Excerpts from The Fruitless Search for Original Intent, Judith A. Baer (McCann and Houseman, Judging the Constitution, 1989.)

....
[First, proponents of original intent] maintain that there is only one correct way to interpret the Constitution, according to its original meaning. Second, they declare that a particular interpretation of that meaning is correct.
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To rely on original intention implies that the original intention is knowable. Behind that assumption lies finally, perhaps as one of those facts too obvious to need mentioning, the assumption that such a thing as original intention exists.
....
Jurisprudence of original intention, and it specific applications, founder not only because of human error but, more importantly, because we can neither discover original intention nor know that it exists.
...

IS ORIGINAL MEANING THE ACCEPTED SOLE DETERMINANT OF INTERPRETATION?

At present, [the original intent] argument is mainly the preserve of those labeled "judicial conservatives." ... But this sort of jurisprudence has not always been confined to conservatives. Justice Hugo Black used original intention to argue a position antithetical to [Attorney General] Meese's: that the Fourteenth Amendment bound the states to the first eight. We can thus establish one point at the start: Reliance on the framers does not produce consistent results, nor, despite Bork's and Meese's claims, does it seem to prevent a jurisprudence of idiosyncrasy.

These uses of the same method to produce contradictory results may help explain why few jurists, however conservative, have accepted intent as the sole determinant of interpretation. Judges as diverse as Oliver Wendell Holmes, Felix Frankfurter, John Marshall Harlan II, Earl Warren, and William Brennan have held the view that Chief Justice Warren put most concisely: "[History is] at best ... inconclusive." Courts have practiced what these judges have preached. Warren's statement came in a unanimous decision interpreting the Fourteenth Amendment to outlaw a practice that had been common at the time the amendment was adopted.
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CAN WE DISCOVER ORIGINAL INTENTION?
The state of constitutional interpretation provides small comfort to the jurist who regards original meaning as either a source of certainty or a corrective to idiosyncrasy. Most interpretations of original meanings have been challenged. ... The rule seems to be that for every interpretation there is at least an equal, if not excessive, and opposite counter-interpretation. .... The search for original intention requires interpreters to investigate the sources on the adoption and ratification of the Constitution and of subsequent amendments. Contemporary records of these events are expansive enough to lead the scholar into unrealistic expectations. Enough primary source material exists to occupy several researchers for an entire professional career. These records appear to hold at least as much information about original intent as anyone would want. But this appearance is deceptive. The records are "mainly unofficial and decidedly incomplete."
....
There exists for the Fourteenth Amendment, by contrast, one source that is lacking for the original Constitution: an apparently complete official record of the first debates. Not only may this record be found in the official journal -- as is the case for all amendments since the Eleventh

-but it has been anthologized along with the debates on all Reconstruction legislation in a volume edited by Alfred Avins. We do not, as yet, know whether members could edit their remarks back in 1866. Even if we could be sure that the record is complete, explorations of this amendment's legislative history are distressingly incomplete. Almost without exception, scholars have ignored the state legislatures. Indeed, the state records on the Fourteenth Amendment are one of the last untapped sources about original intent.

....The states are equal partners with Congress in amending the Constitution. Legislators' votes depend, at least in part, on what they think an amendment means. As legislators' intentions are a crucial part of the amending process, any information we can get about these interpretations will be valuable.

Such a project looms in advance as huge and intimidating. The Fourteenth Amendment was passed by Congress on June l3, 1866, and declared ratified on July 27, 1868. At that later date, there were thirty-seven present or former states, all with bicameral legislatures. All seventy-four of these had considered the amendment at least once during that time period. By 1870, twenty-six houses had reconsidered it. New Jersey and Ohio rescinded their ratification. So did Oregon, but not until September 1868, which made that rescission nugatory. All ten "insurrectionary" states rejected the amendment between November 1866 and February 1867. In March, Congress passed the first Reconstruction Act, which made ratification a condition of readmission for these states. Congress continued to impose this condition even after three-fourths of the states had ratified, and all ten states eventually complied. One hundred sets of debates, therefore, demand analysis.

....No complete official record of debate in any house survives. The fullest records from Massachusetts and Indiana, are not official.

...The lack of information about the state debates on the Fourteenth Amendment forces the jurist to interpret in ignorance. What frustrates the scholar most is not the possibility that no discussions occurred- -there were too many days of debate for silence to have been likely --but the probability that important debates went unrecorded. Things were said, but we cannot discover what they were. Part of our constitutional history is irretrievable.

DOES ORIGINAL INTENTION EXIST?

To speak of original intention implies the existence of an understanding shared by the lawmakers. But even a single deliberative body, like the Philadelphia Convention, may lack a shared understanding. And when we include among the framers, as we must, the members of the state conventions we imply that fourteen separate deliberative bodies shared an interpretation. In the case of an amendment, the authors do not even belong to one legislative body. Congress has two houses that act separately. The Fourteenth Amendment was ratified by twenty-eight bicameral state legislatures. A literal quest for original intent, then, presumes the existence of an understanding shared by no fewer than fifty-eight deliberative bodies in twenty-nine cities over a two-year period. This presumption is dubious on its face.

Inevitably, the interpreter is left with what all these groups had in common: the words of the provisions that they enacted. But much of the meaning of those words lies not within the framers' minds but in the words themselves, and the meaning of the words varies according to the context and the user. Philosophers of language often remind us that neither speakers nor words determine meaning alone.

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Another common situation will provide further illustration of this point. We often have the opportunity to read records of the minutes or proceedings of a meeting of some sort--of our university senate for example, or of a private association. It is often possible to guess, from the

typically bland and truncated accounts, what objections were made to specific proposals and even by whom they were made. Such guesses are possible because the context within which the deliberations took place is one that is known to us and in which we ourselves often must operate. The act of interpretation proceeds from and relies upon shared understanding.

To interpret the original intent of constitutional provisions is an act far more difficult than any of these everyday interpretations. The jurisprude of original intention has the task of performing a "definite creative act of understanding" the meaning of speakers and writers who lived a long time ago and who are not available to us for questioning about what they meant. The context in which they operated --a context in which shared understandings of morals, conventions, and political principles existed --is not ours.

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I believe that purported reliance on original meaning is no more than a smokescreen for individual choice. Honesty demands that we drop the pretense and take responsibility for these choices, guided by the wisdom of past generations but not locked into their mistakes.

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