# A CONCLUSION IN SEARCH OF A HISTORY TO SUPPORT IT

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*"If history could be told in all its complexity and detail it would provide us with something as chaotic and baffling as life itself; but because it can be condensed there is nothing that cannot be made to seem simple, and the chaos acquires form by virtue of what we choose to omit."*

*–Herbert Butterfield*[1]

## I. INTRODUCTION

Originalism is not a theory of constitutional interpretation. It is not a historical method. It is a rhetorical device deployed to win arguments. Originalism survives in constitutional discourse not because its advocates succeed at identifying the "Framers' original intent" or the "original public understanding" of ambiguous eighteenth century texts, but rather because this claim often trumps competing arguments.[2] Invoking the sainted Framers in constitutional debates is akin to invoking the deity in religious controversies. Just as it would be difficult to disagree with a deity's interpretation of holy texts, it is hard to overcome an adversary's claim to be obeying the Framers' commands, unless that claim is rejected by the decision maker. Disagreeing with the Framers might not make one a constitutional apostate, but it weakens an advocate's position in most debates about constitutional interpretation.[3]

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1. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 97 (Bell 1959) (1931).

2. This paper does not consider constitutional amendments adopted after 1791.

3. There are exceptions, including the constitutionality of slavery and restricting citizenship rights like voting and serving on juries to white males.

Of course, any participant in a constitutional dispute claims to speak for the Framers, and with increasing frequency this is precisely what is occurring in the Supreme Court. The most prominent example in recent terms likely is *District of Columbia v. Heller*, in which phalanxes of historians, linguists, and lawyers tussled over the eighteenth century meaning of the Second Amendment.[4] Do we know which side got the history "right"? Well, if history is written by the winners, we do. One side garnered five votes, the losers only four. If we accept the claims of the originalists who prevailed in *Heller*, then historical "truth" was decided by a 5-4 vote of lawyers whose qualifications to make that judgment about history are far from obvious.

Even amateur historians can recognize that this is a charade. The conclusions offered by each side in *Heller* were not dictated by history.[5] Adversaries on both sides of the litigation used history to legitimize mutually inconsistent conclusions about the uncertain meaning of a 220-year-old text. This is history employed to justify the exercise of institutional power. Whatever else this kind of judicial plebiscite is, it is not history. The fact that five of nine judges concluded that history justified one outcome does not establish the "original meaning" of the Second Amendment. It establishes the present meaning adopted by the majority of the twenty-first century Supreme Court. As Professor Davies has written in the context of a recent search and seizure case: "The Court may be the ultimate decider of what the law is, . . . but history is a matter of evidence, not institutional authority."[6]

My purpose in this paper is not to revisit the full range of issues raised by the re-emergence of originalism in recent constitutional discourse, if only because this has been done so ably by others over the course of the past quarter century. Nonetheless, a brief overview of some of originalism's prominent problems may help lay the ground work for the rest of this essay.

In recent decades, the most common originalist approach has been to claim that its proponents could identify the "intent of the Framers." The defects in this approach are so many and so obvious that in recent years some originalists have tried to salvage the doctrine by embracing a new and even less tenable theory. They claim to be able to identify the original "public understanding" of the meaning of the disputed text.[7] Any attempt to apply either approach inevitably raises questions for which no satisfactory answers have been found.

For example, when searching for the Framers' intent, whose intent counts? Were the Framers the members of the Constitutional Convention or the First Congress who drafted the texts; or the members of the state conventions and

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4. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

5. This misuse of history to win legal arguments is not a new phenomenon. *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1707-09 (1996).

6. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 300 (2002).

7. *See Heller*, 128 S. Ct. at 2805 (stating that an inquiry into the public understanding is a critical tool of constitutional interpretation).

state legislatures who ratified the Constitution and the first ten amendments; or all of those people? Do only the views of the Federalists participating in those conventions count? If not, how do we account for the views expressed by Anti-Federalists? Views opposing adoption of the Constitution were widely held, often by influential people. Some members of the Constitutional Convention refused to sign that document and opposed ratification.[8] Some state ratification votes were almost evenly divided between Federalists and Anti-Federalists.[9] Do the views of almost half of the New York ratifiers not count in calculating either the Framers' intent or in determining their "public understanding" of the meaning of the constitutional text? How do we account for the fact that some Framers' views changed within a few years of 1787? Madison, for example, surely must be counted as an indispensable Federalist in the early days of the Republic. But as early as the 1790s, his views were changing, and he proved to be equally indispensable in creating a new Republican Party that advocated increasing the power of the states and weakening the federal government he had helped create only a few dozen months before.[10] Madison's work on behalf of the Republican Party helped destroy the Federalist Party, home of his former allies, including Hamilton and Washington.[11]

Because originalists generally must rely on the surviving documentary record, they must inevitably ignore a substantial percentage of the population of the early Republic. How could they measure either the intent or public understanding of the many illiterates in American society, who could neither read the words of the written debates nor record their own views for posterity? Do originalists simply assume that those people do not count in the calculation of the original intent or understanding of the relevant generations? Similarly, we must wonder how originalists measure the views of women, slaves, and disenfranchised white men (for example, those who owned no property). Or do the views of these millions of people even matter? If they do matter, their exclusion from the drafting and ratifying conventions forces us to question how originalists could ever identify their intent or understanding of the issues originalists claim to be able to resolve.

The simple answer is that they cannot. As a result—and because the last of the Framers died nearly two centuries ago—we must rely upon the surviving documentary records, and these records are inadequate for the task of determining the historical meaning of the ambiguous parts of the Constitution.[12]

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8. J.W. Patterson, *Ratifying the Constitution*, in ABOUT AMERICA: THE CONSTITUTION OF THE UNITED STATES OF AMERICA WITH EXPLANATORY NOTES 13 (2004).

9. *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 111-13 (2006).

10. *See* COLLEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT xv (2009).

