

LEARNING TO READ LIKE AN EIGHTEENTH-CENTURY LAWYER: THE HISTORICAL CRITIQUE OF ORIGINALISM REVISITED

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I. OBJECTIVE MEANING VS. INTERSUBJECTIVE MEANING

Historians have been among the fiercest critics of originalism.¹ Among the many virtues of Jack Balkin's book, *Memory and Authority*, is the deft way he analyzes and dismantles these efforts to insulate originalism from historical critique.² In a short essay, it would be impossible to fully acknowledge the sophistication of Balkin's analysis. Instead, I would like to build on his impressive achievement by pointing out additional problems with the originalist response to historical critique. Indeed, Balkin's critique of existing originalist theory will soon be joined by other devastating challenges, including Jonathan Gienapp's book-length critique of originalism and a series of pithy forthcoming articles by Jud Campbell demonstrating that originalists have not recovered the past but invented it.³ Originalists have approached constitutional meaning from a set of intellectual assumptions that distort, more than they illuminate, the original meanings of these texts. Although often invoking their specialized knowledge of the law, originalists have approached eighteenth-century law anachronistically, treating Founding Era law and modern law as essentially the same. Rather than treat Founding Era law and modern law as if they are close siblings, they are at best distant cousins.

In response to multiple historical critiques, originalists, to borrow Jack Balkin's apt metaphor, have created a Maginot Line, hoping, vainly, to hold back this historical

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¹ For a useful summary of these critiques, see Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 907–12 (2015); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 577 (2011).

² See JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 252–53 (2024).

³ See JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 15–16 (2024); Jud Campbell, *Fundamental Rights at the American Founding*, in 4 THE CAMBRIDGE HISTORY OF RIGHTS: THE EIGHTEENTH AND NINETEENTH CENTURIES 194, 196 (Dan Edelstein & Jennifer Pitts eds., forthcoming 2024).

onslaught.⁴ As with France's ill-conceived effort to fend off Germany with its historical Maginot line, erecting a wall between law and history has done little to stave off a steady barrage of devastating attacks from historians. Balkin's lucid framing of the current theoretical debates between lawyers and historians is extremely helpful to those new to the debate. Even more impressive is that his timely book, to continue with the martial metaphor, offers much to those who have been in the trenches for a long time.

The metaphor of the Maginot Line seems especially apt given that the dominant epistemology among originalists, objective linguistic meaning, fell out of favor among Western thinkers in the decades after the First World War.⁵ The notion of objective meaning has been largely supplanted by the view that meaning is not objective, but intersubjective. In this sense, originalists are about a century behind the times in terms of their ontological and epistemological assumptions.⁶ Recognizing that meaning is intersubjective requires shifting focus away from a search for an objective truth, referential theories of meaning, and instead focusing on meaning as a social construct, functional theories of meaning.⁷ Once one realizes that originalism rests on a serious mischaracterization of the way constitutional communication

⁴ BALKIN, *supra* note 2, at 253.

⁵ Nicolas de Warren, *The First World War, Philosophy, and Europe*, 76 TIJDSCHRIFT VOOR FILOSOFIE 715, 729 (2014).

⁶ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) ("In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment. This shift obviates some, but not all, of the most telling practical objections to originalism and can be very disappointing for critics of originalism—and especially for historians . . ."). Linguists and anthropologists approach meaning as intersubjective, not objective. See Alessandro Duranti, *Husserl, Intersubjectivity and Anthropology*, 10 ANTHROPOLOGICAL THEORY 16, 24 (2010); Johannes Fabian, *Ethnography and Intersubjectivity: Loose Ends*, 4 J. ETHNOGRAPHIC THEORY 199, 206 (2014); Terra Edwards, *Intersubjectivity*, INT'L ENCYC. LINGUISTIC ANTHROPOLOGY 1, 1 (2021).

⁷ See AN INTRODUCTION TO LANGUAGE AND LINGUISTICS 172 (Ralph W. Fasold & Jeff Connor-Linton eds., 2014) (contrasting a structural approach that "[a]ssumes that language is a single code within a homogenous community" with a functional approach that "[a]ssumes that language comprises a repertoire of speech styles within a diverse community"). Approaching Founding Era America as if it fits the former model is hard to reconcile with historical reality and the prevailing scholarly consensus of historians on the realities of life in Founding Era America. On the heterogeneity of Founding Era legal and constitutional discourse, see GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S*, at 1–7 (2019). On the diversity of Founding Era political culture, see generally WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007); *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004).

functioned in the Founding Era, one of originalism's foundational claims, the so-called fixation thesis, crumbles.⁸

Although originalism comes in almost as many flavors as the breakfast cereals lining the shelves in a modern American grocery store, it has about the same nutritional value, which is to say it is mostly empty calories offering little sustenance. Balkin correctly identifies the three most influential variants of originalism currently dominating academic and judicial writing on the Constitution: original public meaning originalism, original methods originalism, and original law originalism.⁹ Balkin's critique of these diverse approaches is devastating. Although distinct in some respects, all these theories approach Founding Era law from the vantage point of an outmoded consensus history paradigm that was abandoned almost a half a century ago.¹⁰ Moreover, the philosophical and linguistic theories cited to support many of the claims put forth by these authors are themselves highly distorted and bear only slight resemblance to the way serious scholars in these other disciplines, most notably linguistic anthropology and sociolinguistics, approach language and meaning.¹¹

II. GUILD ARGUMENTS AND TURF BATTLES

Originalists have mounted a classic guild argument in which lawyers have attempted to defend their turf against interlopers from outside the law. Reduced to its core argument, the claim is simple: historians should stay in their lane and not opine on legal matters because they are not trained in legal analysis. The claim that historians do not understand the law and are therefore incompetent to evaluate the original meaning of legal texts, including the Constitution, has been frequently repeated by originalists, but it has never been well documented or substantiated with any hard evidence—a common failing of much originalist scholarship, which often has a thin veneer of empirical rigor, but generally relies on impressionistic assessments

⁸ See Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427–29 (2021).

⁹ BALKIN, *supra* note 2, at 60.

¹⁰ See Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 AM. Q. 1, 1–2 (1993); see also John Higham, *Changing Paradigms: The Collapse of Consensus History*, 76 J. AM. HIST. 460, 464 (1989).

¹¹ See Lawrence B. Solum, *Pragmatics and Textualism* (July 1, 2024) (unpublished manuscript) (on file with SSRN), <http://dx.doi.org/10.2139/ssrn.4881344> [<https://perma.cc/6RPK-8P62>]. Solum continues to claim authority based on something he calls theoretical linguistics, but no such field exists. *Id.* (manuscript at 3). There are multiple fields of linguistics that have rich theoretical debates. His ignorance of the debates in the fields most relevant to empirical inquiries is shocking but typical of originalism's faux interdisciplinarity. For a summary of the most important theoretical insights in linguistic anthropology, see generally DIRECTIONS IN SOCIOLINGUISTICS: THE ETHNOGRAPHY OF COMMUNICATION (John J. Gumperz & Dell Hymes eds., 1972). See also ALESSANDRO DURANTI, LINGUISTIC ANTHROPOLOGY (1997); A COMPANION TO LINGUISTIC ANTHROPOLOGY (Alessandro Duranti ed., 2004).

and cherry-picked evidence to support its interpretations.¹² Moreover, this argument ignores the fact that modern lawyers are typically not well-schooled in the interpretive practices or legal culture of the Founding Era.¹³ Even among those who claim to employ original methods in their analysis of Founding Era law the results are deeply anachronistic and often riddled with errors.¹⁴

No originalist has been more strident in making this type of guild argument than Randy Barnett: “[S]ome [historians] apparently believe that they, and they alone, can recover the meaning of a law enacted in the Eighteenth Century when they would not be able to understand the meaning of a law enacted in the Twenty-First.”¹⁵ It is odd that Barnett frames this criticism with the qualifier, “apparently believe,” a turn of phrase that suggests that he is not quite sure what historians believe.¹⁶ Nor is it clear which historians Barnett believes have argued that they alone hold the keys to unlocking the meaning of Founding Era legal texts.¹⁷ Barnett confuses two different types of historical critics of originalism.¹⁸ Multiple historians have attacked originalists for their failure to master the relevant historical sources and multiple contexts necessary to unpack the meaning of Founding Era legal texts.¹⁹ Secondly, historians have argued that doing so requires a mastery of some of the most basic methods of intellectual history and a solid grounding in the legal history of the period.²⁰ These two methodological arguments are not guild arguments. The issue is not one of professional affiliation but one of professional competence and methodological rigor. One need not be a trained historian with a PhD to approach Founding Era legal texts historically. The only requirement to engage in historical analysis is to master the tools of the discipline and the sources; one need not be a card-carrying member of the historical guild to write history. There are many legal scholars who are doing first-rate historical work who were not formally trained as historians.²¹

¹² See Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1, 6–8 (2015).

