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Originalism as a Legal Enterprise

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ORIGINALISM AS A LEGAL ENTERPRISE

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The reasonable person is an important and ubiquitous figure in the law. Despite the seeming handicap of being a hypothetical construct assembled by lawyers rather than a flesh-and-blood person, he (for most of Western legal history) or she (in more recent times) determines such varied legal and factual matters as the standard of care for negligence liability,[1] the materiality of misrepresentations in both contract[2] and tort,[3] the applicability of hearsay exceptions for admissions against interest,[4] the scope of liability for workplace harassment under Title VII,[5] the clarity of law necessary to defeat the qualified immunity of government officials,[6] and the custodial status of suspects for purposes of *Miranda*.[7] To carry out these myriad tasks, the reason-

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1. *See* 57A AM. JUR. 2D *Negligence* § 7 (2005) ("Negligence consists of acting other than as a reasonable person would do in the circumstances.").

2. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981) ("A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent.").

3. *See* RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977) (explaining that a fraudulent misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.").

4. *See* FED. R. EVID. 804(b)(3) (a statement is not excludable as hearsay if it is "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.").

5. *See* Pennsylvania State Police v. Suders, 542 U.S. 129, 131 (2004) ("A hostile-environment constructive discharge claim entails . . . working conditions so intolerable that a reasonable person would have felt compelled to resign.").

6. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

7. *See* Yarborough v. Alvarado, 541 U.S. 652, 662 (2004) ("Custody must be determined based on a how a reasonable person in the suspect's situation would perceive

able person must understand community norms of care in some settings, apply customary trade practices in others, and grasp principles of legal interpretation in yet others. The reasonable person constructed by the law is capable of assuming many guises and performing many functions.

We focus here on one particularly significant, and significantly underappreciated, legal function of the reasonable person: The reasonable American person of 1788[8] determines, for 1788 and today, the meaning of the federal Constitution. Thus, when interpreting the Constitution,[9] the touchstone is not the specific thoughts in the heads of any particular historical people—whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant to the ultimate inquiry, but the ultimate inquiry is legal.

Ever since 1986, when then-Judge Antonin Scalia articulated the distinction between original intent, i.e., the subjective thoughts of historically concrete drafters and/or ratifiers, and original meaning, i.e., the meaning that a reasonable person would attribute to textual language,[10] modern originalists have moved steadily towards the latter.[11] But although the weight of

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his circumstances.").

8. At least parts of the Constitution became an operative legal instrument on June 21, 1788. The other parts became operative in stages to which it is more difficult to apply a specific date. *See* Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

9. The same analysis may or may not apply to other legal instruments, such as state constitutions; we leave that inquiry to others. We discuss the problem of post-1788 amendments to the Constitution *infra* text at 36–39.

10. In a speech delivered at the Department of Justice on June 14, 1986, approximately three months before he took his seat on the Supreme Court on September 26, 1986, Judge Scalia urged originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning." Antonin Scalia, Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986), *in* OFFICE OF LEGAL POLICY, ORIGINAL MEANING: A SOURCEBOOK 106 (U.S. Dept. of Justice 1987). Professor Lawson attended that speech and recalls that shortly after Judge Scalia made his recommendation, T. Kenneth Cribb, the Counselor to the Attorney General, taped a handwritten sign to the podium saying something to the effect of "So stipulated." That event, juxtaposed with Judge Scalia's promotion to the Supreme Court, is a convenient marker of the formal ascendancy of the doctrine of original meaning in modern times.

11. Robert Bork and Antonin Scalia—arguably the most visible figures in the modern rise of originalism—have both endorsed reliance upon the reasonable person in constitutional interpretation, statutory interpretation, or both. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("What the [constitutional] ratifiers understood themselves to be enacting must be taken to be what the public of the time would have understood the terms to mean .... The search is

originalist opinion today supports the view that the Constitution's meaning is to be found in the hypothetical mind of the reasonable person,[12] there is not yet a persuasive, systematic defense of this claim nor a clear indication of how one determines the characteristics and interpretative proclivities of this imaginary yet crucial figure. We hope to fill that gap here. In the process, we hope to vindicate the paramount role of lawyers in constitutional interpretation—a role that is seriously threatened by virtually all other originalist (and many nonoriginalist) interpretative methodologies that locate constitutional meaning in sources that are beyond the peculiar competence of lawyers to uncover.

In Part I of this article, we identify the considerations that point generally towards the use of hypothetical rather than historical mental states as the sources of constitutional meaning. The relevant considerations include the Constitution's own terms and structure, the nature of the Constitution's actual authorship and readership, and the social facts that made the Constitution authoritative in practice. Most tellingly, the Constitution itself identifies its author as "We the People of the United States,"[13] which is clearly a legal fiction rather than an historical fact. The Constitution specifically requests that it be understood by reference to a hypothetical rather than historically real author or group of authors.

In Part II we introduce the laborious task of describing the characteristics of this hypothetical "We the People of the United States." How smart and reasonable is this legally-constructed person, and what assumptions does he or she bring to the inter-

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not for a subjective intention."); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (stating that originalists "look for a sort of 'objectified' intent—the intent that a *reasonable person* would gather from the text of the law.") (emphasis added). Similar thoughts have been voiced by an all-star roster of originalist scholars. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–100 (2004); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127-48 (2003); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493-95 (2005).

12. There are notable dissenters who continue to focus on concrete historical intentions. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 36 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 246 (1988)

13. U.S. CONST. pmbl.

pretative enterprise? To complete this task would require us to set forth a complete theory of interpretation, and that is not our goal here. But we do mean to suggest the direction for further research and to provide enough material to allow the enterprise of interpretation to go forward in most cases. At a minimum, we show that the hypothetical "We the People of the United States" bears a striking resemblance to the reasonable person familiar to lawyers.

In Part III, we explain how the reasonable person's central role in constitutional interpretation has important consequences for the roles of various experts and specialists in the interpretative enterprise. In particular, we show that our approach suggests a much more important role for lawyers and legal scholars in constitutional interpretation than is implied by many other interpretative theories. If, for example, the key to constitutional interpretation is to identify the mental states of specific historical individuals, then determining constitutional meaning would properly be the province of experts in identifying those mental states; the most obvious candidates for expertise in this area would be historians, psychologists, and linguists. The task of legal professionals under this approach would most sensibly be to marshal and channel those experts, in much the way that lawyers must marshal and channel experts to prove medical malpractice liability or antitrust damages. Under an originalist approach that searches for actual historical intentions, in which meaning is an historical, psychological, and linguistic fact, legal analysis is appropriately the handmaiden of historical, psychological, and linguistic scholarship. By the same token, if constitutional meaning results from moral values, evolving social norms, or other common "nonoriginalist" sources, then the spotlight shifts to moral philosophers, sociologists, or pollsters. Again, there is no obvious reason to privilege lawyers or legal scholars in this kind of search for meaning.

If, however, constitutional meaning depends upon a distinctively legal construct such as the reasonable person, as we maintain, then determining constitutional meaning is more properly the province of legal experts. The people best able to glean the legally-constructed thoughts of a legally-constructed person are likely to be lawyers and legal scholars. Historians, psychologists, and linguists may have something, and even much, to contribute to this legal enterprise, but constitutional interpretation remains a distinctively legal, rather than a distinctively historical, linguistic, or psychological, task. Under reasonable-person originalism

(as we term our interpretative approach), historical and other scholarship is appropriately the handmaiden of legal analysis. Our analysis therefore validates, and is validated by, more than two centuries of practice, under which lawyers have generally been recognized as significant, if not the predominant, actors in constitutional interpretation. This practice is difficult to explain under any other plausible originalist approach.

The Constitution is a legal document. It should not be surprising that a legal document is best construed through legal means.

I. THE HYPOTHETICAL OBSERVER DEFENDED

A. "WE MUST NEVER FORGET, THAT IT IS A *CONSTITUTION* WE ARE EXPOUNDING"[14]

Many trees have been felled so that academics can debate theories of meaning, constitutional and otherwise. Those debates range broadly across epistemology, the philosophy of language, literary theory, linguistics, semantics, pragmatics, semiotics, and probably a large number of "-ics" of which neither of us has ever heard.[15] To paraphrase an ex-President, much of the debate depends upon what the meaning of "meaning" is.[16]

We have neither the ability nor the desire to enter this thicket. We are humble lawyers, with nary an advanced degree in any other discipline between us. Indeed, a central goal of this article is to vindicate the role of lawyers in constitutional interpretation, and if one must be an expert in a wide variety of "-ics" in order intelligently to engage in such an activity, that is very bad news both for our project and for lawyers in general.