11. *See id.*

12. *See, e.g.*, James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986). Hutson, the Chief of the Manuscript Division of the Library of Congress at the time, warned:

Many of the most important events either were not recorded (e.g., no records were kept of Senate proceedings for years), or the records we have are incomplete in part because no competent trained stenographer was present (e.g., the records of the 1787 Constitutional Convention).[13] The records we do have are useful but hopelessly inadequate for anyone who actually would identify the intent or public understanding of the participants concerning the many ambiguous passages in the Constitution.

In this essay, I address the issue of originalism's legitimacy as an interpretive theory by addressing two specific issues. First, I use essays written by two prominent originalists to demonstrate that Justice Scalia, by any measure the most important proponent of this theory, is not himself an originalist. This conclusion alone does not necessarily discredit the theory, but it supplies strong evidence of originalism's true nature as a tool for winning arguments.

Second, I compare the historical arguments employed by Justice Souter in a recent search and seizure opinion with Professor Davies' detailed critique challenging the validity of the Court's historical analysis in that case. This critique attempts to demonstrate that originalism generally *does not and cannot* solve answer-specific, twenty-first century problems arising under ambiguous eighteenth century texts. It argues that originalism's deficiencies are not linked to a particular ideology. In the Fourth Amendment context, for example, its use by those advocating greater government authority and by those favoring greater restrictions on that power is flawed for the same reasons. Both sides in that debate continue to deploy it—not because originalism leads to historical truth, but in the hopes that it will help them prevail in constitutional disputes.

## II. JUSTICE SCALIA IS NOT AN "ORIGINALIST"

No individual has been more influential as a constitutional originalist than Justice Scalia. His influence extends beyond the impact he has on the handling of cases within the Supreme Court. He has helped shape and proselytize originalism within the judiciary, the legal academy, and among the public at large. An important example of his efforts is his 1988 Taft Lecture at the University of Cincinnati.[14] Randy Barnett, a prominent academic proponent of

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> The question of the integrity of the documentary record is related to the current controversy about the advisability of interpreting the Constitution according to the original intention of the Framers. If Convention records are not faithful accounts of what was said by the delegates in 1787, how can we know what they intended? The purpose of this Article is to issue a caveat about Convention records, to warn that there are problems with most of them and that some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment.

*Id.*

13. LABUNSKI, *supra* note 9, at 235-36, 240; Hutson, *supra* note 12, at 2-16 (discussing the faulty records for the Constitutional Convention, the ratifying conventions, and the Congressional debates concerning the Bill of Rights).

14. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 849 (1989).

originalism, has noted the significance of this lecture in Scalia's efforts to rehabilitate and preserve the theory:

> [M]y subject [is] Justice Scalia's 1988 Taft Lecture, *Originalism: The Lesser Evil*. The published version of this lecture in the *University of Cincinnati Law Review* has had an enormous influence. It is among the most frequently cited law review articles and—together with Justice Scalia's introduction to *A Matter of Interpretation*—helped shape the current debate over the proper method of constitutional interpretation. Indeed, his Taft Lecture can be credited with contributing to one of the most remarkable intellectual comeback stories of legal scholarship.
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> In the 1980s various leading figures in constitutional law took aim at the contention that the Constitution should be interpreted according to the original intentions of its framers. Originalism, it was widely thought, was thoroughly trounced by three unanswerable objections: First, originalism is impractical because it is impossible to discover and aggregate the various intentions held by numerous framers.[15]

Scalia offered those who wished to advance an originalist argument a different model, one intended to avoid the unanswerable and withering criticisms leveled at the "Framers' intent" version of the method:

> In his Taft Lecture, Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment. This shift from original framers intent to original public meaning obviated much of the practical objection to originalism.[16]

Thus, it is particularly interesting that Scalia's Taft Lecture supplies persuasive evidence that Justice Scalia in fact is not an originalist.

### *A. Scalia in His Own Words*

Justice Scalia's central argument was that originalism is a necessary foundation for constitutional judicial review: "[T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—*an enactment that has a fixed meaning* ascertainable through the usual devices familiar to those learned in the law."[17] Ironically, Scalia's argument provides one explanation for his own non-originalist behavior as a judge and also reveals the theory's most prominent Achilles' heel. Finding the kind of fixed, ascertainable meaning that originalism rests upon is

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15. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 8 (2006).

16. *Id.* at 9.

17. Scalia, *supra* note 14, at 854 (emphasis added).

precisely what history does not offer for ambiguous parts of the constitutional text.

The Constitution contains many clear terms posing few interpretative difficulties. Examples include the requirement that Congressional Representatives must be twenty-five years old;[18] Senators must be at least thirty years of age and two Senators are allotted to each State;[19] the President must be thirty-five years old and have been a resident in the United States for fourteen years.[20]

Yet we can readily imagine interpretive problems concerning these simple *numerical* rules. The fourteen-year residency requirement for Presidents does not specify whether those fourteen years must be consecutive. Nor does it specify whether residency must be within one of the states. Does living in Puerto Rico, Guam, or on a military base in a foreign country count as residency within the United States? We may think we know the answers to these questions, but the text itself is silent. Even such a seemingly clear passage prescribing a numerical rule can be ambiguous and require interpretative effort.

This task becomes even more difficult when the language is facially ambiguous—that is, it is language requiring interpretation and amenable to interpretations that are *plausible* but *conflicting*.[21] The Fourth Amendment offers a provocative example of such ambiguity. Indeed, almost all of the substantive terms in the amendment are ambiguous. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[22]

This single sentence contains a dozen ambiguous words and phrases: right, people, secure, persons, houses, papers, effects, unreasonable, searches, seizures, probable cause, and particularity. Even a small sample of the questions raised by attempts to interpret these terms demonstrates the complexity of the task and the unlikelihood that we can establish a fixed and

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18. U.S. CONST. art. 1, § 2.

19. *Id.* § 3.

