

# COMMENTARY

## CONFESSIONS OF AN AMBIVALENT ORIGINALIST

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One of my favorite moments in Larry McMurtry's wonderful novel, *Lonesome Dove*, comes when Augustus has to hang Jake Spoon, his feckless former Texas Ranger buddy who has gone bad by throwing in his lot with the murderous Suggs brothers. Gus half apologetically says to Jake, "I'm sorry you crossed the line," and Jake distractedly replies, "I never seen no line, Gus. I was just trying to get to Kansas without getting scalped." And soon justice is done.<sup>1</sup>

I often recall this passage on those occasions when my scholarly interest in the topic of originalism in constitutional interpretation affords me an opportunity to contribute my mite to such recent and current disputes as: the extent of presidential authority to make war; the meaning of the Second Amendment; the vagaries of the electoral college; the definition of "high Crimes and Misdemeanors"; and the use of sampling procedures in the decennial census.<sup>2</sup> These opportunities come along more frequently than one might imagine. Twenty-one decades and counting after its adoption, the Constitution, we repeatedly learn, contains all kinds of sleeper clauses just waiting to be activated in the course of human events. Since they have lain there dormant, occasion always exists to ask exactly how and why these suddenly controverted clauses made their way into the Constitution in the first place.

Contrary to what one might think, however, the role of public advocate or intellectual is not one that historians easily assume.

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<sup>1</sup> Larry McMurtry, *Lonesome Dove* 572 (1985).

<sup>2</sup> To be completely self-serving, a Rakove sampler would include: Jack Rakove, A Faulty Rethinking of the 2nd Amendment, N.Y. Times, May 12, 2002, § 4 (Week in Review), at 15; Jack Rakove, Before the Trial, Ask the Pivotal Question, N.Y. Times, Jan. 12, 1999, at A19; Jack Rakove, Counting on Madison in the Census Dispute, Wash. Post, Mar. 15, 1998, at C2; Jack Rakove, The Accidental Electors, N.Y. Times, Dec. 19, 2000, at A35; Jack Rakove, Who Declares a War?, N.Y. Times, Aug. 4, 2002, § 4 (Week in Review), at 13.

Unlike lawyers, we are not trained to speak with the voice of the advocate or the adversary. Even if we were so trained, academic historians would have to swim upstream to gain anything like the public recognition that, say, the Ackermans, Dworkins, Posners, and Sunsteins of the world enjoy. Perhaps we are also more conscious of our limitations. Like many, perhaps most, of my disciplinary colleagues, I generally doubt that “lessons of the past” infallibly can guide us in the present. Historical knowledge is always relevant to understanding the origins and contours of the world that we inhabit, but it also instructs us in the difficulty of forecasting the future or predicting the unintended consequences of our actions. Indeed, history may well have an inherently conservative and cautionary bias, insofar as it challenges more than it confirms the human capacity to foresee and control what is to come. Many historians are uncomfortable with the cruel and unusual use often made of historical materials in contemporary political debate. The nuance, subtlety, and respect for ambiguity that we cherish and relish in our research cannot easily be translated into urgent political discussion.<sup>3</sup>

Thus it was that I was reminded of Jake Spoon in November 1998 when I went to testify at the House Judiciary Committee’s hearing on the history of impeachment. The last exchange between Gus and Jake soon proved more apt than I knew at that time. For, as the opening remarks of Rep. Charles Canady (R-Fla.), chair of the Constitution subcommittee (and my fellow Haverford College graduate),<sup>4</sup> made clear, a significant number (say, a majority) of the committee felt that the time was nigh for a hanging of sorts.<sup>5</sup> My own reaction, however, revolved around the sudden aperçu that I had crossed a line from

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<sup>3</sup> On these points, see Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, in *The Transformation of Early American History: Society, Authority, and Ideology* 16, 45-47 (James A. Henretta et al. eds., 1991), and more generally, the discussion of applied historical knowledge in Richard E. Neustadt & Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* (1986).

<sup>4</sup> This led to a mildly amusing misprint in the official hearing transcript. I had addressed Judiciary Committee Chairman Henry Hyde, with whom I once had a lengthy conversation on a flight from then-Washington National Airport to Chicago O’Hare, as “my fellow Chicagoan,” and Subcommittee Chairman Canady as “my fellow alumnus,” but the reporter somehow translated this into an incomprehensible and ludicrous address to “all alumni.” *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 242 (1998)* (statement of Jack N. Rakove, Professor, Stanford University). The testimony is reprinted at Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 *Geo. Wash. L. Rev.* 682 (1999).