Fortunately, it turns out—or so we believe—that interpreting the federal Constitution is considerably *easier* than interpreting the writings of John Milton or uncovering the true character of indexicals. The Constitution is a document of a certain kind, and only a subset of the theoretically possible methods of assign-

14. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

15. For brief glimpses into this world, see LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995); Symposium, *What Is Legal Interpretation?*, 42 SAN DIEGO L. REV. 461–733 (2005).

16. *See* JOHN R. SEARLE, MIND, LANGUAGE, AND SOCIETY: PHILOSOPHY AND THE REAL WORLD 139–41 (1998); Jeffrey Goldsworthy, *Moderate versus Strong Intentionalism: Knapp and Michaels Revisited*, 42 SAN DIEGO L. REV. 669, 670-72 (2005).

ing meaning to words makes sense for such a document. A generalist legal education cannot train one to be a Milton scholar or a philosopher of language, but it *can* train one to participate usefully in a constitutional dialogue.

The federal Constitution is not a poem, a novel (chain or otherwise), a manifesto, or a treatise. The federal Constitution is a blueprint—an instruction manual, if you will—for a particular form of government. It is possible to try to describe the Constitution in other terms—for example, as "a principal symbol of, perhaps *the* principal symbol of, the aspirations of the tradition,"[17] as a mechanism for effecting "a transition from today's nonideal world to the better world of our vision,"[18] or as "that set of beliefs, or whatever, that has some hold on our behavior, our beliefs, and our collective and individual identity"[19]—and any of these descriptions may be accurate (as Obi Wan-Kenobi might put it) from a particular point of view. But they are accurate in the same respect, and from roughly the same point of view, that it can be accurate to describe the Empire State Building as a mountain rather than a building.[20] The actual authors of the

17. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 564 (1985).

18. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 816 (1989).

19. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 309 (1994).

20. Strictly speaking, to call the Empire State Building a "building" presupposes a conceptual framework into which the Empire State Building fits. The basic purpose of concepts—and of words that reduce abstractions to concrete symbols—is to allow a conscious person to organize the world that he or she perceives and thus better enable that person to deal with a complex reality. How one organizes the world depends upon the purposes and context of that organization. In a world in which large artificial structures are commonplace, it is important to have the concept of a "building," and the Empire State Building is likely to fit nicely into any such conceptual scheme. But for someone who has never experienced an artificial shelter, the Empire State Building may seem more like a mountain, and in that person's cognitive context, it may make more sense to say that the Empire State Building is a mountain than that it is a building. As that person acquires more experience with entities that resemble the Empire State Building, the cognitive context will shift, and perhaps the concept of "building" will quickly become epistemologically indispensable. But if the proper characterization of the Empire State Building depends on the context of a specific observer, how can one make strong claims about the entity's status as a "building"?

America from the late eighteenth century to the present has not contained very many people for whom it would be epistemologically appropriate to call the Empire State Building a mountain. In that particular historical and social context, it is perfectly sensible, and indeed epistemologically mandatory, to say that the Empire State Building is a building. It is true that in order to make the statement "The Empire State Building is a building" true in the strongest possible sense, one would need to specify quite carefully the cognitive context in which that statement is made and the qualifications required by the context. But explicitly to add those qualifications to every statement and judgment that we make would be a royal pain in the tush, and we all have lives to lead. Accord-

Constitution viewed it as an instruction manual for a form of government. The actual readers of the Constitution during the time of its creation viewed it as an instruction manual for a form of government. And the Constitution on its face presents itself to the world as an instruction manual for a form of government. It is simply too dry, technical, and boring to be anything else.[21]

B. "WE MUST NEVER FORGET, THAT IT IS A CONSTITUTION WE ARE *EXPOUNDING*"[22]

When faced with an instruction manual, you must make two distinct decisions. First, you must decide whether you want to try to understand the instructions that it contains. If the answer is yes, this requires interpreting, or "expounding," the manual. Second, once you understand (or expound) the instructions, you must then decide whether you want to follow them. These are conceptually separate inquiries. It is entirely possible to understand the instructions perfectly but simply decide that there is a better way to do whatever the instructions concern. Similarly, it is possible to try to accomplish the task that you believe the instructions have in mind without reading or understanding the instructions. This is true of instruction manuals for assembling computer tables, for preparing food, and for constructing a particular form of government.

Our concern in this article is solely with the task of understanding, or expounding, the instruction manual that is the federal Constitution. We aim to describe the appropriate way to read and understand the instructions contained in the Constitution. We have nothing to say about whether any particular people, most notably public officials who carry firearms or command people who carry firearms, should try to follow the instructions in the Constitution once they are understood. That is a substantial question of political morality, not of interpretative theory, and we are not political moralists. (We have enough trouble trying to be interpretative theorists.) All manner of mischief results from people leaping from "the Constitution instructs people to do X" to "people should do X." In particular, folks who do not

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ingly, we normally specify the precise cognitive context for our statements only when we are employing a nonstandard or unusual set of conceptual categories. Anyone who, in normal conversation, denies that the Empire State Building is a building is trying either to cause trouble or to complete a dissertation.

21. *See* STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 31–32 (1998).

22. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis altered).

much believe that people should do X often go to great lengths to misread rather clear instructions to do X contained in the Constitution. The world would be a much cleaner and neater place if such people simply declared, "The Constitution instructs us to do X, but that is a really stupid instruction so we are going to do Y instead." So that there is no mistake, we are discussing in this article the proper way to interpret and understand the Constitution. We are not claiming that those instructions carry any moral authority, should be followed by judges or anyone else, or represent the best way to assemble a government. We come neither to bury nor to praise the Constitution, but merely to expound it.[23]

Instruction manuals such as the Constitution are communicative instruments that attempt to convey information to human minds. As with any form of communication, they can only be understand by reference to human intentions.[24] In this respect,

23. For more on the distinction between interpreting the Constitution and following the Constitution, see Gary Lawson, *On Reading Recipes... and Constitutions*, 85 GEO. L.J. 1823 (1997). For an argument that the proper interpretation of the Constitution cannot be separated from the normative reasons (if any) for following the Constitution, see Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857 (1997). For the response, which agrees at one level that interpretation is always normative but which locates the normative element solely in the standard of proof that one employs, see LAWSON & SEIDMAN, *supra* note 11, at 208 n.15. For an explanation of why this response is not simply incoherent academic pseudobabble, see a forthcoming article that we have not yet gotten around to writing but probably will someday.

24. We gather that this point is controversial among those who fell trees debating meaning, *see supra* text at 6, but we are not sure why. It is certainly true that it is possible to attribute meaning, in some sense, even to the accidental arrangement of tree branches, the motions of planets, or the entrails of goats without any accompanying attribution of "authorship" or "intention" to the event generating meaning. *See* Michael S. Moore, *Interpreting Interpretation*, *in* LAW AND INTERPRETATION, *supra* note 15, at 1, 3, 7; Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465 (2005). But in the context of *communication*, meaning and intention are linked. If one is not trying to understand what an author of a statement intends, one simply is not engaged in the enterprise of communication. If one knows, with mortal certainty, that a certain text was humanly authored for the purpose of communication (and communication in this sense can include one mind speaking to itself or an instruction that is designed to be a conversation-stopping command), it is more than a bit odd—and more than a bit rude—to try to find the "meaning" of that document in anything other than the communicative intentions contained within it. This is not a point about strict logic or the necessary meaning of the word "interpretation" (though it would not surprise us if people wiser than we wish to make such a point), but rather about the normal human response when faced with an act of communication. The fact that academics can dream up exotic ways to react to a communicative instrument—for instance, to treat a constitution like an arrangement of tree branches or a set of goat entrails—does not mean that that is the sensible thing to do. The most sensible and natural response when faced with a communicative instrument is to try to understand the communication. And *if* one chooses to engage in the activity of interpreting a communicative act *qua* communicative act, it is senseless—or at the very least bizarre—to do so without reference to the intentions of

those who doubt the possibility of purely "intention-free interpretation" of the Constitution seem to be correct.[25] The trick is to figure out which intentions are the proper foci of attention.

