, dissenting, compared Article III with the Judiciary Act:

> The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the subject-matter upon which such jurisdiction is to be exercised, uses the word 'controversies' only. The act of Congress more particularly mentions civil controversies, a qualification of the general word in the Constitution, which I do not doubt every *reasonable man* will think well warranted, for it cannot be presumed that the general

141. Fletcher v. Peck, 10 U.S. 87, 143 (1810) (Johnson, J., concurring). In *Calder*, Chase had also suggested that natural law principles alone might justify the judicial invalidation of legislation. Calder v. Bull, 3 U.S. at 388.

142. Calder, 3 U.S. at 388; Wall v. Robson, 11 S.C.L. 498, 506 (Const. Ct. App. S.C. 1820); Sherwood v. Salmon, 5 Day 439, 445 (Conn. 1813).

143. McColloch v. Maryland, 17 U.S. 316, 409 (1819).

144. *Id.* at 409–10.

145. Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816). In 1787, the Supreme Court of Pennsylvania explained that a covenant should receive a "reasonable construction." Pollard v. Shaffer, 1 U.S. 210, 215 (Pa. 1787).

146. Perronneau v. Perronneau's Executors, 1 Des. 521, 535 (S.C. App. 1796); Martindale's Lessee v. Troop, 3 H. & McH. 244, 282 (Md. Gen. 1793), *reversed* (no decision named) (Md. Ct. App. 1796); Purviance v. Angus, 1 U.S. 180, 184 (Pa. 1786).

147. Chrisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

> word 'controversies' was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same Government, only, are uniformly considered of a local nature, and to be decided by its particular laws.[148]

Iredell, thus, did not invoke "reasonable man" as a legal standard that could reveal constitutional meaning. Rather, he invoked it as a rhetorical device akin to an exclamation mark. He intended to emphasize that the congressional action—the statutory gloss on Article III—would be widely acceptable. Indeed, in at least a couple of other cases involving statutory interpretation, judges explained that they must assume that the legislators were "upright and reasonable men."[149]

Still, one might ask: During the first several decades of nationhood, starting in 1776, did any judicial decisions use "reasonable man" as a legal standard of judgment or liability? To answer this question, one must distinguish two types of cases. The first type of case entails the invocation of the reasonable or prudent man as a standard or duty of care that attaches to specific status-relationships or positions. The second type of case entails the invocation of the reasonable or prudent man as a generalized standard of care or liability, applicable among strangers or other unconnected individuals (not in a preexisting status-relationship).

Among the first type, status-relationship cases, an increasing number of instances arose with the turn from the eighteenth to the nineteenth century. A status-relationship might arise in several different ways. One might be born into it, as when an individual inherits real property and is therefore a landowner. More often, one might accept an appointment or otherwise voluntarily assume a professional position or occupation, such as a sheriff, a doctor, or a ship's captain. In these types of cases, regardless of how the status-relationship arose, courts often would invoke reason, or the concepts of reasonableness or prudence, to elaborate the duties attached to the particular position or

148. *Id.* at 431–32 (Iredell, J., dissenting) (emphasis added).

149. Wall v. Robson, 11 S.C.L. 498, 506 (Const. Ct. App. S.C. 1820); Marshall v. Lovelass, 1 N.C. 412, 436 (Superior Cts. of Law & Equity of N.C. 1801).

status.[150] An early example is the 1786 case of *Purviance v. Angus*, involving the liability of a ship's captain for damaged goods.[151] The court explained the captain's duties: "Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action."[152] In such cases, then, reasonableness was not a generalized legal standard of duty or liability; rather, reason (and reasonableness) imbued the legal duties that attached to specific positions, coincident to the natural law concept of reason, which permeated the legal system as a whole.[153]

Yet, individuals might become enmeshed in status-relationships by another means, which became increasingly common during the early-nineteenth century as the nation grew more commercial. Namely, two individuals might enter a contractual relationship with each other.[154] A contractual relationship, of course, might involve an individual who is a member of a profession or similar occupation, but it might also involve other individuals, neither of whom fit into such a recognized position. Over time, as judges repeatedly needed to articulate the duties that attached to various contractual relationships, the judges would invoke reason more often in the guise of the reasonable or prudent man.

150. Foster v. President of Essex Bank, 17 Mass. 479, 501 (Mass. 1821) (duty of bailee); Barber v. Brace, 3 Conn. 9, 14 (Conn. 1819) (ship's master); Patten v. Halsted, 1 N.J.L. 277 (N.J. 1795) (sheriff); McClures v. Hammond, 1 Bay 99 (S.C. Com. Pl. Gen. Sess. 1790) (common carrier).

151. Purviance v. Angus, 1 U.S. 180 (Pa. Err. & App. 1786).

152. *Id.* at 185.

153. A noteworthy example is *Case of Fries*, a politically explosive treason case in which Iredell, as a circuit judge, instructed the jury regarding, among other things, a marshal's duties. 9 F. Cas. 826 (C.C.D. Pa. 1799). Iredell explained that the marshal "acted the part of a prudent man, and was justifiable in the act" of apprehending the defendant. *Id.* at 915. The case was entangled with the Federalists' disastrous 1798 passage of the Alien and Sedition Acts; the allegedly treasonous acts were in reaction against the Federalist legislation. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 695–700 (1993) (discussing the politics of the *Fries* case); STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 70–100 (2008) (discussing Alien and Sedition Acts). But as construed by Iredell, the case turned in part on the status of the marshal and the duties that attached to that status, so Iredell invoked the concept of prudence to explain those duties.

154. *Cf.* CALNAN, *supra* note 107, at 231–35 (distinguishing transactional from pre-transactional duties). In the United States, contract law was only developing as a separable realm in the early-nineteenth century. Kermit L. Hall, THE MAGIC MIRROR 119–23 (1989). In the first edition of his *Commentaries*, James Kent included a lecture (or chapter) on contracts. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 363–436 (1827) [hereinafter 2 KENT].

The only such eighteenth-century case arose in South Carolina in 1793—after ratification of the Constitution, needless to say. The issue revolved around when payment was due on a promissory note. The judge wrote: "The great question for the jury therefore, in this case, is, whether a *reasonable diligence has been used or not?* Such as a *prudent man*, in his ordinary affairs, would observe, where his own interest only was immediately concerned."[155]

After 1800, similar cases arose with growing frequency. For instance, an 1805 Connecticut case involved a dispute over an allegedly fraudulent sale of land.[156] The court stated: "The law redresses those only who use due diligence to protect themselves, such diligence as prudent men ordinarily use."[157] In an 1819 South Carolina case arising from the sale of a horse, the judge elaborated the concept of a prudent man in commerce:

> By ordinary diligence, I understand that sort of care which a prudent man would exercise in relation to his own affairs; and to fix on that character, we must look through the community generally, selecting neither the most scrupulously diligent, nor the most negligent, and having thus established a standard, with a view to the habits of the country in which we live, I know of no other means of making the application, than by the self inquiry, What should I have done under similar circumstances?[158]

The second type of case, involving the judicial invocation of the reasonable or prudent man as a generalized standard of care or liability, was exceedingly rare through the early decades of the nineteenth century. The only such cases arose from prosecutions where courts needed to distinguish murder from manslaughter. In a 1797 North Carolina case, the judge charged the jury as follows:

> Manslaughter is where some great provocation is given, that is calculated to excite the resentment of a *reasonable man* to such a degree as to take away the proper exercise of his reason, he kills the aggressor; as if the aggressor spits in his face, pulls his nose, kicks him, or the

155. Hall v. Smith, 1 S.C.L. (1 Bay) 330 (S.C. Com. Pl. Gen. Sess. 1793).

156. Sherwood v. Salmon, 2 Day 128 (Conn. 1805).

157. *Id.* at 136.

158. La Borde v. Ingraham, 10 S.C.L. (1 Nott & McC.) 419, 421 (1819). For additional examples, see *McNeill v. Brooks*, 9 Tenn. 73, 74 (Tenn. 1822) (contract to ride a horse); *Young v. Cosby*, 6 Ky. (1 Bibb) 227, 227 (1813) (assignment of a note).

> like, or where blows pass; in all these cases the blood is heated and the passions roused or excited; and the killing under such circumstances, is attributed to human frailty, and not to a wickedness of heart.[159]

The next case, a federal prosecution in Rhode Island, arose more than two decades later.[160] It is most noteworthy because Justice Story, riding circuit, was the judge. Similar to the North Carolina judge, Story instructed the jury to decide whether the victim had inflicted such an injury on the defendant as "to provoke a reasonable man" to kill.[161] In these two criminal cases, then, the juries were to determine the defendant's guilt (or liability) by comparing his actions to those of a reasonable man. In this sense, the courts used the "reasonable man" as a generalized legal standard that would apply to all individuals.[162]

Yet, during those early decades, up to 1825, many other courts distinguished murder from manslaughter without invoking a reasonable-man standard. These cases typically stressed the degree of voluntariness: Murder was intentional killing with "malice aforethought."[163] In several cases, the judge (including Story in the federal Rhode Island prosecution) stated that manslaughter was homicide in response to a

159. State v. Weaver, 3 N.C. 54 (N.C. Super. L. & Eq. 1797) (emphasis added).

160. United States v. Cornell, 25 F. Cas. 646 (C.C. D. R.I. 1819).

161. *Id.* at 649. Story wrote:

> These are the material principles of law, which I deem it necessary to bring to the consideration of the jury. If upon weighing the facts they are satisfied that there was not a reasonable provocation in the present case, but that it was slight, and the punishment utterly disproportioned to the offence; if they are satisfied that the party was stimulated by a malignant spirit of revenge, and diabolical fury, and sought the life of the deceased with brutal passion, having received no injury that ought to provoke a *reasonable man* to such an act, then the prisoner is guilty of murder—if otherwise, then he is guilty of manslaughter only.

Id. (emphasis added).

