

A Dialogue with Federal Judges on the Role of History in Interpretation

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The George Washington University Law School*

*Moderated by Amanda L. Tyler¹
The Honorable Frank H. Easterbrook²
The Honorable Brett M. Kavanaugh³
The Honorable Charles F. Lettow⁴
The Honorable Reena Raggi⁵
The Honorable Jeffrey S. Sutton⁶
The Honorable Diane P. Wood⁷*

PROFESSOR TYLER: It is my great privilege and honor to welcome to GW Law School today six esteemed members of the federal judiciary, and we are thrilled to have each and every one of you here.

It is also my privilege to moderate what I expect will be a very interesting—and hopefully very spirited—discussion about the role of history in judicial interpretation.

Now because I know that all of you are not here to hear from me, I will keep my introductions very brief. We are joined by Chief Judge Easterbrook of the Seventh Circuit along with his colleague Judge Wood, also from the Seventh Circuit. We are also joined by Judge Raggi from the Second Circuit and Judge Sutton from the Sixth Circuit as well as Judge Kavanaugh from the D.C. Circuit and Judge Lettow from the Court of Federal Claims.

Before we begin, a brief note on procedure. I have asked each of the panelists, if they would like to do so, to say a few words to start off our discussion about their views on the role of history in judicial interpretation. Following their initial remarks, I will open it up for discussion among the panel, and I may, if I may, interject a few questions to

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keep the discussion going. And then, toward the end, we will open it up for questions from the audience.

So without further ado, Chief Judge Easterbrook.

JUDGE EASTERBROOK: Thank you.

I was asked to say a few words about the effect of Farrand's *Records* on constitutional interpretation, and I actually need only one word: none.

(Laughter)

JUDGE EASTERBROOK: I care about the original public meaning of legal texts. What binds is the text that was approved, according to the procedures for adopting that text, and not anybody's hopes or plans or intent.

To decode meaning, it's necessary to understand how the living interpretive community at the time the text was adopted understands, or understood, legal words. So, for my purposes, something in *The Federalist* or *Federal Farmer* or *Brutus*, or remarks in the ratifying convention, might shed light on how intelligent readers of legal words understood what they mean.

Even the debates in the first Congress can be very helpful because they're roughly contemporaneous with the Constitution. You need to figure out what that interpretive community understood because language—the meaning of language and its context—changes. But secret exchanges among the drafters don't help for that purpose. Only public expressions matter. Farrand's *Records* deal with secret deliberations, so they are irrelevant.

Now perhaps anticipating that I might give a short answer, Professor Tyler circulated a list of some other questions that the members of the panel might address, such as how well lawyers use constitutional history in making arguments. I've got another short answer: terrible.

(Laughter)

JUDGE EASTERBROOK: Law office history is an oxymoron. I don't pay much attention to purported history in legal briefs because people are always taking things out of context. Not that the lawyers generally know enough to understand the original context. They may not even know which particular kind of mistake they're making when they take statements out of context.

If briefs supply references to helpful sources, I am perfectly happy to go read them. I love to go read a book by Leonard Levy, or a book or article by Philip Hamburger. Real historians may have something useful to say even though the lawyers don't.

And I have on my shelf, next to my desk at the court, the entire *Holmes Devise History of the Supreme Court*, which has got a lot of legal history in it, and a five-volume set edited by Philip Kurland and Ralph Lerner called *The Founders' Constitution*.

The Founders' Constitution, by the way, is available free of charge. You can download the whole thing at the University of Chicago Press web site.

The advantage of these sources is neutrality. The historical materials that are put together by these people weren't selected with some piece of litigation in view; that is, they weren't put together to see what advantage they can give to Client *X* in Case *Y*. And I find that to be much more helpful, to get away from any one side's perspective in the litigation.

So there you have my answers: none and terrible, but with small qualifications that leave some role for constitutional history.

PROFESSOR TYLER: As I said, we were hoping for spirited discussion, and I think we are well on our way. Now we will hear from Judge Wood.

JUDGE WOOD: Yes. Well, I will begin by thanking everyone for including me in this symposium. I found the morning very interesting.

Actually, I have less of a disagreement with Chief Judge Easterbrook, my friend and colleague for many years, than you might think, but I thought I might suggest that there are a couple of levels at which one might consider these materials.

You could consider them for the question whether they have any immediate utility to a judge or, for that matter, to lawyers preparing the brief.

You could consider them more for atmospheric—for background—understanding of the Constitution in some way that may or may not play into any particular case.

Or finally, and most readily, you could appreciate them simply as a citizen, as a person, as a fascinating story of solutions to difficult political problems that people were facing at the time—how they attacked them, what they did, what they finessed, what they answered. And I don't think there's any question that we would all enjoy reading these volumes from that point of view.

On the immediate utility question, I think your answer depends quite a bit on the general way in which you regard background materials, whether you want to call it legislative history or whether you want

to call it as they do in the international field, “travaux préparatoires,” or whether you want to call it anything else.

Somebody like Judge Easterbrook, who doesn't think legislative history sheds any light on things, or Justice Scalia as we heard last night, isn't going to use Farrand for that purpose. You're not going to read them saying: “You know, when they put titles of nobility in Article I, what were they really talking about? Was it broad or narrow? Does getting a Congressional Medal of Freedom violate that clause somehow?”

A contextualist, in contrast, is going to read these materials as one of many sources to see how people thought about words and so on. So there may be some utility there.

I might add, by the way, that at the end of the day when one has consulted all of the sources that seem helpful to understand the actual text that was put down, I think it's a fallacy to think that you're going to decide that the text itself has a fixed and clear meaning. You may come to the conclusion that the drafters intended to create an open-ended provision. You may come to the conclusion that the drafters intended to pin an idea down very specifically. So I don't think we should confuse the end result of that inquiry with the nature of the inquiry itself.

I also would suggest that the utility in the immediate sense of these materials depends on where the court stands in our hierarchical system. Constitutional questions of first impression are a rare event, on the Seventh Circuit anyway. Maybe the Sixth Circuit or the Second Circuit or the D.C. Circuit gets more of them. Although every so often, you might find one, they are really much more likely to present themselves after the distillation process has occurred and we're at the Supreme Court. A lot of the times, therefore, these materials might be of some intellectual interest, but there is actually law from a higher authority that a Court of Appeals must consult.

If you can get over those hurdles, I do find it illuminating to look at the papers, but perhaps not specifically helpful. And the only example of a case that I can give you where I felt the need to look at the history leading up to a constitutional provision, and also the history of how it had been interpreted down the years, was a rather strange case that I had a couple of years ago where my panel was asked to consider whether Illinois was properly filling the open Senate seat of then-Senator, and later President, Barack Obama. That case required a careful look at the second paragraph of the Seventeenth Amendment, which, it turned out, nobody had ever really spent much time on.

And the real question was: if there's an executive appointment to fill those seats, does that relieve the state of the obligation to hold an election at some point, or is it okay to just fill the seat with an executive appointment until the next general election?

So I spent a lot of time looking at history of that provision, which may be some signal that in the right case I would find it useful.

So I think I'll turn the floor back now.

PROFESSOR TYLER: And now, Judge Raggi.

JUDGE RAGGI: Thank you, Professor Tyler.

Thank you to everyone at GW for inviting me to attend this symposium.

When Maeva Marcus first told me about the symposium, I immediately tried to figure out how I could wrangle an invitation because I've been a student of the Framers for almost forty years, since I was first introduced to them by the great Kathryn Preyer, and I know many of you know Ms. Preyer. I welcomed the opportunity to hear this morning's panel of serious legal historians discuss the value of the records of the Philadelphia Convention.

