

PRESIDENT MADISON'S LIVING CONSTITUTION: FIXATION, LIQUIDATION, AND CONSTITUTIONAL POLITICS IN THE JEFFERSONIAN ERA

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INTRODUCTION

Originalism is experiencing a classic paradigm crisis.¹ In an attempt to stave off a host of challenges, originalists have adapted and amended their theory so many times in recent years that it now seems more like a failed Rube Goldberg mousetrap than a viable constitutional theory.² Although some originalists see this process as a sign of the doctrine's vitality, a more plausible account would recognize that the theory has collapsed under the weight of its many contradictions.³ One of the many ironies associated with originalism's intellectual failure is that its assumptions about language and constitutional meaning are closer in spirit to the anti-Federalists who were defeated in 1788 than the victorious Federalists who actually framed, ratified,

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1. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996). For a discussion of this theory and responses to it, see Alexander Bird, *Thomas Kuhn*, in *STANFORD ENCYC. OF PHIL.* (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/archives/win2018/entries/thomas-kuhn> [<https://perma.cc/83L5-3QAX>].

2. See generally Peter C. Marzio, *Art, Technology and Satire: The Legacy of Rube Goldberg*, 5 *LEONARDO* 315 (1972).

3. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 247–67 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 749–55 (2011); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1796–99 (1997); Martin S. Flaherty, *Foreword: Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 *FORDHAM L. REV.* 905, 907–12 (2015); Stephen M. Griffin, *Rebooting Originalism*, 2008 *U. ILL. L. REV.* 1185, 1186–91; Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *SAN DIEGO L. REV.* 575 (2011); Peter J. Smith, *How Different Are Originalism and Non-originalism?*, 62 *HASTINGS L.J.* 707, 722–24 (2010). For a useful summary of the many empirical historical problems with originalism, see FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* 112–15 (2013).

and dominated politics and the federal courts in the decades after the adoption of the Constitution.⁴ Thus, public meaning originalism, the theory that continues to shape the modern terms of debate, particularly among conservatives, is a loser's theory.⁵ This irony has thus far eluded leading champions of public meaning originalism, who have remained resolutely uninterested in engaging seriously with historical criticism of their theory.⁶ Two of the central tenets of public meaning originalism—the fixation thesis and the constraint thesis—share little with Federalist constitutionalism and are in fact much closer in spirit to anti-Federalist constitutional ideas.⁷ This irony comes into clear focus if one looks at an important but generally underappreciated moment in early constitutional history: President James Madison's repudiation of his earlier opposition to the Bank of the United States.⁸ In this debate, President Madison embraced a theory far closer to living constitutionalism than to originalism.⁹

4. For a critique of originalism focused on its failure to grapple with founding-era assumptions about constitutional meaning, see generally JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018); Saul Cornell, *Constitutional Meaning and Semantic Instability: Federalists and Anti-Federalists on the Nature of Constitutional Language*, 56 AM. J. LEGAL HIST. 21 (2016).

5. Most new originalism has been pressed into the cause of right-wing constitutional theory. See generally Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). Although less common, there are a few examples of progressive uses of originalism. For a notable example, see Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2112 (2019).

6. See Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1155 (2015). Solum badly misconstrues both the philosophical foundations of modern intellectual history and bizarrely claims that the intellectual history critique of originalism sought to substitute history for constitutional theory. *Id.* at 1113–15. In fact, this is almost the mirror image of the intellectual history critique of constitutional theory. The point of the intellectual history critique of originalism was that claims about historical meaning must adhere to accepted standards of proof and argumentation employed by legal historians, not substitute ahistorical meanings rendered by originalist methods. For withering critiques of Solum's misreading of the historical critique of his ahistorical method, see, for example, Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821 (2019); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. ONLAW 29.

7. On fixation and constraint, see generally Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015). For a discussion of the radically different hermeneutic strategies employed by Federalists and anti-Federalists, see Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMANS. 295 (2011).

8. This episode has started to garner more interest among constitutional scholars. See generally Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 MINN. L. REV. 699 (2016); David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 STAN. L. REV. ONLINE 17 (2019).