<sup>5</sup> *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 4 (1998)* (opening statement of Chairman Canady) (expressing view that Clinton, if guilty of offenses charged, was impeachable for committing “high Crimes and Misdemeanors”).

merely studying history into actively participating (even in a marginal way) in a significant historical event.<sup>6</sup> I had a similar sensation once before: As an expert witness in an Oneida Indian land claims litigation against the State of New York, I found myself making common cause, at two centuries remove, with some of the political leaders I had studied. But the impeachment was a different kind of event. I had come to testify, in effect, as a partisan historian or historical partisan, offering a textured account of the origins of the Impeachment Clause that was meant to explain why, on avowedly originalist grounds, it was manifestly not an appropriate constitutional weapon to be deployed against President Clinton.

There are many historians, including some of those whose work I admire most, who feel that we should avoid deep engagement with contemporary issues. Our work, the questions we ask, the issues that engage us, are doubtless shaped by current concerns. But shaping is one thing, and distorting another. Too close an engagement can allow presentist commitments to mar historical judgment, producing recognizable biases that devalue one's contribution to our knowledge of the past.

I had thought about this problem from a broader and less focused perspective when I set out to write the book that I hoped would make a potentially major contribution to the debate over originalism, itself a hotly contested and politicized subject. My general purpose in writing *Original Meanings: Politics and Ideas in the Making of the Constitution*<sup>7</sup> was twofold. First, it was a natural extension of previous work I had done on the creation of a national polity during the Revolutionary era,<sup>8</sup> a project I hope eventually to bring to a close with a volume on the 1790s. But second, and for our purposes more importantly, it was designed to demonstrate that the lawyers' debate about originalism as a mode of constitutional interpretation would remain genuinely incomplete, not to say futile, if it did not address the essentially historical nature of the inquiries required to produce satisfactory accounts of what the language of the Constitution originally meant. Although I was, and remain, skeptical about the capacity of lawyers and jurists to pursue these inquiries on terms that would pass the professional muster of historians, I nonetheless found the problem interesting in its own right. That is, I liked the idea of formulating an

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<sup>6</sup> However, the most likely head-scratching question that future historians will ask about that episode is: What was that all about anyway?

<sup>7</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996).

<sup>8</sup> See generally Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979).

answer to the following questions: If one wanted to figure out what the Constitution originally meant (whatever that question itself means), how would one do it? What rules would one devise and apply for the identification and evaluation of relevant sources?

But did this understanding of originalism as an exercise in historical inquiry mean that I favored or opposed originalism as a mode of constitutional interpretation, or thought that my intervention should be seen as coming from either the right or left field of historical interpretation (speaking metaphorically)? I thought I could dodge this question in *Original Meanings* with this suitably coy footnote embedded in the preface:

I am often asked whether I think originalism offers a viable or valid theory of constitutional interpretation. My preferred answer is, I hope, suitably ambivalent. In the abstract, I think that originalism is vulnerable to two powerful criticisms. First, it is always in some fundamental sense anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors. Second, the real problems of reconstructing coherent intentions and understandings from the evidence of history raise serious questions about the capacity of originalist forays to yield the definitive conclusions that the advocates of this theory claim to find. On the other hand, I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor—and that may be as good a clue to the appeal of originalism as any other.<sup>9</sup>

As historians are notably ironists, I did not anticipate that colleagues in more earnest disciplines would still want to pin me down to ask what I *really* think.<sup>10</sup> Others took offense with my concluding implication that all constitutional interpretation was at bottom instrumental in nature—that we pick the interpretive canon that we think is most likely to render the decision we want, without regard to neutral principles of adjudication.<sup>11</sup>

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<sup>9</sup> Rakove, *supra* note 7, at xv n.\*.

<sup>10</sup> See, e.g., Christopher L. Eisgruber, *Early Interpretations and Original Sins*, 95 *Mich. L. Rev.* 2005, 2007 (1997) (“What’s ambivalent? . . . From the fact that Rakove not only holds such a dim view of originalism but simply asserts it without argument in a footnote, we might reasonably infer that Rakove never intended his book to say anything about the role originalism should play in constitutional interpretation.”).