162. In one other case, the judge appeared to obscurely refer to a reasonable man as a means of determining land ownership. The judge stated "that to constitute a legal settlement, it must be accompanied with personal residence, unless such danger exists, as would operate on the mind of a man of reasonable firmness." M'Laughlin's Lessee v. Dawson, 4 U.S. 221, 221–22 (Pa. 1800). Also, John Marshall, as the attorney for a client in a 1786 Virginia land dispute, apparently used "prudent man" as a legal standard in his argument to the court. Hite v. Fairfax, 4 Call 42, 73–74 (Va. 1786).

163. State v. Roberts, 8 N.C. 349 (1821); Definition of Indictable Crimes, 2 Del. Cas. 235 (1797). For additional examples, see Lee v. Woolsey, 19 Johns 319 (1822); State v. Pompey, 2 Del. Cas. 113 (1798); State v. Norris, 2 N.C. 429 (1796).

"reasonable provocation."[164] Nevertheless, the crucial point to recognize is that, over and over again, courts needed to distinguish murder from manslaughter, but in doing so, judges relied on a reasonable-man standard only twice, during more than four decades of decision making.

In sum, one can fairly conclude that early courts invoked the reasonable or prudent man as a generalized legal standard rarely and even anomalously. Instead, the judicial invocation of the reasonable or prudent man became increasingly common in contractual cases. With growing frequency, judges would conceptualize specific contractual duties as requiring due diligence, which equated with the actions of a reasonable or prudent man. Then, from the 1820s to the 1850s, as tort law gradually separated from contract law, the concept of the reasonable or prudent man slowly emerged as a generalized standard of care or liability that would govern interactions among strangers.[165] An early example arose in a Vermont appellate case from 1824.[166] A collision between two horses and wagons killed one of the horses, whose owner sued for negligence (or action on the case for negligence—to use the terminology of the common law writs). The appellate court described the jury instructions as follows:

> [I]f the Jury found from the evidence before them, that the defendant did not use common care and diligence, in the management of his horse and wagon, at the time the injury happened, they would find

164. State v. Zellers, 7 N.J.L. 220 (1824) (in jury instructions); Commonwealth v. Gable, 7 Serg. & Rawle 423 (Pa. 1821) (Gibson, J., dissenting); United States v. Cornell, 25 F. Cas. 646, 649 (C.C. D. R.I. 1819) (Story, J.); United States v. Travers, 28 F. Cas. 204 (C.C.D. Mass. 1814) (Story, J.). Neither Tucker's *Blackstone* nor Kent's *Commentaries* invoked the reasonable or prudent man as a standard distinguishing murder from manslaughter. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 316 (1826) [hereinafter 1 KENT]; ST. GEORGE TUCKER, 5 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 190–91 (1803); *see* 2 KENT, *supra* note 154, at 12 (stating that the distinction between murder and manslaughter "does not belong to my present purpose to examine").

165. Hall, *supra* note 155, at 123–26; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 85–89 (1977).

166. Washburn v. Tracy, 2 D. Chip. 128 (Vt. 1824).

> for the plaintiff the value, &c.—If on the other hand, the Jury considered the defendant did use such care and diligence, as prudent men generally use, they would find for the defendant.[167]

The court apparently found this instruction unobjectionable, but nonetheless reversed because the trial judge failed to add an instruction concerning contributory negligence.[168]

In fact, previous historical studies have concluded that the reasonable-man standard first appeared in an 1837 English case, *Vaughan v. Menlove*,[169] and was not incorporated into American law until later in the nineteenth century.[170] And to be sure, by the 1850s, the "reasonable man" had solidified as a standard in American law: An individual defendant, in a civil tort action or criminal prosecution, would be judged in comparison to the hypothesized actions of an ordinary or average man in the same circumstances. In an 1857 tort case involving an accident at a train crossing, the renowned Lemuel Shaw approved a jury instruction that explained the plaintiff's burden in proving that the defendant railroad was "guilty of negligence."[171] The plaintiff, Shaw wrote, "must prove want of ordinary and reasonable care, by omitting such warnings and precautions as persons of ordinary care, under like circumstances, would and ought to use."[172] A Michigan homicide case, decided five years later, applied a similar standard: "In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard."[173]

E. Case Law: On Constitutional Interpretation

An examination of early Supreme Court constitutional cases reveals the justices invoking a wide variety of interpretive guides. In the

167. *Id.* at 135.

168. *Id.* at 135–36.

169. Vaughan v. Menlove, 132 Eng. Rep. 490 (1837).

170. *E.g.*, GILLESPIE, *supra* note 114, at 98; Mark A. Rothstein, *Legal Conceptions of Equality in the Genomic Age*, 25 LAW & INEQ. 429, 436 (2007); Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUTGERS-CAM. L.J. 311, 312–13 (1977).

171. Shaw v. Bos. & Worcester R.R. Corp., 74 Mass. 45, 60 (1857).

172. *Id.*

173. Maher v. People, 10 Mich. 212, 221 (1862). *But cf.* People v. Woods, 331 N.W.2d 707 (Mich. 1982), *cert. denied*, 462 U.S. 1134 (1983) (different standard is now used).

1793 *Chisholm v. Georgia* decision, the issue was whether Article III allowed a citizen of one state to sue another state in federal court.[174] The case might be viewed not only as the Court's first constitutional decision but also as the Court's first foray into a volatile political controversy. The underlying political issues were twofold: First, the case rekindled Anti-federalist fears that the new centralized government would overwhelm state sovereignty, and second, the case, if decided against Georgia, might cause creditors to stampede into federal court suing state governments for large sums of money.[175] The Court, with opinions delivered seriatim, held that the state was unprotected by sovereign immunity and, therefore, subject to suit.[176] In so deciding, the Court buttressed national power at the expense of state sovereignty. The ensuing political uproar was so deafening that the Eleventh Amendment, prohibiting similar suits, was proposed almost immediately and ratified within two years.[177]

The multiple opinions in *Chisholm* show numerous interpretive approaches. Several justices appear to refer to the public meaning of the text, as discerned in various ways. For instance, the lone dissenter, Iredell, stated that the Constitution should have a "fair construction,"[178] such that "every word in the Constitution may have its full effect."[179] All of the justices in the majority appear to suggest that the text has a plain (public) meaning.[180] Justice William Cushing, for instance, reasoned that the case "seems clearly to fall within the letter of the Constitution."[181] Justice James Wilson, the most sophisticated legal scholar on the Court, inquired into the public meaning based on the people's intentions, while also suggesting the text had a plain meaning.[182] Chief Justice John Jay, after declaring that he would look to the Constitution's "letter and express declaration,"[183] explained that meaning is

174. Chisholm v. Georgia, 2 U.S. (Dall.) 419 (1793).
175. MCCLOSKEY, *supra* note 107, at 34–35.
176. *Chisholm*, 2 U.S. (Dall.) at 479.
177. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 20–22 (1993).
178. *Chrisholm*, 2 U.S. (Dall.) at 449 (Iredell, J., dissenting).
179. *Id.* at 450 (Iredell, J., dissenting).
180. *E.g.*, *id.* at 450 (opinion of Blair, J.).
181. *Id.* at 467 (opinion of Cushing, J.).
182. *Id.* at 464–66 (opinion of Wilson, J.).
183. *Id.* at 473 (opinion of Jay, C.J.).

based on "ordinary and common" usage,[184] though he then suggested that congressional understanding and action manifested such usage.[185]

If one were to focus solely on these multiple emphases on the Constitution's public and plain meaning, one could readily conclude that the justices followed a new originalist interpretive method. Such a conclusion, however, would be mistaken. At least two justices, and maybe a third, looked elsewhere in their efforts to ascertain constitutional meaning. Both Wilson and Jay stressed that the Constitution's underlying purposes should inform its interpretation. Both justices drew, in particular, on the preamble's "declared objects" or purposes.[186] Thus, Wilson reasoned that the Court should interpret the Constitution to further such purposes: "to form an union more perfect[,] . . . 'to establish justice[, and]' . . . 'to ensure domestic tranquility.'"[187] Likewise, Jay explained that because he was obliged to attend to "the design of the Constitution,"[188] he must therefore construe Article III in light of the injunction "to establish justice."[189]

Wilson also mentioned "the general texture of the Constitution," suggesting an attention to the fabric of the whole—the location of a particular provision relative to other provisions.[190] Jay, interestingly, emphasized the advantageous practical consequences of allowing states to be sued.[191] The extension of the federal judicial power "to such controversies, appears to me to be wise, because it is honest, and because it is useful. . . . It is useful . . . because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State."[192] Jay continued by listing four more favorable consequences.[193] Meanwhile, Iredell suggested, albeit ambiguously, that the framers' intentions might be relevant, writing, "The framers of the Constitution, I presume, must have meant one of two things."[194]

184. *Id.* at 477 (opinion of Jay, C.J.).
185. *Id.* at 477 (opinion of Jay, C.J.).
186. *Id.* at 465 (opinion of Wilson, J.); *id.* at 474–75 (Jay, C.J.).
187. *Id.* at 465 (opinion of Wilson, J.).
188. *Id.* at 473 (opinion of Jay, C.J.).
189. *Id.* at 475–76 (opinion of Jay, C.J.).
190. *Id.* at 465 (opinion of Wilson, J.).
191. *Id.* at 472 (opinion of Jay, C.J.).
192. *Id.* at 479 (opinion of Jay, C.J.).
193. *Id.* at 479 (opinion of Jay, C.J.).
194. *Id.* at 432 (Iredell, J., dissenting).