¹³ See *id.* at 7.

¹⁴ Originalist misreading of the role of preambles in Founding Era statutes is a good illustration of this problem. For an overview of the way originalism misinterprets this issue, see Saul Cornell, “*Half Cocked*”: *The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY 203, 209 (2016).

¹⁵ Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, REASON: VOLOKH CONSPIRACY (Mar. 28, 2017, 12:51 PM), <https://reason.com/volokh/2017/03/28/challenging-the-priesthood-of/> [<https://perma.cc/EX37-GPHF>].

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ Flaherty, *supra* note 1.

²⁰ See *id.* at 910–12.

²¹ See generally STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021); Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 12 n.38 (2023).

Legal scholar David Rabban, one of the finest legal academics writing legal history, is one of many examples of scholars working in a genuinely interdisciplinary fashion in this field.²² Indeed, Rabban's incisive critiques of the work of scholar Leonard Levy, a history PhD who wrote on the First Amendment, exposed Levy's penchant for writing law office history.²³ Rabban's critique of Levy shows that even distinguished historians can fall into this trap.²⁴

Similarly, the claim that all lawyers are competent to offer compelling interpretations of complex issues in contemporary law simply by virtue of having gone to law school is equally fallacious. Take the issue of statutory interpretation raised by Barnett.²⁵ Sophisticated empirical studies by Abbe Gluck have demonstrated that even those charged with writing and interpreting the nation's laws, whose staffs include scores of lawyers, are often not fully conversant with the rules of modern statutory construction.²⁶ I think it is fair to say that most legal scholars who do not teach or publish in a particular area are typically not reliable guides on cutting-edge issues in legal analysis in fields outside of their expertise. Although most lawyers have some basic familiarity with modern statutory construction, if one does not teach "reg/leg" or statutory interpretation, it is doubtful that the average law professor could navigate the intricacies of the debate between John Manning and William Eskridge on the relevance of equitable construction to modern law, to name just a single example of the difficulty.²⁷ Most significant of all, few legal scholars have taken the time to master the rules of statutory construction in place during the Founding Era, rules that were crafted to deal with the pervasive role of common law in eighteenth-century law.²⁸ Barnett's conjecture itself rests on the erroneous assumption that the rules of statutory construction have remained stable over the last two hundred years.²⁹ If you are unaware that the rules of statutory construction routinely taught in today's

²² See generally David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 854–55 (1985).

²³ See *id.*

²⁴ See *id.* On the concept of law office history, see BALKIN, *supra* note 2, at 89, 231.

²⁵ Barnett, *supra* note 15.

²⁶ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018).

²⁷ John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution (November 1, 2001)*, 101 COLUM. L. REV. 1648 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 994 (2001).

²⁸ See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 577 (2006).

²⁹ Barnett, *supra* note 15.

law schools are markedly different than those in place at the time of the Constitution, you should not be commenting on the meaning of Founding Era statutes.³⁰

Barnett's claims about historians' lack of credentials in matters of statutory construction and other aspects of legal interpretation are not shared by courts. As the data in the following table shows, courts have generally ignored the work of some of the most outspoken originalist scholars, including Barnett, despite the increasing number of originalists on the bench.³¹ To be sure, as the struggle over the Affordable Care Act shows, ideologically driven legal scholarship does have an outsized impact once a case reaches the Supreme Court, but in cases below this level, where most ordinary law occurs, courts have generally not paid much heed to most originalists, a reassuring fact.³²

³⁰ *Id.*

³¹ Although an admittedly imperfect measure of influence, the HeinOnline scholar rank does suggest that Barnett's claims reflect his own guild bias more than the legal practice of jurists. See *ScholarRank's Top 250 Authors in HeinOnline*, HEINONLINE, <https://home.heinonline.org/tools/author-profile-pages/scholarrank/> [<https://perma.cc/VN3A-32X8>] (last visited Nov. 27, 2024). HeinOnline's formula for creating this metric includes both scholarly citation and court citations:

ScholarRank is an overall ranking based on the calculation of five HeinOnline ScholarCheck metrics. The Z-score for each of the five metrics is taken and then averaged. The final average is entered into standard competition ranking to produce the overall ScholarRank for each author. The raw data and final ranking are updated on a monthly basis and can be found on the HeinOnline author's profile page.

Id.

³² See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 636 (2010). Barnett relies on Justice Scalia's flawed originalist analysis in *Printz v. United States*, 521 U.S. 898 (1997). For a more rigorous discussion of the way the Founders viewed this principle, see Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1176–79 (2013). For another forceful critique of the legal merits of Barnett's challenge to the A.C.A., see Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1859 (2011). On the implications of the *Daubert* standard for evaluating amicus briefs, see Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1811–12 (2014).

Table One: Court Citations of Selected Scholars in the Originalist Debate³³

Scholar	Saul Cornell	Randy Barnett	Lawrence Solum	John McGinnis	Michael Rappaport
Court citations in the past five years	114	28	31	20	19

Moreover, it is doubtful that federal courts charged with implementing the *Daubert* standard on expert testimony would judge Barnett and many other prominent originalists as experts on issues related to Founding Era statutes or eighteenth-century statutory construction.³⁴ Ultimately, this is little more than a classic guild argument designed to ward off historical critique.

III. PUBLIC MEANING ORIGINALISM AND THE PERILS OF LAW OFFICE PHILOSOPHY

Lawrence Solum and Randy Barnett have been among the most outspoken critics of historical challenges to originalism.³⁵ Solum and Barnett's critique rests on two interrelated errors. The first error, ably explicated by Balkin, can be traced to their

³³ Data derived from HeinOnline Scholar Rank. See *Cornell, Saul*, HEINONLINE, https://heinonline.org/HOL/AuthorProfile?search_name=Cornell%2C+Saul&collection=journals&base=jsline.org [https://perma.cc/8S2V-GTHC] (last visited Nov. 27, 2024); *Barnett, Randy E.*, HEINONLINE, https://heinonline.org/HOL/AuthorProfile?search_name=Barnett%2C+Randy+E.&collection=journals&base=js [https://perma.cc/99J5-P5KT] (last visited Nov. 27, 2024); *Solum, Lawrence B.*, HEINONLINE, https://heinonline.org/HOL/AuthorProfile?search_name=Solum%2C+Lawrence+B.&collection=journals&base=js [https://perma.cc/GXW4-NLR4] (last visited Nov. 27, 2024); *McGinnis, John O.*, HEINONLINE, https://heinonline.org/HOL/AuthorProfile?search_name=McGinnis%2C+John+O.&collection=journals&base=js [https://perma.cc/7DTP-JRVK] (last visited Nov. 27, 2024); *Rappaport, Michael B.*, HEINONLINE, https://heinonline.org/HOL/AuthorProfile?action=edit&search_name=Rappaport%2C%20Michael%20B.&collection=journals [https://perma.cc/LLF9-V57P] (last visited Nov. 27, 2024).