20. U.S. CONST. art. 2, § 1.

21. Constitutional commentators claiming to "know" the original meaning of the constitutional text occasionally attempt to squelch disagreement by claiming that only their approved interpretation is "plausible." In a recent profile of Justice Stevens, Jeffry Toobin quotes Robert Bork as leveling the following criticism: "He finds rights in the Constitution that *no plausible reading* could find there." Jeffrey Toobin, *After Stevens*: *What Will the Supreme Court Be Like Without Its Liberal Leader*?, THE NEW YORKER, March 22, 2010, at 39, *available at* www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin (emphasis added).

22. U.S. CONST. amend. IV.

certain original meaning for this text. For example, our twenty-first century understandings of the term "right" surely differ from ideas accepted in the eighteenth century by people living during the Enlightenment, in a society in which a large percentage of the population was deprived—by law—of fundamental rights now held by all citizens. Whatever the word "right" meant then or means now, it is held by "the people." The Framers' choice of words suggests a collective right against government authority—the "right of the people"—yet established doctrine commands that these rights are personal, held and exercised by each individual separately as the rights of the person.[23]

The other key terms raise similarly vexing questions. How "secure" are the people entitled to be and how do we distinguish a citizen who is secure from one who is not? What conduct is "unreasonable"? When government agents employ technological devices to listen to telephone conversations or to read emails, are they searching? If they record the conversation or download the digital messages, are they seizing those communications? If they are searches and seizures, are they unreasonable?

As the previous paragraph suggests, the inherent difficulties in applying eighteenth century concepts to twenty-first century disputes are exacerbated by the profound social, political, economic, and technological developments over the past 220 years. Even if it were possible to identify a single, fixed meaning for each of these terms that was universally accepted during the framing era—and this is often impossible—it remains uncertain how those ideas can be applied to issues not even contemplated by the Framers, whoever they were.

It may surprise some to learn that in his Taft Lecture, Scalia acknowledged some of originalism's fundamental shortcomings:

> [O]riginalism [is] not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly. Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough . . . . But what is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.[24]

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23. *See* Davies, *supra* note 6, at 429, 432-35.
24. Scalia, *supra* note 14, at 856-57.

Precisely. What separates Scalia from originalism's critics is his confidence that he, in fact, is capable of overcoming all of these problems and discovering an eighteenth century "original public understanding" that dictates how specific constitutional problems should be resolved today. And he reaches the same conclusions about other intractable problems facing originalists. For example, originalists on all sides of all issues are wont to find support for their claims in the "common law."[25]

This use, actually misuse, of common-law authorities may be the most common error made by originalists. Again, Scalia acknowledges the problem of selecting the proper historical sources in the search for "truth." Referring to arguments raised in an earlier case, Scalia noted:

> [T]his analysis simply *assumes* that the English experience is relevant. That is seemingly a reasonable assumption. After all, the colonists of 1789 were Englishmen, and one would think that their notion of what the executive Power included would comport with that tradition. But in fact the point is not at all that clear.[26]

Precisely. But once again Scalia is undaunted by the problem. Referring to the old case which served as the exemplar for his lecture and which raised the issue of the Framers' views of the President's prerogative powers in comparison to the British King's, Scalia reviewed a variety of sources including Jefferson's draft of the Virginia Constitution, a twentieth century book by Professor Crosskey, and Blackstone's *Commentaries*.[27] There is ample reason to question the significance of each of these sources, but Scalia offers them as an example of how a justice could use these kinds of sources to find a historical answer to the question being litigated.

This is not a frivolous explanation, and many historians have turned to these and similar sources in their work. But Scalia's analysis and his conclusions are speculative, and he confesses that in his text. "I am not setting forth all of this as necessarily the correct historical analysis, but as an example of how an expansion of" how the author of the old case, Chief Justice Taft himself, might have begun to construct an opinion relying upon historical sources.[28]

The problem is that if Jefferson's draft of a state constitution is only marginally relevant, if Blackstone turns out to be a less weighty authority than is often assumed by non-historian lawyers, and if Professor Crosskey's work has been superseded by sixty years of sophisticated scholarly research, then this "historical" argument is meritless. Functionally it is just a makeweight used to support a conclusion reached for other reasons.

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25. *Id.* at 856-58.
26. *Id.* at 857.
27. *Id.* at 859.
28. *Id.* at 860.

Scalia does not, and need not, acknowledge this because historical accuracy is not really his goal. This becomes apparent when he offers his explanation of why originalism is preferable to nonoriginalism. His first argument rests upon the bald assumption that he can identify an original meaning to resolve a constitutional dispute. "I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned."[29] An original meaning can only be abandoned if it already has been found. In the context of litigation, Scalia rather blithely dismisses the trenchant problems both originalism's critics and he have identified:

> While it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to such refined questions of original intent as the precise content of "the executive Power," for the vast majority of questions the answer is clear. The death penalty, for example, was not cruel and unusual punishment because it is referred to in the Constitution itself; and the right of confrontation by its plain language meant, at least, being face-to-face with the person testifying against one at trial. For the non-originalist, even these are open questions. As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G. K. Chesterton's observation that a thing worth doing is worth doing badly.[30]

To this point, my comments have demonstrated that Justice Scalia has publicly acknowledged some of orginalism's defects, but also that he has been willing to discount or even dismiss those problems and argue that it is the preferred approach to constitutional interpretation. This falls far short of establishing that he is not, in fact, a practicing originalist. I will leave that task to another self-proclaimed originalist, Professor Randy Barnett.[31]

### *B. Barnett's 2006 Taft Lecture*

In 2006, Professor Randy Barnett delivered the annual Taft Lecture and used the opportunity to criticize Justice Scalia and the "faint-hearted" originalism he had proposed eighteen years earlier.[32] As noted above, Barnett did praise Scalia's efforts to redefine originalism into an ostensibly more

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29. *Id.* at 862-63.

30. *Id.* at 863.