But when Maeva said she was going to suggest me as a panelist, I hesitated, explaining that in almost twenty-five years on the federal bench I have never cited Farrand's *Records*. Now I don't think that's because the Framers' language is so plain as never to admit ambiguity, and it's certainly not because I don't care what they said or thought outside the document. Indeed, because I went to law school from legal history, I started out with some very strange notions, like thinking that the older the case the better it might be.

(Laughter)

JUDGE RAGGI: Indeed, one of the traumatic experiences of my first semester in law school was reading *Erie v. Tompkins*, but not for the reasons it's traumatic for most law students. I spent most of the semester trying to figure out how a case could be great if it reversed Justice Story. I mean Story! But I got over that, and maybe that's why I don't cite legal history anymore.

Actually, I expect it's because I'm a judge on what the Framers described as an inferior court, where constitutional interpretation is necessarily informed and, indeed, controlled by extensive Supreme Court precedent.

And so, while Justice Thomas may cite Farrand's *Records* to question whether the states' ratification of the Constitution's Bankruptcy Clause qualifies as a waiver of sovereign immunity, and while Justice Scalia may cite Farrand to question whether the Executive can be

compelled to relinquish some of its Article II powers to special prosecutors, once a Supreme Court majority has spoken on these points, we mere mortals can only follow.

(Laughter)

JUDGE RAGGI: I did a bit of digging through Supreme Court precedent, and I did a bit of digging through Second Circuit precedent, both appellate and at the district court level, for citations to Farrand, and I noted two facts. First, the number of citations is quite small, less than twenty. And second, those citations fall within a particular time sphere, with the exception of one 1934 cite by then-District Judge Learned Hand when writing about the Commerce Clause, a hot topic in the 1930s, and one 1997 cite by my colleague John Walker in a circuit court opinion about the Treaty Power. Virtually all of the cites to Farrand in the Second Circuit come within a fifteen-year window, from 1968 to 1982.

Now one might think why 1968 to 1982? Well, it was a period when a number of cases came before the courts that might be perceived of as attempting to recalibrate the constitutional balance of power among the branches of government. But there have been other eras that confronted similar challenges. So I prefer to think that there's a simpler explanation for those dates.

If the number of Second Circuit citations to Farrand is small, the number of judges responsible for those citations is smaller still. But many of them, at least by reputation, were students of history as well as law, sometimes students of history before they were students of law.

And so, I suspect they did not read Farrand's *Records* simply to cherry-pick quotable quotes to support views they had already reached in discrete cases. Rather, I like to think that most of them had read Farrand, or at least excerpts from his reports, as part of a larger process of educating themselves about the history of the document that they were charged with interpreting.

And it occurs to me that that is the ideal—for judges to be educating themselves constantly, and outside the context of any particular case, about the process by which the Constitution came to be drafted, ratified, amended, and interpreted.

In short, it may not be important for judges to cite Farrand's *Records* in deciding any particular case, but it is important that we be familiar with those records and with the overall history of the Framing era generally, simply to be good and responsible judges in construing

a foundation document that is a product of a mindset two centuries removed from our own.

Indeed, as historians have taught us, the mindset of the Framing generation is not only not identical to ours—it was not identical to that of the revolutionary generation that preceded them, nor was it identical to that of the Jacksonians who would follow them. Thus, simply as an important source for the way the Framing generation thought and spoke and wrote, particularly about the Constitution, I think Farrand's *Records* can play a useful role in the education of judges.

But I have to confess that listening to some of this morning's comments I was frightened about going down this route. It sounded so daunting, and I've expressed to more than one of the panelists that I think judges, therefore, should go home and hug their volume of *The Federalist Papers* because in addition to being marvelous in its own respect, it's so much more accessible than all of these other materials.

And so, I think all of these factors tend to make us shy away from Farrand as something we go to in the course of deciding individual cases, but I guess there's still enough of the historian in me to think that we should read it and let it inform our overall view of that generation.

PROFESSOR TYLER: Thank you. Now we will hear from Judge Sutton.

JUDGE SUTTON: My plan is to talk about the risks and benefits when judges and lawyers use history in construing the Constitution.

There are some risks. Much of interpretation turns on context. If you're interpreting a phrase in a straightforward statute, you can get a sense of context by reviewing the whole statute as well as other statutes in the area.

Let's say, however, that the statute involves a technical area of law, say bankruptcy. Here, the question is not just understanding the immediate context of the phrase but also understanding bankruptcy conventions or big-picture bankruptcy concepts with which the interpreter may not be familiar.

Now shift to an eighteenth-century phrase in an eighteenth-century context. The work just got a little more difficult. Here, there is more room for interpretive anxiety, a sense for which you can glean when you read early nineteenth-century and late eighteenth-century common law cases. The reader confronts unusual words, unique phrasing, and concepts freighted with meaning that the twenty-first-century reader may not immediately appreciate. If there is a risk of

missing contextual clues in reading cases from that era, it surely is true that a similar risk applies to interpreting a phrase in the original Constitution.

Appreciating an eighteenth-century context is not the only danger. A judge concerned about the risk of importing policy views into the act of interpretation faces a similar risk in reading history. Indeed, when it comes to history, the willful advocate or judge may have more to work with.

Those are the key risks, most of which flow from the reality that lawyers and judges, generally speaking, are not trained historians.

Before turning to the benefits of using history in constitutional interpretation, it is worth making a practical point, one relevant to the students in the audience. As an advocate, you have no choice. You have to learn—and argue—the history. At the Supreme Court today, if you win the historical argument, you win two votes on the constitutional argument. Anyone comfortable giving up two votes out of nine is not going to get far as a litigator, as opposed to say a corporate lawyer.

What is more, all nine Justices are originalists in one sense. Every one of them wants to know what the original meaning was. It may be a takeoff point for some as opposed to a resting point for others. But all nine want to know what the initial frame of reference is, as all of the *Heller* opinions show. Everyone is taking the history—the original meaning of the Constitution—seriously there.

This, by the way, represents something of a change. To get a sense for this, I looked at the constitutional cases at the Court in two Terms, separated by twenty years. In 1987, seven percent of the decisions looked at the history seriously or turned on the history. In 2007, it was thirty-five percent. The number of Supreme Court briefs invoking history also grew dramatically over these two decades.

Today, all nine Justices care about the history. Even a Justice who believes in evolving meaning wants to know the starting point: evolving from what? And of course a Justice who believes in originalism *must* know the history.

Let me return to the topic of whether judges, Justices, and lawyers can interpret history in a credible and trustworthy way.

In one sense, law is history. All of law is backward looking. A trial recreates events of the past. A court of appeals decision relies on precedents, decisions of the past that must themselves be construed. Whether it is the original meaning of a law, a contract, a constitution, or an event, all law is (at least in part) backward looking, and lawyers

accordingly should be better than most at recreating what has already happened and why.

Just as cross-examination works as a truth-divining device in a trial, so the adversarial process ought to work when it comes to understanding history. Yes, as Chief Judge Easterbrook points out, there is plenty of (unreliable) law office history, but there is no reason to doubt that most lawyers have the capacity to show courts when that is so.

Judges, it is true, are not trained historians. But they are not trained engineers, accountants, or doctors either. And we still entrust them to resolve all of these disputes, many of them far more complicated than deciphering the meaning of an eighteenth-century word or phrase.

Happily, time has improved the quality of the assistance the courts get in this area—both from merits briefs and amicus briefs. You might even say that a modern version of the Brandeis brief is a brief written by a legal historian. As an advocate, Justice Brandeis filed briefs filled with social science data that explained why the states were passing progressive laws and why the Supreme Court ought to let the experiments continue. One form of the modern Brandeis brief, you might say, lays out the history relevant to the constitutional dispute, with some of the briefs even being filed by honest-to-goodness historians and some filed by historians with no axes to grind.