A 1796 decision, *Hylton v. United States*, again raised (implicitly) the crucial issue of the scope of national power vis-à-vis the states. The case focused specifically on the congressional authority to tax,[195] and once more, the justices favored federal power. The Court held that a congressional tax on carriages did not constitute a "direct" tax under Article I, and that, therefore, the constitutional requirement of apportionment (among the states per their populations) did not apply.[196] Three justices, Chase, William Paterson, and Iredell, issued seriatim opinions. All of them relied to some degree on the public or plain meaning of the constitutional text, yet all of them also considered additional interpretive guides. Chase, writing the first opinion, began by asserting: "I am inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the Constitution."[197] But Chase continued by emphasizing the practical consequences of his interpretive glean on the Constitution's tax clauses. "It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice."[198] To hammer home the inequality in concrete terms, Chase compared two states, computing the amounts in dollars that each would owe if apportionment were required. Iredell and Paterson also contemplated practical consequences. Like Chase, Iredell considered the effects of an apportionment rule and showed his calculations in dollars.[199] Iredell concluded: "This mode [of taxation] is too manifestly absurd to be supported."[200] Both Iredell and Paterson also considered the practical consequences of an alternative tax scheme proposed by one of the parties. Paterson found it "utterly impracticable,"[201] while Iredell feared it had "dangerous consequences."[202]

Paterson's opinion is worth spotlighting because of how he further delved into constitutional meaning. After he considered public meaning—concluding that "the natural and common, or technical and appropriate, meaning of the [constitutional] words" were not "clear and

195. Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).
196. Art. I, §2, cl. 3; Art. I, §8, cl. 1; Art. I, §9, cl. 4.
197. *Hylton*, 3 U.S. at 173 (opinion of Chase, J.).
198. *Id.* at 174 (opinion of Chase, J.).
199. *Id.* at 181–82 (opinion of Iredell, J.).
200. *Id.* at 182 (opinion of Iredell, J.).
201. *Id.* at 179 (opinion of Paterson, J.).
202. *Id.* at 183 (opinion of Iredell, J.).

precise"—Paterson entered into an extensive exploration of the framers' intentions.[203] First, he examined Congress's taxing power in general. "It was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports."[204] Next, Paterson specifically explored what "the framers of the Constitution contemplated as falling within the rule of apportionment."[205] His analysis of this (recent) history led him to emphasize the political interests at stake during the Philadelphia convention. In particular, the "southern states," because they "possessed a large number of slaves," worried that other states would act through Congress to tax them unfairly.[206] "To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers."[207] Paterson stressed, in other words, that the various constitutional tax clauses were "the work of [political] compromise."[208] From his vantage, however, the "sacrifices and concessions" of the non-southern states were "radically wrong."[209] Based on this political history, Paterson shaped an interpretive conclusion: "The rule [of apportionment], therefore, ought not to be extended by construction."[210] This extraordinary passage bears reiteration: Paterson reviewed part of the framing history, recognized the tax apportionment clauses as arising from a political compromise, denounced the substance of the compromise, and therefore maintained that the Court should strictly or narrowly interpret the apportionment clauses. Paterson was not finished, though. After examining the pre-constitutional history of the 1780s as well as the practical consequences of the proposed alternative tax scheme, Paterson added a flourish: "I shall close the discourse with reading a passage or two from [Adam] Smith's

203. *Id.* at 176 (opinion of Paterson, J.).
204. *Id.* at 176 (opinion of Paterson, J.).
205. *Id.* at 177 (opinion of Paterson, J.).
206. *Id.* at 177 (opinion of Paterson, J.).
207. *Id.* (opinion of Paterson, J.).
208. *Id.* at 178 (opinion of Paterson, J.).
209. *Id.*
210. *Id.*

Wealth of Nations."[211] He quoted two long passages from Smith on methods of taxation, thus implying that Smith's observations informed Paterson's interpretation of the Constitution's tax clauses.[212]

The issue in the 1798 *Calder v. Bull* case was whether Article I, Section 10, Clause 1, which prohibits states from enacting ex post facto laws, precluded the Connecticut legislature from passing a resolution that set aside a judicial decree in a probate dispute. This time, the Court preserved a degree of state sovereignty by unanimously holding, with seriatim opinions, that the constitutional prohibition applied only to criminal laws and thus was inapposite to the legislative resolution.[213] Chase's discussion of interpretive methods was most interesting. Like the justices in *Chisholm*, Chase looked to public meaning, referring to "the plain and obvious meaning and intention of the [ex post facto] prohibition."[214] But to discern such meaning, Chase examined how both Blackstone and "the author of the *Federalist* [*Papers*]" used the phrase, ex post facto (remember, Hamilton, Madison, and Jay first published the essays of the *Federalist Papers* in New York newspapers during the debate over ratification).[215] Chase, moreover, considered other factors relevant to constitutional interpretation. He contemplated the practical consequences that would follow from including civil as well as criminal laws within the ambit of the ex post facto clause: "If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."[216] And Chase, as mentioned in the previous section, also accentuated natural law. After equating natural law with reason, he suggested that the Constitution should be interpreted in accord with natural law principles.[217] Yet, it should be noted,

211. *Id.*

212. *Id.*

213. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

214. *Id.* at 390 (opinion of Chase, J.).

215. *Id.* at 391 (stylistic changes added). Justice William Paterson, also looking to public meaning, examined Blackstone and the use of the phrase, ex post facto, in state constitutions. *Id.* at 396–97 (opinion of Paterson, J.). On the Federalist Papers, see MAIER, *supra* note 98, at 84.

216. *Id.* at 393 (opinion of Chase, J.) (stylistic changes added).

217. *Id.* at 388. Chase added: "An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* (stylistic changes added). This passage at least suggests that natural law

Iredell, for one, was skeptical about relying on such principles as the basis for judicial decision making.[218]

Despite Iredell, natural law was widely accepted at the time, so justices in other cases unsurprisingly referred to it.[219] In *Fletcher v. Peck*, not only did Johnson's concurrence invoke natural law, as discussed earlier, but Marshall's majority opinion did so as well. *Fletcher* involved a state legislative land grant. After the grant, when accusations of fraud (the bribing of legislators) surfaced, a subsequent legislature passed a law withdrawing the grant. The issue was whether the contract clause, Article I, Section 10, Clause 1, precluded the second legislative action as a "Law impairing the Obligation of Contracts."[220] The Court held the withdrawal legislation unconstitutional.[221] By assuming that it had the power to invalidate state law, the Court invigorated national power and underscored that the Constitution had carved away aspects of state sovereignty.[222] Marshall extensively discussed natural law,[223] and maintained that the Court should interpret the contract clause harmoniously with natural law principles, those "general principles which are common to our free institutions."[224] But neither Marshall nor Johnson limited himself to a focus on natural law. Marshall also discussed the Constitution's public meaning, looking "to the natural meaning of words,"[225] while Johnson appeared to imbue the framers' intentions, as reflected in the *Federalist Papers*, with importance.[226]

One remarkable case, *Ogden v. Saunders*,[227] decided in 1827, deep into the Marshall Court era, and long after the justices had abandoned

principles alone might justify the judicial invalidation of legislation.

218. *Id.* at 398–99 (opinion of Iredell, J.).

219. *See* FELDMAN, *supra* note 107 (discussing natural law era); MCCLOSKEY, *supra* note 107, at 50–51 (same).

220. U.S. CONST. art. I, §10, cl. 1.

221. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

222. MCCLOSKEY, *supra* note 107, at 52–53; SCHWARTZ, *supra* note 177, at 43–44.

223. *Fletcher*, 10 U.S. (6 Cranch) at 133–35.

224. *Id.* at 139; *see* MCCLOSKEY, *supra* note 107, at 50–51 (discussing Marshall's invocation of natural law).

225. *Fletcher*, 10 U.S. (6 Cranch) at 138.

226. Johnson wrote: "There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures." *Id.* at 144 (Johnson, J., concurring).

227. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

the English practice of issuing seriatim opinions,[228] nicely illustrates not only that the justices, as a group, used a wide variety of interpretive approaches, but also that individual justices applied multiple interpretive strategies. The majority held that the congressional bankruptcy power, under Article I, Section 8, Clause 4,[229] was not exclusive, and that a state bankruptcy statute did not violate the contract clause so long as it applied to contracts entered subsequently to the legislative enactment.[230] What rendered the case extraordinary was that the justices issued five opinions: one each by the four majority justices, Johnson, Robert Trimble, Smith Thompson, and Bushrod Washington, and one by the dissenting Marshall, joined by Gabriel Duvall and Joseph Story.[231] Thus, partly because they were so closely divided, the justices momentarily returned to the seriatim approach. Given that the Marshall Court decided most significant cases unanimously, with Marshall writing the Court's opinions, this case provides a rare view into the interpretive approaches of the respective justices.[232]

Justices Johnson and Trimble invoked public meaning, based on how the people actually understood the Constitution.[233] Johnson, for instance, emphasized "the sense put upon [the Constitution] by the people when it was adopted by them."[234] Both justices believed that contemporary constructions of the document provided the best evidence of public meaning. Johnson gleaned such evidence from legislative actions taken after ratification,[235] while Trimble quoted from the *Federalist Papers* to illustrate "the contemporary construction" given

228. SCHWARTZ, *supra* note 177, at 20, 39.

229. U.S. CONST. art. I, § 8, cl. 4.

230. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

231. In fact, after re-argument, Johnson issued yet another opinion on an additional issue. *Id.* at 358 (opinion of Johnson, J.).

232. "For the first and only time in his career Marshall had been unable to forge a majority in a constitutional case." WHITE, *supra* note 85, at 651; *see* SCHWARTZ, *supra* note 177, at 39 (discussing how the Marshall Court usually avoided seriatim opinions).

233. *Ogden*, 25 U.S. (12 Wheat.) at 278–79, 290 (opinion of Johnson, J.); *id.* at 329 (opinion of Trimble, J.).

234. *Id.* at 290 (opinion of Johnson, J.). Trimble wrote: "I suppose this was the understanding of the American people when they adopted the constitution." *Id.* at 329 (opinion of Trimble, J.).