³⁴ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993); see also FED. R. EVID. 702. For an overview of the current debate over the viability of the *Daubert* standard, see David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 5–6 (2015). For an overview of historians and the *Daubert* standard, see generally 130 AM. JUR. PROOF OF FACTS 3D 89 *Qualifying Historians As Expert Witnesses* (2012). N.E.H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbroglio: In Search of a Serviceable History*, 31 RUTGERS L.J. 473, 489–90 (2000), propose the idea of historical special masters, but this approach has not garnered much support among lawyers. See *United States v. Bullock*, 679 F. Supp. 3d 501, 505 (S.D. Miss. 2023). For an illuminating discussion of *Bullock*, see Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. 1, 72–73 (2023). For more background on historical special masters, see Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 384 (2013).

³⁵ Barnett, *supra* note 15.

unfamiliarity with historical scholarship and historical methodology.³⁶ Barnett somewhat confusingly claims that historians are not interested in the original meaning(s) of constitutional texts because they are largely concerned with “describing past events, . . . explaining why what happened in the past happened, [and] why people did what they did; as a result, they are very concerned with identifying motives, or other causal influences.”³⁷ Barnett appears to have lifted this mischaracterization of what historians do from a tendentious and ill-informed claim made by Solum, who also seems unaware of how historical scholarship in constitutional and legal history deals with questions of constitutional meaning in the past.³⁸ It is certainly true that many historians are interested in forms of thick description, recovering the larger web of belief that made constitutional texts comprehensible to the eighteenth-century reading public.³⁹ It is also true that many historians are interested in the motives of historical actors or the casual influence and consequences of ideas.⁴⁰ But, their undocumented claims that constitutional and legal historians are uninterested in the meaning of legal texts from the past is hard to fathom. Indeed, for legal and constitutional historians, understanding what text means is at the very core of their work. Anyone familiar with the writings of Gordon Wood or Jack Rakove, to name just two of the most prominent historians writing about constitutional meaning, could conclude that these historians were not interested in what constitutional texts meant in the past.⁴¹

Their second error rests on the simplistic view of language employed by Barnett and Solum.⁴² Both men claim that their approach to language is solidly grounded in

³⁶ BALKIN, *supra* note 2, at 244–45.

³⁷ Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, VOLOKH CONSPIRACY (Aug. 19, 2013, 4:22 PM), <http://volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/> [https://perma.cc/RN6F-PQTE]. Barnett’s confusion about history seems to derive from his reliance on the problematic discussion of historical methodology penned by originalist Lawrence Solum. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 292–93 (2017). Their bizarre account of historical methodology is replicated in their commentary on *Dobbs* and *Bruen*. See Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023).

³⁸ Barnett & Solum, *supra* note 37.

³⁹ See Ronald G. Walters, *Signs of the Times: Clifford Geertz and Historians*, 47 SOC. RSCH. 537, 542–44 (1980).

⁴⁰ For a useful introductory discussion of some of the issues relevant to historical research, see ZACHARY M. SCHRAG, *THE PRINCETON GUIDE TO HISTORICAL RESEARCH* (2021). On the difficulty of acquiring the cognitive processes necessary to think historically, see SAM WINEBURG, *HISTORICAL THINKING AND OTHER UNNATURAL ACTS* (2001).

⁴¹ Consider Wood and Rakove’s contributions to the debate over the origins of judicial review, a central issue in the history of constitutional law. See Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 798–99 (1999); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1034–45 (1997).

⁴² See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621; Solum, *supra* note 37, at 276–78;

the philosophy of language and theoretical linguistics.⁴³ In fact, their claims about language and meaning have tenuous foundations in these disciplines. Indeed, their approach to philosophy of language represents only a single strand of a complex field that is itself deeply divided. Solum and Barnett have resurrected the distinguished philosopher Paul Grice's intention-based theory of meaning.⁴⁴ Unfortunately, neither Solum nor Barnett appears to have devoted much attention to placing Gricean theory in historical context, understanding its position in the evolving history of language philosophy. Although Grice's model has its champions among some philosophers, its assumptions and framework have been rejected by empirical linguists who study how languages function in the real world.⁴⁵

It seems ironic that originalists would turn to an intention-based theory to solve a problem that stemmed from the absence of a methodology to aggregate intentions. The absence of an empirical method to sum intents was a fatal flaw in earlier originalist theories and was central to historical critiques of intentionalism (originalism 1.0).⁴⁶ The essence of that critique was that there was no methodology to create a "calculus of intents," to allow scholars to identify a univocal meaning for most provisions of the Constitution.⁴⁷ Public meaning originalists claimed to solve this problem by turning to Gricean theory.⁴⁸ Unfortunately, Grice does not offer such a solution; he assumes that summing and linking multiple intents to utterances is a straightforward and unproblematic task. If that were true for Founding Era legal texts, then there would have been no need to move beyond the first generation of intentionalist theories of constitutional meaning and turn to public meaning. In a sense the entire public meaning paradigm rests on a circular argument. Rather than lead to a solution to the problem of how to sum intents, Barnett and Solum just assume that the problem has been solved and continue down the same old law office history path reading texts anachronistically and cherry-picking evidence with little attention to how to select or weight the importance or influence of individual texts. Public meaning originalists make three additional errors. First, they assume the existence of a linguistic consensus, instead of demonstrating that one existed in the Founding Era.⁴⁹ Secondly, they have no methodology for selecting or weighting various texts in determining

Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015).

⁴³ See Solum, *supra* note 11 (manuscript at 19).

⁴⁴ See Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 945 (2015).

⁴⁵ For critiques of Solum's highly selective and distorted approach to the philosophy of language, see Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 BYU L. REV. 695, 697; Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427 (2021).

⁴⁶ See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

⁴⁷ *Id.*

⁴⁸ Gienapp, *supra* note 44, at 946–47.

⁴⁹ See *id.* at 941.

public meaning.⁵⁰ Finally, most originalists assume that simply looking at words without paying attention to the intellectual and cultural history of the Founding Era yields a historically accurate account of what those words meant.⁵¹ As Jonathan Gienapp has noted, this atomistic approach, akin to running the Constitution through a Google translator set to eighteenth-century constitutional English, distorts more than it clarifies original meaning.⁵² Historians generally embrace some form of moderate meaning holism. Only by translating the words and the underlying concepts and values of eighteenth-century constitutional texts can we hope to recover their original meanings.⁵³

If one examines the writings of public meaning originalism, one will find that they use many of the same sources and read those sources in much the same way that first generation originalists did, and not surprisingly, they arrive at virtually the same conclusions as originalists working in an earlier intentionalist paradigm.⁵⁴ It is true that public meaning originalists do draw more heavily on early dictionaries (mostly English dictionaries or American dictionaries from after the Founding Era) and have added some material from digital searches in new online databases.⁵⁵ But, the underlying methodological problem of summing multiple intents, dealing with how these additional data points ought to be weighted, and recovering the broader context necessary to engage in holistic translation has never been addressed. Solum and Barnett may have added some new data to traditional originalism's impressionistic and ahistorical methods, but they still have no theory or methodology to address the empirical problem of aggregating intents posed by critics of originalism 1.0.⁵⁶ Nor have they grappled with the overwhelming historical evidence that there was no consensus on how to read legal texts in the eighteenth century. In essence, they have given us a version of reader response literary criticism whose reader is not a Founding Era American, but a modern lawyer with close ideological affinities with the Federalist Society. This is little more than an act of "historical ventriloquism."⁵⁷

⁵⁰ For further discussion, see Darrell Miller's contribution to this volume. *See generally* Darrell A.H. Miller, *Originalism's Selection Problem*, 33 WM. & MARY BILL RTS. J. 375 (2024).

⁵¹ Gienapp, *supra* note 44, at 941.

⁵² *See id.* at 942.

⁵³ *See id.*

⁵⁴ Thus, if one compares Barnett's writing about the Second Amendment before his embrace of new originalism and after, the conclusions are virtually the same. *Compare* Randy E. Barnett, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1143 (1996), *with* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 239 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)).