My last point is: what other option is there? The history sometimes may be difficult. And it sometimes may lead to indeterminate answers. But that itself tells the court something. If the history is indeterminate, perhaps that proves the court ought to let democracy have its way, allowing the people, not the courts, to resolve the disputes arising in this or that area of public policy. At the same time, if the history shows that there is a better reading, one that shows what the Constitution originally meant, that generally will provide a good reason for enforcing it that way.

PROFESSOR TYLER: Thank you.

Judge Kavanaugh, please.

JUDGE KAVANAUGH: Thank you and thank you for having me on this panel. I look forward to the discussion, but I thought I would just say a few words about my approach to the broader question presented.

For me, echoing what Chief Judge Easterbrook said, in part, it starts with the text of the document. The text of the document is not just something that we're supposed to look at just for interest. It's

law. It is binding law. It says in Article VI it's the supreme law of the land, and it is binding on us. Those words in the document are binding on us in all three branches of the federal government, not just as judges, unless it's amended.

What happened in that summer of 1787?

What were they getting at? What are these notes that we're reading and talking about? Well, they talk about a group of people who were trying to set up a structure of government. They weren't thinking first and foremost about a Bill of Rights. In fact, the Constitution's original text does not have a Bill of Rights and only has a few individual rights such as in Article I, Section 9 and Section 10.

They were talking about structure. And why? They thought structure was so important to the protection of individual liberty. It wasn't that they didn't care about liberty. They recognized that a declaration of rights without a structure that would protect rights, without a separation of powers, wouldn't protect liberty. So we have these words that I'll talk about that set up this structure—the structure of government.

How did they get there?

Were they all of one mind? No. There were debates in secret—secret for thirty years after, which was important to the candor of the debates.

Debates back and forth about are we the people, or are we the states, and you see that compromise reflected. And we have a House of Representatives that is elected basically by population and a Senate that has a very odd structure in a country that purports to say one person, one vote is important.

Well, look at the United States Senate. It is wildly inconsistent with a one person, one vote because you have two Senators from Delaware and two Senators from California. If you're a citizen of California, you're not getting the same kind of representation.

There were debates about how to appoint judges. Through August of the Convention—remember, in September, it's approved—the Senate was going to pick judges. Then suddenly, it switches by September to the President with the Senate picking judges.

For most of the debate during the summer, it was going to be a one-term presidency of six or seven years. It ended up allowing presidents to be reelected as many times as they could. Subsequently, the Twenty-Second Amendment limits them to two terms.

But think about the debate about the structure of the President. Having someone elected over and over again starts to sound like a

king, which was something they were familiar with and they didn't want.

On the other hand, they wanted what? Responsiveness to the people. So they set up a structure and had debates.

At one point in July, Congress was given the power to legislate for the general interest of the Union. But then, it was pulled back to the enumerated powers in Article I, Section 8, but with one clause at the end there, the Necessary and Proper Clause, that encompassed more power, more generally than the specific list that had been before it.

So what we see, as Professor Manning has written about statutory interpretation and constitutional interpretation, is if you pick up these words, which are law, and you act as if, gee, this section doesn't make sense in connection with this section and it seems inconsistent, it was a compromise. It was a compromise. And to understand how the words got here and the words bind us, you need to know it was a compromise.

And you understand, I think, the words that bind us better if you're familiar with the debates that led up to those compromises, and understand why we have things that might not make a ton of sense together.

It's true in legislation. Whenever we hear in court, or someone says in court—we're not sure Congress was consistent in these two provisions, we can't figure it out—well, it was a compromise. It was a debate.

And the same thing, we forget. We think of fifty-five people showing up who were all marching in lockstep. No, wildly different views. Some wanted a national government. Hamilton wanted to make the states administrative units of the national government. And many—George Mason refused to sign the final document because he thought it had gone too far in giving power to the national government.

So the text matters, and it matters, as I said, for all three branches today.

In the House and Senate—in the House, they're elected every two years. What does that mean? That's Article I, Section 2. It means they're constantly concerned about getting reelected.

Guess what? They're concerned about short-term things. They're reluctant to make big, serious change. Why? Because they have to face the voters constantly.

In Article I, Section 5, we all talk about the Senate. Oh, it's a sixty-vote requirement. In the Senate, it's sixty votes. I don't see that in here. Article I, Section 5, each house sets the rules of its proceedings—huge change in how our laws are passed and how our lives are affected because of a rule established by the Senate that stems directly from the text that was passed in 1787.

Article I, Section 7, we learned in fourth grade, Congress passes the laws. Wrong. It's the House, Senate, and President who pass the laws. There are three entities who pass the laws. There is shared power right in the text of the Constitution. That's why the President has a State of the Union that matters and makes recommendations that matter. Because of the text of the document, you understand they were about shared power.

Article II, Section 1, the first fifteen words, "The executive Power shall be vested in" one person—you wonder do they mean that. Yes. You see the debates. There's discussion of a plural executive. James Wilson, the father of the presidency—one person. One person. They meant one person.

That has—we talk about does this have relevance today. Yes. For me, it does at least. When we have cases with agencies that are accountable to the President, yes. I think that's in tension, as I've said, with the one person. But they meant it. It applies still today.

We see their concern about independence of the President and judges. From what? From what, if you read the debates and you skim the text? From Congress. Madison is concerned about Congress.

So how do they create an independent President and independent judiciary, so basic to how all of us care about our day-to-day lives? Tenure and compensation. Tenure and compensation. Life tenure for judges and you can't reduce their salaries. For Presidents, a four-year fixed tenure and you can't reduce or increase the President's salary.

Why can't you increase? Because they didn't want Congress to be able to say if you do this, we'll increase—double—your salary. So you can't even increase the President's salary.

They were concerned about independence, but you wouldn't know about these. These words come to light as part of a compromise when you know the history.

So I would say know the words. They read this the last day of the Convention, out loud, for thirty-two minutes. Read it. Read it again. You learn something each time you read it.

We talk about majestic generalities. Actually, it's more like really nitty-gritty details of specific government structure, and that's where

our liberty really is protected. And to know it, to know these words better, to understand how they came together, looking at the debates of what happened in the summer of 1787, for me, is very illuminating.

Thank you.

PROFESSOR TYLER: Thank you.

And Judge Lettow.

JUDGE LETTOW: Thank you. It is a pleasure to be here. Respecting the topic of this symposium, I am in effect a proto-historian—or perhaps I should say pseudo-historian—because late-ish in life I studied history under two very rigorous historians. One was Professor Gordon Wood, who attended the proceedings last night with Justice Scalia and who is a colonial- and revolutionary-era historian. The other was Tim Harris, who happens to be a Tudor-Stuart historian.

Why did I do that relatively late in life? It appeared to me from a variety of experiences as a practicing lawyer that a large part of the Bill of Rights and, indeed, of the structure of the Constitution, came from English experiences in the Tudor-Stuart period, especially with the later Stuarts. A large part of our Constitution's Bill of Rights is actually drawn from the English Bill of Rights adopted by the English Parliament and accepted by William and Mary in 1688 and 1689.

If there's one thing that came out of this morning's discussion, it was, as historians would say, that context means everything. Happily, this panel has agreed. It's very hard for us to put ourselves in the context of people who initially, before the Revolution started, thought they were Englishmen and Englishwomen who had all the rights and liberties of the English people, but they were denied those rights through some actions by the British Crown and the Privy Council.

Historians have gone into great detail about *Cato's Letters* and other conceptual ideas that led up to the American Revolution. Although those materials might not provide insight into the words of the Constitution, they nonetheless convey a sense of what the colonial people initially were thinking and then how it evolved into what we have today. The words the drafters of the Constitution were using had specific meanings and were derived from their conceptual reading and experience with the Articles of Confederation and state constitutions.

The people who comprised the Constitutional Convention were selected by their state governments for a reason. Two, three, four, five, or six delegates came from each state. Those selected were the people who the state conventions thought would be knowledgeable on the subjects at issue.