31. *See* Barnett, *supra* note 15, at 23-24 ("I and other originalists have more work to do, both theoretically and investigating original meaning.").

32. *Id.* at 7. In his earlier lecture, Scalia described himself as a "faint-hearted originalist" who was willing to jettison that method even where he concluded that a fixed and certain historical answer existed, if the originalist method produced unacceptable results. *See* Scalia, *supra* note 14, at 864.

defensible theory and his success as its most prominent cheerleader.[33] Nonetheless, Barnett sharply criticized Scalia's infidelity to originalism, both as the Justice formulated the theory in his 1988 Taft Lecture and in his conduct as a judge deciding cases.[34] Barnett concluded bluntly that Scalia is not an originalist.[35]

> Instead, I would conclude from his Taft Lecture and his behavior on the Court that Justice Scalia is simply not an originalist. Whatever virtues he attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes. Where originalism gives him the results he wants, he can embrace originalism. Where it does not, he can embrace precedent that will. Where friendly precedent is unavailing, he can assert the nonjusticiability of clauses that yield results to which he is opposed. And where all else fails, he can simply punt, perhaps citing the history of traditionally-accepted practices of which he approves.[36]

Barnett's critique is particularly biting because it accuses Scalia of engaging in the same kinds of conduct he condemns as "nonoriginalist."[37] Scalia has complained for a generation about judges who render opinions "rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean," so that rather than have its eighteenth century meaning, today "the Constitution is what the judges say it is."[38]

Yet Barnett asserts, and then offers a number of supporting examples, that this is how Justice Scalia decides cases, using history as nothing more than one of the tools available to "yield results" that Scalia prefers.[39]

Justice Scalia's central complaint about nonoriginalists is that they substitute personally held fundamental values for the original meaning of the constitutional text.[40] Once again, Barnett criticizes Scalia for exhibiting the same nonoriginalist behavior.[41] "Of course, if Justice Scalia, like professed nonoriginalists, is actually committed to other values or objectives above originalism, he may well assert the difficulties of originalism as a means of pursuing these other values, as nonoriginalists do."[42]

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33. *See supra* note 15 and accompanying text.
34. *See* Barnett, *supra* note 15, at 11-13.
35. *Id.* at 13.
36. *Id.* at 13-14.
37. *See id.* at 11-12.
38. Scalia, *supra* note 14, at 852.
39. Barnett, *supra* note 15, at 13-15.
40. Scalia, *supra* note 14, at 854-55.
41. *See* Barnett, *supra* note 15, at 15-16.
42. *Id.*

It is worth remembering that this exegesis is presented not by a professed critic of originalism, but by a scholar whose commitment to the concept is so strong that he describes Scalia's obvious deviations from its commands in theological terms. Scalia's errors are not just wrong, they are *sins*.

> Justice Scalia himself commits the comparable sin of ignoring the original meaning of those portions of the Constitution that conflict with his conception of "the rule of law as a law of rules." Discarding those provisions that do not meet with one's approval hardly seems like what we would call "fidelity" to a written constitution.[43]

Justice Scalia may be guilty of originalist heresy, but that is not an issue relevant to the discussion here. I agree with Professor Barnett that like most judges and lawyers, Justice Scalia only asserts an originalist historical pedigree for his opinions when that produces the results he already seeks. I disagree, however, with Barnett's assumption that there is a historical answer to most, perhaps all, constitutional questions arising, including those arising under ambiguous texts. In his Taft Lecture, Barnett discussed three Supreme Court cases demonstrating Scalia's infidelity to originalism.[44] In each, Scalia erred by not joining the "originalist concurring opinion," "the originalist dissenting opinion," or the "impassioned originalist dissent" filed by Justice Thomas.[45] One remarkable characteristic of Barnett's argument here is that he assumes it is unnecessary to validate the Thomas opinions. He offers no explanation of why these opinions are originalist. Even more striking, he offers no evidence that these allegedly originalist opinions are historically accurate or that history even supplies the correct answers for the issues in dispute.

In this passage Barnett's cavalier assumption that Justice Thomas's originalist opinions lead us to the historical truth of the text's original meaning highlights the ultimate intellectual failure of this method.[46] Originalism frequently cannot provide definitive answers to specific disputes arising under ambiguous texts like the Fourth Amendment. Whether deployed with theological regularity by Justice Thomas or with heretical inconstancy by Justice Scalia, originalism does not work.

## III. THE *ATWATER* ARREST

In the well-known *Atwater* case, the Supreme Court held that the Fourth Amendment did not forbid "a warrantless arrest for a minor criminal offense,

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43. *Id.* at 12.

44. *Id.* at 14 (discussing Gonzales v. Raich, 545 U.S. 1 (2005); Kelo v. City of New London, 545 U.S. 469 (2005); and United States v. Lopez, 514 U.S. 549 (1995)).

45. *Id.* at 14-15.

46. *Id.* (discussing *Gonzales*, 545 U.S. at 57-74 (Thomas, J., dissenting)).

such as a misdemeanor seatbelt violation punishable only by a fine."[47] Atwater was arrested for violating Texas's seatbelt laws while driving her pickup truck without fastening her safety belt or those of her two young children.[48] Atwater and her husband sued for damages under 42 U.S.C. § 1983, claiming that the arrest violated her right to be free from unreasonable seizures.[49]

Atwater argued specifically "that 'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace,' a category she claims was then understood narrowly as covering only those nonfelony offenses involving or tending toward violence."[50] It is a measure of originalism's impact on constitutional litigation that Atwater relied primarily upon history and that Justice Souter devoted the better part of his majority opinion to historical analysis.[51] Justice Souter was not by any sensible measure an originalist judge, yet this opinion consisted largely of a lengthy and detailed historical analysis responding to and rejecting Atwater's arguments.[52] Although Souter was no originalist, his opinion exhibited many of the characteristics of that method. He concluded that although Atwater's "historical argument is by no means insubstantial, it ultimately fails."[53]

But not because the majority rejected the use of history to interpret the Constitution. Instead, the opinion began by asserting the importance of history to this inquiry:

> In reading the Amendment, we are guided by "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," since "[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." Thus, the first step here is to assess Atwater's claim that peace officers' authority to make warrantless arrests for misdemeanors was restricted at common law . . . .[54]

When he takes that "first step," Justice Souter's exegesis of the common-law exhibits many of the errors that exemplify the shortcomings in originalist analysis in litigation.[55] Ironically, that analysis produces a conclusion phrased

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47. Atwater v. Lago Vista, 532 U.S. 318, 323 (2001). For lengthy but partial lists of responses to the *Atwater* decision in the popular media and by scholars, *see* Davies, *supra* note 6, at 245 nn. 14 & 16, 268 n. 82.