9. See generally Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

I. MR. MADISON'S MESS: THE WAR OF 1812, CONSTITUTIONAL POLITICS,
AND THE PROBLEM OF LEGAL CHANGE

After nearly a decade in opposition during the 1790s, Republicans celebrated their presidential triumph in the election of 1800 with toasts and songs about “Jefferson and Liberty.”¹⁰ Federalists feared that the new president was a disciple of Thomas Paine’s radical democratic ideas.¹¹ A Jeffersonian presidency, they dreaded, would be a political catastrophe that would undo all their work of the previous decade. President Thomas Jefferson turned out to be a very different person from Vice President Jefferson, the leader of the Republican opposition during the John Adams administration. Rather than mount a full-scale attack on Federalist policy, Jefferson adopted a less confrontational approach. In his presidential inaugural address, he struck a conciliatory tone and reminded Americans: “We are all Republicans, we are all Federalists.”¹²

Jefferson also promised the nation “a wise and frugal government.”¹³ Implementing this, however, proved far more difficult than he had hoped. The opportunity to purchase the Louisiana Territory and double the size of the new nation led him to cast aside his constitutional theory of strict construction to achieve his political goal of creating an expanding yeoman republic.¹⁴ By the end of Jefferson’s second term in 1809, some Americans believed that the president and his Republican allies had become indistinguishable from their Federalist opponents when it came to using federal power to further their goals.¹⁵ The same would prove true for Jefferson’s anointed successor, James Madison, who made additional compromises that left some of his most ardent supporters feeling betrayed.¹⁶

Events in Europe posed several challenges to Jefferson and Madison that neither figure could have anticipated when they led the opposition during the tempestuous 1790s. In 1803, two weeks after selling Louisiana, France again found itself at war with Great Britain.¹⁷ Although Napoleon’s armies dominated the European continent, Britain’s navy commanded the seas and defeated the French fleet at the Battle of Trafalgar in 1805. American

10. GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS CONSTITUTION, 1780s–1830s* (2019).

11. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 50, 105 (2005); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 177–78, 199–200 (2009).

12. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in THOMAS JEFFERSON: *WRITINGS* 492, 493 (Merrill D. Peterson ed., 1984). See also generally JAMES ROGER SHARP, *THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE* (2010); WILENTZ, *supra* note 11; WOOD, *supra* note 11.

13. Jeffrey H. Morrison, *James Madison and Thomas Jefferson: A “Friendship Which Was for Life,”* in *A COMPANION TO JAMES MADISON AND JAMES MONROE* 259, 269 (Stuart Leibiger ed., 2013).

14. JEREMY D. BAILEY, *THOMAS JEFFERSON AND EXECUTIVE POWER* 2, 4–5 (2007).

15. *Id.* at 2.

16. For a sympathetic account of Jefferson’s effort to adapt his political ideals to the presidency, see *id.*

17. LEONARD & CORNELL, *supra* note 10, at 124.

merchants reaped huge profits from trade with both the French and the British in the nascent stages of the European conflict.¹⁸ Accordingly, the United States insisted that neutral nations had a right to carry on nonmilitary trade with both sides in the conflict, but neither Britain nor France honored this idea. The British navy boarded and searched American ships and seized cargoes without providing compensation. Even more galling to Americans was the British practice of impressment—forcing merchant seamen to serve in the British navy. Many American sailors had once served in the British navy but now claimed American citizenship.¹⁹ Great Britain refused to recognize these claims, arguing that the men were deserters still subject to British law. Between 1803 and 1812, the British navy abducted and impressed 6000 Americans.²⁰

Hoping to avoid war with Britain and France, Jefferson proposed a policy of “peaceable coercion.”²¹ The 1807 Embargo Act²² became the cornerstone of this policy. By keeping America’s ships out of harm’s way and depriving Britain and France of the economic benefits of American trade, Jeffersonian policy was designed to force both nations to respect the right of neutral nations to trade on the high seas.²³ The policy was a total failure. Smugglers flouted the ban, and it proved exceedingly unpopular in New England and seaport towns.²⁴ American exports fell from \$108 million in 1807 to \$22 million in 1808.²⁵ To enforce the embargo along the Canadian border, Jefferson had to send in troops, a decision he had decried during the Whiskey Rebellion a decade earlier.²⁶