⁵⁵ *See* Solum, *supra* note 37, at 282–84.

⁵⁶ *See id.*

⁵⁷ As a number of scholars have noted, "Originalism can easily degenerate into 'historical ventriloquism.'" Andrew Koppelman, *What's Left of Originalism? On Jack M. Balkin's "Memory and Authority,"* L.A. REV. BOOKS (June 28, 2024), <https://lareviewofbooks.org>

Put another way, public meaning originalists have not solved the problem they set out to solve, they have simply obscured their lack of a solution by employing a philosophical cant that few lawyers have the skills to debunk and adding a modicum of new sources which they continue to treat in a presentist and ahistorical fashion. As the old rock anthem reminds us, “[M]eet the new boss, same as the old boss.”⁵⁸

Despite their protestations to the contrary, Barnett and Solum’s approach is not supported by contemporary linguistics. Their approach is roughly comparable to what a freshman college student might encounter in an introductory linguistics course if the student stopped going to class just before the midterm.⁵⁹ The Gricean theory of meaning they champion rests on a series of assumptions that no empirically oriented linguist would accept as an accurate account of the way languages function in complex literate societies.⁶⁰

By plucking Grice’s theory out of its intellectual context, including its role in the history of philosophy, they have replicated the ahistorical approach they have taken to Founding Era constitutional thought.⁶¹ In both instances, Solum and Barnett have approached texts with a set of assumptions that might well apply to a subset of legal academics, mostly members of the Federalist Society, arguing around a seminar table at elite law schools. Treating Founding Era constitutional discourse in this fashion is patently ahistorical.⁶² Grice’s approach was not designed to ground

/article/whats-left-of-originalism-on-jack-m-balkins-memory-and-authority/ [https://perma.cc/Y2SP-JWLM]; see also Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 409 n.102 (2018); M. Henry Ishitani, *Today’s Brandeis Brief? The Fate of the Historians’ Brief Amidst the Rise of an Originalist Court*, 2 J. AM. CONST. HIST. 1, 62 (2024).

⁵⁸ THE WHO, *My Generation*, on MY GENERATION (Brunswick Records 1965), as quoted in Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1098–99 (2009).

⁵⁹ AN INTRODUCTION TO LANGUAGE AND LINGUISTICS, *supra* note 7. In this introductory text, Grice’s model is discussed in Chapter Four and linguistic anthropology in Chapter Five. *Id.* at 159–67, 170–74.

⁶⁰ See Alessandro Duranti, *The Ethnography of Speaking: Toward a Linguistics of the Praxis*, 4 LINGUISTICS: CAMBRIDGE SURV. 210, 217 (Frederick J. Newmeyer ed., 1988); Elizabeth Keating, *The Ethnography of Communication*, in HANDBOOK OF ETHNOGRAPHY 285, 290–92 (Paul Atkinson et al. eds., 2001). Solum’s model is also incompatible with the dominant models within sociolinguistics. See generally DELL HYMES, FOUNDATIONS IN SOCIOLINGUISTICS: AN ETHNOGRAPHIC APPROACH (1974).

⁶¹ On the complex connections between history and philosophy, see Richard Rorty, *The Historiography of Philosophy: Four Genres*, in PHILOSOPHY IN HISTORY: ESSAYS ON THE HISTORIOGRAPHY OF PHILOSOPHY 49, 49 (Richard Rorty, J.B. Schneewind & Quentin Skinner eds., 1984).

⁶² See generally Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 534 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)). Prakash follows other originalists in assuming, not demonstrating, a simple default rule for reading Founding Era legal texts and constitutions. *Id.* at 541. This unexamined assumption and the related erroneous assumption that modern lawyers are best equipped to read Founding Era legal texts, despite the vast

a method of historical inquiry; it was an effort to understand an ideal speech situation (derived largely from post-war Anglo-American academic culture) that bears scant resemblance to the rough and tumble world of Founding Era legal and constitutional debate.⁶³

Gricean theory builds on assumptions appropriate to face communication among social equals who share common linguistic practices and cultural norms and are engaged in a cooperative enterprise of communication.⁶⁴ According to Gricean theory, four maxims guide communication:

- The maxim of Quality: make your contribution one that is true rather than false.
- The maxim of Quantity: provide the information that is required for the purposes of the conversation, but no more.
- The maxim of Relevance: make your contributions relevant.
- The maxim of Manner: be clear and orderly in your talk.⁶⁵

Large swathes of human communication do not fit this model—poetry, politics, oratory, to name just a few types of communication that are not easily accommodated by Grice’s theory. The contentious and ideologically fraught debate over the ratification of the Constitution would be among those that do not. The ethnocentrism and cultural insularity of Grice’s theory has prompted caustic criticism from linguistic anthropologists who have faulted Grice and other philosophers of language working in a Gricean paradigm for their “claims to characterize universal properties of linguistic meaning,” which actually offer “an account of specifically Oxonian (with a branch office in Berkeley) ideologies about communication, elucidated with

gulf separating their legal world from our own, is central to virtually all forms of originalism. These assumptions have been debunked by multiple scholars, most recently, Gienapp and Balkin. See Gienapp, *supra* note 44, at 942; BALKIN, *supra* note 2.

⁶³ Cornell, *supra* note 12, at 4–6; see also Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHIL. FOUND. LANGUAGE L. 217, 233 (Andrei Marmor & Scott Soames eds., 2011) (noting that “[p]hilosophy of language and Gricean theory have nothing to say about what we should *deem* to be the content of the legislature’s intentions”).

⁶⁴ See Jane H. Hill, Book Review, 45 LANGUAGE IN SOC’Y 609, 609 (2016) (reviewing ALESSANDRO DURANTI, *THE ANTHROPOLOGY OF INTENTIONS: LANGUAGE IN A WORLD OF OTHERS* (2015)).

⁶⁵ This summary of Grice’s maxims is taken from AN INTRODUCTION TO LANGUAGE AND LINGUISTICS, *supra* note 7, at 160. For another useful discussion of Gricean maxims, see generally A.P. MARTINICH, COMMUNICATION AND REFERENCE 17–37 (1984). For a critique of their applicability to real-world communication, see Megan Henricks Stotts, *Conversational Maxims as Social Norms*, 2022 INQUIRY 1, 12–17, <https://doi.org/10.1080/0020174X.2021.2020158> [<https://perma.cc/67JN-P72G>] (claiming Grice cast these rules as defining features of all rational communication, but they are social norms governing communication in a limited number of settings and culturally and historically specific).

entirely invented examples that glossed over the many complications and subtleties that must have been present even in the academic seminars from which the work emerged.”⁶⁶ In short, Solum’s method may illuminate how some modern law professors communicate, but not much else.

If one turns to history and particularly post-Revolutionary America, the problems with approaching constitutional texts from a Gricean perspective are multiplied. There are manifold historical problems with applying Grice’s maxims to constitutional discourse in 1788.⁶⁷ Ratification was a contentious political debate, not a simple face-to-face conversation between equals seeking to act cooperatively. Given these facts about ratification, any theory of meaning focused on constitutional debate in the Founding Era must recognize that speech was governed by rhetorical conventions and political agendas, not cooperative principles.⁶⁸ The goal was not the mutual sharing of information, but persuasion and strategic advantage. The debates in the various state ratification conventions, and the essays that filled the popular press, were rarely truthful, seldom concise, and often rambled.⁶⁹ Thus, ratification does not meet the basic requirements of Grice’s theory.

Moreover, ratification was rife with so-called “sneaky intentions,” a type of speech that pervades political discourse. Sneaky intentions are not animated by the goal of communication, but by the goal of persuasion and oftentimes manipulation or deception.⁷⁰ Sneaky intentions posed such a serious problem for Grice’s model that he categorically excluded them from his theory.⁷¹ Thus Solum and Barnett’s model applies Gricean theory to a type of speech that the distinguished philosopher argued was not covered by his model. By failing to understand Grice’s theory and its place in the history of philosophy, Solum and Barnett have chosen an approach ill-suited to understanding Founding Era texts.⁷² In short, ratification did not conform to Grice’s maxims, so a theory based on them is a poor guide to discerning

⁶⁶ See Hill, *supra* note 64, at 609.