235. *Id.* at 290 (opinion of Johnson, J.).

during the ratification process.[236] Johnson explained that "the cotemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."[237]

Apparently consistent with a public meaning approach, two justices, Johnson as well as Thompson, suggested that some constitutional provisions had a plain meaning.[238] Thompson, for example, wrote: "If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction."[239] He then referred to "the plain and natural interpretation" of the contract clause.[240] Reasoning inversely, so to speak, Johnson found it significant that "nothing . . . on the face of the Constitution" directly prohibited states from enacting bankruptcy laws.[241] Justice Washington emphasized the textual arrangement of the words within particular provisions.[242] Johnson and Trimble also thought that the fabric of the whole Constitution was relevant to interpretation.[243] "The principle," Trimble wrote, "that the association of one clause with another of like kind, may aid in its construction, is deemed sound."[244]

Four justices—Washington, Johnson, Thompson, and Trimble—relied on the framers' intentions.[245] Trimble referred to the framers as "sages,"[246] while Washington wrote: "I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely

236. *Id.* at 329 (opinion of Trimble, J.).

237. *Id.* at 290 (opinion of Johnson, J.).

238. *Id.* at 274–75 (opinion of Johnson, J.); *id.* at 302–03 (opinion of Thompson, J.).

239. *Id.* at 302 (opinion of Thompson, J.).

240. *Id.* at 303.

241. *Id.* at 274–75 (opinion of Johnson, J.).

242. *Id.* at 267–68 (opinion of Washington, J.).

243. *Id.* at 275, 288–89 (opinion of Johnson, J.); *id*. at 329–31 (opinion of Trimble, J.).

244. *Id.* at 329 (opinion of Trimble, J.). In a different case, Marshall, too, found the fabric of the whole significant. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

245. *Ogden*, 25 U.S. (12 Wheat.) at 256, 258 (opinion of Washington, J.); *id.* at 274–75, 280 (opinion of Johnson, J.); *id.* at 302–05 (opinion of Thompson, J.); *id.* at 329, 331 (opinion of Trimble, J.).

246. *Id.* at 331 (opinion of Trimble, J.).

to fulfil the intentions of those who framed the constitution of the United States."[247] Related to framers' intentions, Washington and Johnson believed that the Constitution's overall purposes should inform its interpretation,[248] while Thompson considered "the reason and policy" of particular provisions to be relevant.[249]

Three justices, Washington, Johnson, and Thompson, suggested that natural law principles should inform constitutional interpretation.[250] Two justices, Johnson and Marshall (dissenting), reasoned that the history of the political problems that provoked the Philadelphia convention was germane to constitutional interpretation.[251] Marshall, for instance, emphasized that state government corruption in the 1780s produced unjust debtor relief laws, which engendered the inclusion of the contracts clause in the Constitution.[252] Two justices, Johnson and Thompson, believed that the justices could legitimately consider practical consequences when interpreting the Constitution.[253] At one point, when considering what constituted an "obligation" under the contracts clause, Thompson contemplated whether a particular interpretation would "facilitate commercial intercourse."[254] Finally, two justices, Johnson and Thompson, examined judicial precedents concerning disputed constitutional meanings.[255] Thompson, for instance, considered prior state court interpretations of the contract clause to be relevant.[256]

247. *Id.* at 256 (opinion of Washington, J.).

248. *Id.* at 265; *id.* at 274 (opinion of Johnson, J.).

249. *Id*. at 303 (opinion of Thompson, J.).

250. *Id*. at 258, 266 (opinion of Washington, J.); *id*. at 282 (opinion of Johnson, J.); *id*. at 303–04 (opinion of Thompson, J.).

251. *Id*. at 274, 276–77 (opinion of Johnson, J.); *id*. at 339, 354–55 (Marshall, C.J., dissenting).

252. *Id*. at 354–55 (Marshall, C.J., dissenting).

253. *Id*. at 276 (opinion of Johnson, J.); *id*. at 300, 313 (opinion of Thompson, J.).

254. *Id*. at 300 (opinion of Thompson, J.). The judicial promotion of commercial progress became increasingly important during the nineteenth century. Feldman, *supra* note 107, at 74–82.

255. *Ogden*, 25 U.S. (12 Wheat.) at 272 (opinion of Johnson, J.); *id*. at 296 (opinion of Thompson, J.).

256. *Id*. at 296 (opinion of Thompson, J.); *see id*. at 272 (opinion of Johnson, J.) (discussing Supreme Court precedents vis-à-vis state power to pass bankruptcy laws).

In sum, the five justices writing opinions in *Ogden* employed a dizzying array of interpretive strategies. No justice relied on only one exclusive interpretive approach, whether public meaning or otherwise. Every justice used multiple approaches. Justice Washington explicitly admitted that, in his view, constitutional interpretation was not mechanical, and constitutional meaning was not objective and determinate. He explained his interpretive judgment:

> I should be disingenous were I to declare, from this place, that I embrace [a particular interpretation of the contract clause] without hesitation, and without a doubt of its correctness. The most that candour will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt, than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.[257]

To be sure, the justices in *Ogden* as well as earlier constitutional cases often considered the public meaning of the Constitution. Even so, rather than supporting new originalism, these early judicial analyses of public meaning, when carefully reviewed in context, critically undermine new originalist claims. In most instances when justices considered public meaning relevant to constitutional interpretation, they nonetheless moved on to consider additional interpretive sources. In so doing, the justices effectively repudiated new originalist methodology. The gist of most new originalisms is that the preferred originalist method provides the exclusive interpretive path to constitutional meaning.[258] Originalist methodology exhausts constitutional meaning, leaving no room for additional interpretive methods. McGinnis and Rappaport, in particular, emphasize that reasonable-person originalism rejects more eclectic or pluralist approaches to interpretation,

257. *Id.* at 256 (opinion of Washington, J.). Washington added that if the justices were doubtful about constitutional meaning, then they should defer to the legislative judgment, *id.* at 270, a viewpoint that James Thayer would famously advocate more than sixty years later. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

258. To a degree, this is true even of a "living originalist," like Balkin. BALKIN, *supra* note 64, at 3–4. He distinguishes constitutional construction from interpretation; only the latter supposedly uncovers constitutional meaning. *Id.* at 5–6, 12–13. Thus, apparently, the more open-ended (or living) part of his originalism is, technically, not interpretation. *But see id.* at 5 (explaining that he will usually refer to both interpretation and construction as "'interpretation' generally").

which they fear might sneak in the back door under the conceptual cloak of constitutional construction.[259] Only originalist methods, it is claimed, lead to fixed and objective constitutional meanings. But an eclectic interpreter, unlike an originalist, does not claim such exclusivity of method. The eclecticist is open to multiple interpretive approaches, including an inquiry into public meaning, but also others, such as an examination of framers' intentions, practical consequences, and so forth. Thus, when the early justices examined public meaning and then moved on to additional interpretive sources, they implicitly rejected new originalism. By consensus of their practices, the justices agreed on and implemented an interpretive eclecticism. True, they readily considered public meaning, but they did not find that it exhausted constitutional meaning.

F. Legal Treatises

In the early 1790s, James Wilson struck a keynote in his seminal lectures on law by linking reason and natural law.[260] Then, in the first great comprehensive treatise on American law, James Kent elaborated this link and tied it to the common law:

> A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases.[261]

Indeed, numerous treatise writers, before and after Kent, proclaimed that the common law was scientific precisely because it was a rational system of principles.[262] Reason was inherent to the common law system and crucial to judicial decision making. In a 1795 treatise on Connecticut state law, Zephaniah Swift explained that the common

259. *Methods*, *supra* note 10, at 773.

260. JAMES WILSON, THE WORKS OF JAMES WILSON 123–25, 145 (1967 ed.); *see* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2–9 (1st ed. 1765-1769) (linking natural law and reason); WHITE, *supra* note 85, at 129.

261. 1 KENT, *supra* note 164, at 439; *see also id*. at 2 (discussing the law of nations).

262. ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 39 (1795).

law is binding "where it is founded in reason, and consonant to the genius and manners of the people."[263] In his *Course of Legal Study*, David Hoffman's pronouncement was even more rhapsodic: "If law be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason."[264]

Treatise writers discerned numerous important ramifications from the reason or rationality of natural law. Francis Hilliard, for example, explicitly recommended that any judge, confronting ambiguity, should take "for his guide the universal law of reason and justice."[265] Nathaniel Chipman, in his *Sketches of the Principles of Government*, published in 1793, emphasized that "the constitutional principles of government [were] founded in the principles of natural law."[266] Meanwhile, although the nation lacked a hereditary aristocracy, many Americans perceived a natural order within society.[267] In this vein, the common law imposed obligations that appeared to arise naturally from one's status within society. According to Jesse Root, writing in 1798:

> [The common law] taught the dignity, the character, the rights and duties of man, his rank and station here and his relation to futurity [and thus] defines the obligations and duties between husbands and wives, parents and children, brothers and sisters, between the rulers and the people, and the people or citizens towards each other.[268]

Despite the widespread linking of reason, natural law, and the common law in American treatises from the early decades of nationhood, one can search in vain for invocations of a "reasonable man" as a generalized legal standard of liability or judgment. The first edition of Kent's *Commentaries on American Law*, published from 1826 to 1830, did not contain the terms reasonable man, prudent man, or ordinary

263. *Id*. at 42–43.

264. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 25 (2d ed. 1846); *see* David Hoffman, *A Lecture, Introductory to a Course of Lectures* (1823), *reprinted in* THE LEGAL MIND IN AMERICA 83, 85 (Perry Miller ed., 1962) (discussing legal science).

265. FRANCIS HILLIARD, THE ELEMENTS OF LAW 3 (1835).

266. NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 115 (1793); *see id*. at 118, 280 (making similar statements).