Delegates like Pinckney from South Carolina proffered a text to the Constitutional Convention that was quickly dismissed, but yet, when it came to the style committee, Pinckney's text was picked up in pieces. Why? Because there were things in it that conveyed what people understood and wanted.

What I'd like to propose is the somewhat iconoclastic view that we have three different kinds of constitutional interpretation being employed, although we do not specifically identify or delineate those methodologies.

First, we have some cases that are of great moment politically in the country. Maeva Marcus has written extensively on the *Steel Seizure Case*, which dealt with implied presidential powers. To me, that is a case like some of those that are coming up now that involve great political controversy. People—some people—have been inclined to look to original materials in that context. Justice Black wrote the opinion for the Court in that case, and he did not cite any of those materials. What did he cite? He cited the text of the Constitution, and he stopped. If you look at Justice Black's jurisprudence, then you understand why he did that.

By looking at what happened subsequently with that precedent, we can see the importance of Justice Jackson's concurrence, which has become the more instructional opinion, long term. And yet, he said about the original materials—and he really was talking about the ratifying convention debates, that: "The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."

What keeps judges from emphasizing transient results or looking to the moment at hand? As a trial judge, you ordinarily have other courts settling precedent—the Supreme Court, the courts of appeals. You have relatively little flexibility. You're allowed to think for yourself on rare occasions.

What made Justice Jackson's opinion important was that it provided a framework for future analysis. He set out a tripartite analysis based on original materials. First, he said the presidential implied powers are strongest when they are premised on explicitly granted duties and responsibilities. Second, he said they are middling when they depend on congressional action. Third, they are weakest—he uses the famous words "lowest ebb"—when the President is acting in a way antithetical to the will of Congress.

Second, other materials written within a few decades can be instructive. Justice Story's commentaries were published in 1833, and

abridged versions are available now. He was a contemporary—he was a Justice, if I recall correctly, for thirty-four years and a contemporary of Chief Justice Marshall's. Those two Justices wrote opinions that established a lot of the basic implementation of the Constitution, especially insofar as the judiciary is concerned.

Their jurisprudence was relatively important because Farrand says that the debates in the Constitutional Convention about Article III took only three days. It really wasn't something that people argued about. In any event, Story was concerned about the judiciary's role in preserving the structure of the Constitution.

We had also people in the early nineteenth century who wanted to get at some of the original materials. Jonathan Elliot collected the debates in the ratifying conventions, in a five-volume set published between 1827 and 1830. What I'd like to do is look at how some of the judges and Justices looked at those materials, very briefly.

There's a fascinating arcane case called *Virginia v. West Virginia* decided in 1918. Nobody in the room is really familiar with this case, but it dealt with the very arcane subject of how the Supreme Court was going to enforce a judgment it had issued in favor of one state against another state. It happened to be a judgment for money, and West Virginia refused to pay Virginia. This related to the arrangement by which West Virginia was admitted to the Union in 1863.

Chief Justice White's opinion for the Court cites extensively Elliot's compilation, *The Federalist Papers*, and Justice Story's commentaries. Why does he do that? There is very little available in the constitutional debates respecting the Supreme Court's original jurisdiction. All you get out of the Constitutional Convention is that they wanted an original jurisdiction, not what it entailed. So you have, again, only a kind of implementing structure.

Now I want to go back just for a moment to Justice Jackson's opinion in *Youngstown Sheet & Tube*, the *Steel Seizure Case*. He had to say about some of these original materials: "Just what our forefathers did envision [about executive powers], or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

And that is probably correct.

You can make any sort of argument you want, but he, nonetheless, proceeded from the words of the Constitution that served as the base for Justice Black's majority opinion to develop his construct about what implied federal powers, presidential powers mean.

Third, I'd like to talk about one last case. It's a recent case—it was decided in 2010, *Free Enterprise Fund v. Public Company Accounting Oversight Board*. I know Judge Kavanaugh is familiar with that case. But it holds that certain tenure provisions of the Sarbanes-Oxley Act contravene the Constitution's separation of powers. Judge Kavanaugh's dissent in the D.C. Circuit was essentially upheld and adopted by the Supreme Court.

Why do I think that's important? I think the judiciary has a special responsibility in terms of separation of powers, keeping a balance. The judiciary, Supreme Court, courts of appeals and trial judges have a special responsibility to maintain the constitutional separation of powers and the balance of powers. There's no one spot in the Constitution that tells you exactly what that balance is, and it does change over time, but there are limitations for the judiciary and the other branches.

So some constitutional cases involve something close to plain meaning, for example, the presidential powers. Everybody has a clue what those are about, and you can look at the words. Then there are the arcane subjects like *Virginia v. West Virginia* that turn on understandings about the role of courts. And then there are cases that are really separation of powers cases.

Those categories of cases are handled differently, and original materials have a different role in each type of case.

Thank you.

PROFESSOR TYLER: Thank you. I have a list of about 100 questions for this panel, and I don't think we will be able to get through all of them, so I will choose my favorites.

The first that I wanted to throw out to all the judges picks up on the comments that Chief Judge Easterbrook began with and a question that I had circulated to all of you before the symposium. He talked about the terrible briefing that his court gets with respect to historical materials, and I wanted to ask the other members of the panel whether they concur with that evaluation and observe that it is very interesting insofar as last night we heard from Justice Scalia that there has been an explosion at the Supreme Court in briefing by various amici on issues of history and giving background history.

I also wanted to pick up on the point made by Chief Judge Easterbrook about the law office history problem, and the concern that when you have briefing about historical evidence, it is briefing being done as a means to an end. There is a goal in mind. It is not as impartial as academic work purports to be.

And that leads into the question whether the rest of you, like Chief Judge Easterbrook, do consult academic materials. And I hope you are all going to say yes and give us—those of us in the room who are professors—hope that our work is meaningful in the real world, but I fear some of you may say no.

Does anyone wish to speak to that?

JUDGE WOOD: Since I'm on the same court, I'll note that the lawyers very seldom see the need to include much historical material in their briefs. That is true even in cases where you might think they should have done so, or somebody would at least think it possible that it is in their best interest to do that.

If it is a case that presents a constitutional issue—it could be a case about the meaning of sovereign immunity or it could be a case about what we think substantive due process is (if anything), or how are we going to deal with those kinds of issues—one doesn't very often see briefing by lawyers. That said, in the *Judge v. Quinn* case that I mentioned (the Seventeenth Amendment case) there was some effort to do that, though not very much.

I think the reliability problems are huge. There's so much material out there, and you don't want it to be a giant Rorschach test where the lawyers will just see in it whatever they want to see. So my own confidence level is pretty low in what I see in the briefs, particularly on historical matters.

I think if some engineering expert on water movement puts something in, or similar expert testimony based on hard science, that would be different. I had a case where the question was whether Asian carp are about to invade the Great Lakes. There was expert testimony in that record that I wasn't as nervous about, because at least I felt that I understood what they were talking about.

JUDGE WOOD: Well, I realize that the States of Ohio and Michigan think that. They were among the plaintiffs in this case. So disregard everything Judge Sutton is saying.

(Laughter)

JUDGE WOOD: I will consult academic materials when I think they're going to be useful, but that does not happen too often, unless it's one of these kinds of cases.

JUDGE SUTTON: I have one process-based problem with the usage of history today. Most lawyers save it for the Supreme Court. If lawyers care about getting this right, they should follow the normal rules of presenting the information as early in the process as possible.

At a minimum, the history ought to be presented at the courts of appeals. It allows one set of judges to construe it and it gives the losing side a chance to respond. If one believes in the adversarial process, as I do, the court's efforts to construe history accurately will only improve if the history is presented earlier rather than later in the litigation process.