Federalists in New England, whose political fortunes had been flagging, now regained their voices, rallying against Jefferson and his “Dambargo.”²⁷ Jefferson’s Embargo Act not only divided Republicans but also strengthened the fortunes of the Federalists in many places, particularly New England, where the economic impact of the embargo struck hardest.²⁸ The Federalist presidential candidate in the 1808 election, Charles Pinckney, received three times as many votes as he had in 1804, doing particularly well in New England.²⁹ Despite this strong showing, especially in New England and New

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451.

23. LEONARD & CORNELL, *supra* note 10, at 124.

24. *Id.* at 124–25.

25. *Id.* at 124.

26. *Id.* at 125. See generally J. C. A. STAGG, *THE WAR OF 1812: CONFLICT FOR A CONTINENT* (2012).

27. LEONARD & CORNELL, *supra* note 10, at 125.

28. *Id.*

29. Philip J. Lampi, *The Federalist Party Resurgence, 1808–1816: Evidence from the New Nation Votes Database*, 33 J. EARLY REPUBLIC 255, 259 (2013).

York, Madison defeated Pinckney by 122 to 47 electoral votes to become the fourth president of the United States in 1809.³⁰

Unfortunately for Madison, he had inherited a major foreign policy crisis from Jefferson. The embargo had not forced Britain and France to change their policies. Southern agriculture and New England commerce had suffered and frustration among Madison's supporters was growing.³¹ As prospects for avoiding armed conflict dwindled, many Republicans were swept up by a more belligerent attitude: many believed that war was the only option left.³² Support for this stance was far from universal among Republicans. Militarism revived old fears and rhetoric, especially among the "Old Republicans," who believed that war would precipitate the establishment of a large military, new taxes, and an increased concentration of power in the federal government.³³

Changes in the structure of politics played a major role in the emergence of a pro-war strain of Republicanism. The political center of gravity of Jeffersonian Republicanism had shifted from old colonial centers of power, such as Virginia to the southwest, to new states like Kentucky and Tennessee. Congressmen Henry Clay of Kentucky and John C. Calhoun, an up-country South Carolinian, were the rising stars who spoke for a new breed of Republican politician.³⁴

In addition to championing a military response to Great Britain's actions on the high seas, many Americans viewed the struggle as a way to settle old scores, including recent Irish immigrants, who had felt the oppressive hand of British rule firsthand, and frontier settlers who were angered by British trade with Native Americans, a lucrative commerce that included guns.³⁵ Although the immediate cause of the War of 1812 was British naval policy, the war had the greatest transformative impact along the western frontier. For Republican "War Hawks," expansion into Native American territory, the annexation of Canada, and possible expansion into Florida were driven by a nearly insatiable desire for new lands for expropriation and settlement.³⁶

Unfortunately, America was ill prepared to take on the greatest naval power in the world. Great Britain had created a powerful fiscal-military state that was far better equipped to wage war.³⁷ By contrast, America's military was greatly weakened by Republican demilitarization begun by Jefferson.

30. Aaron N. Coleman, *President James Madison's Domestic Policies, 1809–1817: Jeffersonian Factionalism and the Beginnings of American Nationalism*, in *A COMPANION TO JAMES MADISON AND JAMES MONROE*, *supra* note 13, at 192, 195.

31. See Jasper M. Trautsch, "Mr. Madison's War" or the Dynamic of Early American Nationalism?, 10 *EARLY AM. STUD.* 630, 645–46 (2012).

32. LEONARD & CORNELL, *supra* note 10, at 129.

33. *Id.*

34. *Id.* at 129–30. See also generally J. C. A. STAGG, *MR. MADISON'S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783–1830* (1983).