48. *Atwater*, 532 U.S. at 323-24.

49. *Id.* at 323-25.

50. *Id.* at 327.

51. *See id.* Almost three-quarters of the 37-page majority opinion is devoted to historical arguments. *See id.*

52. *See id.* at 327-45.

53. *Id.* at 327.

54. *Id.* at 326-27 (citations omitted).

55. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155 ("[The Supreme Court's] recent historical essays are very poor indeed. . . . [T]hey are essentially pieces of special

with the reasoned balance of historical analysis: "the 'founding-era common-law rules' were not nearly as clear as Atwater claims; on the contrary, the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power."[56]

The analysis supporting that conclusion does not exhibit the same sensitivity to the nature of historical research. Justice Souter does not claim that Atwater's argument has no support in the common-law authorities.[57] But he does not need to, because the conclusion that the authorities were inconsistent does not require that; indeed, it requires the existence of conflicting authorities. The problem is not with the majority's ultimate conclusion. The problem is with its use of sources to make that claim.[58]

Like other advocates debating the historical meaning of the Constitution, Justice Souter appears to emphasize the sources, data, and methods that support his conclusion, regardless of their logical or historical relevance. For example, in many passages Souter's use of disparate and often irrelevant sources has the effect of portraying the common law as a fixed body of law, so certain in its meaning that secondary sources written centuries after the creation of the Republic can tell us the specific meaning of the common law, which, apparently, automatically tells us the original meaning of the Fourth Amendment. In sections discussing the common-law meaning of breach of the peace, he lumps together multiple nineteenth and twentieth century criminal law treatises; several eighteenth century English legal treatises, including but not limited to, Hawkins, Hale, and Blackstone; a twentieth century American law review article; twentieth century Supreme Court opinions containing broad assertions about the common-law rules; and selected seventeenth and eighteenth century English judicial opinions.[59]

Of course the common law was not a fixed body of rules from 1600 to 1791. Nor was the law of England identical to the law in the North American colonies at any point during those two centuries. Indeed, the law frequently varied even among those colonies, or the States in the period from the Revolution to the ratification of the Bill of Rights.[60] To assume that all of these sources—primary and secondary alike—are valuable (perhaps equally weighted) sources of information about the common-law rules—is error. For

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pleading. Too often they reach conclusions that are plainly erroneous. More often they state as categorical absolutes propositions that the historian would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth.").

56. *Atwater*, 532 U.S. at 327-28.

57. *Id.* at 329-30 (discussing several "eminent authorities supporting Atwater's position").

58. To be clear, my reading of the history of this period leads me to agree with Justice Souter's ultimate conclusion—that the common-law authorities, including the sources relevant to the question before the Court—were inconsistent and not as certain as Atwater and Professor Davies assert.

59. *Atwater*, 532 U.S. at 328-33.

60. In fact, at various points, Justice Souter expressly acknowledges the common law's variability, yet this does not halt his imprecise use of authorities. *See, e.g.*, *Atwater*, 532 U.S. at 328 n.2 ("The term apparently meant very different things in different common-law contexts.").

example, the historical record is ambiguous about the authority ceded to Blackstone (particularly when he differed from other authorities) by the Framers individually and collectively during the relevant years and even about the version of his work they used after 1771.[61] English judicial opinions and treatises drafted around the time of the English Revolution might have little relevance to the colonists' views of eighteenth century law in the remarkable new republic. Indeed, throughout this period the dissident Americans' use of English law was selective, imprecise, and often at odds with how their British counterparts understood the same legal rules.[62] From the beginning of the revolutionary period through the establishment of the new nation, the Founders interpreted English law to serve their own ends, often adopting interpretations inconsistent with law in the mother country.[63] Any analysis that simply assumes the relevance of English common-law sources to the original meaning of the Constitution misses this important fact.

Justice Souter's use of history exemplifies another mistake common in originalist arguments; I will call it the *temporal* error. The most obvious temporal error is to rely upon sources created after the ratification of the relevant constitutional text. The very premises upon which the originalist project rests—and much of its appeal to lawyers—derive from its conception of the Constitution as a legal document with a definite meaning fixed at the time of its enactment. This is consistent with some of our most basic ideas about the nature of law and legal rules. We generally conceptualize legal rules as having a temporal starting point: they are created at a specific moment in time. Those who later interpret the rules are charged with identifying the original meanings and applying them to the problem at hand.[64] Subsequent judicial interpretation does not and cannot alter this original meaning. This is a fundamental premise

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61. *See, e.g.*, Davies, *supra* note 6, at 298 n.184 (citations omitted) ("I have not located direct evidence that the Framers were aware of Blackstone's revisionism. Indeed, it should be noted that Blackstone made his change quickly enough that it appeared when the first volume of his Commentaries was reprinted in Philadelphia in 1771 . . . . However, I think it is safe to assume that the Framers would have been aware of Blackstone's revisionism, if for no other reason than that numerous copies of Blackstone's original edition had been imported into the colonies . . . . Moreover, the Framers, who were certainly conversant with the controversy regarding John Wilkes, would have also been aware that Coke and Pratt (in Wilkes) had taken the opposite position from Blackstone's revision. The Framers were also aware of Blackstone's connection to the Tory Ministry in England."). The flaw in the assumption that Blackstone (or any treatise writer) defined the "common law" for the founding generations is revealed most cryptically in Jefferson's dismissal of Blackstone's work as merely "honeyed Mansfieldism." *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 10 (1969).