⁶⁷ See Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821, 831 (2019).

⁶⁸ On the notion that law is guided by strategic, not communicative goals, see Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHIL. FOUND. LANGUAGE L. 1, 10–14 (Andrei Marmor & Scott Soames, eds., 2011).

⁶⁹ For a useful overview of the dynamics of ratification, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at ix (2011).

⁷⁰ On Grice and the problem of sneaky intentions, see Peter Pagin & Neri Marsili, *Assertion*, STAN. ENCYC. PHIL. (2021), <https://plato.stanford.edu/archives/win2021/entries/assertion/> [<https://perma.cc/5GMP-SCME>]; PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 302–03 (1989).

⁷¹ See generally GRICE, *supra* note 70.

⁷² On the history of philosophy as a distinctive subgenre in the history of ideas, see Rorty, *supra* note 61. For an exemplary illustration of this method in practice, see Bruce Kuklick, *Studying the History of American Philosophy*, 18 TRANSACTIONS CHARLES S. PEIRCE SOC’Y 18, 29–30 (1982).

what those texts meant to Americans in 1788. This is law office philosophy and linguistics at its worst.

Indeed, one need only note the warning issued by Publius in *Federalist* No. 1 to see the problems with applying a Gricean framework to ratification. Publius cautioned, “The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favorable to the discovery of truth.”⁷³ Founding Era readers and listeners approached constitutional debate with a level of sophistication missing from recent originalist scholarship. Contrary to the claims of originalists, Americans from all walks of life were drawn into the conversation over the new Constitution.⁷⁴ In taverns, coffee houses, and in the vibrant press of the early republic, Americans eagerly read about the Constitution and formed their own opinions of its merits and defects. Recovering the way actual Americans read the Constitution suggests that most readers applied their own “hermeneutics of suspicion” when reading the Constitution.⁷⁵ Understanding Founding Era constitutional communication requires understanding the rhetoric of ratification and strategies of persuasion that Americans used in public discourse in 1788.⁷⁶ Any such inquiry must focus on actual readers, not imagined readers, if it is to avoid anachronism, confirmation bias, and a host of other interpretive problems.

IV. ORIGINAL METHODS ORIGINALISM: METAPHORS IN PLACE OF METHODOLOGY

John McGinnis and Michael Rappaport argue that the Constitution was written in something they call “the language of law.”⁷⁷ Interpreting a text written in the language of law, they argue, requires linguistic competency in that language.⁷⁸ Of course, describing law as a language is hard to square with the way linguists use this term.⁷⁹ Upon closer examination their implausible claim appears to rest on little

⁷³ THE FEDERALIST NO. 1 (Alexander Hamilton).

⁷⁴ See *Convention Debates*, 25 January, A.M., 6 RATIFICATION BY THE STATES: MASS., NO. 3, reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION (Kaminski et al. eds., 2009) [hereinafter DHRC].

⁷⁵ On Founding Era readers’ “hermeneutics of suspicion” and the existence of different patterns of reading during ratification, see Cornell, *supra* note 67, at 837.

⁷⁶ See *id.*

⁷⁷ See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325–29 (2018).

⁷⁸ See *id.*

⁷⁹ See AN INTRODUCTION TO LANGUAGE AND LINGUISTICS, *supra* note 7, at 9 (“A precise definition of language is not easy to provide, because the language phenomenon is complex. . . . [W]e might define language as *a finite system of elements and principles that make it possible for speakers to construct sentences to do particular communicative jobs.*” (emphasis added)). Clearly, law is not a language in any meaningful sense in which linguists might use the term. The language of the law is a metaphor, not an analytical construct.

more than the fact that the Constitution uses some legal terms of art, and was written by a body that included many lawyers—it is little more than a poorly chosen metaphor. As a factual matter, the Constitution was not written in a distinct legal language, something akin to the Norman French that English elites had used centuries before in courts and legal documents. The Constitution was written in eighteenth-century English and employed some legal terms of art.⁸⁰

Interestingly, McGinnis and Rappaport’s approach was rejected by Justice Scalia in *District of Columbia v. Heller*.⁸¹ Scalia insisted that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. . . . [and] excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”⁸² If the Constitution were written in a language that most Americans did not speak, it would contradict McGinnis and Rappaport’s repeated claims that the Constitution rests on a democratic supermajority foundation, but they seem unaware that their support for *Heller* and their own views about originalism rest on theoretical claims that are contradictory and incompatible with one another.⁸³

During ratification, Americans discussed the various provisions of the Constitution in some detail. These discussions do not support the claim that the Constitution was written in the language of law, but decisively cut against that claim;⁸⁴ in seeking to vindicate their language of law argument, they give short shrift to popular constitutionalism. Charges that the Constitution was an elitist document, a criticism suffused with plebeian resentments, were repeated in both the state ratification conventions and popular press. Screeds against “well-born” aristocrats attempting to foist the Constitution onto the people were frequently made by proponents of popular constitutionalism. These attacks singled out the way these elites couched their support for the Constitution in a rhetoric that hid its true purpose and were designed to lull people into a false sense of security that the new government posed

⁸⁰ See Sir John Baker, *The Three Languages of the Common Law*, in 1 COLLECTED PAPERS ON ENGLISH LEGAL HISTORY 515, 516–18 (2013); Serge Lusignan, *French Language in Contact with English: Social Context and Linguistic Change (Mid-13th–14th Centuries)*, in LANGUAGE AND CULTURE IN MEDIEVAL BRITAIN 19, 29–30 (Jocelyn Wogan-Browne et al. eds., 2009); J.H. BAKER, *MANUAL OF LAW FRENCH* (2d ed. 1990).

⁸¹ See *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008).

⁸² *Id.*

⁸³ The language of law thesis is incompatible with McGinnis and Rappaport’s other claim that the Constitution rests on consent and that it is firmly rooted in supermajority support. For the most elaborate statement of their thesis, see John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695–96 (2013).

⁸⁴ Compare McGinnis and Rappaport’s discussion of Brutus in *Language of Law*, *supra* note 77, with the discussion in Saul Cornell, *The People’s Constitution vs. The Lawyers’ Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 311–20 (2011).

no threat to liberty and had sufficient safeguards against tyranny.⁸⁵ But, these populist critiques of Federalist elitism did not posit that the Constitution was written in a “language of law.” Consider the lively debate in the Massachusetts Ratifying Convention between Anti-Federalist Amos Singletary and Federalist Jonathan Smith. Singletary did not claim that the Constitution was written in a distinctive language of law, and his ire and suspicions were directed at more than lawyers; his indictment extended to the clergy and economic elites supporting the Constitution, groups he believed sought to lord it over common folk and create a government that favored the interests of the wealthy and learned classes. His plebeian populism was far more than a critique of lawyers.⁸⁶

These lawyers, and men of learning, and monied men, that talk so finely and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this Constitution and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great Leviathan, Mr. President, yes, just as the whale swallowed up Jonah.⁸⁷

Singletary’s denunciation of the Constitution did not go unanswered in the state convention, a body that included some of the Commonwealth’s most distinguished lawyers, including William Cushing, Theophilus Parsons, and Theodore Sedgwick, individuals who went on to illustrious careers as jurists.⁸⁸ The most effective rebuttal of Singletary’s attack was not penned by one of these learned jurists, rather it was delivered by Jonathan Smith, a local militia officer, farmer, and a Federalist member of the state ratification convention from western Massachusetts.⁸⁹ Smith described himself as “a plain man” who got his “living by the plough” and was “not used to speaking in public.”⁹⁰ In a folksy plain style, Smith addressed the other “plough-joggers” in the convention.⁹¹ He described his own informal legal education and

⁸⁵ See generally SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999).