I have no problem with law review articles and am not afraid to use the good ones. My complaint here is that law review articles often are not relevant to what judges are doing. But when they are relevant, I am grateful for them.

JUDGE EASTERBROOK: I'll follow up on my own observation. I'm not as enthusiastic about law review articles as Judge Sutton because many law review articles are just amicus briefs published under another name and they have the same problem of slant.

I, for example, praised Philip Hamburger. He will often write articles about legal history but not with any case in mind.

I get really suspicious of law review articles that say I'm going to tell the judiciary how to handle the following problem, which is now pending some place. They come across as amicus briefs by another name.

Legal history is much more apt to be reliable when somebody is just trying to gather the history about some event, some clause, without regard to what use anybody might make of it, without regard to what dispute there is because then there's no reason to be selective.

I'm similarly very suspicious of things that are becoming more common: self-described scholars' briefs, briefs signed by people who identify themselves as "I'm a professor here and here's a list of 100 professors there."

There was a famous bunch of warring scholars' briefs in the case about the Solomon Amendment some years back, which said that if you take federal money, you can't discriminate against military recruiters. And hundreds of people at America's top law schools put their name to a number of amicus briefs filed in that case, which contained bizarre, implausible assertions about what the First Amendment meant. They couldn't find a Justice—they not only could not find a single Justice to agree with them; they couldn't find a single Justice who would say a favorable thing about those briefs.

So I'm fundamentally suspicious of scholars when they turn to advocacy either in briefs or in advocates' articles as opposed to the kind of analysis you get when there does not appear to be anything on the line other than the historical analysis.

JUDGE RAGGI: I share some of those views. I would not be looking to encourage more briefing by historians.

I mean I'm not quite sure what role they're playing. Are they experts before the appellate court, or are they advocates? I mean it was observed yesterday ours is an advocacy system. So I, of course, expect briefs to use history or law or anything else to advocate a side, but I think it casts historians in something of an awkward and possibly even corrupting role to have them start to play the part of advocates in a particular case.

I much prefer to take my history outside the context of a particular case and from historians. I mean I applauded when Mary Bilder said that she does her historical review without concern for how it affects pending cases or current items of debate, and I think that that's preferable.

That being said, on rare occasions I have found myself looking for either historical articles or even law review articles dealing with particular constitutional clauses, and my favorites are ones that do historical surveys.

So the two occasions when I've had to do this were, one, when my brilliant colleague, Judge Calabresi, came up with an imaginative construction of the Vicinage Clause. So I thought maybe I should read a little bit about the Vicinage Clause, and you know, it was an interesting detour through lots of historical byways. I enjoyed it very much.

More recently, I've been trying to do a little legal inquiry into the role of the jury venire, not the jury itself but the venire, as representatives of the public in connection with the right to a public trial and how that's ensured.

So I mean I think there's a lot that history can teach us but not necessarily as an advocate for a particular side, and so I'm not looking for historians to start taking that task as theirs more often.

PROFESSOR TYLER: I will note that the judge did not say whether she ultimately came to agree with Judge Calabresi.

JUDGE RAGGI: Not at all.

PROFESSOR TYLER: I figured. I figured.

Please.

JUDGE KAVANAUGH: For students, as you're going out to practice, I think one of the biggest mistakes I see in advocacy is arguing without the context, arguing by snippet—a snippet from a Supreme Court case here or there, not putting together how does this regulatory program work, how does that statutory scheme work.

It's like the Google Maps thing. You start out here and then zero in on the question. That helps us understand where, how the pieces fit together, so too with constitutional history.

It seems to me we're often given one quote, usually with ellipses, missing something critical, from a case from the 1800s. Well, that's not so helpful.

Why did they say that? What was the context? What's the broader context?

It's true in statutory cases, regulatory cases. Start here. Zero in to what the issue is.

I love looking at treatises, law review articles. The more I can read about how we got in this statute to where we are, in this constitutional provision and how it's been applied.

I know three professors—Kerr and Clark and Manning—in this room; I know I've benefited from all three of them and their work.

David Baron and Marty Lederman did this huge survey following *Youngstown*, about the Commander-in-Chief power. I devoured that. That's influenced how I think about the issue.

So academic writing does matter to me. I'm looking for it. I think it can be helpful when it's focused on issues that are coming up in the courts.

JUDGE SUTTON: I want to respond to Chief Judge Easterbrook.

PROFESSOR TYLER: Okay, please.

JUDGE SUTTON: I'm not going to let him get away with that.

PROFESSOR TYLER: As I said, we hoped for a spirited discussion.

JUDGE SUTTON: Of course, there can be junk history in the same way there can be junk science. That's the way it goes, and that's all that's going on here.

Yes, we should be skeptical of law office history, supposed historians claiming to be real historians, or history written in the context of, and for, a specific case. But sometimes that's all you have. And judges, it has been my experience, generally know how to ferret out what's worth relying on and what's not.

I am not going to say there ought to be a *Daubert* test for historian amicus briefs. But some historians are better, and more disinterested, than others. Gordon Wood would pass, and so would many others.

JUDGE KAVANAUGH: I would just add it's important to go into the original material yourself if it's a really important case and not just take—I think picking up on both the comments of Judge Suttan and Chief Judge Easterbrook, that you don't just take a law review and say oh, that's the answer.

You have to go into what they were looking at and see for yourself as well. They've spent a year looking at something you might have three hours, given our caseloads, to look at. So you benefit from their history.

JUDGE EASTERBROOK: Sometimes the Justices do. There's already been mention of *Swift v. Tyson* getting overruled by *Erie*.

Justice Brandeis says in *Erie*: “Well, the reason we have to overrule *Swift v. Tyson* is that Professor Warren, he's on the faculty of Harvard. Professor Warren who's on the faculty of Harvard said that Story got this all wrong, and in fact it all exceeds Congress's powers to have federal common law. And well, we just have to overrule it.”

You don't even find a description of Warren's argument in *Erie*, and the judgment of later legal historians about Warren's history is that it was an advocate's history and it's complete bunk. But it persuaded the Supreme Court. And of course, two years later they started recreating federal common law anyway—

(Laughter)

JUDGE EASTERBROOK: —even though it was all unconstitutional according to *Erie*.

So yes, sometimes they just say oh, yeah, this great legal historian has told us, and we're doing it. But I would think *Erie* would be a good object lesson.

PROFESSOR TYLER: Changing course a little bit, one of the other things that I wanted to ask the judges, since I am fortunate to have them sitting alongside me, is whether you think history can be more informative with respect to certain clauses, or certain kinds of clauses, or certain aspects of the Constitution as opposed to others.

I am thinking, for example, of the problem of levels of generality. Depending on the specificity of a clause, might history be more relevant to your consideration in construction of that clause?

I am also thinking about terms of art that are used in the Constitution. Justice Scalia mentioned a few in his remarks last evening, one of which happens to be near and dear to my heart, the privilege of the writ of habeas corpus, because I write about it. But there are others—bills of attainder, et cetera, letters of marque and reprisal.

There are other terms in the Constitution that one might argue are at a higher level of generality—equal protection possibly, due process possibly, cruel and unusual, a phrase that the Justice talked about last night.

Are there different levels of relevance for history when you're doing constitutional interpretation?

JUDGE EASTERBROOK: I'll be happy to take that on.

First, there are some things in the Constitution that actually refer to history. The Seventh Amendment says the right of trial by jury shall be preserved. That means you have to figure out what it was. In order to preserve it, you need to know what it was.

There are other things that have reference to history, but only if you know some history first do you know they are references to history. The Cruel and Unusual Punishments Clause is an example. If you just read that today, it sounds very open ended, and one has to go and figure out what's cruel or unusual. But I began by saying that in order to figure out the original public meaning of the Constitution you have to figure out what the words meant to people at the time.