62. WOOD, *supra* note 61, at 7-9.

63. I do not mean to minimize the importance of English common law in the nation's formative years. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-31 (1967). But the common law did not have a fixed or certain meaning. *See id.* And important sources were interpreted differently in North American and England, and modified to meet society's needs from 1776 through 1791 and beyond. *See* WOOD, *supra* note 61, at 7, 9, 13, 16, 523 (1969); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 401-06 (2009).

64. Scalia, *supra* note 14, at 854.

of originalism, a premise that inevitably precludes post-ratification sources from defining the rule's original meaning.

Yet originalists frequently employ post-ratification sources to support their arguments, and Justice Souter's *Atwater* opinion displays the same error. After a review of English law, he offered an "examination of specifically American evidence" and concluded that "[n]either the history of the [F]raming [E]ra nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater's position."[65]

That may well be correct, but Souter's sources consist of a handful of twentieth century law review articles, treatises, and compilations of eighteenth century documents.[66] These sources may have been the best evidence available to the Court or the only sources the Justice and his clerks had time to read, but they do not reflect the kind of exhaustive research that even Justice Scalia asserted was necessary to make the kind of historical judgment involved in the *Atwater* case.[67]

Justice Souter does cite numerous judicial opinions to support the majority's conclusion but does not even suggest that these reveal anything about the original meaning of the Fourth Amendment.[68] He discusses judicial opinions issued from forty to more than one hundred forty years after the Fourth Amendment's ratification, but offers this material to demonstrate how "the historical record . . . has unfolded since the framing."[69] This passage is noteworthy because Justice Souter accurately describes the temporal relevance of these opinions. They tell us something about the nature of the law of arrests from the mid-nineteenth until the early twentieth centuries but are not authoritative sources concerning the Fourth Amendment's original meaning.[70]

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65. *Atwater*, 532 U.S. at 336 (emphasis added).

66. *Id.* at 336-37.

67. In another section Souter asserts that "evidence of actual practice also counsels against Atwater's position" and cites authorities from "the period leading up to and surrounding the framing of the Bill of Rights." *Id.* at 337-38. What he means by "actual practice" is unclear. *See id*. Souter lists statutes enacted by the colonies and the States during the most relevant times, and this logically represents the "actual practice" of these particular legislatures. *See id.* The relationship between law on the books and "actual practice" of law enforcers in the field and of courts is far from certain, particularly during times of rapid social, political, and institutional change like the revolutionary and framing generations—particularly on the eighteenth century frontier. Davies recognizes this gap in the historical record:

> So far as I know, we have no historical sources that preserve systematic evidence of practice; hence, it is not possible to demonstrate to what extent framing-era practice comported with doctrine. However, because we know that there is often a gap between contemporary doctrine and practice, it makes sense to assume that there was a similar gap at the time of the framing. Indeed, because we know that that the contemporary gap generally widens when legal standards are applied to relatively powerless members of society, and because we know that framing-era society was even more stratified by class than contemporary society, there is reason to suspect that there was an even larger gap between doctrine and practice in the treatment of lower status persons at the time of the framing. Davies, *supra* note 6, at 281 n.124.

68. *See generally*, *Atwater*, 532 U.S. 318 (discussing numerous opinions).

69. *Id.* at 340-42.

70. *See id.* at 340-45.

This is an important distinction, one too often ignored by originalists scouring the historical record for any scrap of evidence to support their conclusions.[71]

What ultimately distinguishes Justice Souter's historical analysis in *Atwater* from the typical originalist argument is not, then, his methods or sources; it is the recognition that history may not—in this case does not—provide a precise answer to a narrow question. It is hardly surprising that a relatively cursory survey of seven hundred years of English and American search and seizure law does not produce a unitary answer to the question of the constitutionality of warrantless arrests for misdemeanors not involving breaches of the peace.[72] The problem for originalists is that even a more extensive and intensive investigation will fail to provide such an answer.

## IV. A FOURTH AMENDMENT ORIGINALIST DISSECTS *ATWATER*'S "ORIGINALISM"

Professor Tom Davies, a prominent Fourth Amendment originalist, responded to the *Atwater* decision with a lengthy and detailed critique of Justice Souter's use of history to resolve that dispute.[73] The title, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, alone is sufficient to reveal his dissatisfaction with the holding and its *ratio decedendi*.[74]

In fact, his dissatisfaction appears to run much deeper and wider; he is concerned with the success of the entire originalist project in the Supreme Court:

> Invocations of original meaning have become more prominent in Supreme Court decisions over the last several decades, especially since 1990. That turn to originalism–which no doubt reflects the conservative tilt of the membership of the Court . . . can be explained in two ways that are not mutually exclusive. One explanation . . . is that a commitment to rely upon the original meaning of the written constitution simply dovetails with a conservative philosophy of judicial restraint.
>
> However, judicial restraint has not always been associated with politically conservative justices. Hence, a more legal-realist explanation is also apparent: at least in the context of the civil liberties/civil rights issues that now dominate the Court's constitutional law docket, an originalist stance will generally incline toward a conservative rather than a liberal outcome. In

71. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 780-81 & n.91 (1994).

72. *See Atwater*, 532 U.S. at 333-34. Souter cites sources spanning the centuries from the late thirteenth century to the early twenty-first century. *See id*.

73. *See* Davies, *supra* note 6, at 300. I had the privilege of reviewing and commenting on an early draft of this article. The reader is justified in wondering whether this might generate bias in favor of Professor Davies' position. As the reader will see, my admiration for Professor Davies' work does not mean that I agree with his conclusions or even his evaluation of particular historical materials.