267. DOUGLAS T. MILLER, THE BIRTH OF MODERN AMERICA 1820-1850, at 117–25 (1970); WHITE, *supra* note 85, at 18–20.

268. Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), *reprinted in* THE LEGAL MIND IN AMERICA 31, 35–36 (Perry Miller ed., 1962).

man.[269] To be sure, the reasonable or prudent man would become manifest in subsequent editions of the *Commentaries*. In the twelfth edition, published in 1873, Oliver Wendell Holmes, Jr., writing as the editor, included a lengthy footnote when discussing duties for bailments of goods. Holmes explained that if there were no other duties imposed—for instance, by custom or statute—then the "standard" or "ground of liability" should be "the conduct of a prudent man," regardless of whether the case was tried to a judge or jury.[270] Holmes added that "liability does not necessarily depend on culpability, but often simply on the bringing about, or permitting to come to pass, certain external facts."[271]

Holmes is famous for advocating for an objective legal standard in torts and other common law cases. Throughout his book, *The Common Law*, published in 1881, he argued that the reasonable or prudent man should become (and, in many instances, was already) a near-universal objective standard, applicable in torts, criminal law, contracts, and so on.[272] In Holmes's *Commentaries* footnote, he cited repeatedly to his essay, *The Theory of Torts*, published the same year as the twelfth edition. In the essay, Holmes unequivocally rejected the idea that negligence should be based on "culpability," arising from "the state of the party's mind."[273] In a jury trial, Holmes explained, the jury represents "the average opinion of the community" and thus fixes the appropriate "standard of conduct."[274] Ultimately, Holmes concluded, the jury must decide whether the defendant's "conduct was not that of a prudent man."[275] Yet, despite Holmes's eventual renown vis-à-vis the objective reasonable-man standard, his views were consistent with those of many of his contemporaries.[276] In other words, while treatise writers in the

269. Kent's first edition did not discuss negligence qua negligence.

270. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 766–67 n.1 (12th ed. 1873).

271. *Id.* Holmes's footnote might be considered consistent with the status-relationship cases from earlier in the nineteenth century. *See supra* notes 150–158 and accompanying text. But he clearly expanded on the applicability of the reasonable or prudent man in subsequent writings. *See infra* notes 272–277 and accompanying text.

272. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 38, 49–51, 108–13 (1881).

273. Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1873).

274. *Id.* at 655.

275. *Id.*

276. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 115–16 (1992).

early-nineteenth century did not invoke the reasonable or prudent man as a legal standard, by *mid-* to *late*-century, this approach would become common.[277]

Treatise writers from the early decades who expressly discussed constitutional interpretation often articulated nebulous and even inconsistent views. They ultimately, then, appeared to implicitly adopt an eclectic approach.[278] In the first edition of his *Commentaries*, Kent stated that the constitutionality of legislative actions should be determined in accord with "the true intent and meaning of the constitution," which at least suggested a somewhat mechanical approach focused on text and intent.[279] But two sentences later, he explicitly elaborated: "The interpretation or construction of the constitution . . . requires the exercise of the same legal discretion, as the interpretation or construction of a law."[280] Kent's reference to the interpretation of "a law" might refer to statutory law, but it might also refer to the common law.[281] When discussing statutory interpretation, Kent first emphasized the overriding importance of "the intention of the lawgiver,"[282] but then explained that legislative intent could be gleaned from a variety of sources, including "context" as well as "what is consonant to reason and good discretion."[283] Likewise, Kent explained that

277. In the eleventh edition of Kent's *Commentaries*, published immediately after the Civil War, the editor, George F. Comstock, did not include Holmes's footnote arguing that the prudent man established a standard of liability. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 751 (11th ed. 1866–1867). Nonetheless, Comstock elsewhere invoked a prudent-man standard. For instance, when citing an English case, Comstock explained that "the negligence on the part of the guest was defined to be such, that the loss would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances." *Id.* at 787 n.1. Comstock's invocation of the prudent man, of course, might be considered consistent with the status-relationship cases from earlier in the nineteenth century. *See supra* notes 150–158 and accompanying text.

278. *See* WHITE, *supra* note 85, at 91 (discussing David Hoffman's 1817 *Course of Legal Study*).

279. 1 KENT, *supra* note 165, at 421.

280. *Id.*

281. When Kent introduced his discussion of "municipal law," he explained that "[i]t is composed of written and unwritten, or statute and common law." *Id.* at 419.

282. *Id.* at 431.

283. *Id.* at 432.

statutory language should be understood from the layperson's perspective,[284] but also from the lawyer's perspective.[285] Kent's pronouncements concerning the interpretation of the common law were no less paradoxical. In fact, he seemed to endorse paradox when he praised the eighteenth-century English judge, Lord Mansfield:

> Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment.[286]

Unquestionably, the preeminent treatise on constitutional law was Joseph Story's *Commentaries on the Constitution of the United States*, published in 1833 in both a three-volume edition and a one-volume abridgement. [287] Story acknowledged that commentators and judges had strongly disagreed about the proper approach to constitutional interpretation.[288] He thus proposed to clarify: "Let us, then, endeavour to ascertain, what are the true rules of interpretation applicable to the constitution; so that we may have some fixed standard."[289] With unwitting irony, he then *reduced* constitutional interpretation to *nineteen* rules. Indeed, constitutional scholars today probably would not even categorize some of Story's so-called rules as true interpretive rules. For instance, rule 9 stated: "Where a power is remedial in its nature, there is much reason to contend, that it ought to be construed liberally."[290] Rule 11 began: "And this leads us to remark, in the next place, that in the interpretation of the constitution there is no solid objection to implied powers."[291] Each of these would-be rules appears to reflect a substantive constitutional position regarding governmental power rather

284. *Id.*

285. *Id.* at 434.

286. *Id.* at 444.

287. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833) (in 3 volumes).

288. *Id.*

289. *Id.*

290. *Id.* at 412.

291. *Id.* at 418.

than an interpretive guide or method that would apply to all constitutional provisions.

Most important, every time Story pronounced a rule that suggested an originalist or strict constructionist approach, he soon presented a countervailing position that undermined the former would-be rule. Rule 1 illustrates: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."[292] This statement suggested an emphasis on public meaning ("the sense of the terms") and original intent, but Story followed with a large qualification, more suggestive of an eclectic approach. "Mr. Justice Blackstone has remarked that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law."[293] Rule 7 suggested that constitutional meaning is fixed: "[The Constitution] is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever."[294] Yet, rule 16 emphasized constitutional ambiguity: "[W]ords, from the necessary imperfection of all human language, acquire different shades of meaning, each of which is equally appropriate, and equally legitimate; each of which recedes in a wider or narrower degree from the others, according to circumstances; and each of which receives from its general use some indefiniteness and obscurity."[295]

Story went so far as to repudiate explicitly "all notions of subjecting [the Constitution] to a strict interpretation."[296] In the midst of the volatile political disputes of the 1790s, pitting Federalists (including Hamilton) against Republicans (including Madison), Jefferson had advocated for a rule of strict interpretation in accord with originalism, particularly with regard to congressional power. "On every question of construction [we should] carry ourselves back to the time, when the

292. *Id.* at 383.
293. *Id.*
294. *Id.* at 410.
295. *Id.* at 437.
296. *Id.* at 407.

constitution was adopted;" wrote Jefferson, "recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against, conform to the probable one, in which it was passed."[297] Story sharply denounced this interpretive rule because of its "utter looseness, and incoherence."[298] In the end, Story's nineteen rules, when taken as a whole in all their pluralistic diversity, seem to endorse an eclectic interpretive approach leading to "reasonable" constitutional constructions.[299]

To be clear, as was true with the early Supreme Court justices, the early treatise writers made innumerable statements that scholars today can pluck out of context to demonstrate that history supposedly supports some type of originalism. For example, Story, who was of course both a justice and a treatise writer (and a Harvard professor), wrote: "In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense."[300] Could Story have been more pellucid? He supported a plain meaning interpretive approach—except when he did not. He immediately continued the foregoing statement with the following: "*unless* the context furnishes some ground to control, qualify, or enlarge it."[301]

G. Framers and Ratifiers

The previous sections identified a multitude of statements by treatise writers and judges that signify a variety of approaches to constitutional interpretation. Although I only occasionally mentioned the political contexts in which such statements were uttered, one should remember that the writers always entertained broad political ideologies, if not also specific political goals. Joseph Story did not write his nineteen rules of constitutional interpretation in a political vacuum, devoid of political preferences. To the contrary, Story favored national power over state sovereignty, and his interpretive rules reflected his

297. *Id.* at 390 n.1 (quoting Jefferson).

298. *Id.*

299. *Id.* at 407; *see id.* at 441 ("[W]e should never forget, that it is an instrument of government we are to construe"); WHITE, *supra* note 85, at 114–18 (discussing Story's interpretive approach); William Michael Treanor, *Against Textualism*, 103 NW. U.L. REV. 983, 998 (2009) (arguing that founders' generation did not generally accept a strict interpretative approach).

300. STORY, *supra* note 287, at 436.

301. *Id.* (emphasis added).

ideology, sometimes quite distinctly.[302] For instance, his express rejection of Jefferson's strict constitutional interpretation must be understood in relation to Jefferson's political advocacy for state over national power.[303] Given this, the fact that justices and scholars so rarely and anomalously invoked the reasonable man as a legal standard during the early decades of nationhood suggests that lawyers and laypersons, *regardless* of their diverse political views, would not have conceived of reasonable-person originalism as a legitimate interpretive method.

This final historical section focuses on the framers and ratifiers. Why place this discussion last? First, if anyone in American history uttered a definitive rule (or rules) for constitutional interpretation, it would have been the framers or ratifiers. Constitutional scholars today could legitimately deem the framers and ratifiers to be authoritative, presumably more so than the justices, the treatise writers, or anyone else. Hence, before dismissing reasonable-person originalism, one should examine its strongest potential historical justification. Second, an examination of the historical evidence surrounding the framing and ratification ultimately underscores the significance of political context. As will become clear, one cannot find any definitive statement of an interpretive method exactly because all interpretive claims during the framing and ratification were profoundly political—and obviously so. In the end, then, this final focus on the framers and ratifiers highlights a basic failing of reasonable-person originalism; it attempts the impossible by claiming to filter politics out of (constitutional) history.