There are three plausible candidates: the intentions of actual authors, the intentions of actual readers, or the intentions of fictitious authors or readers. The most obvious (though, as we shall see, not necessarily the best) of the three would seem to be the actual intentions of the document's actual author(s). Whoever uses a word or phrase, such as the phrase "executive Power" that appears in Article II of the Constitution,[26] presumably has in mind something about the (real or imagined) world that he or she is trying to communicate, so the most straightforward way to identify that particular something seems to be simply to ask—literally or figuratively—the actual speaker what that something might be. (One cannot literally ask a dead speaker what he or she meant, but one can—and often must, as with wills or Shakespearean plays—do so hypothetically and can glean answers from evidence left behind by that speaker.) It is possible to ask directly whether a specific thing or relation was contemplated as part of the reference of a term or phrase, but because language aside from proper names is normally general, it makes more sense to ask about the intended criteria for the set of the referents and then determine whether a specific thing or relation is within that set. In the case, for example, of the words "executive Power" in Article II of the Constitution, we would ask the speaker how we would recognize "executive Power" (and distinguish it from a square dance, a unicorn, or legislative power) if we came across it.

Another theoretically possible way to ascertain the meaning of a phrase such as "executive Power" is to ask how readers of the phrase understand it, which means to determine which referents various readers of the phrase attribute to it. Any readers will of course have to make some assumptions about the mental state of the author—e.g., that the author was speaking English,[27] that the author was attempting to communicate rather than doodle pointlessly,[28] and that the author was attempting to issue a

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some author.

25. *See* WHITTINGTON, *supra* note 12, at 59, 94–95; Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?: Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

26. U.S. CONST. art. II, § 1.

27. *See* Alexander & Prakash, *supra* note 25, at 974-75; Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651, 658-59 (2005).

28. *See* Alexander & Prakash, *supra* note 25, at 976.

legal command rather than compose a poem or inspire aspirations to greatness—and in that sense any "meaning" attributable to readers will in fact require significant focus on the intentions (real or presumed) of the authors. But there is no reason to suppose that any specific reader will necessarily "map" the phrase "executive Power" onto the world of things and relations in precisely the same fashion as will the author. Assuming that reader and author are both speaking the same language, that both are relatively fluent in that language, and that the phrase is part of the standard vocabulary of ordinary speakers, there is reason to think that there will be substantial overlap in the coverage that each will give to the phrase, but there is room for divergence at the margins. In all likelihood, not everyone in 1788 understood "executive Power" in quite the same way. One could perfectly well say that once the author's intentions have defined the language and form of the communication, those intentions have done their work and that the precise scope of the phrase "executive Power" is then determined by the mental states of some reader. One, of course, needs reasons to say this, but one could perfectly well say it.

A third possibility is that meaning depends neither on the mental states of any actual authors nor on the thoughts of any actual readers, but rather on the mental states that *would* have been held by some person or persons who *might or might not* ever have actually existed under conditions that *might or might not* ever have been actually realized. One can imagine a hypothetical author, a hypothetical reader, or both, and one can imagine the part of the world that such a hypothetical person would mark off by means of the phrase "executive Power." For present purposes, we are not going to distinguish hypothetical readers from hypothetical authors. It is not clear that it makes any significant difference,[29] and our emphasis in this article is on the "hypothetical" part of the description.

For three mutually reinforcing reasons—the Constitution's language and structure, the actual authorship and readership of the Constitution, and the Constitution's perceived source of authority—the hypothetical approach is superior to either the "actual authorial intentions" approach or the "actual reader understanding" approach.[30] We hasten to add that the lines among

29. As we will explain, in the context of the federal Constitution the relevant hypothetical author and readers are identical. *See infra* text at 31–32.

30. There are, of course, other ways to determine the referents of the Constitution's language and therefore attach meaning to that language, but none of those methods de-

these approaches are not as crisp as we have made them out to be. If one believes that authorial intentions are controlling, the understandings of actual and/or reasonable readers may well be very good, or even the best available, evidence of those intentions. Similarly, if one is looking for the understandings of actual readers, the understandings of authors who shared a common language and framework with those readers may be very good evidence of the readers' understandings. And if one is looking for the understandings that would have been held by a reasonable observer, the understandings of actual observers is at least a plausible place to start that inquiry. In a large range of cases, the actual understandings of historically real authors, the actual understandings of historically real readers, and the hypothetical understandings of reasonable authors or readers will likely overlap.[31] But the difference between the object of inquiry and the evidence for that object can subtly affect the interpretative process, and there may be times when different approaches will yield different answers. For instance, it may well be that the vast majority of actual authors and actual readers of the federal Constitution in 1788 thought that the Treaty Power in Article II was a distinct grant of power to the President but that a hypothetical author or reader examining the actual document would instead conclude that the President's power to negotiate treaties was already contained in the grant of "executive Power" in the Article II Vesting Clause. In the latter case, the Treaty Clause is best read as a clarification and qualification of an already-granted power rather than as a distinct grant of presidential power, with potentially major consequences for the scope of the Treaty Power.[32] The proper source of intentions can matter a great deal;

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serves to be called "interpretation." *See supra* note 24. For example, one could say that the term "executive Power" has whatever meaning best fits the most attractive moral theory that thinkers (whether modern or historical) can devise. But that is not really a method of interpreting the Constitution. The Constitution is quite irrelevant, or at least incidental, to that enterprise. If one really has a good moral theory, and if one believes that such a moral theory is the appropriate basis for governance, why would one possibly bother trying to match up that moral theory with the words of the Constitution, which probably bear at most a coincidental relationship to that theory? If one tried to map such a moral theory onto the menu at a local restaurant, no one (we hope) would seriously regard that as an attempt to "interpret" the menu, and it should not be regarded as a serious attempt to "interpret" the Constitution. It may be a very good, or even the best, method of social organization, but to call it "interpretation" seems bizarre, or at the very least deliberately equivocal.

31. *See* Nelson, *infra* note 72, at 557-58; Douglas G. Smith, *Does the Constitution Embody a "Presumption of Liberty"?*, 2005 U. ILL. L. REV. 319, 325; Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1639 (2000).

32. We have elsewhere laid out those consequences at great length. *See* Gary Law-

it is worth getting this right. The first place to look for the right answer is the Constitution itself.

C. "WE MUST NEVER FORGET, THAT IT IS A CONSTITUTION *WE* ARE EXPOUNDING"[33]

The Constitution appears to be noticeably silent about its own interpretation. It specifies no principles of interpretation. Nor does it specifically identify anyone who is expressly charged with the task of interpreting the Constitution. Various actors are assigned roles and tasks by the Constitution, and many of those roles and tasks require, as a necessary incident, that the actor interpret and apply the Constitution, but all such powers of interpretation arise by inference; no clause of the Constitution expressly grants a power of interpretation.[34]

The Constitution does, however, expressly specify its own putative authorship. In its very first sentence, the Constitution states that

> *We the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[35]

The Constitution declares itself to be authored by, and to speak on behalf of, "We the People of the United States." As a matter of political theory, of course, this declaration is a preposterous pretension with no grounding in reality. But we are not interested in the Constitution's authority or its status as a matter of political theory. We are interested in its meaning. And the Constitution's declaration of authorship is directly relevant to that inquiry.

To be sure, the Constitution does not specifically say that it is "authored" by "We the People." It says, rather, that it is "ordain[ed] and establish[ed]"—that is, given effect as a legal instrument—by "We the People." But in the context of a legal in-

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son & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

33. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis altered).

34. On the absence of a specified supreme interpreter, and the consequences of that absence, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003).