<sup>11</sup> See, e.g., Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 *Const. Comment.* 529, 532 (1998) (“His only compliment is entirely back-handed. He admires originalism only when it supports the outcomes he favors. . . . Oddly enough, Rakove somehow believes such comments betray his ‘ambivalen[ce]’ towards originalism. One wonders what Rakove says about theories he openly disdains.” (citations omitted) (alteration in original)).

Historians, qua historians, though, have no normative stake in any particular mode or rule of constitutional interpretation. If we were to find that the Supreme Court, individual Justices, or other constitutional decisionmakers varied their rules of interpretation to meet circumstances and preferences, that would be cause for professional celebration—not moral alarm—because it would identify a problem or a puzzle for exploration and explanation. As a close student and biographer of James Madison, for example, I find it more—not less—interesting to ask how a constitutional framer of 1787 who was disappointed that the new government would not enjoy a negative over state legislation<sup>12</sup> could become the author of that founding text of states' rights discourse, the Virginia Resolutions of 1798.<sup>13</sup> Explaining an individual's seeming inconsistency is one of the "anomalies" that are the bread and butter of historical research.<sup>14</sup> In Madison's case, it may even lead us to realize that consistency need not always be defined in terms of the positions to which one subscribes; it also can be the mark of an empiricist temperament that is prepared to revise past positions on the basis of new evidence.

Of course, in the realm of constitutional jurisprudence, evidence of radical inconsistency in judicial decisionmaking could well be cause for deserved alarm insofar as it suggests that life tenure serves to promote judicial caprice rather than principled independence. Such inconsistency is less surprising and alarming, however, when the political branches make constitutional decisions. Indeed, one plausibly could interpret one of Madison's most famous statements as a justification for a sort of situational ethics of constitutional decisionmaking. "Ambition must be made to counteract ambition," he famously wrote in *Federalist No. 51*. "The interest of the man must be connected with

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<sup>12</sup> See Rakove, *supra* note 7, at 51 (explaining that Madison believed negative on state legislation necessary to prevent "factious majorities" from resisting national policies and enacting unjust laws).

<sup>13</sup> See James Madison, *Virginia Resolutions Against the Alien and Sedition Acts*, December 21, 1798, in *James Madison: Writings* 589 (Jack N. Rakove ed., 1999) (asserting Virginia's position that Alien and Sedition Acts were unconstitutional and calling on other states to take "the necessary and proper measures" in cooperation with Virginia to "maintain unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people"); see also Jack N. Rakove, *James Madison and the Creation of the American Republic* 149-54 (2d ed. 2002) (describing evolution of Madison's state-centered strategy in opposition to Alien and Sedition Acts); *id.* at 213-14 (describing use by Southern politicians of Virginia Resolutions in arguing "that a state could nullify an act of Congress it deemed unconstitutional" and Madison's struggle against this view).

<sup>14</sup> On this point, see especially Bernard Bailyn, *The Problems of the Working Historian: A Comment*, in *Philosophy and History: A Symposium* 92, 96 (Sidney Hook ed., 1963) (describing questions raised by "anomalies in the existing data" as "true historical problems").

the constitutional rights of the place.”<sup>15</sup> Taken literally, this seems to imply that an officeholder’s reading of the Constitution’s messy allocation of authority over, say, matters of national security, should not rest on a disinterested, behind-the-veil-of-ignorance reading of the relevant text that strives for the one “best” reading of the Constitution. Rather, a situational ethics of constitutionalism suggests that an officeholder’s duty is to ask what action is instrumentally appropriate for someone holding that office at that moment. Or to put the point more simply still, there should be nothing surprising about the discovery that a Republican might be a strong advocate of congressional micromanagement of the presidential conduct of foreign policy during the Clinton presidency, but then be a vigorous proponent of executive prerogative during either the Bush I or Bush II administrations.