35. See ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS & INDIAN ALLIES* 6–9 (2011).

36. LEONARD & CORNELL, *supra* note 10, at 130.

37. See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688–1783* (1990).

Even so, led by Clay and Calhoun, the War Hawks agitated for war. Madison too finally accepted that Jefferson's alternative policy of commercial coercion had failed and war was almost inevitable.³⁸ However, the strong opposition of the Anglophilic Federalists and the reluctance of some old-school Republicans to sanction the expansion in federal power necessary to wage war delayed a declaration until June 1812, when Congress voted for war 79 to 49 in the House of Representatives and 19 to 13 in the Senate.³⁹ No one factor explains the voting pattern, but by 1812, many Americans had come to believe that the war was a second chapter in America's struggle for independence, a conflict that was absolutely necessary to bring Britain to heel, break British domination of international trade, and cut off British support for hostile Native American populations along the frontier.⁴⁰

In New England, popular resistance to Republican power bubbled up from below, even as elites formulated a more formal set of responses to a potentially disastrous war.⁴¹ Across Massachusetts, state legislatures received petitions from towns requesting that their state government "interpose," effectively creating a shield that could protect the liberties of citizens from the tyranny of the central government. The current threat now came from Republicans, not from Federalists.⁴² These "memorials" requested a convention of the "northern and commercial states" to address the constitutional issues raised by Republican policy.⁴³ Though a number of these issues had been percolating for a decade, after two years of war, there was talk of more radical steps, such as secession or direct diplomatic engagement with the British.⁴⁴

In response to the petitions, Massachusetts's legislature and its governor threw their weight behind a New England states' convention that would convene in Hartford, Connecticut.⁴⁵ However, not all states sent full delegations, and the Federalists who did travel to Hartford were dominated by moderate voices, not the firebrands of secession.⁴⁶ Rather than follow a

38. LEONARD & CORNELL, *supra* note 10, at 130; *see also* TAYLOR, *supra* note 35.

39. LEONARD & CORNELL, *supra* note 10, at 130.

40. *Id.*; *see also* David J. Siemers, *President James Madison and Foreign Affairs, 1809–1817: Years of Principle and Peril*, in *A COMPANION TO JAMES MADISON AND JAMES MONROE*, *supra* note 13, at 208, 216.

41. *See generally* Joshua M. Smith, *Murder on Isle Au Haut: Violence and Jefferson's Embargo in Coastal Maine, 1807–1809*, *ME. HIST.*, Spring 2000, at 17.

42. LEONARD & CORNELL, *supra* note 10, at 132.

43. *Id.* (quoting Letter from Joseph Lyman to Several Gentlemen (Jan. 5, 1814), in *NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY, AND MORAL SUBJECTS* 312, 314 (New York, Webster & Clark 1843)); *see also* Thomas Jefferson, A Proclamation (Apr. 19, 1808), in *1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT* 438, 439 (New York, Bureau of Nat'l Literature 1897); Letter from Thomas Jefferson to Daniel D. Tompkins (Aug. 15, 1808), in *12 THE WRITINGS OF THOMAS JEFFERSON* 131, 132 (Albert Ellery Bergh ed., 1907).

44. LEONARD & CORNELL, *supra* note 10, at 132. For the standard account, *see* JAMES M. BANNER, *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789–1815* (1970).

45. LEONARD & CORNELL, *supra* note 10, at 132.

46. *Id.*

radical states' rights agenda, the Hartford Convention adopted a platform of more moderate constitutional reforms, including seven proposed amendments that squarely targeted Republican power.⁴⁷

The first proposal aimed to weaken Southern influence in Congress by revoking the three-fifths compromise, a change that would cut back Republican power by depriving them of a significant portion of their southern electoral base.⁴⁸ The second proposed amendment attacked the Louisiana Purchase and its support for the spread of slavery. Rather than a simple majority, to admit new states, future acquisitions of land would require a supermajority.⁴⁹ The Federalists sought to constitutionalize their criticism of the embargo, requiring any future embargo lasting longer than sixty days to attain a similar supermajority.⁵⁰ Moreover, in a not very subtle rebuke of Albert Gallatin, a leading Jeffersonian, the Hartford Convention proposed that naturalized immigrants no longer be permitted to hold civil office or serve in Congress.⁵¹ Presidents would be limited to a single term. Finally, a proposal aimed to prevent a future "Virginia dynasty" from dominating the presidency would prohibit presidents from the same state following one another consecutively.⁵²