35. U.S. CONST. pmbl. (emphasis added).

strument, that is the relevant form of authorship. If the two of us went to a stationery store and bought and executed a form document for the lease of land, neither one of us would have literally "authored" the form document in question. Someone who works for the company that published the document is the actual, literal author. Nonetheless, by executing the document, we take it on as our own expression. If there is a question about the intention behind the lease that we execute, one would not summon the employee of the publishing company to glean those intentions. Similarly, if a lawyer drafts a will for a client, it is the client's intentions that are thought to speak through the will, not the lawyer's. The lawyer's job is to channel the client's intentions, not to perform the act of intending. The person who executes a legal document assumes a kind of authorship separate and distinct from the literal authorship that originally put the words of the document together onto paper. In the same respect, when the Constitution declares that "We the People" "ordain and establish" the Constitution, it declares that "We the People" are the legal, even if not the physical, authors of the words contained in the document. According to the Constitution, "We the People" are trying to communicate, and the intentions of "We the People" are therefore the key to that communication.

"We the People of the United States," however, is a hypothetical legal construct. The document was not, in literal fact, written, read, debated, or ratified by "We the People," and everyone who ever actually wrote, read, debated, or ratified the document had to know this. The document was written, read, debated, and eventually ratified by a rather small subset of any plausible grouping of "We the People."[36] But if the document is to be taken on its own terms, the Constitution clearly identifies in whose name it purports to speak, and that is *not* the historically real authors or readers of the document.

The Constitution specifically identifies a set of historically real authors as well. The names of thirty nine signatories appear at the conclusion of the original Constitution, along with the date of authorship.[37] But they are, for interpretative purposes,

36. Akhil Amar has usefully reminded us that it is easy to overstate the exclusiveness of the founding era's constitutional deliberations; by historical standards, those deliberations were characterized far more by their remarkable inclusiveness than by almost anything else. *See* Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671 (2002). But while this is an important point to remember both historically and politically, from the standpoint of interpretation it only reduces and does not eliminate the gap between the Constitution's pretensions and its reality.

37. *See* U.S. CONST. art. VII ("Done in Convention by the Unanimous Consent of

like the authors of a form lease or a will that is executed by others. Those actual authors and readers were part of "We the People," and their concrete understandings are therefore evidence of the understandings of the broader grouping in whose name the Constitution purports to speak. But a strict reliance on the intentions or understandings of the actual authors or readers of the Constitution is inconsistent with the terms of the document itself, which directs us to its self-declared hypothetical authors. Put another way, the clearly expressed intention of the actual authors of the Constitution is to treat the document *as though* it was written by some group called "We the People" even if that is factually false. Even if one takes actual historical intentions as the touchstone, reliance on those intentions entails reliance on hypothetical intentions. All roads lead to the intentions of "We the People."

Of course, the Constitution's declaration of legal authorship demonstrates only that the Constitution is best understood from a hypothetical perspective of some kind, not that such a perspective must be that of a reasonable person. In Part II, we undertake the task of figuring out what these "People" who the Constitution claims as its authors are like and what characteristics they possess, including their degree and kind of reasonableness. For the moment, the important point is that the Constitution's language mandates use of a hypothetical rather than an actual source of meaning. If the reasonable person turns out to be a good proxy for "We the People," the case for reasonable-person originalism has been made.

Our argument differs significantly from the standard rationale that has been offered for using the reasonable person as the touchstone of meaning. That rationale has not focused on the Constitution's actual language or claimed authorship, but on its presumed status as law. As Justice Scalia has written in oft-quoted language:

> [T]he reason we adopt this objectified version [of intentions] is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said

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the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names.").

> to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.[38]

Justice Scalia has also focused on the practical fear that willful judges will often use the search for unexpressed intentions as an excuse to make law,[39] but that is an argument about institutional design and governance rather than an argument about interpretation.

We are not persuaded that one can defeat strict intentionalism as a theory of interpretation based on the nature of law. The argument simply begs the question of what law must look like. Indeed, there are facially plausible theories of law that ground its authority precisely in the intentions of the lawmaker.[40] In addition, Justice Scalia's argument tries to draw a very tight link between theories of meaning and theories of political legitimacy. As one of us has attempted to demonstrate at considerable length elsewhere, those are two distinct inquiries: What the Constitution *means* is conceptually separate from whether the Constitution is *worth obeying*.[41] A constitution or law founded on the principle of lawmaker's intentions might well be a *bad* constitution or law, but that goes to its authority rather than its meaning. We do not categorically rule out the possibility that one might be able to construct an argument against strict intentionalism based on the nature of law, but we do not ourselves advance that claim here. Our argument is based on the actual Constitution that we have, not on what an ideal constitution would provide.

D. AUTHOR, AUTHOR

Historical facts about the actual authorship and readership of the Constitution further suggest that the reasonable person is the proper locus of constitutional meaning. The Constitution is a collective construction, with many actual authors. This fact in-

38. SCALIA, *supra* note 11, at 17.

39. *See id.* at 17–18.

40. *See* WHITTINGTON, *supra* note 12, at 94–95; Kay, *supra* note 12, at 246 ("Recourse to intention is necessary because only certain people have the authority to make law.").

41. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823 (1997).

creases the relative plausibility of a hypothetical approach to interpretation.

Reliance on actual, concrete intentions as the source of meaning of a communication works best when one is dealing with a single individual. Even in that case, there is no direct contact with the mind of the other person, so that the intentions of the communicator must be inferred, but inferences of that sort are made routinely and easily.[42] In a jointly-authored work such as this one, the problems increase, because the concrete intentions of the authors may not precisely overlap; when we use a word, such as "overlap," in all likelihood the two of us are not using it to identify *precisely* the same things and relations in the world. But any divergence between the intentions of authors such as we is likely to be very small in a large range of cases—even if the authors reside 6000 miles apart. For most ordinary purposes, it makes perfectly good sense to speak of the "intentions" of the two of us as joint authors, though we will see shortly that it is important to understand precisely why and how this makes good sense.

The Constitution was not written by two people. Fifty five delegates attended the Convention that produced the Constitution. People who were not delegates directly or indirectly influenced the drafting process.[43] If one regards the delegates at the state ratifying conventions as the effective "authors" of the document, that number rises to 1,649. The actual readership of the Constitution in 1787–88 was much higher than that. As the number of minds involved in the process of communication increases, the plausibility of speaking intelligibly of an actual joint communicative "intention" seemingly becomes more and more remote. Did the Federalists, the Anti-Federalists, the merchants of New York, and the backwoods farmers of Virginia all have joint intentions with respect to the meaning of the Constitution?

This problem has been well plumbed. In the 1980s, a veritable cottage industry arose among critics of originalism raising the supposed interpretative problems posed by the Constitution's multiple authors and readers.[44] In its strongest form, the argument claimed that the problem of "summing" intentions across

42. *See* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 68–69 (1992).

43. Prominent founding-era figures who were not delegates at the Convention included Thomas Jefferson, John Adams, John Jay, Samuel Chase, and Richard Henry Lee.

44. For string citations, see Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456 n.31 (1984); Kay, *supra* note 12, at 245 n.82.

many persons rendered the search for collective intentions literally impossible. A weaker form would suggest that if an alternative account of constitutional meaning that does not require such summing is available, one ought to consider the alternative.

The now-classic rebuttal to the strong claim of impossibility was offered by Professor Richard Kay in 1988.[45] Professor Kay's influential response argued that discerning collective intentions might be difficult in some cases but was not conceptually or practically impossible. In the context of constitutional meaning, the key for Professor Kay was that the actions of certain identifiable groups—namely, a majority of the people at a supermajority of the ratifying conventions that approved the Constitution—are responsible for making the Constitution authoritative law.[46] Accordingly, Professor Kay maintained, as long as a majority of ratifiers at a sufficient majority of the ratifying conventions had some degree of overlapping intentions, those areas of overlap determined the meaning of the relevant constitutional provision. For example, "probably all of the enactors of the Fifth and Fourteenth Amendments understood that incarceration would be a deprivation of liberty requiring due process of law,"[47] and one can therefore confidently consider this area of agreement part of the Constitution's meaning. As long as those areas of agreement are robust, there is no insuperable problem for constitutional adjudication even if the Constitution simply does not reach outside those areas of agreement.[48]

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45. *See* Kay, *supra* note 12, at 245–50.

46. *See id.* at 247 ("[T]he authority of the Constitution is conventionally and popularly premised on the understanding that it was the work of 'the People' in their original, sovereign capacity. Actually, the role of 'the People' was played by the special ratifying conventions in the individual states .... The inquiry into original intent, therefore, should focus on the intentions of the various ratifying bodies who possessed the constituent authority.").