And the kind of lawyers who drafted and ratified these documents, they were—had all been reading their Blackstone and their Cook and they were well aware of the history of that phrase. It was lifted lock, stock, and barrel out of the Bill of Rights of 1689 after the Glorious Revolution, and it had particular meaning at the time. Its meaning was that the judiciary couldn't invent punishments. It was designed to clamp down on Lord Chief Justice Jeffreys and his ilk. You get sent to that history by the interpretive community of the time of the Constitution.

If you don't know that, you might think that this was just an open-ended authority for the judges to make up a law of what's cruel and unusual when in its historical context it was an anti-judge rule. It was designed to increase the powers of legislatures vis-à-vis judges.

So yes, you start with the text to figure out what the text does. You have to consult the original interpretive community, and that may send you straight to history.

I think that's all I have to say about it.

PROFESSOR TYLER: Okay. Would others like to chime in?
Judge Wood?

JUDGE WOOD: Well, I think one needs to give these people a little more credit actually than Judge Easterbrook is, in that certainly there are things like the Seventh Amendment, you know, which concerns the right to trial by jury. For most of the Constitution, though, I

think that it's pretty clear when a term of art is being used, and I haven't seen very many cases lately dealing with the *marque* and *re-prisal* problem. Every now and then issues about bills of attainder come up, but that's simply a matter of definition.

It seems to me unless we think the people who wrote the Constitution were really stupid, one should give them credit: they used relatively open-ended terms when they meant an open-ended term, and they used very specific terms when they meant to be specific.

And so, sure, you can go look at history and see what the English Bill of Rights meant when it said "cruel and unusual," but it's not clear that it was even still meaning the same thing by 1791 in England, much less in the United States. I think they meant this to be open ended.

I get concerned with this search for what the people meant at the time any particular constitutional provision was written because it begins to remind me of Biblical exegesis. These are human beings who were, I think as Judge Kavanaugh rightly said, fundamentally creating a structure of government. Later on, other things got added. They were doing it in a political process that involved a certain amount of compromise. And if we seize too much on every little word that was whispered, I think we're actually going to lose the big picture in the details.

JUDGE RAGGI: I think the question of whether history speaks more clearly in some circumstances than others, I would answer it, yes. I mean I think with respect to this era in particular, when language was employed to deal with a problem that the Americans had experienced over time with the British and wrote to ensure that that problem did not recur in the new republic, we have a much clearer idea of both what their concern was and how they sought to address it.

I think it's the compromises that Judge Kavanaugh spoke about, where they weren't quite sure how they wanted to resolve some matters, that history leaves us with more doubts. But I also think that when we see them compromise and look at the history of that, even that says to us what remarkable people they were.

I mean if we deal with a section of the records that we now look at only historically because we have a war that solved this particular issue—and that's the slavery bargain of the Constitution—I mean there's no question that this did not slip into the Constitution unwittingly. I mean there were debates about this. We see this in the records of Gouverneur Morris vehemently denouncing slavery. Yet, we have the Fugitive Slave Clause.

But to use it as an example, I think it's interesting to see that it starts with the Framers talking about a person legally held in service in one state and then it's amended in the final draft to a person held to service in one state under the laws thereof. And if we were to construe that, I think it is somewhat instructive to know that there was a change and to see Madison's note that the change was intended to avoid any suggestion that slavery was legal, the word first used in a moral sense—remember, these were people who still thought that there was something to natural law—and merely to acknowledge its existence under the laws of a state, without passing on their validity.

So there are ambiguous terms and all, but it's still instructive to see how far history takes us, though it may not take us all the way home.

I also think that sometimes we stop our historical inquiries at certain points because we're a little uncomfortable with what history teaches us when it doesn't comport with our own views of things. It is sometimes disquieting to read some of the history of this period, especially with respect to the Constitution, and realize the Framers' ambiguity about democracy.

I mean democracy is a word that only has a positive view for our era. I mean it's wonderful. And yet, we see them talking about the tyranny of the majorities, the problems of an excessive democracy. This doesn't easily hit our twenty-first-century ears, and so I sometimes wonder whether we follow through on how much that view, that historical aspect of their work, informed the structural, the importance they gave to structure, that Judge Kavanaugh spoke about.

So I think history is always valuable. It answers some questions more clearly than others. But part of the problem is with the Framers, and part of the problem is with ourselves.

JUDGE KAVANAUGH: I think on the history—and when I say history, we're talking about what happened in the summer of 1787 as well as the English history, where it came from and also going into the ratification debates, to try to figure out what the words meant.

But ultimately, one of my theses is that the words actually tell us a lot more than we often assume, that they're not so complicated. It's not mystifying to actually read this and get some meaning out of it. One of the things I say in a lot of cases is don't snatch the ambiguity from clarity, whether it's a regulation, a statute, or a constitutional provision, because it tells us more than we sometimes assume.

On the compromises and recognizing though, for me, when you recognize the compromise, it's all the more reason to stick to the

words because if you go—there's going to be two sides to that, and there's going to be history that pushes both sides. And you'll see often times in cases one side's historical debate quotes "and the Framers meant this to mean *X*." Well, actually the provision was a compromise between people who wanted one way and people who wanted another, and you're just quoting one side.

The point being be careful about even *The Federalist*, I'd say, point of view. That's not the authoritative interpretation of the words. You've got to be careful about some of the ratification debates. You've got to be careful about different people at the Convention itself. They had different views.

So when there's compromise, all the more reason for me to stick as close as you can to what the text says.

JUDGE SUTTON: The more vague a constitutional text, the more likely history ought to affect the interpretation of it. The right to confront witnesses in a criminal trial presents an interesting example. In *Crawford*, the Court overruled *Roberts* in a 7-2 opinion written by Justice Scalia. In many respects, this is Justice Scalia at his finest. *Crawford* might indeed be a case where the clarity of the text largely sufficed by itself for Justice Scalia, but the history helps to explain how he garnered seven votes to overrule *Roberts*.

JUDGE LETTOW: Just a really quick comment. There is a statement in an opinion by Justice Holmes in a case in 1921 dealing with, of all things, direct taxation, that the Supreme Court in recent years has quoted. Judge Holmes's observation in *New York Trust Co. v. Eisner* was that a page of history is worth a volume of logic, or is worth more than a volume of logic. And I think if you get the right case that is really true, and it's being picked up today.

PROFESSOR TYLER: If I can follow through on a thread of the discussion that I found very interesting, there seem to be two views of the level of generality, drawing us to history or actually being viewed as text that's mean to open ended.

So Judge Wood talked about cruel and unusual as open-ended language that may, in fact, invite a greater role for interpretation or for the interpreter. Chief Judge Easterbrook says, no, we need to read this in context. We need to go back and know enough to look at history, and actually, it is more specific than what you perhaps give it credit for today. And Judge Sutton said the higher the level of generality, perhaps we need to be looking at history more.

So there is—I'm trying to draw out—a little bit of disagreement here.

Chief Justice Easterbrook, do you want to say anything in response to Judge Wood?

JUDGE EASTERBROOK: Well, we may disagree about that particular clause. There are a number of other clauses that are quite open ended. Of course, the reasonableness section in the Fourth Amendment is an open-ended clause and summons up the image of tort law.

It is often helpful to remember that the Fourth Amendment, for example, has got both this open-ended reasonableness clause, and then the second clause of the Fourth Amendment says “and no warrants shall issue, but upon probable cause” and “particularly describing,” et cetera.

The second clause of the Fourth Amendment is another restriction on judges. Right? The thing that judges might implement is the first clause.

The second clause comes, we know, from historical understanding, because the king’s judges back in colonial times were issuing writs, general writs, that would allow searches along the waterfront for smuggled goods and the like. And when the king’s messengers arrived with a writ, they were then immune in later suits for damages in trespass. So the idea was to get rid of those and open things up to the normal judicial process in which if the king’s messengers broke down your door you could sue him in trespass.