During the constitutional convention and the ratification process, the debates focused on the *meaning* of the proposed Constitution rather than on the proper interpretive method or approach. Moreover, for many Americans involved in the ratification debates, the meaning—or more precisely, the significance—of the Constitution revolved far less around particular provisions and far more around whether one favored preservation of the Union or preservation of the states as sovereigns.[304] The framers had specified a ratification process in Article VII that presented the people with a straightforward choice: Either

302. O'NEILL, *supra* note 10, at 21; H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1293–94 (1985).

303. STORY, *supra* note 287, at 390 n.1.

304. RAKOVE, *supra* note 27, at 11–12.

take it (the proposed Constitution), or leave it. To supporters of the Constitution, like Hamilton and Madison, the nation could not continue to survive with the weak central government established under the Articles of Confederation.[305] To opponents, however, ratification of the Constitution meant the destruction of the states. And perpetuation of the states was paramount. According to Patrick Henry, the proposed Constitution would "change our government" into a "fatal system," which would engender "the utter annihilation of the most solemn engagements of the states."[306] He further cautioned: "If a wrong step be now made, the republic may be lost forever."[307] State sovereignty was the umbrella protecting individual liberty: The people's "liberty will be lost, and tyranny must and will arise."[308]

Thus, when ratification is understood in its political context—as a crucial political decision—its central significance was the choice of a strong central government over strong state sovereigns. The legal historian, Jack Rakove, narrows the meaning of ratification to an even finer point: "The only understanding we can be entirely confident the majority of ratifiers shared was that they were indeed deciding whether the Constitution would 'form a more perfect union' than the Articles of Confederation."[309] Even so, supporters and opponents of ratification also disagreed about the details. They differed widely in their interpretations of specific provisions, and thus disputed likely constitutional applications and consequences. While the overarching choice between a strong central government and strong state sovereigns was clear, when it came to specifics, the Constitution meant different things to

305. *E.g.*, THE FEDERALIST NO. 15 (Alexander Hamilton) (emphasizing problems under Articles of Confederation).

306. PATRICK HENRY, OPENING SPEECH (VIRGINIA RATIFYING CONVENTION, JUNE 4, 1788), *reprinted in* 2 THE DEBATE ON THE CONSTITUTION: JANUARY TO AUGUST 1788, at 595 (Bernard Bailyn ed., 1993).

307. *Id.* at 596.

308. *Id.*; *see also* Letter from Robert Yates & John Lansing, Jr. to Governor George Clinton (Jan. 14, 1788), *On the Likely Failure of Liberty*, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION: JANUARY TO AUGUST 17883–6 (Bernard Bailyn ed., 1993) (explaining why they refused to stay at constitutional convention).

309. RAKOVE, *supra* note 27, at 17.

different people. The documents and records of the ratification debates in the several states reveal a "range of meanings" that Americans, at the time, attached to the Constitution.[310]

Pauline Maier's magisterial history of ratification illustrates, as a general matter, the complexities that historical research can uncover, and underscores, more specifically, the range of viewpoints, the vigorous disagreements, which arose during the ratification process. For instance, Maier emphasizes that the oppositional labels, Federalist and Antifederalist, were misleading because the supporting and opposing positions could not really be reduced to a distinct bipolarity. Federalists mostly used these terms for political advantage—better to be 'for' something than 'anti'—even though the terminology "oversimplified the debate[s]."[311]

Unquestionably, critics of the Constitution did not articulate a univocal position. Some opponents "thought the Constitution was fundamentally flawed and should be rejected;"[312] some thought the Constitution would be acceptable but only with certain pre-ratification amendments;[313] some "wanted a new federal government, although not the one proposed;"[314] and some disliked the Constitution but believed it could be sufficiently amended after ratification.[315]

The supporters of the Constitution also did not speak with one voice. True, all Federalists "supported ratification of the Constitution 'as it now stands,'"[316] yet Benjamin Franklin was not the only one to admit that the document was imperfect.[317] Of course, Federalist supporters "differed over what perfection would be."[318] Indeed, some wanted a centralized government so strong or consolidated that it

310. *Id.* at 7; *see generally*, 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776–1787 (Merrill Jensen ed., 1976); MAIER, *supra* note 98 (elaborating the disagreements over ratification).

311. MAIER, *supra* note 98, at 94.

312. *Id.* at 93.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Franklin*, *supra* note 88, at 3; *see* MAIER, *supra* note 98, at 298 (during Virginia ratifying convention, Madison admitted that the document was imperfect).

318. MAIER, *supra* note 98, at 93.

would, in effect, eradicate the state sovereigns—exactly what some Antifederalists feared. Other supporters were disgusted with state governmental corruption, wanted a strong centralized government that could keep the states in check, but were not ready to abandon state sovereignty completely. Some supporters were dissatisfied with constitutional provisions that embodied political compromises from the Philadelphia convention, such as equal Senate representation for states regardless of population.[319]

Why, then, did all Federalists nonetheless support ratification of the Constitution, as proposed? Again, like Franklin, they recognized the unstable political ground that lay under the document. Most agreed that the nation would not likely survive further procrastination; action must be taken, or it would be too late. Federalists, therefore, feared proposals for pre-ratification amendments or a second convention. Either approach—amendments or convention—would undoubtedly generate additional political dithering and the likely implosion of the compromises supporting the original document. Political paralysis would set in, and the nation would stagger downward. Madison could not have been clearer than in a letter he wrote soon after ratification:

> You ask me why I agreed to the constitution proposed by the Convention of Philada [sic]. I answer because I thought it safe to the liberties of the people, and the best that could be obtained from the jarring interests of States, and the miscellaneous opinions of Politicians; and because experience has proved that the real danger to America & to liberty lies in the defect of *energy* & *stability* in the present establishments of the United States.[320]

Given such sentiments, a prominent Federalist like James Wilson, who had opposed equal Senate representation at the Philadelphia convention, turned around and defended this provision in the public debates over ratification. Instead of denouncing the political compromise, he celebrated it as "evidence of mutual concession and accommodation [that] ought rather to command a generous applause."[321]

319. *Id.* at 93–94.

320. Letter from James Madison to Philip Mazzei (Oct. 8, 1788), *reprinted in Records*, *supra* note 59, at 353 (emphasis in the original).

321. JAMES WILSON, SPEECH AT A PUBLIC MEETING IN PHILADELPHIA (OCT. 6, 1787), *reprinted in* XIII THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE

The multifaceted and zealous politics of ratification undermines reasonable-person originalism. Antifederalist opponents disagreed among themselves about the advantages and disadvantages of the Constitution; Federalist supporters disagreed among themselves; and most important, at the time, ratification seemed far from certain.[322] Federalists not only were afraid that the required nine states would not ratify, but also were apprehensive that two crucial states, Virginia and New York, remained unpredictable throughout much of the ratification process.[323] Without those two states, the union might wither, even if nine other states ratified. Given such political divergences and uncertainties, one cannot possibly find a univocal public meaning or actual understanding for key constitutional provisions. Consequently, McGinnis and Rappaport's reasonable-person standard—which supposedly uncovers an objective semantic meaning for all constitutional provisions—cannot survive the political vortex of the framing and ratification. Constitutional meaning cannot be abstracted from the politics because meaning was being forged in the crucible of politics. Certainly, during the ratification debates, any statement about constitutional meaning or interpretation must be viewed warily because Federalists and Antifederalists alike were motivated to posture for political advantage.[324] The proposed and ratified Constitution was, through and through, a political document, the meaning of which emerged in the political disputes of the founding and subsequent eras.

While the overarching significance of ratification was clear—one favored either a strong centralized government or strong state sovereigns—the vigorous disagreements about the details, about the meanings of specific provisions, revealed multiple and competing interpretive approaches. To be sure, debate never centered on interpretive methods or rules, but different approaches became manifest in the debates over the substantive meanings and likely consequences of various

CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE, FEB. 21 TO NOV. 7, 1787, at 341 (John P. Kaminski & Gaspare J. Saladino eds., 1981); *see also* MAIER, *supra* note 98, at 79–80 (discussing Wilson).

322. MAIER, *supra* note 98, at ix–xii, 68–69, 97, 115–16, 125 (emphasizing uncertainty).

323. *Id.* at 255–400 (discussing Virginia and New York).

324. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1212 (2009).

constitutional provisions. At a broad level, the Antifederalist opponents of ratification, on the one side, tended to favor a religious hermeneutic consistent with many Protestant denominations. This approach claimed to be, in a sense, anti-interpretation. Individuals supposedly could directly discern a plain meaning from a text—religious or otherwise—without the aid of trained experts or interpretive rules. This was a hermeneutic of the common people. Federalist supporters, on the other side, tended to favor a legal hermeneutic that had developed through decades (or centuries) of judicial interpretations of the (English) common law and statutes. From this perspective, the interpretive traditions established in the legal profession could guide constitutional construction.[325]

Without question, during the founding era the most important authority for the American legal profession was Blackstone. The lawyers among the framers and ratifiers certainly would have been familiar with Blackstone, and likely would have trained primarily by reading Blackstone's *Commentaries on the Laws of England*.[326] Because of the obscurity of the English Constitution, Blackstone's views on statutory interpretation were most relevant to the construction of the proposed American Constitution as a written legal document. In his chapter "Of the Nature of Laws in General," Blackstone summarized his approach to statutory interpretation in a single paragraph, which he then elaborated point by point in subsequent pages:

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.[327]

In this passage, Blackstone appeared to state initially that legislators' intentions are crucial, but he immediately clarified by suggesting that the interpreter discerns intent from objective signs or markers. Blackstone, that is, seemed less interested in the legislators' subjective

325. Cornell, *supra* note 80, at 304–05; Powell, *supra* note 19, at 912–13.

326. *See* RAKOVE, *supra* note 27, at 353; FELDMAN, *supra* note 107, at 49–50 (emphasizing Blackstone's importance to early American lawyers); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731 (1976) (same).

327. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 59 (1st ed. 1765-1769).

thoughts than in what the legislators' words signified to others. And then Blackstone broadened the inquiry. He explained that he would examine not only the legislators' words but also a host of other factors, including context, consequences, and purposes.[328] In the next chapter, focused on "the laws of England,"[329] Blackstone returned to his exegesis of statutory interpretation, largely reiterating his prior points, but he added that an interpreter might need to alter his approach, depending on the specific type of statute. One method did not fit all legislation. Given Blackstone's conservative reputation, his overall approach to statutory interpretation appears surprisingly flexible, near eclectic. Undoubtedly, in the United States, Blackstone's legal hermeneutic strongly differed from the competing Protestant hermeneutic. Blackstone implicitly recognized the importance of tradition, the development of expertise, and the advantage of pluralistic openness to textual meaning.

In any event, whenever one finds any explicit declaration from the founding era regarding interpretive method—whether from the Philadelphia convention, the ratification debates, or the immediately ensuing years—one must remember to understand the declaration within its political context. To underscore the importance of politics vis-à-vis interpretive views, the remainder of this section focuses on two of the leading framers, Hamilton and Madison, both of whom also played crucial roles in the ratification debates and then governmental affairs of the 1790s. I offer a caveat at the outset: based on this discussion of Hamilton and Madison, one might conclude that they should be condemned for inconsistency—indeed, today, they might be denounced as flip-floppers. And to be sure, their respective arguments sometimes appear inconsistent. But to emphasize and denounce Hamilton and Madison for inconsistency would be to miss the main point rather dramatically. Hamilton's and Madison's arguments instead illustrate the predominance during the founding era of an eclectic approach to constitutional interpretation. Astute intellectuals, like Hamilton and Madison, readily drew upon a multitude of interpretive sources, varying their approaches in accord with their current political interests.

328. *See id.* at 59–62.

329. *Id.*

In his essays in the *Federalist Papers*, advocating for ratification, Hamilton suggested, in one breath, that constitutional interpretation was mechanical, but then suggested, in the next breath, that it was inherently discretionary and requires judgment. Throughout most of *Federalist*, *Number 78*, Hamilton maintained that judgment and discretion were inherent in legal interpretation and judicial decision-making.[330] He repeatedly distinguished judicial will from judicial judgment.[331] Judicial will was unduly partisan, but judgment was unavoidable. Judgment, from this perspective, was not equivalent to judicial subjectivism, relativism, or activism. But toward the end of the essay, Hamilton depicted judicial decision making as more mechanical. While discussing judicial independence, he explained that lifetime judicial appointments would free federal judges from political pressure, so that when they decided cases, "nothing would be consulted but the Constitution and the laws."[332] He added that lifetime tenure would attract judges well-qualified by study and knowledge. With such suitable judges, the nation would "avoid an arbitrary discretion in the courts," but only if the judges also were "bound down by strict rules and precedents, which [would] serve to define and point out their duty in every particular case that comes before them."[333]

Thus, the end of *Federalist Number 78*, connotes a mechanical interpretive approach harmonious with a strict or narrow construction of the Constitution. It appears, for instance, to controvert a liberal or flexible constitutional interpretation that might engender the recognition of implied national powers. Hamilton argued similarly in *Federalist Number 84*. In that essay, Hamilton reasoned that a Bill of Rights was unnecessary because the Constitution would limit Congress to exercising the powers expressly enumerated in Article I, Section 8, such as the power to regulate interstate commerce. The Constitution, Hamilton insisted, would not invest Congress with a broad or open-ended police power that would allow it to regulate for the general health and welfare. Consequently, the Constitution would not empower Congress to infringe on individual liberties, such as would be

330. THE FEDERALIST NO. 78 (Alexander Hamilton) (Cinton Rossiter ed., 1961) 464–72.

331. *Id.* at 468–69.

332. *Id.* at 471.

333. *Id.*

protected by a Bill of Rights. A Bill of Rights, from this perspective, would be redundant.[334] Hamilton, though, did not stop there. A Bill of Rights not only would be redundant, he reasoned, but it also would endanger individual rights and liberties. By delineating "exceptions to powers which are not granted," a Bill of Rights "would afford a colorable pretext to claim more than were granted."[335] A Bill of Rights would give power-hungry "men disposed to usurp, a plausible pretense" for claiming that governmental powers extended over any rights and liberties not expressly protected.[336] A Bill of Rights, in short, would provide a specious rationale for finding implied national powers.

Yet, almost as soon as President Washington had appointed him the first Secretary of the Treasury, Hamilton devised a complicated plan to put the nation on solid financial footing. The creation of a national bank was a crucial component of the plan, and Congress responded by passing a bill that would charter a bank. Washington, contemplating the bill, asked Secretary of State Jefferson and Attorney General Edmund Randolph whether he should veto the action. Both encouraged Washington to do so. Jefferson, in particular, argued that the Constitution's grant of congressional power should be strictly construed. Following an argument that Madison had made when arguing against the bill in the House, Jefferson insisted that Congress should be limited to its expressly enumerated powers and should not be allowed to exercise implied powers.[337] The president thus asked Hamilton to respond. Despite his earlier arguments in the *Federalist Papers*, suggesting that Congress should be limited to its expressly enumerated powers, Hamilton now unequivocally and enthusiastically argued that Congress must have implied powers, including a power to charter a bank.[338]

Even with such constitutional wavering, Hamilton remained unswervingly constant in at least one respect: He always used the terms,

334. THE FEDERALIST NO. 84, at 510–13 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

335. *Id.* at 513.

336. *Id.* at 514.

337. THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BANK (FEB. 15, 1791), *reprinted in* 2 GREAT ISSUES IN AMERICAN HISTORY 160 (Richard Hofstadter ed., 1958); MADISON, SPEECH, *supra* note 57, at 486.

338. HAMILTON, OPINION, *supra* note 57, at 165–66.

"reasonable man" and "prudent man," in a non-technical sense. In the *Federalist Papers*, for instance, he would rhetorically underscore the persuasiveness of his arguments by emphasizing that any reasonable or prudent man would agree with him.[339] In *Federalist*, *Number 34*, Hamilton discussed the power to tax and its relation to national security. He acknowledged the possibility of European nations going to war against each other. He explained: "If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No *reasonable man* would hastily pronounce that we are entirely out of its reach."[340] No evidence suggests that Hamilton ever conceived of the "reasonable man" as a standard of legal judgment or liability.

When it came to governmental power, Madison vacillated as much as Hamilton did. During the ratification debates and initially in Congress, Madison insisted that the Constitution should be interpreted liberally or flexibly. At the Virginia ratifying convention, Madison admitted that "precision" in drafting the Constitution "was not so easily obtained."[341] Partly for that reason, he maintained that the Constitution should be given a "fair and liberal interpretation."[342] Approximately one year later, the first House was debating the organization of the executive branch. Madison moved to create three executive departments headed by secretaries "who shall be appointed by the president, by and with the advice and consent of the senate; and to be removeable [sic] by the president."[343] The president's power to remove executive officials was especially contentious, but Madison insisted that the Constitution granted the president an implied removal power, without the

339. THE FEDERALIST NO. 15, at 110 (Alexander Hamilton)(Clinton Rossiter ed., 1961) ("Such a state of things can certainly not service the name of government, nor would any prudent man choose to commit his happiness to it."); THE FEDERALIST NO. 17, at 118 (Alexander Hamilton)(Clinton Rossiter ed., 1961) ("Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons interested with the administration of the general government could ever feel to divest the States of the authorities of that description.").

340. THE FEDERALIST NO. 34, 205, 208 (Alexander Hamilton)(Clinton Rossiter ed., 1961) (emphasis added). For a subsequent example, see ALEXANDER HAMILTON: REPLY TO ANONYMOUS CHARGES (1792), *reprinted in Records*, *supra* note 59, at 368 (prudent man).

341. JAMES MADISON, IN THE VIRGINIA CONVENTION (JUNE 20, 1788), *in Records*, *supra* note 59, at 331.

342. *Id.*

343. RAKOVE, *supra* note 27, at 347 (quoting Madison).

advice and consent of the senate, which Article II, Section 2, Clause 2, seemed to require at least for appointments.[344] Madison argued to interpret the Constitution according to its "spirit and principles," rather than in a strict manner that would be "very inconvenient in practice."[345] He continued in subsequent speeches to advocate for flexible constitutional interpretation and the recognition of an implied presidential removal power.[346] Nevertheless, by the early 1790s, Madison was arguing in the House for a strict or narrow constitutional construction, which would deny Congress an implied power to charter a national bank and thus thwart part of Hamilton's financial plan. Madison cautioned against Hamilton's claim for implied congressional power: "If implications thus remote and thus multiplied can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy. The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself."[347]

Madison also wavered in his references to (what would today be considered) originalist sources, such as framers' intentions and original public meaning. He never explicitly relied on the framers' subjective intentions as an interpretive guide to the Constitution, but he did hint at their relevance at least twice. In one of his speeches on an implied presidential removal power, he reasoned that without such power, the president would be unable to "take care that the laws be faithfully executed."[348] He added a rhetorical flourish to this point: "I can hardly bring myself to imagine the wisdom of the convention who framed the constitution, contemplated such incongruity."[349] Then, in his House speech opposing the national bank, he similarly alluded to the framers' intentions.[350]

344. JAMES MADISON, SPEECH IN CONGRESS ON THE REMOVAL POWER (May 19, 1789), *reprinted in* JAMES MADISON: WRITINGS 434 (Library of America 1999).

345. *Id.* at 435.

346. JAMES MADISON, SPEECH IN CONGRESS ON PRESIDENTIAL REMOVAL POWER (June 17, 1789), *reprinted in* JAMES MADISON: WRITINGS 457–65 (Library of America 1999).