47. *Id.* at 248.

48. *See id.* at 249:

> [W]e should be able to accumulate enough identical intentions to compose an authoritative lawmaker. By discerning the language's central paradigm, we can define an area of application that was intended by virtually all the relevant individuals who together constitute the lawmaker. As we move out from this core idea to somewhat less obvious applications, we can expect to find fewer individuals who intend the law to extend so far. Still, as long as it is probable that a necessary law-making majority shared a particular understanding it will be appropriate to so interpret the provision. This approach, therefore, requires the judge to ask whether the challenged action falls within a meaning intended by an authoritative lawmaker. Idiosyncratic meanings held by individuals within the majority (or by individual law-making bodies) falling outside that shared, core intention will not have the force of law because they lack such an authoritative source. They may be ignored for the same reasons that we ignore the intentions of the dissenters.

The difficulty with Professor Kay's argument is that it starts from the premise that the Constitution is authoritatively binding law and then constructs a mechanism of meaning based on that assumption. The Constitution's authoritativeness, however, is a conclusion rather than a premise, and that conclusion can only be reached after the meaning of the Constitution is first uncovered. If the Constitution was written by thirty nine people, and some small subset of those people held a qualitatively different intention than the remaining majority, then from the standpoint of actual authorship the Constitution has no discernible meaning. From the standpoint of meaning rather than authority, there is no obvious reason to privilege the majority over the minority in the case of jointly authored works. The Constitution might have had a meaning in the strict authorial sense if it had been written by a different set of authors that did not include the dissenting voices, but there is nothing in the nature of interpretation *per se* that allows one to ignore the intentions of actual authors when one sets out to discover the intentions of actual authors. Professor Kay has made an interesting and powerful argument about political theory, but it is not a convincing account of the Constitution's meaning.

In recent years, there has been a surge of interest in collective intentions, stimulated largely by debates about statutory interpretation.[49] A common theme in these debates, which provides support for Professor Kay's solution to the problem of collective intentions, is that the "intentions" of large groups can be reduced to the "intentions" of much smaller sub-groups if the group members individually agree that the joint product should be understood in this fashion.[50] In the context of the federal Constitution, one could say that the intentions of a majority of ratifiers represents constitutional meaning because the participants in the ratification process *agreed*—i.e., intended—that the majority's intentions would represent the intentions of the whole group.

It is certainly possible for individuals in a group to intend that their intentions be understood by reference to something

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For a similar argument, see WHITTINGTON, *supra* note 12, at 96–97.

49. *See, e.g.*, Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005); Abby Wright, Comment, *For All Intents and Purposes: What Collective Intention Tells Us About Congress and Statutory Interpretation*, 154 U. PA. L. REV. 983 (2006).

50. *See* Solan, *supra* note 49, at 428 ("We routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play.").

other than their actual intentions. Indeed, that is essentially what we argued in the previous portion of this article, and it underlies the broader account of joint intentions that we are about to provide. But the "second-order author" whose intentions stand in for the real intentions of the real members of the group need not be a subgroup of the actual authors. There is a more plausible "second-order author" available.

Strictly speaking, collectives—including very small collectives, such as the two of us—cannot have an intention. Only single minds, whether real or imaginary, can have intentions.[51] This is a special case of the more general principle that only concrete individuals and not groups can act.[52] To be sure, there are philosophical traditions that claim otherwise. As Jeanne Schroeder has explained, "[t]here are many intellectual traditions—Hegelianism for one—that posit that collectives cannot be reduced to a mere aggregation of individuals but have unique characteristics of their own."[53] No one, we think, really claims that aggregations of individuals are "mere." When individuals get into groups, they often behave differently than when they are on their own. But that does not mean that the group has a metaphysical existence apart from the individuals. Rather, it requires one to analyze the behavior of individuals in groups differently than one would analyze behavior of individuals in isolation. That requirement in no way challenges the basic metaphysics of methodological individualism. When we speak of the intention of a group, we do so metaphorically.[54]

The only real solution (as opposed to a palliative) to the problem of collective intentions is to take the metaphor seriously as a metaphor. The metaphor works by positing the collective as a fictitious individual. We anthropomorphize the collective and attribute to it a single mind. We act *as though* it were a concrete person able to act in an intentional way.[55] Anthropomorphism of

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51. *Accord* John R. Searle, *Collective Intentions and Actions*, *in* INTENTIONS IN COMMUNCATION (Philip R. Cohen, Jerry Morgan & Martha E. Pollack eds., 1990) 401, 406 ("Since society consists entirely of individuals, there cannot be a group mind or group consciousness. All consciousness is in individual minds, in individual brains.").

52. *See* Lawson, *supra* note 42, at 59–60.

53. *See* Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351, 389 (2001).

54. *See* John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 434 (2005) ("Legislative intent, to the extent textualists invoke it, is a framework of analysis designed to satisfy the minimum conditions for meaningful communication by a multimember body without actual intentions to judges, administrators, and the public, who all form a community of shared conventions for decoding language in context.").

55. *See* Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV.

this kind is especially plausible, and especially necessary, with respect to legal documents, which only function well when they speak with one voice, even if the process which generated that voice was messy and divisive. Many disciplines prosper by finding questions. Law works best when it finds answers.

This anthropomorphism is *not*, one must note, some mystical way of attributing metaphysical status to an actual "group mind."[56] Quite to the contrary, it is an epistemological tool for dealing with the fact that people engaged in joint enterprises, operating within the same objective reality, might have similar but nonidentical conceptual frameworks that lead to perhaps subtle differences in individual meaning. It is theoretically possible to try, as do Professor Kay and others, to find the core of objects and relations that each and every one of the joint authors has in mind by using a particular word or phrase and to limit joint meaning only to those objects and relations held in common, and over a certain range of authors and communicative acts, this strategy may be plausible. But as the number of authors rises, the plausibility of such a strategy starts to depreciate very quickly—and any reasonable group of authors must be aware of this fact. A group of joint authors sets loose upon the world a text that would be difficult or impossible to interpret if each and every author's conceptual framework has to be plumbed. It is far more plausible to attribute to such a group of joint authors the intention—the common intention, if you will—to have the work product interpreted *as though* it emerged from a single author with a single intention. The final result may not match up precisely with what any specific author would have meant had he or she been the sole author, and in that sense the attribution of meaning to joint authorship involves a certain element of creation as well as attribution,[57] but that is the price that one pays for the benefits of joint authorship.

1, 26-33 (1980).

56. For a criticism of this very different kind of anthropomorphism, in which we do not engage, see WHITTINGTON, *supra* note 12, at 163–64.

57. *See* Heidi Hurd, *Interpreting Authorities, in* LAW AND INTERPRETATION, *supra* note 15, at 405, 423. Dean Hurd objects to this anthropomorphism because "[a]nthropomorphic intentionalism thus stands to intentionalism as hypothetical consent stands to actual consent. Just as a rapist could hardly defend himself by claiming hypothetical consent on the part of his victim, so a judge could hardly claim an allegiance to legislative intent if she resolved conflicts between the particular intentions of legislators by assigning them new ones." *Id.* Dean's Hurd's objection, however, pertains to the *authority* of anthropomorphized intentions rather than to their epistemological status as the source of *meaning* of jointly authored works. And, of course, if the best understanding of the actual intentions of joint authors is that their work be understood by reference to an-

The meaning of a jointly authored text is therefore something (at least potentially) different from the meaning intended by any of the individual joint authors. It represents—in its cumulative, "common" form—the non-specific "intentions" of a fictitious author who is constructed to represent, however imperfectly, the actions of the real authors. If the real authors have used language carefully, any divergence between their individual intentions and the "intentions" of the collective product will likely be small. But the real authors have brought into the world something that literally has meaning only because we can posit a hypothetical author to take their places.