The impeachment controversy of 1998-1999 illustrates this aspect of our constitutional culture nicely. Ordinarily we expect Republicans to make the strongest appeals to the original meaning of the Constitution and expect Democrats to favor a moral reading of the text, divorced from an historicist understanding of its language. But the structure of the impeachment debate seemed to produce the opposite result. It was the Republicans who sounded more as if they had come to the fray fresh from reading Ronald Dworkin, invoking, as Chairman Hyde was wont to do, grand principles of the rule of law, the inspiration of Thomas á Becket, and memories of the war dead at Omaha Beach.<sup>16</sup> True, Republican speakers did rip occasional snippets of quotations from Alexander Hamilton’s discussion of impeachment in *Federalist No. 65*.<sup>17</sup> But their rhetoric relied more on the general damage that allowing Clinton to go unchastised would do to the rule of law rather than close historical analysis of the kinds of offenses that the framers would have explicitly envisioned as falling under that mysterious phrase, “other high Crimes and Misdemeanors.”

It was to provide just such analysis that I eagerly contacted my Stanford colleague, Deborah Rhode, then serving as a minority counsel on the Judiciary Committee, when I heard of the proposed hearings on the origins of the Impeachment Clause. Lawyers aplenty

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<sup>15</sup> *The Federalist No. 51*, at 318, 319 (James Madison) (Isaac Kramnick ed., 1987).

<sup>16</sup> See *Trial of William Jefferson Clinton, President of the United States*, 145 Cong. Rec. S299-300 (daily ed. Jan. 16, 1999) (statement of Manager Hyde) (invoking general principles of rule of law, rejection of divine right of kings, and memories of executed dissidents and war dead at Normandy).

<sup>17</sup> E.g., *Trial of William Jefferson Clinton, President of the United States*, 145 Cong. Rec. S293 (daily ed. Jan. 16, 1999) (statement of Manager Canady) (quoting *Federalist No. 65* (Alexander Hamilton)), 145 Cong. Rec. S872-73 (daily ed. Jan 22, 1999) (statement of Manager Canady) (same).

would volunteer to appear, I knew, but the number of historians both qualified and willing to do so was likely to be small.<sup>18</sup> I therefore thought, not without reason, that I could offer a perspective on the Impeachment Clause that would otherwise be absent, and at the same time provide a timely application of the general method of originalism that I had developed in *Original Meanings*. Of course, I was not unaware of the partisan implications of this act. I am a longtime Democrat from a family with both academic and personal connections to the old Cook County machine of the first Mayor Daley,<sup>19</sup> through which I found summer employment painting guard rails on the Tri-State Tollway. I believed then, as I do now, that the Clinton impeachment was first and foremost an intensely partisan act that said far more about the depth of Republican hatred for the sitting President than concern for the protection of fundamental constitutional values. But I also believed that the Republican theory of impeachment, on its merits, was essentially inconsistent with the original intentions underlying the inclusion of the relevant clause in the Constitution. To accept that theory would have the dangerous consequence of breathing life into a provision that had lain largely dormant for most of our history, and had been used successfully only once, to help terminate the Nixon presidency for offenses that the framers would have had no trouble classifying as “high Crimes and Misdemeanors.”

The actual experience of making the case for an originalist analysis of the Impeachment Clause proved instructive, though perhaps not quite in the way I naively had imagined it might. By the time my turn came to summarize my position, it was late afternoon, and the seemingly electric mood of the morning session had long faded. In that curious state of divided consciousness in which we somehow try to observe ourselves as we are being observed, I found myself wondering what sense the members of the committee could possibly make of the historically textured account I was trying to condense into ten minutes. It is, after all, one thing to pay patriotic obeisance to the wisdom of the framers and quite another to grapple, as historians do, with the nuances and complexities, not to say the uncertainties and limitations, of their thought. Most members of Congress feel an intui-

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<sup>18</sup> The best qualified were Peter Charles Hoffer and N.E.H. Hull, coauthors of the excellent study, *Impeachment in America, 1635-1805* (1984), but they either did not volunteer or were not asked to appear.