⁸⁶ See *id.*

⁸⁷ See DHRC, *supra* note 74, at 1345–46.

⁸⁸ Curiously, McGinnis and Rappaport only cite two texts in linguistics to support their language of law thesis and both are over fifty years old, see DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 290 (1963); *PHILOSOPHY AND ORDINARY LANGUAGE*, at vii–viii (Charles E. Caton ed., 1963). Both texts predated the development of the ethnography of speaking, the foundational paradigm in modern linguistic anthropology, on this movement see Dell Hymes, *Introduction: Toward Ethnographies of Communication*, 66 *AM. ANTHROPOLOGIST* 1, 1–3 (1964).

⁸⁹ See DHRC, *supra* note 74, at 1344.

⁹⁰ See *id.* at 1346.

⁹¹ See *id.*

how it shaped his thinking about the Constitution.⁹² Contrary to McGinnis and Rappaport's claims about the Constitution being written in the language of law, Smith had little trouble reading the text. Nor did he believe understanding it required any special legal skill. "When I saw this Constitution," he informed his fellow delegates, "I got a copy of it and read it over and over."⁹³

McGinnis and Rappaport share a common failing among originalists: they assume Founding Era legal culture was much like modern law. Yet, in contrast to modern America, there was no sharp line separating lawyers from the ordinary reading public in 1788—legal knowledge existed along a continuum.⁹⁴ At one end of this spectrum stood the legal elite, often university-educated, and these lawyers, men like Theophilus Parsons, were steeped in a world of books.⁹⁵ Such figures often owned an impressive collection of legal texts that they consulted and often copied into their commonplace books.⁹⁶ At the other end were men like Jonathan Smith, a yeoman with access to a vibrant public sphere of political debate and growing world of print culture.⁹⁷ Although there has been a good deal of scholarship on the plebeian face of Anti-Federalism, far less attention has been devoted to the plebeian face of Publius: popular Federalist constitutionalism.⁹⁸ Smith's ratification speech offers one tantalizing glimpse into this world.⁹⁹

I had been a member of the Convention to form our own state Constitution, and had learnt something of the checks and balances of power, and I found them all here. I did not go to any lawyer, to ask his opinion, we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution.¹⁰⁰

Contrary to McGinnis and Rappaport's spurious claims, Smith, an actual eighteenth-century reader of the Constitution, believed that formal legal training was

⁹² See *id.* at 1346–48.

⁹³ See *id.* at 1346–47.

⁹⁴ See *id.*

⁹⁵ See generally THOMAS JEFFERSON, JEFFERSON'S LEGAL COMMONPLACE BOOK (David Thomas König & Michael P. Zuckert eds., 2019). On the importance of commonplacing as a mode of mastering the intricacies of the law, see Letter from Thomas Jefferson to Thomas Jefferson Randolph (Dec. 7, 1808), in THE FAMILY LETTERS OF THOMAS JEFFERSON 368, 368–69 (Edwin Morris Betts & James Adams Bear, Jr., eds., 1966); M.H. HOEFELICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 22 (2010) (describing the "bookishness" of the Massachusetts legal elite, including Parsons).

⁹⁶ See JEFFERSON, *supra* note 95 and accompanying text.

⁹⁷ See Cornell, *supra* note 84, at 317–19.

⁹⁸ *Id.*

⁹⁹ See DHRC, *supra* note 74, at 1346.

¹⁰⁰ See *id.* at 1346–47.

unnecessary to understand its text.¹⁰¹ Nor does his speech offer much support for the proposition that the Constitution was written in a “language of law” beyond the comprehension of ordinary Americans. Smith did not defer to the lawyers in the convention; nor did he feel the need to consult with any lawyers to help him understand its language. His view of law was gained from his own reading habits and participation in lawmaking activities in the post-Revolutionary era. In short, the language of law thesis rests on nothing more than a poorly chosen metaphor. It silences and erases the voices of countless Americans. This claim is particularly ironic given that McGinnis and Rappaport ground the Constitution’s legitimacy in its supermajority democratic origins.¹⁰²

Another feature of the language of law thesis that presents a different, but no less troubling, scholarly error: a failure to grapple with interpretive pluralism at the Founding in a serious and sustained way. There was no agreement on how legal texts ought to be read at this moment in American history.¹⁰³ Different types of legal texts were governed by different rules of interpretation.¹⁰⁴ Nor was there a widely shared view of what distinguished a written constitution from other types of legal documents.¹⁰⁵ As Jonathan Gienapp’s work establishes, there was no consensus on what type of text the new Constitution was, a fact that meant that there were multiple modes of constitutional interpretation vying for support among different groups in the Founding Era.¹⁰⁶ In short, the Founding Era was distinguished by its interpretive pluralism, not interpretive consensus.¹⁰⁷

The solution to the problem of Founding Era interpretive pluralism proposed by McGinnis and Rappaport is something they call the “51–49 rule.”¹⁰⁸ According to

¹⁰¹ See *id.*

¹⁰² This version of originalism is guilty of succumbing to the “enormous condescension of posterity,” a pernicious and ahistorical bias that the great English historian E.P. Thompson warned against. E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 12 (1964). For discussion of the importance of Thompson’s influence on legal history, see Robert W. Gordon, *E.P. Thompson’s Legacies*, 82 GEO. L.J. 2005, 2010–11 (1994).

¹⁰³ See BALKIN, *supra* note 2, at 124–25; Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 912–13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 558 (2003); see also Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 2–3 (2020).

¹⁰⁴ See BALKIN, *supra* note 2, at 125.

¹⁰⁵ See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 5–8 (2018).

¹⁰⁶ BALKIN, *supra* note 2, at 123–25; GIENAPP, *supra* note 105, at 7–8.

¹⁰⁷ BALKIN, *supra* note 2, at 123–25.

¹⁰⁸ See John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 923 (2021); McGinnis & Rappaport, *supra* note 83, at 1702–03; see also BALKIN, *supra* note 2, at 123. Solum sets a higher bar in his suggestion that 75–95% agreement is sufficient for the purposes of establishing original public meaning, but this statistic is also conjured out of thin air, Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2022 (2021).

this rule, one need only prove that 51% of the relevant population of Americans at the time of the Founding read a legal text in a particular way to establish its original meaning. Calculating percentages requires a data set, an acceptable statistical method, and deductions based on the data.¹⁰⁹ Given that McGinnis and Rappaport have never explained their method, published their data, or offered an account of how they determined what most Americans believed in 1788, the “51–49 rule” is itself really more a metaphor than a metric.¹¹⁰

Balkin’s evaluation of their pseudo-empirical approach is worth quoting in detail:

There are good reasons to think that their “descriptive” theory of original meaning has little to do with historical accuracy. First, there was no general agreement in 1787 that lawyers’ views rather than the views of the general public determined the meaning of the new Constitution. In any case, what it meant to be trained as a lawyer in 1787 was quite different from what it means to be trained as a lawyer today. People did not go to graduate schools of law, and many picked up their legal training haphazardly or through apprenticeships. Second, there was no consensus about what legal methods people should use to interpret the new Constitution. Third, there is little reason to believe that lawyers would have reached consensus on how to read the new Constitution, judging from the constant disputes between lawyers about virtually every important question that arose both before and after ratification. For example, among those with legal training, interpretive controversies immediately broke out.¹¹¹

There was no language of law in 1788 and the “51%” figure is just a made-up statistic that has no foundation in the historical record.¹¹² Taken together, original methods originalism is no method at all, but merely a series of vague metaphors masquerading as a methodology.

Setting aside the methodological problems with this rule, it is not clear that the rule accords with Founding Era theories of judicial review. Consider James Iredell’s observation about the need for judicial modesty when exercising judicial review.