The actual authors of the Constitution brought into being precisely such a joint product. Indeed, they did so in dramatic fashion through a collaborative, cooperative, deliberative effort that involved considerable discussion, negotiation, and compromise. Once that joint product is put forth into the world, interpreters can then act *as though* the Constitution was the product of a single mind. That hypothetical mind may well have been trying to mediate among the competing goals and desires of a great many people, and the end product of that mind perhaps should be understood in light of such a task when one tries to ascertain its degree of coherence, but the nature of the Constitution's authorship dictates use of some hypothetical perspective for interpretation. The Constitution's use of the construct of "We the People of the United States" as its putative source thus reflects the underlying reality that the meaning of the Constitution cannot be found inside the minds of the historically real authors (or readers) but must instead be determined by reference to an anthropomorphized abstraction.[58] If we are even close to right about this, then the actual historical drafters of the Constitution, by insisting that the Constitution be interpreted by reference to the intentions of "We the People of the United States," were not merely wise in the ways of human behavior,[59] but were also (to paraphrase Miguelito Loveless) pretty fair metaphysicians in the bargain.

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thropomorphized intentions, as is true of the federal Constitution, the objection is weakened still further.

58. Randy Barnett has pointed out that, properly speaking, one should therefore refer to "We the People of the United States" in the singular rather than the plural. *See* BARNETT, *supra* note 11, at 13 n.16. We nonetheless generally use the plural form in this Article because we find it to be cleaner grammatically, though we will occasionally treat "We the People" as a singular noun when it seems more analytically appropriate.

59. *See* Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL'Y 1 (1993).

E. "WE THE GUN OWNERS OF THE UNITED STATES"

Perhaps the most obvious objection to the use of hypothetical rather than actual intentions as the touchstone of constitutional meaning is that it divorces the Constitution from its most plausible source of authority in the actions of real persons generally recognized as having the real power to enact binding law. Why should anyone who is trying to operate a government care about the legally constructed mental states of a hypothetical entity?

We have repeatedly pointed out a crucial mistake in this argument: It begs the question about the Constitution's authority. The Constitution has meaning *whether or not* it has any authority as a matter of political theory. Indeed, under any remotely plausible theory of authority, one would need to know the Constitution's meaning before deciding whether it has any authority. It may well be, when the dust settles, that no one will or should care about the Constitution's meaning. But one might as well make that judgment with the meaning in hand.

Furthermore, the brute fact of the Constitution's widespread acceptance as authoritative law supports rather than contradicts the use of "We the People" as the source of constitutional meaning. The Constitution did *not* become authoritative in practice (whether or not authoritative in theory) because of the actions of its historically real authors or ratifiers.

One of the most remarkable features of the Constitution was its quick acceptance by former opponents upon ratification. The ratification process was hard fought, with strong accusations flung by both sides. Opponents of the Constitution feared tyranny; from their standpoint, adoption of the Constitution would essentially undo the effects of the American Revolution.[60] To compound matters, the Constitution proclaimed a ratification method that required the assent of only nine states instead of the unanimous consent of all thirteen as was specified in the Articles of Confederation.[61] People who were inclined to fight against what they perceived as a new tyranny had plenty of intellectual resources on which to draw. Shays' Rebellion demonstrated that the material resources for armed uprisings were readily present as well. The new federal government could not possibly have an

60. *See* DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME 9–10 (2002).

61. For a frank acknowledgement of this problem, see THE FEDERALIST NO. 40 (James Madison) (1787).

overwhelming military force until the government had been up and running for some time. Recent events cast great doubt on the Constitution's durability: The Articles of Confederation had failed within a very short time, and state constitutions were changing with astonishing rapidity. The process by which the Constitution was brought into being seemed to contain the ingredients of a very bloody civil war.[62]

It never happened. Almost uniformly, the opponents of the Constitution quickly and publicly assented to the new regime, and many of them took positions in the federal government or the old state governments that required constitutionally-mandated oaths—and oaths actually meant something to politicians in those days—to preserve the new constitutional order. The ordinary citizens who opposed the Constitution, including those who dominated certain regions of the country, did not take up arms against those who they regarded as usurpers and enemies of liberty, even though the new government had either no or a very weak army for much of this time. The transition from the Articles of Confederation to the Constitution was spectacularly peaceful and smooth.

The reasons for this remarkable (and not at all inevitable) transition, involving a combination of theoretical concerns about law and practical concerns about order held by Antifederalists, have been well developed in an important study by David Siemers.[63] We might have more to say about this process in a later work. For now, our focus is on how the post-ratification process of acceptance bears on constitutional meaning.

The Constitution became authoritative as a matter of social fact because people generally did not shoot at the officials of the new government. If they had done so, the new government would have crumbled, at least in certain regions in which the potential shooters were substantial in number.[64] From that standpoint, the relevant historical actors who accounted for the Constitution's authority were all of the people—many of whom had publicly opposed significant provisions of the Constitution—who could have revolted but did not. The concrete intentions that mattered for constitutional acceptance were therefore the intentions of all of the people who could have mustered arms against the new regime. As a practical matter, it is therefore impossible

62. *See* SIEMERS, *supra* note 60, at 39–40.
63. *See id.* at 9–17, 25–46.
64. *See id.* at 39–40.

to use the actual intentions of those who made the Constitution authoritative: Those intentions are too numerous, too disparate, and too unknowable to make the enterprise even conceivable.

II. THE HYPOTHETICAL OBSERVER DEFINED

Once attention is focused on the need to interpret the Constitution from the standpoint of a hypothetical figure, the hard task is determining the characteristics of that hypothetical figure so that his or her mental states can be appropriately constructed. Is that person an author or a reader? Is that person of extraordinary or average intelligence? What assumptions is that person going to make when interpreting a legal text?

A full answer to these questions is the major part of a complete theory of constitutional interpretation. Perhaps someday we will attempt such an enterprise, but today is not someday. Our more modest goal here is to outline the way in which such an enterprise should progress.

A. WE THE PEOPLE

The question of hypothetical author versus hypothetical reader can be answered quite easily: It makes no difference whatsoever because the declared author and target audience of the Constitution are exactly the same.

The Constitution declares itself to be written by "We the People of the United States." For whom is that Constitution written? To what audience is the Constitution directed? The obvious answer is: "We the People of the United States."

The Constitution, as we have said, is an instruction manual for a form of government authored in the legal sense by "We the People of the United States." The target audience for that manual is "We the People of the United States." The instructions contained in the Constitution are not directed to the people of France, England, or Russia, nor simply to the officials or judges of the new American government. They are directed to the people—all of the people—who were expected to carry out those instructions. The anthropomorphized author of the Constitution is the same as its anthropomorphized audience. The Constitution, in this respect, is something in the nature of a "memo to self" written by "We the People of the United States." The interpretative task is therefore to figure out the hypothetical characteris-

tics of this "We the People of the United States" who both "wrote" the Constitution and are its target audience.

A second property of the hypothetical person denoted by "We the People of the United States" can also be determined readily: That person "exists" at the moment of the creation of the Constitution. With respect to the original Constitution, that means that "We the People" are represented by a hypothetical mind existing in the late eighteenth century. This conclusion does not require any special reference to the Constitution. Reliance on original rather than current or evolving meanings for interpreting a text is simply, as Professor Saikrishna Prakash has aptly termed it, a "Default Rule" of human communication.[65] The written character of the Constitution reinforces this default rule.[66] It is always possible, of course, for the original meaning of a text to specify (implicitly or explicitly) that it is to be understood in light of current or evolving meanings, but one would only reach that conclusion by first referring to the original meaning. We suspect that this obvious proposition is even remotely controversial only because most people assume that the *meaning* of the Constitution has normative consequences, and it is not at all obvious why old meanings should drive current practice. But from a purely interpretative perspective, originalism is a given. "No one, we trust, would ever think of interpreting the Confederate Constitution or the original corporate charter for Rhode Island according to contemporary public meanings, evolving social values, or any interpretative method other than some variant of original public meaning."[67]

In addition to the standard default rule, the Constitution itself is very clear about its own place in time. As we have noted,[68] the actual authors carefully dated the document as of September 17, 1787. The Constitution contains a specific reference to the year 1808.[69] Far from altering the "originalist" default rule for communication, the Constitution confirms it. Again, it is conceptually possible that first-order use of original meaning could require second-order use of a different temporal perspective in some cases, but that conclusion would have to be reached through the use of original meaning.

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65. *See* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998).

66. *See* BARNETT, *supra* note 11, at 100–07.

67. LAWSON & SEIDMAN, *supra* note 11, at 9.

68. *See supra* note 37.