74. *See id.*

> particular, that stance may seem to provide a justification for cutting back earlier liberal decisions that otherwise would enjoy the status of precedent . . . such as the Fourth Amendment exclusionary rule.
>
> Over the last decade, as the conservative majority on the Court has become more dominant, the conservative ideological commitment to originalism has intensified.[75]

Professor Davies is correct to associate the recent emergence of constitutional originalism with conservative political success. Originalism has been promoted by conservative judges like Scalia, Thomas, Bork and many others; touted by conservative politicians going back to Ronald Reagan's first Attorney General, Edwin Meese; and supported by conservative organizations like the Federalist Society and the Heritage Foundation.[76] It is not surprising, therefore, that Davies emphasizes this connection.

By emphasizing the political views of originalism's current proponents, however, Davies obscures a more important truth about originalism. Its defects are not ideological; they are methodological. Ironically, Professor Davies' article proves that point. For although he criticizes conservative "law and order originalism," he claims to be able to sort through the ancient and complex history of search and seizure law to prove that "the historical sources do not comport with the *Atwater* majority's expansive treatment of arrest authority for minor offenses" and that the holding was inconsistent "with framing-era law."[77] In a lengthy and detailed effort (of almost 200 pages), he examines Justice Souter's primary historical claims, methodically dissecting each one to reveal shoddy research here, a misreading of common law and statutory precedents there, and always concluding that history inexorably leads us to the same conclusion: the Fourth Amendment does not permit warrantless arrests for minor offenses—like Atwater's—not threatening a breach of the peace.[78]

In short, Davies challenges Justice Souter's conclusion that no such clear rule exists and criticizes right wing originalism, yet offers an alternative as

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75. *Id.* at 252-54, 258 (citations omitted).

76. *Id.* at 258-61, 263-65; *see* Susan Mann, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 STAN. L. REV. 959, 1008 (1989). Davies discusses some important opinions by Justices Scalia and Thomas that employ originalist techniques to interpret the Fourth Amendment. *See* Davies, *supra* note 6, at 258-61, 263-65.

77. *See* Davies, *supra* note 6, at 260, 266 ("Because originalism in the Rehnquist Court is usually (not always) invoked to support expansive police powers, it is appropriate to call these recent variations on the *Carroll* approach 'law-and-order originalism.'") (citations omitted).

78. *See id*. at 292-300 (providing for an extended example of Professor Davies' close reading of authorities). In this section Professor Davies challenges the *Atwater* opinion's reliance on Williamson v. United States, 207 U.S. 425 (1908), cited as authority for the conclusion that "[T]he term [breach of the peace] carried a similarly broad meaning when employed to . . . delimit the scope of parliamentary privilege [from arrest]" located in the Arrest Clause, U.S. CONST. art. I, § 6, cl. 1. *Id.* at 292. Although Davies criticizes Souter for relying on *Williamson*, almost all of this passage is devoted to a detailed argument challenging the historical analyses penned by Justice Edward White in that 1908 Supreme Court opinion. Souter's error was to rely on this opinion, but the judicial errors in interpreting history were made more than a century ago.

originalist as anything Justice Thomas or Professor Barnett could devise. He argues that a proper reading of history provides us with a precise twenty-first century rule defining the government's authority to arrest for non-felony offenses not threatening a breach of the peace.[79]

Of course, applying the originalist label does not mean that Davies is wrong and Justice Souter right. It might be that history does reveal a precise, fixed rule rather than the inconsistency Souter cites. Reading Davies' exhaustive critique of the historical record is likely to persuade even his critics that he is not guilty of the *selectivity error*: culling history only for sources supporting his position. But in his attempt to establish a rule certain, Davies (surely unintentionally) phrases arguments that sabotage his claims.

Professor Davies' mistake is to overreach by repeatedly claiming that history supplies the clear rule he advocates when the evidence he cites, and even his analyses of that evidence, fall short of establishing the rules he supports. In passage after passage he claims that a clear rule emerges from the founding-era authorities, but too often the best support for this direct assertion is a conclusory assertion about the authorities rather than unequivocal facts appearing in them. This problem is particularly noticeable in the discussion of Anglo-American common-law rules governing misdemeanor arrests.[80]

Professor Davies begins this discussion by rejecting Justice Souter's conclusion that the common-law rules governing misdemeanor arrests during the founding era were uncertain, asserting that the supposed conflict among authorities "is largely the invention of Souter's presentation."[81] Davies argues that a clear rule emerges from these same authorities.[82] But the broad assertion of the existence of clear rules rests upon the following conclusion: "When examined closely, the framing-era sources give a *fairly consistent account* of warrantless arrest authority for less than felony offenses."[83] A *fairly consistent* account? This is a description Justice Souter might have used to support his conclusion to the contrary.

The phrase "fairly consistent" conceivably could be nothing more than an unfortunate turn of phrase without any substantive significance, but this explanation seems less likely with each recurrence of phrasing that blurs rather than clarifies the content of authorities.[84] For example, when he turns to

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79. Davies, *supra* note 6, at 301.

80. *Id.* at 301 *et seq.*

81. *Id.* at 301.

82. *Id.*

83. *Id.* (emphasis added).

84. Like other originalists, Professor Davies can and does cite sources that support his positions. My concern is not that no historical sources support these arguments; it is that these sources are treated as conclusive authorities when they are not met. Davies asserts, for example, that Souter's analysis "is inconsistent with the basic common-law approach to legal authority. Modern judges may think that government officers are authorized to do anything that is not explicitly forbidden, but common-law authorities had the opposite understanding—an officer lacked authority to arrest unless it was expressly recognized in the law books." *Id*. at 302-03 (citations omitted). This is a plausible and interesting claim, but his evidence is conclusory, and the material referred to in the supporting footnotes is either weak or not directly relevant.