347. MADISON, SPEECH, *supra* note 57, at 486.

348. JAMES MADISON, SPEECH IN CONGRESS ON PRESIDENTIAL REMOVAL POWER (JUNE 17, 1789), *reprinted in* JAMES MADISON: WRITINGS 459 (Library of America 1999).

349. *Id.*; *see also* RAKOVE, *supra* note 27, at 351–52 (discussing Madison's position).

350. MADISON, SPEECH, *supra* note 57, at 482.

Madison's references to original public meaning were more lucid, but far from uniform. During the ratification debates, several of Madison's *Federalist* essays doubted the wisdom of allowing the people, represented most directly in the House, to decide constitutional questions.[351] In *Federalist Number 49*, he revealed a distinct distrust of public opinion, which he feared would manifest passion more often than reason, especially in constitutional matters.[352] From Madison's perspective, the greatest threat to a republic was factionalism, most likely to arise among the people and their direct representatives. He believed that the indirect elections of the president, through the electoral college, and the senators, through the state legislatures, would help filter out the people's factionalist passions.[353] Indeed, both Madison and Hamilton worried that the longer the public debate over ratification lasted, the more likely it became that the people would be infected with a factionalism leading them to grievous error.[354]

Yet, in the midst of the political battles of the 1790s, Madison's ostensible attitude toward the people and public opinion changed. In his House speech against the bank, he stated: "Contemporary and concurrent expositions are reasonable evidence of the meaning of the parties."[355] Apparently, he now viewed public meaning to be a reliable interpretive guide to the Constitution.[356] Madison more distinctly accepted this position in a subsequent dispute over the *Jay Treaty*, negotiated by John Jay with Britain in 1794 and ratified by the Senate in

351. RAKOVE, *supra* note 27, at 346–47.

352. THE FEDERALIST NO. 49, (James Madison) (Clinton Rossiter ed, 1961); RAKOVE, *supra* note 27, at 140–41.

353. THE FEDERALIST NO. 49 (James Madison) (Clinton Rossiter ed., 1961) ("But the legislative party would not only be able to plead their cause most successfully with the people. They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in the convention."); RAKOVE, *supra* note 27, at 309–10.

354. RAKOVE, *supra* note 27, at 141–42; *see* Cornell, *supra* note 80, at 311–15 (arguing that new originalists unwittingly advocate a position mostly advocated by the Antifederalists rather than by Madison and the Federalists).

355. MADISON, SPEECH, *supra* note 57, at 482.

356. *See id*. at 488–89 (drawing on ratification debates in several states to argue against congressional power to charter national bank); RAKOVE, *supra* note 27, at 351–52 (discussing Madison's bank speech).

1795.[357] On the one side, Hamilton favored the treaty and had defended it with numerous arguments, one of which invoked the framers' intentions.[358] On the other side, Madison and the Republicans vehemently disliked the treaty; they thought it commensurate to surrender. Consequently, they sought to resist it in the House, but did the Constitution allow the House to refuse implementation of a ratified treaty? Madison spoke in the House about the treaty power, in general, and the Jay Treaty, in particular. In one remarkable passage, he explained his (current) approach to constitutional meaning.[359] Despite his earlier allusions to the relevance of the framers' intentions, he now appeared to repudiate their significance. The framers' intentions, he said, "[c]ould never be regarded as the oracular guide in the expounding [of] the constitution."[360] Rather, he emphasized public meaning as an interpretive guide, thus disregarding his earlier distrust of the people and public opinion. "As the [constitutional] instrument came from [the framers], it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."[361] Madison suggested that public meaning should be derived from the actual understandings of delegates to the state ratifying conventions. "If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution."[362]

To reiterate a crucial point, while Hamilton's and Madison's respective arguments sometimes appear inconsistent, they primarily demonstrate the practice of constitutional eclecticism during the

357. THE JAY TREATY (NOV. 19, 1794), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 165 (Henry Steele Commager ed., 9th ed. 1973).

358. RAKOVE, *supra* note 27, at 357–58.

359. JAMES MADISON, SPEECH IN CONGRESS ON THE JAY TREATY (APRIL 6, 1796), *reprinted in* JAMES MADISON: WRITINGS 568, 574 (Library of America 1999) [hereinafter MADISON, TREATY]. Numerous constitutional historians have accentuated the importance of this speech. *E.g.*, Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 102–03 (1988); Powell, *supra* note 19, at 921.

360. MADISON, TREATY, *supra* note 359, at 574; *see* Powell, *supra* note 19, at 921 (emphasizing Madison's rejection of original intent).

361. MADISON, TREATY, *supra* note 359, at 574.

362. *Id.*; *see* Lofgren, *supra* note 359, at 102–03 (discussing Madison's emphasis of the ratifiers' intentions).

founding era. Hamilton and Madison interpreted the Constitution from their respective political horizons, and as their horizons shifted, their views of the Constitution changed accordingly. When discerning constitutional meaning, they drew upon a multitude of available interpretive sources, varying their approaches based on their current political interests. Whether they explicitly or implicitly articulated those interpretive approaches, Hamilton and Madison spoke and wrote as politicians embroiled in volatile disputes. They were not Platonic philosopher kings ruminating about the ideal approach to constitutional interpretation.

A vivid and unequivocal final illustration of interpretive eclecticism is worth sketching. Madison, it will be recalled, opposed the chartering of the first national bank in the early 1790s. In arguing that Congress lacked the power to create the bank, he insisted that the Constitution should be strictly construed.[363] To support this position, he alluded to the framers' intentions but, more clearly, maintained that original public meaning should guide constitutional interpretation.[364] As fortune would have it, in 1815, he was president when Congress passed a bill chartering a second national bank. He vetoed this bill, but on policy rather than constitutional grounds.[365] In fact, he reasoned that a national bank, "once unconstitutional, had become constitutional."[366] He explained that "the constitutional authority of the Legislature" to charter a bank had been established "by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[367] In other words, even if original public meaning had precluded congressional power to charter a bank—as Madison had previously argued—precedent had changed the meaning of the Constitution. And precedent arose not only from judicial decisions, but also from the actions of the executive, the legislature, and the people in

363. MADISON, SPEECH, *supra* note 57, at 486.

364. *Id.* at 482.

365. JAMES MADISON, VETO MESSAGE ON THE NATIONAL BANK (JANUARY 30, 1815), *reprinted in* 8 THE WRITINGS OF JAMES MADISON 327 (Gaillard Hunt ed. 1808-1819) [hereinafter MADISON, VETO].

366. David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1538 (2013).

367. MADISON, VETO, *supra* note 365.

general. From Madison's perspective, constitutional meaning was not fixed at the time of ratification, whether by original public meaning or anything else. To the contrary, a variety of factors could shape the proper current interpretation of the text.

IV. Conclusion

McGinnis and Rappaport, like other originalists, seek interpretive purity: constitutional meaning devoid of politics, discretion, and indeterminacy. Focused on this goal, McGinnis and Rappaport are methodological reductionists. They seek to reduce constitutional interpretation to a single legitimate method—reasonable-person originalism—which, they claim, filters out the impurities and leaves a fixed and objective constitutional meaning. For all originalists, not only reasonable-person originalists, when history is processed pursuant to the proper method, the result is purity. Thus, McGinnis and Rappaport maintain that if a Supreme Court justice (or other constitutional interpreter) applies reasonable-person methodology to the historical materials, then the justice will discern pristine constitutional meaning.

As a general matter, McGinnis and Rappaport's methodological hopes (as well as those of other originalists) collide fatally with an impenetrable obstacle. They want history, as processed through originalist method, to eliminate judicial discretion and constitutional ambiguity, but historical understanding uncovers contingencies and subtexts. Historical thinking leads to complexity rather than to univocal meaning.

More specifically, McGinnis and Rappaport claim that history both justifies using reasonable-person originalism and specifies the precise contours of that approach. "In our view," they argue, "the appropriate interpretive rules are those that would have been employed in the process of enacting the Constitution. Those interpretive rules would be those that a reasonable person at the time of the Constitution's enactment would have applied to the Constitution."[368] But this argument is a non sequitur: The historical conclusion does not follow from the historical premise. Even if McGinnis and Rappaport correctly advocate for applying the interpretive rules "that would have

368. McGinnis, *Principles*, *supra* note 10, at 372 n.1.

been employed in the process of enacting the Constitution,"[369] those rules would not have included any invocation of a reasonable man (or reasonable person). From 1787 to 1789, when states debated ratification of the proposed Constitution, neither a lawyer nor a layperson would have proposed interpreting the Constitution pursuant to a reasonable-person standard. The historical evidence shows that, while "reasonable man" and "prudent man" were commonly used figures of speech, the reasonable or prudent man was not widely conceived at that time to be a legal standard of judgment or liability. Given that McGinnis and Rappaport dismiss other interpretive approaches because they do not fit the historical materials,[370] this lack of historical support for reasonable-person originalism subverts their argument, by their own measure.

If reasonable-person originalism is the purest and most advanced originalism extant today, then constitutional scholars and jurists need to start looking elsewhere for constitutional guidance. In fact, the historical evidence not only undermines reasonable-person originalism, but also supports an alternative: eclecticism.[371] Of course, because McGinnis and Rappaport and other originalists are methodological reductionists, an eclectic interpretive approach is anathema to them. They want to invoke history—typically claiming that their methods have deep historical roots—but they refuse to see the evidence with a historical eye. During the early decades of nationhood, numerous judges and treatise writers—as well as the icons, Hamilton and Madison—were eclectic, invoking multiple sources of constitutional meaning. To be sure, these early Americans relied on originalist sources. They considered public meaning and framers' intentions, but they also considered practical consequences, precedents, history, and so on. We should continue to do the same today. No single method exhausts constitutional meaning.

369. *Id.*

370. McGinnis, *Methods*, *supra* note 10, at 773, 787.

371. *See*, *e.g.*., CROSS, *supra* note 85, at 91–106 (drawing from an empirical study to show that many post-World War II justices—including Warren Court justices—inconsistently used originalist sources).