69. U.S. CONST. art. I, § 9, cl. 1.

So what can we say about an anthropomorphized "We the People of the United States" in the late eighteenth century? The actual people of that time varied greatly across many important dimensions. They had vastly different educations and intelligence. They may have differed in the hermeneutical traditions that they followed. They may have had very different views about the appropriate role and scope of reason in human affairs. Any such differences could profoundly affect the way that people engaged in interpretation—of a Constitution or anything else. What was the perspective of "We the People of the United States?"

We can glean considerable information about "We the People of the United States" by examining their handiwork. The memo to self in our possession reveals a great deal about its author. For starters, "We the People of the United States" obviously had a high degree of intelligence and education. It is impossible to read the Constitution without coming away with a profound admiration for its intricacy, interconnectedness, sophistication, and solid grounding in articulable and plausible assumptions about human behavior. If this was what "We the People of the United States" memorialized in a memo to self, "We the People of the United States" was one smart cookie.

"We the People" also exhibits a strong commitment to human reason. There is good historical warrant for attributing such a commitment to a hypothetical person of the late eighteenth century,[70] and the Constitution confirms that commitment in its putative author. The sheer (for lack of a better term) audacity represented by the attempt to write down, in technical detail, a blueprint for a form of government attests to a deep appreciation of the power and possibility of human reason. Even more tellingly, the absence of any specification in the Constitution of a supreme or authoritative interpreter reflects the view that answers will emerge for those who make the effort to find them. A regime of multiple interpreters is a testament to faith in reason.

In addition, "We the People of the United States" is learned in the law. The Constitution is a legal document—and a legal document of considerable sophistication. It uses much language that would have been quite familiar to lawyers of the late eighteenth century.[71] Whether or not "We the People" was actually a

70. For a study of the role of reason in the founding generation, see SMITH, *supra* note 21.

71. *See, e.g.*, Robert G. Natelson, *The Agency Law Origins of the Necessary and*

lawyer, he or she was conversant with legal traditions and conventions of the time.

In sum, the hypothetical "We the People of the United States" is a pretty good fit with the reasonable person of the law. This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law. "We the People of the United States" is a formidable intellectual figure.

The devil, as always, is in the details. The difficult questions of interpretation concern the specific interpretative conventions and presumptions that "We the People of the United States," as a reasonable person, would employ in difficult cases. The range of issues to be resolved has been elegantly surveyed by Caleb Nelson in his (should-be-if-it-is-not-already) classic study of founding era interpretative conventions.[72] A complete theory of interpretation must address those issues. For now, however, it is enough to establish that constitutional meaning is found in the hypothetical mind of the reasonable person identified by the Constitution as "We the People of the United States."

B. THEY THE PEOPLE?

The Constitution of 1788 defines its own putative authorship. Interpretation of the Constitution of 1788 must therefore take place by reference to the hypothetical 1788 author specified in the document. But what about amendments to the Constitution? Is the meaning of a constitutional amendment passed in 1791, or 1868 or 1971, determined by reference to actual intentions of actual authors, or do the arguments for hypothetical authorship apply to those post-1788 texts as well?

There are two plausible answers, and neither refers to the actual intentions of actual authors. One possible answer is that

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Proper Clause, 55 CASE W. RES. L. REV. 243 (2005) (tracing the language of the Sweeping Clause to conceptions of agency law that would have been well known to eighteenth century private lawyers); *cf.* LAWSON & SEIDMAN, *supra* note 11, at 51–57 (tracing the language of the Sweeping Clause to the principle of reasonableness that would have been well known to eighteenth century public lawyers).

72. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 563–78 (2003); *see also* Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 175–78 (2000) (raising similar questions about interpretative conventions).

the hypothetical author at the time of enactment of an amendment determines the meaning of that amendment. In such a case, however, the characteristics of that hypothetical author are up for grabs. The author does not necessarily share the same level of intelligence, sophistication, or education or the same interpretative presuppositions as does "We the People of the United States" circa 1788. On this understanding, each amendment could potentially require its own unique interpretative analysis.

A second possible answer, as strange as it may seem at first glance, is that amendments to the Constitution, even amendments enacted in 1971, should be interpreted as though they were enacted by "We the People of the United States" circa 1788. That is, the level of education, assumptions about the role of reason, and interpretative conventions that establish meaning for *all* constitutional amendments might be fixed in stone, at least as default rules, by the Constitution of 1788.

Whichever of these two options proves to be correct, it is not possible to rely upon actual intentions of actual authors, for reasons similar to those that apply to the original Constitution. Constitutional amendments, no less than the Constitution of 1788, are the product of the joint action of many people. Ratifying conventions and state legislatures cannot have intentions except in a metaphorical sense. Reliance upon actual intentions is literally impossible. More significantly, the constitutional text mandates use of hypothetical rather than real intentions for amendments as well as for the original text. Article V declares that upon ratification amendments "shall be valid to all Intents and Purposes, as Part of *this Constitution*."[73] Article V thus makes amendments part of precisely the same document ("this Constitution") that is authored, according to the Preamble, by "We the People of the United States." The internal rules of the document, including its interpretative rules, therefore apply to amendments just as much as to the original text (unless there is something in the amendment itself that alters the basic default rule).

The interesting question is whether "We the People" assumes a different set of characteristics when the meaning of amendments is at stake. The difference can be very important. We have a great deal of information about the author of the Constitution of 1788 from examining the document itself. We glean much less information from a provision that reads:

73. U.S. CONST. art. V (emphasis added).

> Section 1
>
> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> Section 2
>
> The Congress shall have power to enforce this article by appropriate legislation.[74]

If this is the only text left behind by that particular author, we know that he or she is relatively fluent in English and is generally conversant with the rest of the Constitution (because the provision uses many terms and phrases employed in similar ways elsewhere in the document), but not a whole lot beyond that. We can, of course, situate the hypothetical author historically and make some assumptions about his or her characteristics based on general knowledge of authors of the time. Those characteristics might be very different than the characteristics of "We the People" circa 1788 with respect to such important matters as attitudes towards reason, interpretative conventions in general, interpretative conventions with regard to constitutions in particular, and so forth. A hypothetical American constitutional author in 1971 is different in many ways from a hypothetical American constitutional author in 1788. If the perspective of 1971 controls the meaning of the Twenty Sixth Amendment, the person whose understandings determine meaning may or may not be a "reasonable person" as we have been using that phrase.

Where in time one locates the proper perspective can matter a great deal. Consider the Due Process Clauses of the Fifth and Fourteenth Amendments. Their operative language is nearly identical, but they are separated in time by 77 years. The understanding of the phrase "due process of law" held by a reasonable person in 1791 could be very different than the understanding of the same phrase held by a reasonable person in 1868. If the Due Process Clause of 1868 is best understood by reference to 1791 interpretative conventions, it might well have a very different meaning than reasonable people in 1868 would have imagined.

Though the matter is hardly free of doubt, we offer the suggestion that the reasonable person of 1788—the original "We the People of the United States"—is the reference point for all in-

74. *Id.* amend. XXVI.

terpretative issues until the document itself otherwise specifies. By designating amendments as part of "this Constitution"—the Constitution that, by its own terms, was authored by "We the People of the United States" in 1788—the Constitution establishes a uniform standard for interpretation. The Constitution provides for unity across time between original texts and subsequent amendments.[75] It would be entirely possible, of course, for one or more of those amendments to provide a different interpretative rule, either for particular amendments or for the document as a whole. But in the absence of any such stipulation, the interpretative rules generally applicable to the Constitution apply to all of its parts, including those parts that are added by Article V.

III. LAWYERS VICTORIOUS[76]

How one interprets the Constitution determines who should be doing the interpreting. It seems largely to have escaped the notice of legal scholars that, under many of the most widely advocated modes of interpretation other than the mode put forward in this article, lawyers and legal scholars are fairly low down the list of plausible constitutional interpreters. The gap between interpretative theory and lawyerly expertise is perhaps most pronounced in the case of originalist theories other than our own, but many nonoriginalist theories also have implications for the interpretative role of lawyers.

Suppose that one believes, as do many modern observers, that constitutional meaning depends to some extent on normative considerations—that is, that the meaning of the Constitution turns (at least in significant measure) on what a morally good Constitution would say. Under this approach, the people best qualified to interpret the Constitution are obviously the people who are best qualified to determine what is morally good.