This list of proposals was transmitted to the states so they could commence the formal amendment process.⁵³ Initially, the timing seemed propitious, coming at the end of a dispiriting, two-year military stalemate that included the burning of the president's residence (a humiliation that also included British troops' ransacking the mansion and feasting on an elegant dinner that had been prepared for President Madison and his wife, Dolly).⁵⁴ Federalists might have had good reason to think America would be receptive to the Hartford Convention's statements of grievances and reforms when they were formulated.⁵⁵ However, by the time the proposals were published, a peace treaty ending the war had been signed in Ghent, Belgium.⁵⁶ Even more disastrous for the hopes of a Federalist revival, though, was the news of a stunning victory by Andrew Jackson and his troops at the Battle of New Orleans on January 8, 1815.⁵⁷ Although the Treaty of Ghent had already been signed, Jackson's impressive victory over the British was a cause for national celebration.⁵⁸ Indeed, Jackson would ride "The Glorious 8th of January" to a political career that symbolized, if it did not embody, the triumph of a racialized vision of democratic constitutionalism over the

47. *Id.*

48. *Id.*; see also Alison L. LaCroix, *A Singular and Awkward War: The Transatlantic Context of the Hartford Convention*, 6 *AM. NINETEENTH CENTURY HIST.* 3, 22 (2005).

49. LEONARD & CORNELL, *supra* note 10, at 132.

50. *Id.* at 132–33.

51. *Id.* at 133.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

Federalists' hierarchical, but in some respects more inclusive, form of constitutionalism.⁵⁹ The vision of the Hartford Convention and the New England Federalists were dashed, at least as a force in national politics.⁶⁰

The War of 1812 forced a major realignment in American politics. The war marked the end of Federalist hope for political revival at the national level. Federalists, particularly in New England, suffered significant setbacks because of their anti-war stance and anti-nationalism. Still, there were some notable local successes by Federalists that revealed the remarkable resiliency of their ideology in many parts of the nation. Federalist newspaper editors and local politicians continued to challenge the Madison administration, despite the weakness of their party's efforts on the national scene.⁶¹

Even more troubling to Madison's agenda was the fracturing of his Republican coalition. The Old Republican animus toward Madison persisted, but the War of 1812 spurred younger Republicans to drift in a neo-Federalist direction, especially on matters of political economy and military policy.⁶² Rejecting Alexander Hamilton's vision of a powerful fiscal military state modeled on Great Britain was one thing, but the War Hawks recognized that it was vital to create a Republican alternative.⁶³ Traditional Republican hostility to institutions like a standing army, a national bank, and a national system of internal improvements had hampered the war effort and left the nation vulnerable. Dogmatic adherence to strict construction and skepticism of federal power gave way to a more pragmatic view of the Constitution for politicians such as Clay and Calhoun.⁶⁴

Although at first glance it might seem that the pressures of war led Federalists and Republicans to reverse roles on questions of federal power, this claim obscures far more than it illuminates. The postures Republicans and Federalists adopted in response to the challenges of the War of 1812 were predictable given the structures created by the federal system.⁶⁵ The defenses of states' rights were never exclusively the province of Republicans any more than defenses of federal power were the exclusive preserve of Federalists.⁶⁶ In 1788, the most nationalist-minded Federalists were forced to adapt their arguments to anti-Federalist critiques, acknowledging a limited commitment to states' rights, at least within the sphere of powers clearly reserved to the states by the Constitution.⁶⁷ Madison was no exception to this process of

59. *Id.*

60. See Lampi, *supra* note 29, at 275.

61. See generally Andrew W. Robertson, *Afterword, Reconceptualizing Jeffersonian Democracy*, 33 J. EARLY REPUBLIC 317 (2013).

62. See LEONARD & CORNELL, *supra* note 10, at 129–33.

63. *Id.*

64. For an important collection of essays reevaluating the Jeffersonian period, see JEFFERSONIANS IN POWER: THE RHETORIC OF OPPOSITION MEETS THE REALITIES OF GOVERNING (Joanne B. Freeman & Johann N. Neem eds., 2019).