<sup>19</sup> On these connections, see generally Milton L. Rakove, *Don't Make No Waves, Don't Back No Losers: An Insider's Analysis of the Daley Machine* (1975) (based on experience as Chicago Democratic Party activist); Milton L. Rakove, *We Don't Want Nobody Nobody Sent: An Oral History of the Daley Years* (1979) (based on taped interviews with Chicago Democratic and Republican party activists).

tive bond with the framers of the Constitution, since they inhabit the offices that the framers created, and presumably love what they are doing (after all, they do everything possible to stay there). They also share the conviction, which permeates our political culture, that the Constitution distilled the best political thinking of the day, that all of its clauses were carefully framed and considered, that it really was, in Gladstone's endlessly quoted observation, "the most wonderful work ever struck off at a given time by the brain and purpose of man."<sup>20</sup>

In presenting them with an (or this) historian's account of the origins of the Impeachment Clause, I realized that I might as well have been speaking in tongues. On the one hand, I argued that a broad reading of "high Crimes and Misdemeanors," like that required to sustain the Republican theory, was inconsistent with the one factor that provided the closest thing to an independent variable in the framers' discussions of the presidency: their desire to make the office as politically independent of Congress as possible, subject only to the concern that one house or the other of the national legislature had to be entrusted with the task of making a final election of the President whenever the electors in the states failed to produce a majority. But I also emphasized the difficulties that the framers faced in imagining the political potentialities of the presidency, which strongly suggested that the Impeachment Clause was more reflective of their residual uncertainty about the office than of any well-conceived notion about an orderly process of removal. I further suggested that the belated insertion of "high Crimes and Misdemeanors" on September 8, 1787, was the product of a tug-of-war between George Mason (who refused to sign the Constitution) and James Madison. Mason tried to enlarge the standard of impeachment to the highly subjective notion of "mal-administration"; Madison protested that this phrase was far too open-ended; and the Convention, with little further thought, instead reached back into English history (to the fourteenth century, in fact) to adopt "high Crimes and Misdemeanors."<sup>21</sup> Given how little examination this late amendment received, and the state of desuetude in which the clause has languished for most of our history, I concluded that it would be rash indeed to give an expansive meaning to the clause under the highly partisan circumstances prevailing in 1998.

Are there any morals to this story? Or better yet, is the moral that I have somehow betrayed my professional ethics by venturing to apply my scholarly knowledge in partisan causes? Casually com-

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<sup>20</sup> William E. Gladstone, *Kin Beyond Sea*, 127 *N. Am. Rev.* 179, 185 (1878); see also the discussion of this remark in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* 162-63 (1986).

<sup>21</sup> See 2 *Records of the Federal Convention of 1787*, at 550 (Max Farrand ed., 1911).

menting on my secondary career as public intellectual, David Brady, a somewhat conservative colleague at Stanford, has twitted me for writing only in favor of political positions that I personally support. Does that also mean that I am shading the historical record to support the outcomes I prefer, in a way that echoes my notion that all constitutional argumentation is essentially instrumental in nature, and that no one (or hardly anyone) actually succeeds in developing or deploying “neutral principles” (including originalism) very well, if at all?

In their own defense against these imprecations and innuendoes (and hopefully not having a fool for a client), working historians may be allowed to plead the following: First, and least importantly, we have not abandoned our First Amendment rights as citizens and are entitled to exercise our political rights in the most effective way that we can. Second, by nature of our vocation and craft, historians are likely to provide a measure of nuance and complexity, not to say perspective, that otherwise would be lacking. But third, and most importantly and saliently, what one says or writes in public on issues of contemporary concern absolutely has to be consistent with one’s scholarship. In writing about impeachment, for example, one obviously would not want one’s testimony to be impeached by one’s scholarly writings, lest one be accused of being a constitutional hooker in the mode, say, of those legal academics who told the Florida legislature that it could still appoint a slate of presidential electors *after* the date set by Congress in exercise of its constitutional authority to “determine the Time of chusing the Electors.”<sup>22</sup> In my own case, this is the rule I have tried to follow scrupulously. Hence my testimony in the late unpleasantness in Washington over the Clinton impeachment was, I believe, deeply consistent with the argument of the chapter in *Original Meanings* discussing the creation of the presidency.<sup>23</sup> Or similarly, in recently entering the Twilight Zone of contemporary constitutional scholarship known as “Second Amendment Studies,” an issue I previously had avoided, I took some pains to make clear that I was deploying the same mode of historical analysis that I had worked out in *Original Meanings*, with the proviso that examining the origins

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<sup>22</sup> U.S. Const. art II, § 1, cl. 3. Compare 3 U.S.C. § 1 (2000) (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”), with David Barstow, G.O.P. in Control: Lawyers for Republicans Urge Special Session to Choose Electors, N.Y. Times, Nov. 29, 2000, at A1 (discussing testimony of “[t]hree lawyers hired by the Republican leaders of the Florida Legislature,” including two law professors, that state legislature still could appoint slate of electors on November 28).