Now of course, the further point is that historical understanding suggests that the entire current law of the Fourth Amendment is misconceived because it exalts warrants and then when the king’s messengers break down your door they all get qualified immunity or absolute immunity. Right?

One may very much doubt that there should be any immunity here or any special role for warrants, but history will enlighten on that front.

There’s one other point I want to make about the generalities when they are in the Constitution. There are a lot of things in the Constitution that I think it is very hard for people in the twenty-first century to recover the original understanding. Historians will often disagree about their meaning in part because the culture, including the legal culture and, therefore, the context in which these words are understood, has changed sufficiently that we can’t really recapture. We don’t live in a world anymore where you’ve got some analogies to Rome, some to Greece, some to Blackstone, and that’s what we know

about how democracy works. We live in a very different world where we've had another 200 and some-odd years' worth of experience.

What happens when a judge can't recover the original understanding reliably? There are two fundamentally different ways of thinking about that.

There are some people who are inclined to think that this liberates the judges to do something that is wise and prudent and sensible. Generally, we think of them as pragmatists or sometimes as living Constitution types.

I am not inclined to agree with that in part because I do agree with *Marbury v. Madison*; that is, that the rationale for judicial review lies on thinking—lies in thinking of the Constitution as a rule of real law and not as the ability to go out and do something that's prudent, and also because the real structure of the Constitution is that modern and difficult disputes are supposed to be resolved through representative democracy.

If there isn't really a real rule in that text, what we've got is the parts of the Constitution that authorize who among the living is to decide those difficult problems. And the who among the living that is supposed to decide is the people you can throw out of office rather than the people with tenure. That's really there in the words of the Constitution, as well as the history.

So we have a decoding rule for what happens when we can't get, with high certainty, a meaning out of these vague clauses.

PROFESSOR TYLER: I have many more questions, but to be fair to the people in the audience I think that this is an appropriate time to open it up, if there are questions from the audience.

Professor Manning, please.

PROFESSOR MANNING: (Off microphone.) Thank you, Professor Tyler.

So I have a question for Judge Easterbrook and for Judge Wood.

So Judge Wood, if Judge Easterbrook is right about the meaning of cruel and unusual—well, what cruel and unusual punishment would have meant to a late eighteenth-century American, don't we need to figure out what the community understood those words to mean?

Is it interpretation if we're not asking what those words would have meant to the community, the linguistic and social community that adopted the Constitution?

And what you say, I think, is we don't want to lose the big picture by focusing on the detail. And my question is: If we don't focus on the

detail, on what those words precisely meant to the lawmakers in the late eighteenth century, are we depriving them of the ability to use precise language to express precise legal policy?

JUDGE WOOD: That's a fair question, and I guess I see two possibilities.

I'm certainly not a trained historian, but possibility number one is that the meaning of the words, "cruel and unusual," against the backdrop of 1688 had already changed a bit by the time we get to 1791, at the time the Eighth Amendment is adopted, and that the people who used that term knew that. They knew that there were some punishments that were exclusively capital punishment for certain felonies in 1688, and that wasn't true anymore of all felonies by the time you get to 1791. The list was much bigger than it is today, but it had changed.

And so, if they use a term that they realized themselves is measured against prevailing social norms, I don't know why we have to exclude that possibility from their thinking. That is an answer one could get from looking at what the contemporary understanding was.

So in that sense, I'll associate myself with what Judge Sutton said. I don't think somebody like me wants to toss out every scrap of original understanding. I think it's extremely useful. Sometimes it's the last word.

And yet, there are points of difficulty in constitutional interpretation that cause all sorts of people to look to preexisting understandings that are not reflected in the language of the Constitution. And the example there I give you is the Eleventh Amendment which, to some people, symbolizes a whole concept of the way state sovereignty relates to federal sovereignty. To other people, it seems to withdraw a ground of jurisdiction from Article III, which is the "plain language" reading.

And so, if you're going to get into these preconstitutional understandings and all the rest of it, then I don't know why that's the natural stopping point. I'm certainly happy to look at language, but I just leave open the possibility that sometimes language will tell you that they meant to adopt a dynamic process.

PROFESSOR MANNING: Can I ask a quick follow-up to Judge Easterbrook?

PROFESSOR TYLER: Please.

PROFESSOR MANNING: (Off microphone.) In your article *Statutes' Domains*, you say: When meaning runs out, put the statute down. On the other hand, there are statutes that invite judges to open language to make common law, like the Sherman Act.

Do you feel the same way about the Constitution as you do about a statute, or was that the point of your prior remark?

JUDGE EASTERBROOK: That was the point of my prior remark.

PROFESSOR MANNING: (Off microphone.) The opposite of with the Constitution?

JUDGE EASTERBROOK: No, with the Constitution. If the meaning runs out, the justification for judicial review runs out with it, given the rationale of *Marbury* for judicial review. And you're, therefore, left to the political wrenches; that is, we, the living, will make decisions for we, the living. And we, the living means people you can throw out of office.

PROFESSOR MANNING: (Off microphone.) Are there phrases open-ended enough that they invite judges in a constitutional case to make up common law of constitutional—

JUDGE EASTERBROOK: I think the first clause of the Fourth Amendment is one of those phrases. Yes, they're there.

I ought to say, by the way, that I agree with Judge Wood. I think the Supreme Court has completely mangled the law of state sovereign immunity, that the text of the Eleventh Amendment should be enforced as it's written and not elaborated on in the weird way that Justices have done.

JUDGE SUTTON: It's possible, however, that *Chisholm* is wrong, as the Court said in *Alden*. And if *Chisholm* is wrong, the Eleventh Amendment becomes largely irrelevant, as you must start the analysis before the Eleventh Amendment was ratified. So that's potentially a straw man.

PROFESSOR TYLER: Are there other questions?

Professor Green.

PROFESSOR GREEN: (Off microphone.) A fairly basic question, but I'm not sure there's agreement here.

Judge Easterbrook, you said you mostly focus on the original public meaning of the words of the Constitution. Judge Wood, who sits in the same court, said you never get, almost never get, cases of constitutional first impression. Judge Raggi and Judge Sutton both talked about the fact you never have reason to cite Farrand's *Records*.

I assume that the reason for that is not because of the view of Judge Wood, like Judge Easterbrook, that it's not actually relevant to the original meaning of the Constitution but because they save it for the Supreme Court, which has the power to revisit its own precedent.

So I'm sort of wondering on the many cases of nonconstitutional first impression, where is the role for history. It seems to be quite large and fairly explicitly in Judge Easterbrook's comments, maybe less in some others. I was wondering where you put in history when there's a whole set of precedents that you're supposed to be sort of trying to navigate.

JUDGE EASTERBROOK: Well, I want to repeat what my colleague Judge Wood said. The Constitution says we're an inferior court. Right, an inferior court, not necessarily inferior judges, but inferior court.

(Laughter)

JUDGE EASTERBROOK: So they both—our marching orders from the Supreme Court trump our original views of the Constitution. If they say that *Hans v. Louisiana* was correctly decided and remains good law, then for our purposes *Hans v. Louisiana* is just the cat's meow and a wonderful decision.

(Laughter)

JUDGE WOOD: I'm going to point out that a certain Frank Easterbrook in the *McDonald* case made it very clear that he was indeed following some rather antiquated marching rules from the Supreme Court about whether the Second Amendment was incorporated through the Fourteenth Amendment and thus applicable to the states. And he said they said no in the nineteenth century; it wasn't incorporated.

But I would just say there are some very large hints in that opinion that he thought maybe some kind of incorporation was possible—I'm not sure he went as far as privileges and immunities—and that the *McDonald* result in the court of appeals wasn't going to last too long.