¹⁰⁹ See KONRAD H. JARAUSCH & KENNETH A. HARDY, *QUANTITATIVE METHODS FOR HISTORIANS: A GUIDE TO RESEARCH, DATA, AND STATISTICS* 1–11 (1991) (writing that citing a statistic to a non-existent data set would likely constitute scholarly misconduct in almost any field of scholarly inquiry).

¹¹⁰ This rule is a textbook example of a fallacy identified by historian David Hackett Fischer. See DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 90 (1970) (“Many ideational and emotional problems, which lie at the heart of historical problems, cannot be understood in quantitative terms.”).

¹¹¹ BALKIN, *supra* note 2, at 125 (footnotes omitted).

¹¹² See DARRELL HUFF, *HOW TO LIE WITH STATISTICS* 7–9 (1954).

Iredell's method was not something akin to a "51–49 rule." Far from it, Iredell's judicial minimalism and highly deferential view of judges' role is almost the polar opposite of McGinnis and Rappaport's made-up modern rule. To prompt judicial action, something had to be "unconstitutional beyond dispute before it is pronounced such."¹¹³ The "51–49 rule," even if it could be turned into a real method, would still be inconsistent with Founding Era views of judicial review which required a far higher bar than "51%".¹¹⁴

V. ORIGINAL LAW ORIGINALISM: ONE STEP FORWARD, TWO STEPS BACK

The latest and most sophisticated variant of originalism, original law originalism, casts aside the simplistic linguistic assumptions at the core of public meaning originalism and original methods originalism.¹¹⁵ Rather than turn to a distorted version of linguistics or a poorly framed metaphor about law as language, this variant, championed by William Baude and Stephen Sachs, is grounded in the positivistic theories of law of H.L.A. Hart.¹¹⁶ Their search for the original legal meaning of the text is guided by their belief that a clear rule of recognition was established at the Founding. Because these were legal rules, lawyers, not historians, are best equipped to discern them. By abandoning law office philosophy and linguistics, and returning to law office law, their alternative model is a welcome development in originalist theory.¹¹⁷ The problem with this otherwise positive development, as Balkin notes, is that Baude and Sachs continue to approach modern law and Founding Era law as if there was broad agreement on how constitutional texts were to be interpreted.¹¹⁸ Moreover, both scholars mistakenly assume a strong continuity between Founding

¹¹³ 3 THE PAPERS OF JAMES IREDELL 310 (Donna Kelly & Lang Baradell eds., 2003); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., dissenting).

¹¹⁴ For a good summary of how Founding Era judges approached judicial review, see Campbell, *supra* note 3. In his essay on the duty of clarity, McGinnis discusses Iredell's views but he does not explore the tension between Iredell and his "51–49 rule." John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843 (2016).

¹¹⁵ See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354–64 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 828–29 (2015). For a critique of their Hartian model, see GIENAPP, *supra* note 3, at 227–28.

¹¹⁶ See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

¹¹⁷ For a much more sophisticated critique of the simplistic linguistic turn in originalism from a rigorous philosophical point of view, see Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUD. PHIL. L. 39, 39–40 (Leslie Green & Brian Leiter eds., 2011); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1296–99 (2014); Greenberg, *supra* note 63, at 223–24. For Greenberg's critique of Baude and Sachs's approach to legal meaning, see Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 117–18 (2017).

¹¹⁸ BALKIN, *supra* at note 2, at 252–53.

Era law and modern law, a move that leads them to erroneously claim that interpreting eighteenth-century legal texts is simply ordinary lawyer's work that anyone who has attended a modern law school can undertake with the tools gleaned from an ordinary legal education and practice.¹¹⁹ Both assumptions are false.

Dissensus, not consensus, marked Founding Era constitutionalism, and the tensions and disagreements over how to understand legal texts did not disappear in the ensuing decades after the adoption of the Constitution.¹²⁰ Moreover, making sense of eighteenth-century legal texts is not something that most modern lawyers are well qualified to do given the profound changes that have transformed the law in the centuries separating us from the Founding Era. Finally, comparing constitutional interpretation to deciphering an old will or deed, a claim central to Baude and Sachs's argument, ignores the unique problems posed by making sense of the Constitution which was a novel type of legal document, not a legal instrument whose rules of interpretation were well established.¹²¹ Making sense of a Founding Era will, or statute, poses different challenges than interpreting Founding Era constitutions, a distinction that Baude and Sachs gloss over.¹²²

Rather than demonstrate the existence of continuity between Founding Era law and modern law, Baude and Sachs simply assume this to be an incontrovertible fact about law. Originalism is our law because it just is. Despite a steady stream of articles purporting to demonstrate the truth of this proposition, nothing in their writing demonstrates that an unbroken and uncontested line connects our vision of law with that of the Founders.¹²³ Doing so would require a detailed survey of American legal history, a project that neither Baude nor Sachs has undertaken. As both Balkin's and Gienapp's work makes clear, only by ignoring much of the relevant history could their thesis be propounded. In short, Baude and Sachs are just playing another memory game, selectively culling evidence to support their modern Federalist Society compliant ideology.¹²⁴

The continuity posited by Baude and Sachs is difficult to reconcile with historical reality. In fact, American jurists, lawyers, and legislatures have vehemently disagreed over what the content of law has been from the moment the Constitution

¹¹⁹ William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019).

¹²⁰ AN INTRODUCTION TO LANGUAGE AND LINGUISTICS, *supra* note 7, at 1–3.

¹²¹ GIENAPP, *supra* note 3, at 7–8.

¹²² For a useful summary of the rules of statutory construction employed in early America, see ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 11 (1822). For a discussion of the evolution of the history of statutory interpretation, see WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 151–53 (1999).

¹²³ See BALKIN, *supra* note 2, at 234–35.

¹²⁴ BALKIN, *supra* note 2; GIENAPP, *supra* note 105, at 18–19. On the role of the Federalist Society in modern right wing legal theory and politics, see Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698 (2018).

was first published in the Philadelphia press in 1787.¹²⁵ Nor did ratification end this process of contestation. Indeed, rather than inaugurate an era of consensus the adoption of the Constitution set in motion a process of contestation that led to Civil War, not constitutional harmony.¹²⁶

Baude and Sachs's thesis shares with other variants of originalism a reliance on an outmoded version of consensus history that serious scholars of the Founding Era abandoned long ago.¹²⁷ Moreover, the assertion that originalism is our law ignores or dismisses the voices of non-elites, constitutional outsiders, and anyone who does not fit within their mythical consensus.¹²⁸ Dismissing popular constitutionalism poses more serious problems than Baude and Sachs acknowledge.¹²⁹ Rather than demonstrate that the Founding Era law was the province of a small elite, they simply assume that most Americans were mute bystanders to the great constitutional debates of the Revolutionary era.¹³⁰

The foundation of Baude and Sachs's originalism is their historically dubious notion that there was a clear legal rule of recognition in place in the Founding Era. In essence, their theory rests on an intellectual sleight of hand where a contemporary originalist ideology congenial to those on the political right, not eighteenth-century

¹²⁵ To gain some sense of the range of conflicts, one need only peruse the contributions to the three-volume *CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher Tomlins eds., 2008). The account of American constitutionalism in this account teems with tension and conflict. *Id.*

¹²⁶ *Id.*

¹²⁷ See BALKIN, *supra* note 2, at 252–53.

¹²⁸ For a summary of the scholarship on interpretive pluralism in the Founding Era, see BALKIN, *supra* note 2, at 3–8. There are additional problems with Baude and Sachs's claim that originalism is our law, including the absence of a consensus among contemporary jurists that this is true. See Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 HARV. L. REV. F. 133, 152 (2022) (“The claim that *current* judicial practice mandates or establishes original-law originalism is hard to square with the apparent judicial dissensus on constitutional fundamentals.”). Although history has always been important in constitutional interpretation, the claim that originalism has always been our law is little more than a mantra, with no grounding in historical fact. *Id.* Despite frequently intoning this mantra, Baude and Sachs have never demonstrated with sufficient empirical evidence that such a view dominated American law at any time in the early Republic. *Id.*

¹²⁹ For a trenchant critique of their application of Hartian positivism and their dismissal of popular constitutionalism, see Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017).