There is no plausible theory of which we are aware under which lawyers or legal scholars (who we will henceforth refer to collectively as "lawyers") fit that description. There is nothing in the training, background, or demonstrated abilities of lawyers

75. In order to address this topic adequately, we would of course need to address competing theories that call for a different integration of original text with subsequent amendments. *See, e.g*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (arguing, inter alia, that the original text must sometimes be reinterpreted in light of amendments).

76. With apologies to J.K. Rowling and Severus Snape.

that would inspire any confidence in their superior abilities to identify moral truth. They are not necessarily inferior to anyone else in their moral capacities, but they certainly have no claim to superiority. Moral philosophers, based on their training and background, have a facially better claim to the role of primary constitutional interpreter if moral truth is relevant to the inquiry, but their actual performance over time does not warrant granting them any privileged status. The same goes for lawyers who have formal training in moral philosophy; there is nothing in experience to suggest that such a background generates deeper perception of moral truth than does, e.g, regular attendance at religious services, a good upbringing, or a careful re-reading of *Atlas Shrugged*. For people who subscribe to a particular religious view of morality, perhaps recognized authorities in that religious tradition should have the paramount role in constitutional interpretation, though any such role will be confined to adherents of that particular tradition.

It may well be that *no one* is qualified to interpret the Constitution if the document's meaning depends in any strong way on moral truth. This conclusion does not depend on any profound skepticism about moral truth, but only on skepticism about the qualifications of any identifiable group of people to discover it.[77] At the very least, for any theory of interpretation that requires moral judgment, lawyers stand in no better position than "nine people picked at random from the Kansas City telephone directory."[78] It is a slight exaggeration to say that if constitutional interpretation depends on moral considerations, then lawyers have nothing useful to contribute to the enterprise. But it is only a slight exaggeration.

One possible attraction of some forms of originalism is that they seem to obviate the need to discover moral truth. Why worry about normative matters when the relevant value judgments are already contained in the document?[79] But the forms of

77. For a quick overview of the carnage wrought by legal scholars attempting to do normative theory, see Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775–83 (1988).

78. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

79. Similar considerations support the practice of "common law constitutionalism," in which constitutional meaning is found primarily in the practices that take place in the name of the Constitution. The relevant value judgments are contained in those practices rather than in abstract reasoning. For an especially clear and sophisticated presentation of this model, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). Common-law constitutionalism, unlike theories of interpretation based on moral reasoning, prescribes a major role for lawyers; who better than law-

originalism that rely on historically real mental states rather than the views of the reasonable person also leave only a very limited role for lawyers and legal scholars in the interpretative process. If meaning is to be found in the actual mental states of some set of historical figures—whether it be the Framers, the ratifiers, or any subset of the actually existing public—lawyers have no privileged insight into those mental states.

There are professionals who devote their lives and training to the identification of historically real mental states. Historians spend much of their energy developing the context in which historically situated figures acted and identifying the forces that would likely have shaped their thoughts and actions. Psychologists specialize in the inner workings of the mind. Linguists study the actual uses of language. Other professionals, such as semioticians, study other aspects of the communicative process. If one is really trying to identify, as an historical fact, the thoughts that were going through the heads of concrete persons at a particular point in time and space, one would need to draw on the expertise of historians, psychologists, linguists, semioticians, and a host of other professionals who can each contribute a piece of the puzzle involved in reconstructing the thoughts of a conscious mind. If the person whose thoughts are being reconstructed was him- or herself a lawyer, or was learned in the law, then lawyers might well have something important to contribute to the inquiry as well; they might know something important about the likely context and framework within which the subject formed thoughts. But identifying historically real thoughts is a task for expertise, and in most cases it is not at all clear why lawyers would think that such expertise belongs to them.

Lawyers do, of course, have a plausible role in an originalist interpretative approach that searches for historically real mental states, though it is a very different role than they usually play. The law often deals with matters well beyond the expertise of lawyers, ranging from the causes of heart attacks to the value of close corporations. Those matters are properly the subject of expert testimony. The task of lawyers in such matters is to marshal

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yers, after all, to understand and interpret the practices of other lawyers? But common-law constitutionalism works much better as a description of actual practice or prescription for effective governance than as a theory of constitutional interpretation. Common-law constitutionalists interpret a great many things—past decisions, social practices, evolving customs and traditions, etc.—but the Constitution of the United States is not one of those things. It serves no purpose other than to invite equivocation to call common-law constitutionalism a method of interpreting the Constitution.

and channel the relevant experts and to translate their conclusions into the specialized language of the law. A lawyer could, on his or her own, describe the legal context in which decisions about scientific causation or economic value are made, identify a range of considerations that are part of that inquiry, and set out the framework into which expert testimony on such matters must be plugged. But a lawyer could not, on his or her own, determine causation or value. The lawyer facilitates the inquiry but cannot unilaterally conclude it.

Similarly, if constitutional meaning is found in historically real mental states, lawyers can describe the legal context in which decisions about constitutional meaning are made, identify a range of considerations that are part of that inquiry, and set out the framework into which expert testimony on such matters must be plugged. But a lawyer could not, on his or her own, determine constitutional meaning. That ultimate conclusion would be the province of experts, of whom the lawyer *qua* lawyer is not one. The lawyer is still necessary in order to marshal and channel the evidence produced from experts. It is doubtful whether any one expert, in either history, psychology, linguistics, or any other relevant field, would possess all of the information needed for an accurate assessment of real mental states. The lawyer's job within this interpretative framework is to assemble the pieces—"assemble" in the sense both of "gather" and of "put together." That is an important job, to be sure. But it does not involve making pronouncements about constitutional meaning without reliance upon experts in mental reconstruction. Under this model of originalism, the central resources in constitutional interpretation do not come from the law, and the central actors in interpretation are not lawyers.

It is fair to say that, under a mode of interpretation that looks for actual mental states, legal scholarship is appropriately the handmaiden of historical, psychological, linguistic, and other professional scholarship. The law sorts and assembles the materials of interpretation, but it does not itself provide them. Constitutional scholars would need to see themselves primarily as transmission belts for the findings of other experts.

If, however, constitutional meaning is found in the hypothetical mind of the reasonable person denoted by "We the People of the United States," the role of lawyers is potentially more robust. "We the People of the United States," as a species of the reasonable person, is a legal construct rather than an historical individual. The intentions or thoughts of "We the People of the

United States" are also legal constructs. Lawyers create the object of interpretation, so it is not surprising that lawyers might play a key role in understanding it.

Professionals such as historians, psychologists, and linguists, of course, have an important role to play even in identifying the hypothetical mental states of the reasonable person. In order to know what mental states can most appropriately be attributed to the reasonable person, it helps to know the mental states that were most likely held by real persons situated in the same point in space and time. All of the evidence that establishes the meaning of the Constitution under a concrete-intent-based approach to interpretation is *relevant* to establishing the meaning of the Constitution under a reasonable-person-based approach. The lawyer seeking the thoughts of the reasonable person ignores historians, psychologists, and linguists at considerable peril. But rather than merely marshalling, channeling, and assembling the data provided by experts, the lawyer under reasonable-person originalism must also engage in an affirmative act of construction. There is a step in the process beyond explaining what the experts have found. And the lawyer is well positioned for that task. The only direct evidence we have about the thoughts of "We the People of the United States" is the memo to self known as the Constitution that "We the People" authored and left us. The person best equipped to identify the thoughts of such an author is the person who has taken the time, energy, and care to read the product of those thoughts. One certainly does not need to be a lawyer in order to engage in that enterprise. Because, however, the Constitution is a legal document drafted in legal terms for legal purposes, a legal background is helpful, if not strictly indispensable, to understanding the Constitution. At the very least, a legal background is as or more important to the interpretative enterprise as is a background in history, psychology, moral theory, or any other specialized discipline.

A careful reading of the Constitution will, of course, be informed by insights from disciplines such as history, psychology, and linguistics. But the raw material is there for anyone to see. Understanding the thoughts of "We the People" is not a distinctively historical, psychological, or linguistic task. It is an act of legal construction, based on a legal document, using legal language, in a legal context. For lack of a better description, it is a legal enterprise.