Souter's reliance on Blackstone, Davies complains that "Souter's characterization does not square with the *tenor of Blackstone's text*."[85] His objection here is to Souter's failure to interpret the text's *tenor* as Davies would have. Whatever the proper reading of the *tenor* of Blackstone's commentary, Professor Davies offers no evidence of why he is better situated or more able than Justice Souter to construe the proper tone of a legal treatise written more than two centuries ago. I am quite willing to be persuaded that this, indeed, is the case. But as a reader, I see no evidence that Davies holds such a superior position.

When Davies examines another reference to Blackstone in the *Atwater* opinion, he levels a slightly different but analogous criticism: Souter is wrong and "*[t]he better reading* is that Blackstone recognized that it was *a general rule* that an observed breach of the peace was required for a lawful warrantless misdemeanor arrest."[86] In other words, the "better reading" reveals that Blackstone agrees with Davies. This is a variant of the authority gambit in which a disputant tries to win an argument by claiming the imprimatur of some higher authority: God, the Framers, or in this case, Blackstone. Once again, Davies fails to establish why the conclusion he prefers is the "better reading."[87]

Finally, at various points Davies attempts to establish the bases for his conclusions by assuring his readers that they can safely assume facts essential to his analysis. He asserts, for example, that one can safely assume the American Framers knew and understood the content of

> "centuries[-]old" English statutes, including most prominently the 1285 Statute of Winchester, [that] routinely were discussed in the common-law treatises and manuals where they were described as being "but an affirmance of the common law." . . . One can even safely assume that they were part of the Framers' understanding of "the law of the land" and "due process of law." However, that is not the case with later English statutes, which cannot be assumed to constitute significant evidence of framing-era American constitutional understandings.[88]

This short passage depends upon several assumptions not supported by the evidence Davies supplies. References to ancient statutes establishes the availability of that information to anyone with access to those books. This does not come close, however, to establishing that any individual or group among the founding generations actually: read these passages; accepted their validity;

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85. *Id.* at 302 (emphasis added).

86. *Id.* at 303 (first emphasis added).

87. In the same passage Davies also wrote that "Blackstone stated the law at a high level of generality, his statements should not be understood to dismiss the possibility that specific exceptions might have been recognized regarding nonbreach offenses that presented an unusual need for such authority." *Id.* at 303. This statement can be used to support Davies, Souter, or both in the *Atwater* dispute, but it also expresses a broader truth about using legal materials from another century to resolve contemporary disputes.

88. *Id.* at 327.

or "understood" them in the ways that Davies posits.[89] Nor does it deal with the variance between North Americans and British interpretations of the same English precedents.[90] Each of these assumptions must be correct for Davies' conclusions based upon them to be historically accurate, yet by their very nature these *assumptions* rest upon faith in their truth and not upon historical fact.

This raises a difficult question: Why does Professor Davies rely on unsubstantiated (and perhaps unprovable) assumptions rather than evidence? That query brings us back to the beginning of this article, where I claimed that originalism is not history, it is a device for winning arguments. I am most certainly *not* suggesting that Professor Davies is intentionally manipulating historical sources to win this debate (although in my experience, he like most advocates, prefers to win these debates). I have no doubt that Professor Davies believes that his historical analysis is both based on the evidence and correct, just as I believe that Professor Barnett and Justice Thomas offer their originalist interpretations with the intention of presenting the historical record accurately and honestly. The difficulty arises because they are deploying that history in adversarial disputes, and their purpose generally is to prevail in a legal dispute.

In that setting, it is not surprising that Professor Davies or any other debater would offer assumptions to fill gaps in the historical record, and do so with the best of intentions. I have focused upon his response to *Atwater* precisely because anyone familiar with contemporary Fourth Amendment scholarship knows that no law professor studying the original meaning of that text is more rigorous than Professor Davies in researching the subject or seeking to untangle its subtle complexities.

Yet even a scholar as diligent as Professor Davies inevitably commits originalist errors when he attempts to divine from history a precise answer to a twenty-first century question requiring interpretation of an ambiguous constitutional text. It is worth recalling that the question of original meaning arising in *Atwater* seems relatively simple, the kind of question one might expect history to answer: Does the Fourth Amendment forbid warrantless arrests for minor criminal offenses in the absence of at least a threat of a breach of the peace? As the analyses authored by both Justice Souter (intentionally) and Professor Davies (sometimes unintentionally) demonstrate, even an ostensibly simple question like this defies our attempts to find an unequivocal answer in history.

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89. In an earlier footnote, I include a passage where Davies acknowledges the gap between words on the page and actual practice during the revolutionary and founding decades. *See supra* note 67. The gap between the meaning we attribute to words on the page and the understanding held by one or several eighteenth century people is, if anything, even greater.

90. *See supra* notes 60-63 and accompanying text.

## V. CONCLUSION

Does this mean that history has no meaning or that history has no role in constitutional interpretation? My answer to these questions is a vehement "no." Of course history is important for understanding our constitutional scheme. But the detailed use of history by Justice Souter in *Atwater* and the even more detailed rebuttal by Professor Davies demonstrate (yet again) that complex histories do not supply simple answers to our difficult problems. When advocates attempt to defy this reality, inevitably they produce something that is not history but a species of special pleading, a device that can recast outcome driven arguments as objective historical "truth."

How can we use history, then, in our interpretive efforts? First, we must accept the truth of history's complexity and the uncertainty of its lessons. Then we must abandon the illusion that history can provide us with specific solutions to the problems we must solve today. "Even complex histories can guide us [but only if] if we are willing to deal with them on an appropriate level of abstraction."[91] Finally, we must accept the reality that there is no Framers' "invisible hand" to guide us safely to a "correct" decision—the decision they would have made had they governed in the twenty-first century. We are responsible for defining this society, this government, this Constitution in this time. We share their history, but we stand alone in the present.

91. Cloud, *supra* note 5, at 1747.