¹³⁰ AN INTRODUCTION TO LANGUAGE AND LINGUISTICS, *supra* note 7. In this sense, Baude and Sachs are not recovering the past but erasing much of it and creating the Federalist Society vision of the Founding Era. This is not an exercise in historical recovery, but in creating historical memory, one fashioned in decidedly anti-democratic terms. For a powerful critique of this approach to the past, see Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180–93 (2023).

law, determines the rule of recognition attributed to the Founding Era.¹³¹ Even if one accepted their elitist assumptions and restricted the scope of one's inquiry to lawyers in 1788, there was no agreed-upon methodology for reading constitutional texts.¹³² Once again, this is a modern ideological claim difficult to square with the last century of historical writing on American constitutional history. Had they grappled with that body of scholarship, it would have been impossible to advance their outdated consensus history version of the past.¹³³

The intellectual sleight of hand at the core of their argument is evident in a passing observation they make to fend off historical critique, a concession that ultimately dooms their argument. They note, "[T]oday's lawyers are fully capable of rendering an opinion on which side of a Founding Era dispute had the better claim."¹³⁴ Undoubtedly, most lawyers and judges do believe they are eminently capable of deciding which Founding Era argument should prevail in modern cases, but there is nothing originalist about modern lawyers picking and choosing which Founding vision they prefer and proclaiming it the original meaning of the Constitution. This is a normative exercise steeped in modern values, not Founding Era facts. Thus, it turns out that their version of originalism is just another modern fiction invented by lawyers to advance their agendas, not a verifiable truth claim about the past.¹³⁵ Their version of originalism was debunked by Larry Kramer almost two decades ago. As Kramer noted,

[I]nsofar as there were, at the time, two or more plausible positions on the correct original public meaning of a provision of the Constitution, all one does in embracing one of them today is to take sides in a historical dispute that was not resolved at the time of the Founding, and so is not resolvable on originalist terms today. Originalism claims to be grounded on a theory of positive law, but it actually has no more objective grounding or authority than what Ronald Dworkin does when he applies moral theory to interpret the same provisions.¹³⁶

Baude and Sachs's turn away from law office linguistics and philosophy back to law is a welcome development, but it stops short of recognizing that originalism does not resolve constitutional questions so much as shift the fight to an imaginary

¹³¹ BALKIN, *supra* note 2, at 3–8.

¹³² GIENAPP, *supra* note 105, at 3–4.

¹³³ Kammen, *supra* note 10; *see also* Higham, *supra* note 10.

¹³⁴ Baude & Sachs, *supra* note 119, at 818–19.

¹³⁵ BALKIN, *supra* note 2, at 3–8.

¹³⁶ Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 115–27 (Amy Gutmann et al. eds., 1997); Kramer, *supra* note 103, at 911; BALKIN, *supra* note 2, at 3–8.

eighteenth-century battlefield created by originalists in accordance with their modern values and prejudices. The Founding Era world they have conjured is an anachronism, a fictional construct, an act of historical construction, not reconstruction.¹³⁷ Rather than liberate themselves from the problem of law office history, their effort to buttress the legal Maginot Line against historical critique suffers from the same ahistorical problems as public meaning originalism and original methods originalism.

VI. ORIGINALISM: AN IDIOTIC THEORY OF CONSTITUTIONAL LAW

Originalism turns the vast majority of Founding Era Americans into little more than “idiots.”¹³⁸ Ordinary Americans were not passive bystanders to ratification.¹³⁹ Consider the case of Thomas Bourn, a delegate to the Massachusetts Ratifying Convention from the Cape Cod town of Sandwich. When the town proposed binding its delegates with specific voting instructions on ratification, Bourn gave them an ultimatum, threatening to resign and reminding his fellow townsmen that to deprive delegates of their voice would be to literally render them idiots.¹⁴⁰ He wrote, “Under the restrictions with which your delegates are fettered, the greatest idiot [sic] might answer your purpose as well, as the greatest man.”¹⁴¹ Any theory of originalism that turns the vast majority of Americans into “idiots” is inconsistent with the ideas of popular sovereignty at the core of American constitutionalism. It also undermines the frequently voiced originalist claim that lawful change rests on a majoritarian foundation.¹⁴² In this sense Baude and Sachs offer us a version of originalism that would have made ratification impossible. If anyone had voiced their unseemly

¹³⁷ On the genre of law office history, see BALKIN, *supra* note 2, at 252–53.

¹³⁸ The political concept of idiocy, as Hannah Arendt’s classically inflected analysis of politics suggests, treats individuals as voiceless in the public sphere. See HANNAH ARENDT, *THE HUMAN CONDITION* 38 (2d ed. 1998); see also DAVID MILLER, *POLITICAL PHILOSOPHY: A VERY SHORT INTRODUCTION* 40–42 (2003). For a discussion of originalism and the problem of constitutional idiocy, see Cornell, *supra* note 84, at 300–01. In Founding Era English, the term “idiot” not only referred to the legal concept of a person of diminished mental capacity, but it might have also signified an ordinary person without learning, or a private person without a public voice. See OXFORD ENG. DICTIONARY (3d ed. 2010), https://www.oed.com/dictionary/idiot_n?tab=meaning_and_use [<https://perma.cc/9N7H-W2PB>]. In his early dictionary of “hard words,” Edward Phillips notes that idiot “(in Greek) properly signifies a private Man, who has no Publick Office; among the *Latins* it is also taken for an unlearned or unskillful Person.” Edward Phillips, *THE NEW WORLD OF WORDS* (London, 7th ed. 1720). For other contemporaneous usages to the Constitution, see JAMES FORDYCE, 1 *SERMONS TO A YOUNG WOMAN* 178 (Phila., M. Carey 1787); PELATIAH WEBSTER, *POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY* 343 (Phila., Joseph Cruikshank 1791).

¹³⁹ Cornell, *supra* note 87, at 300–01.

¹⁴⁰ See DHRC, *supra* note 74, at 1020.

¹⁴¹ See *id.*

¹⁴² On the centrality of popular constitutionalism to Founding Era law, see generally Cornell, *supra* note 84.

elitism in 1788 and dismissed the people's sanction as the only foundation for supporting the Constitution ratification would have failed. This paradox renders their vision of originalism untenable. But this is hardly the only flaw in Baude and Sachs's ahistorical approach to history.

To move beyond law office history, lawyers and judges still need a coherent and transparent methodology to sum and weight intents. Such an account will need to accurately reconstruct Founding Era reading practices, not assume that Founding Era lawyers were little different than modern lawyers. Picking sides in the Founding Era's debates is not originalism, it is an exercise in historical memory building. Elevating some Founding Era voices over others is inherently a value-laden task and the values are decidedly modern not Founding Era ones.¹⁴³

I think Kramer's framing of originalism, a position consonant with Ronald Dworkin's "semantic originalism" and Balkin's "living originalism" is apposite: the best any serious and intellectually honest originalist theory could ever hope to achieve, assuming any theory could ever escape the problems of confirmation bias and a host of other methodological problems, would be to have us take sides in the Founding Era's own interpretive battles.¹⁴⁴ If originalists focused their attention on this more modest goal, I think most historians would find such a development salutary and long overdue.

¹⁴³ For a survey of the plethora of interpretive and factual errors committed by originalists, see generally GIENAPP, *supra* note 105.

¹⁴⁴ For an interesting critique of Dworkin's semantic originalism, see Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197 (2000). Whittington's intentionalist critique acknowledges that there are empirical challenges to ascertaining intent, but his account does not offer concrete methodological guidance. *Id.* Still, Whittington's approach is consistent with historical critiques of originalism 2.0. His main disagreement with historians appears to be that dealing with the problem of multiple intents has been overstated by historians. *Id.*