65. LEONARD & CORNELL, *supra* note 10, at 134.

66. *Id.*

67. *Id.*

accommodation and adaptation.⁶⁸ One of the most dramatic examples of how Madison's thought evolved during the debate over ratification may be found in his engagement with anti-Federalist critiques of consolidation and the structural safeguards created by the Constitution to limit potential federal tyranny. *Federalist No. 46* contemplated the unthinkable: a nightmare scenario in which the individual states might need to call on their militias to protect themselves from federal overreach.⁶⁹ It is unlikely Madison would have felt compelled to lay out this doomsday option at the outset of ratification were it not for persistent anti-Federalist attacks. To fend off the exaggerated rhetoric and attacks of anti-Federalists, Madison was led to offer concrete assurances that the new federal government would never bring about the dreaded "consolidation" that so many anti-Federalists warned was inevitable.⁷⁰

Madison's frank recognition of the reality that the state militias might serve as the ultimate check on federal power, something that is difficult to comprehend in our modern post-Civil War vision of federalism, is a useful reminder of the historical chasm that separates modern constitutional law from the founding era.⁷¹

Making sense of Madison's evolving constitutional thought has posed a host of interpretive problems for scholars.⁷² In comparison to Hamilton's radical nationalist and statist notions, Madison's federalism was conceptualized in dynamic, not static terms.⁷³ Achieving the correct balance between the centripetal and centrifugal forces in American politics at any particular moment in time required adjustments and accommodations of the facts on the ground as well as the actions of multiple constitutional actors.⁷⁴ More importantly, throughout his public life, Madison wrestled with the more fundamental question: how to preserve his constitutional ideals in the face of the crises and challenges posed by changing circumstances. Modern scholars have spilled a good deal of ink debating the so-called "Madison Problem"—the degree to which Madison's constitutional ideas and commitments shifted over time.⁷⁵ One possible solution to this conundrum

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

69. *THE FEDERALIST NO. 46* (James Madison) (E. H. Scott ed., Chicago, Scott, Foresman & Co. 1898).

70. *Id.*

71. See Gienapp, *supra* note 6, at 942–43.

72. See generally Alan Gibson, *The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research*, 64 *REV. POL.* 311 (2002); David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 *FORDHAM L. REV.* 2033, 2046 (2021).

73. LEONARD & CORNELL, *supra* note 10, at 134.

74. *Id.*

75. See generally MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015); GREG WEINER, *MADISON'S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS* (2012); GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006); Peter S. Onuf, *The "Madison Problem" Revisited*, 28 *LAW & HIST. REV.* 515 (2010). The most dramatic illustration of this aspect of Madison's thought was his shifting views of the meaning

is to recognize that Madison had always accepted that the realities of constitutional politics would often force periodic reconsiderations of his constitutional theory. In short, Madison's vision of constitutional laws was always attuned to the necessity of change in response to new challenges. In modern constitutional law, it is common to think of law limiting and framing politics. In the founding era, the reverse was true. Politics set the parameters of constitutional change.⁷⁶

The War of 1812 tested Madison's constitutional views and commitments on many issues that had divided Americans since 1788. The problem of wartime finance forced him to revisit his earlier opposition to Hamilton's bank. The first bank debate pit Hamilton against Jefferson and Madison.⁷⁷ Much had changed in the years since that conflict divided Americans, but the antibank rhetoric of the 1790s was a powerful language readily available to those who wished to oppose it.⁷⁸ Although many of the same ideological issues were put in play, the dynamics of constitutional politics were radically different during Madison's presidency.⁷⁹ Since its incorporation, the bank had blossomed and largely escaped political controversy.⁸⁰ Once viewed as an institution closely aligned with eastern financial interests and a source of the corruption inimical to the survival of republican government, the bank now enjoyed broader support. It had developed ties with economic interests in multiple regions of the nation, including links to the south and west.⁸¹ The bank was no longer seen as a creature of a small regional cabal of economic elites but rather, it could claim to be central to multiple sectors of the growing American economy.⁸² To further diffuse criticism that the bank would become an agent of consolidation and undermine the states, the individual branches enjoyed a good deal of autonomy. Rather than pursuing a monolithic set of fiscal goals driven by a distant national elite, the bank was able to forge stronger ties with regional and local economic elites whose own economic fortunes were now tied to the prosperity of an institution they once viewed with suspicion.⁸³