So lower court judges can, and sometimes do, come to the correct bottom line with a bit of dicta along the way about where things might go.

JUDGE EASTERBROOK: Somebody had asked me. I agree with Justice Thomas's opinion in *McDonald*, although I didn't think that as a judge of the Seventh Circuit I could overrule the *Slaughterhouse Cases* all by myself.

(Laughter)

JUDGE SUTTON: It is well to remember that even at the U.S. Supreme Court there are not a lot of first-time constitutional interpretation cases. That is what made *Heller* so fascinating, and it is that kind of case where history is most relevant.

JUDGE RAGGI: I also think that when I said that I hadn't cited Farrand I pointed out the same thing, that often the Supreme Court has spoken or given some construction to the clause in the Constitution and we're bound by it.

But as Judge Easterbrook was speaking about our role vis-à-vis the political branches, I was reminded that one of the things that history does teach, as judges, when we go into it for this period, is something that again fits into the category of something we'd perhaps rather not learn, which is that they weren't sure they needed inferior courts at all.

(Laughter)

JUDGE RAGGI: It's a very disappointing lesson for those of us.

The debates show not only that they were tired, or they had come up with enough and they were just going to leave it to Congress, that there was actively a group who thought that the Supreme Court and the state courts could handle everything just fine and that there was no need for any inferior courts. So again, it's a compromise that we exist at all. Talk about by the skin of our teeth.

But I think that signals some caution too, in just having inferior courts decide to write the world anew with respect to certain constitutional clauses, especially when there's some guidance in the precedents.

PROFESSOR TYLER: Professor Sachs.

PROFESSOR SACHS: (Off microphone.) I just wanted to ask a question, given the role of inferior courts and the Supreme Court, about the role of concurrences.

I had the good fortune to clerk for Judge Williams in the D.C. Circuit who has, I think, the relatively rare distinction of writing a concurrence to his own majority opinion in order to make statements that couldn't be made on behalf of the majority.

And often, there are judges who write concurrences, saying: "I agree with the panel because they applied the precedent correctly. Here are eighteen reasons why the Supreme Court was wrong."

When in your decisionmaking does it seem appropriate to do that, if ever, and is that something that you would think would be an appropriate role for an inferior court judge?

JUDGE WOOD: I'm just going to say that last week I went out to Berkeley and gave the Brennan Lecture, which was on the topic of concurrences and dissents primarily in the courts of appeals level. I chose that focus because I think the reasons why one might write sep-

arately are different at our level than they are for the court of last resort. I'd be glad to send you a copy of my paper.

I think one writes separately for several reasons. Sometimes it's to signal that there are just more reasons supporting the result. Sometimes you're just trying to shore up the majority opinion. You're more or less offering a second reason why the Supreme Court should deny a cert. petition. Sometimes you're saying that the majority should have been bolder. There are all kinds of reasons why you might write separately.

JUDGE SUTTON: It's a great idea for the courts of appeals. If they see a doctrine that's not working in practice, there is nothing wrong with saying so. There are some things district court judges are going to see that courts of appeals judges do not see, and there are some things that courts of appeals judges are going to see that the Supreme Court does not see.

JUDGE RAGGI: You do have to be careful about it.

I mean Judge Sutton has talked about *Crawford*. In fact, it was a 7-2 decision, and yet, I think you would find any number of judges at the trial level for sure, and to some extent on the appellate level, who have questioned whether it is a sufficiently open-eyed opinion to what goes on actually in trials for the last several hundred years.

But you can't write an opinion that just says that. So are you prepared to take on the history, or can you marshal a sufficient number of circumstances yielding results that would warrant reconsideration?

I mean I'm not sure that would persuade the majority, that it feels awkward or inconvenience results. I don't see that as changing their mind. And so, we follow the rule we've been given.

I think sometimes you have to know what the basis for the Supreme Court's decision is, whether it's history or some other rationale, and then be able to demonstrate why you think that maybe it needs further thinking.

I alluded before to the question of public trials and the role of the venire. The Supreme Court's decision that even jury venire is part of the trial that has to be public is in a per curiam decision with—it's Justice Scalia. I'm forgetting who joined him in it, criticizing the majority for doing it as a per curiam opinion in a case that had not been briefed. That seems to be something of an invitation to the lower courts to invite further discussion on the issue. I'm not sure a case like *Crawford* does.

PROFESSOR TYLER: Anyone else want to chime in on this?

JUDGE WOOD: I want to chime in to remind you all how strikingly times have changed since the end of the Convention. I was interested to read George Washington's diary entry dated Monday, September 17, 1787. He reports the business is done and he says he "retired to meditate on the momentous work which had been executed after not less than five, for a large part of the time, six, and sometimes seven hours sitting every day, Sundays and the ten days adjournment, to give a committee opportunity and time to arrange the business excluded for more than four months."

And I thought, when was the last time I had a seven-hour work day?

(Laughter)

JUDGE WOOD: It just goes to show that they were very able people to have come up with this result.

JUDGE EASTERBROOK: But we have air-conditioning, and that was Philadelphia, and they didn't.

JUDGE RAGGI: That may be the problem with modern legislation.

JUDGE WOOD: That's right.

PROFESSOR TYLER: This was tremendous fun. I invite the audience to join me in thanking our wonderful panel.

(Applause)

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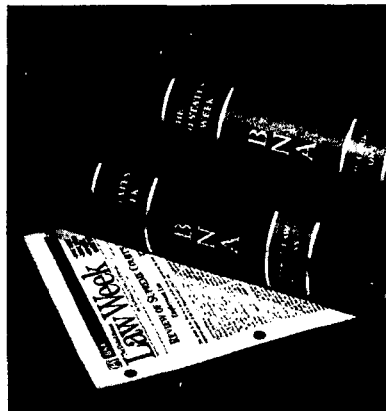
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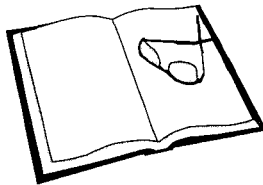
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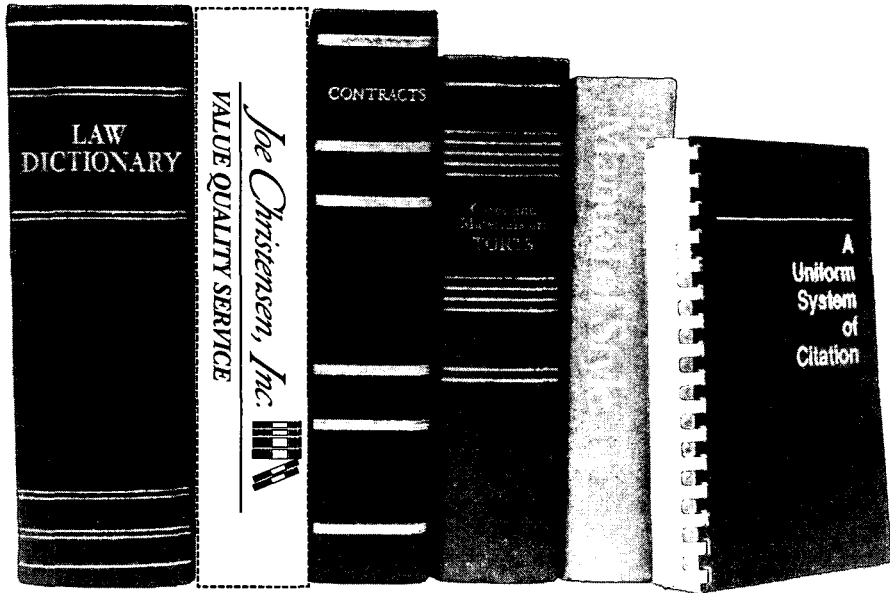
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