<sup>23</sup> See Rakove, *supra* note 7, at 244-87.

of particular clauses of the Bill of Rights posed additional difficulties that I had not canvassed there.<sup>24</sup>

One final observation carries me back to the title of this Commentary and the coy footnote in the preface to my book. By virtue of having become *plus originaliste que les originels originalistes*, in terms of my scholarly investment in this field, I do enjoy being able to *epater ces memes originalistes* by demonstrating that seriously conducted originalist forays do not always produce plausible or persuasive results that uniformly align with prevailing conservative positions. Indeed, there are a number of issues on which, I believe, originalist positions would tend to favor (in conventional political terms) liberal outcomes. In the realm of foreign affairs, to take one nontrivial example, textualism and originalism alike call into question the sort of bold affirmations of presidential prerogative that have been repeatedly advanced in recent decades. But does that mean that every departure from an ordinal originalist understanding should be dismissed as usurpation? Or are such apparent departures not better explained as evidence of either necessary adaptations or the process whereby the meaning of “all new laws,” even those enacted—like the Constitution—after “the fullest and most mature deliberation,” can only “be liquidated and ascertained by a series of particular discussions and adjudications?”<sup>25</sup> To this question, I only can repeat the disclaimer I offered in 1996: Originalism is problematic on grounds of democratic theory, and unless performed with the historical acumen I tried to deploy in *Original Meanings*, is likely to degenerate into so much law-office history, providing jurists and others with more, not less, license to justify the positions they would have taken anyway. But on those issues where it supports the outcomes I favor, it remains attractive, not least when it exposes the inconsistencies of those who profess to be originalists on principle.

Let me close, then, with an anecdote about former Attorney General Edwin Meese, whose July 1985 address to the American Bar Association, with its call for a return to a “jurisprudence of original intention,”<sup>26</sup> placed originalism smack dab in the center of constitutional debate. A year or two later, with the bicentennial of the Constitution in full flower, I was asked to address something known as

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<sup>24</sup> See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *Chi.-Kent L. Rev.* 103, 113-19 (2000) (discussing originalist historical methodology), revised and reprinted in *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms* 74, 79-83 (Carl T. Bogus ed., 2002).

<sup>25</sup> *The Federalist* No. 37, at 241, 245 (James Madison) (Isaac Kramnick ed., 1987).

<sup>26</sup> Edwin Meese III, *Interpreting the Constitution*, in *Interpreting the Constitution: The Debate over Original Intent* 13, 17 (Jack N. Rakove ed., 1990).

the Humanities Forum at Stanford (donors who give generously to the School of Humanities and Sciences). The subject was the debate over originalism, and Meese, by then retired from the Department of Justice and loosely affiliated with Stanford through our very own hotbed of conservative thinking, the Hoover Institution, was the commentator. At some point, I made the same observation rendered above that originalist approaches would tend to disfavor the broad interpretation of executive prerogative over national security affairs that the Reagan Administration—in which Attorney General Meese had served—was so fond of avowing.<sup>27</sup> Meese's reply, which I only can paraphrase from memory (albeit a vivid one) was revealing: You have to realize, he said, that the Constitution had been written in a very different period and world, and that much had changed since then.

So perhaps I am not alone in suggesting that ambivalent originalism may have its occasional allure across the political spectrum. Meanwhile, I can only tell one of my critics, Saikrishna Prakash, that he is dead wrong when he alleges that, "Whether he knows it or not, Rakove does not think much of our Constitution."<sup>28</sup> In fact, I think a great deal of the Constitution, as well as about it, which is, however, not the same thing as agreeing that the electoral college or the Impeachment Clause or the equal state vote in the Senate makes a great deal of sense. The Constitution has been good to me, and I am trying to reciprocate, even if that means sometimes having to explain why James Madison probably would prefer to have his profile associated with the American Civil Liberties Union rather than with the Federalist Society.

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<sup>27</sup> One should recall that this exchange occurred during the post-Iran-Contra period.

<sup>28</sup> Prakash, *supra* note 11, at 530.