Considering its importance to the American economy, rechartering the bank should have been an uncomplicated affair.⁸⁴ But despite its newfound support, the ghost of Hamilton continued to hover over the debate, making it

of the Tenth Amendment, particularly his original opposition to including the word "expressly" and his later reinterpretation of the Tenth Amendment as if the word expressly had been included in the text. See GIENAPP, *supra* note 4, at 195–96.

76. This crisp conceptualization is developed by Rachel A. Shelden, *Contesting the Constitution: Constitutional Politics, Then and Now*, 48 REVS. IN AM. HIST. 515, 519 (2020).

77. LEONARD & CORNELL, *supra* note 10, at 134.

78. See generally MARK R. KILLENBECK, *M'CUCCLOCH V. MARYLAND: SECURING A NATION* (2006) (summarizing the events that led to the rise of the second bank and the debates surrounding its establishment).

79. See LEONARD & CORNELL, *supra* note 10, at 134.

80. *Id.*

81. *Id.*

82. *Id.* at 135.

83. *Id.*

84. *Id.*

an easy target for Old Republicans who believed that the dangers of the bank were not offset by its economic benefits.⁸⁵ Moreover, nothing in the ensuing years had changed the view of many that the power to create such an institution was simply not among those delegated to the federal government by the Constitution.⁸⁶ Finally, some simply attacked the bank for reasons of political advantage.⁸⁷

II. MADISONIAN CONSTITUTIONAL THEORY AND “JUST CONSTRUCTION”: AN INFERENCEALIST MODEL

Beginning with his earliest writings, Madison proved to be a pragmatic and adaptable constitutional theorist. Over the course of ratification and after his election to Congress, he was forced to address a variety of novel constitutional questions. The touchstones of his theory were not fixation and constraint, the twin poles of much modern originalism but rather, flexibility and change.

When the issue of the president’s removal power was debated shortly after ratification, members of the First Congress were deeply divided over how to interpret the text of the Constitution. Representative Elbridge Gerry articulated a distinctly anti-Federalist point of view, arguing that “all construction of the meaning of the constitution is dangerous or unnatural, and therefore ought to be avoided.”⁸⁸ Madison and several others rejected Gerry’s strong textualism in favor of an argument that rested on the “nature of things.”⁸⁹ Unfortunately, there was considerable disagreement over what the nature of things was in this instance. Different interpretive theories and different textual sources were pressed into battle by the participants in the debate. Some invoked the intent of the Philadelphia Convention, but others, most notably Madison, referenced the intentions of the state ratification conventions, and some appealed to the criticism of anti-Federalist essayists or the exegesis of the executive in arguments developed in the various essays of *The Federalist*.⁹⁰

During the debate over the Bank of the United States, Gerry and Madison found themselves opposing one another again. This debate offered more opportunities to flesh out issues of constitutional interpretation. The language of the Constitution, Gerry argued, had to be interpreted using the traditional tools of statutory construction, and he turned to William

85. *Id.*

86. *Id.*

87. *Id.*

88. Jonathan Gienapp, *Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 J. EARLY REPUBLIC 375, 405–06 (2015) (quoting 1 ANNALS OF CONG. 596 (1789) (Joseph Gales ed., 1834) (statement of Rep. Elbridge Gerry)).

89. *Id.* at 381, 410.

90. *Id.* at 403–08; see also CORNELL, *supra* note 68, at 187–94. Although modern convention often refers to “The Federalist Papers,” members of the founding generation did not use this term. The correct historical usage should refer to the original edition THE FEDERALIST: A COLLECTION OF ESSAYS (New York, J & A. McLean 1788).

Blackstone as the recognized authority for discerning those rules.⁹¹ Madison rejected Gerry's analysis, noting that the U.S. Constitution was a different type of legal instrument that demanded a novel approach. Madison argued that the intentions of the state ratification conventions, not the Framers, were dispositive of the Constitution's legal meaning.⁹² The disagreement between Madison and Gerry underscored a point that had become obvious during the debate over the removal power: there was no universally accepted method of interpreting the new Constitution.⁹³ Indeed, there was no consensus on what sort of legal document the Constitution was or which modes of legal analysis were best suited to glean its meaning.⁹⁴

Some modern originalists have chosen to use modern philosophy of language and analogize constitutional interpretation in the founding era to an ordinary conversation between social equals engaged in an open and direct exchange of information in the contemporary Anglo-American academic world.⁹⁵ The "standard communication model" favored by many originalists rests on a set of anachronistic assumptions about founding-era constitutional debate. Conversations about constitutional meaning, from the plebeian world of the tavern to the more formal discourse evident in courts of law, were typically shaped by strategic and political concerns, not the ordinary maxims of conversation that modern philosophers of language treat as universal norms evidenced in all cultures at all times.⁹⁶ Most forms of

91. See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 153–54 (2007).

92. LEONARD & CORNELL, *supra* note 10, at 135.

93. Both of these episodes—the removal debate and the bank debate—serve as a useful reminder that there was not a fixed set of legal rules employed by the founding generation to ascertain the meaning of the Constitution. The notion of invoking a fixed set of original methods to interpret the Constitution ignores the level of contestation over interpretive questions in the founding era. This erroneous assumption mars the approach of so-called "original methods originalism." See generally John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019).

94. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–29 (2003).

95. Thus, philosopher Paul Grice, the figure most often cited by public meaning originalists, argued that it is speaker intentions that determine meaning. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 489–92 (2013). Scott Soames offers a more convincing Gricean account of constitutional meaning. See generally Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013) (discussing determining original constitutional meaning in a Gricean tradition). For a critique of Lawrence Solum's use of Grice, suggesting that the philosopher's theory ought to lead to an intentionalist, not a public meaning approach, see Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 703–04 (2009). For other philosophical critiques of the relevance of Grice's conversational model, see generally Mark Greenberg, *Legislation as Communication?: Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 233–41 (Andrei Marmor & Scott Soames eds., 2011); Mark Greenberg, *Natural Law Colloquium: Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 122 (2020); Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423, 435 (2008).

96. The problem with adopting a Gricean approach, even the more sophisticated version advanced by Soames, derives from the assumption that constitutional discourse is simply a form of ordinary day-to-day communication among social equals who share common

constitutional communication in the founding era were shaped by the rhetorical and ideological rules of eighteenth-century Anglo-American debate, not the ordinary conversation rules that modern philosophers have taken as normative in simple, direct communication.⁹⁷ Indeed, if one studies actual patterns of reading to make sense of the way the Constitution was interpreted in 1788—focusing on real eighteenth-century constitutional communication, not some fictional version conjured up by modern originalists—it is clear that founding-era readers were far more sophisticated in decoding texts and were especially mindful of political agendas and rhetorical excesses. Communication was not always honest, seldom concise, hardly ever maximally informative, and rarely clear. To deal with these realities, founding-era readers approached constitutional writings with a good deal of suspicion and filtered them through an ideological lens that reflected the political fears, aspirations, and experiences of different readers and actors. Thus, when compared to founding-era Americans, modern originalist modes of reading seem extremely simplistic and naïve.⁹⁸

One of the many ironies unnoticed by modern originalists arises from Madison's theory of ratifier intent. According to the standard philosophy-of-language communication model, in ordinary conversation, speakers' meaning is typically dispositive.⁹⁹ Yet, Madison's theory of ratifier intent focuses not on speakers' meaning but on a very specific group of listeners—the participants in state ratification conventions.¹⁰⁰ This simple fact alone

background assumptions and interpretive conventions. Constitutional communication, at least from the founding era, simply does not fit this model. Moreover, Grice's model assumes that one can clearly identify the relevant participants in the original conversation and, once identified, it assumes all participants were part of a single speech community. All of these assumptions are historically inaccurate. Founding-era America was a period of revolutionary ferment and deep division and is better characterized as a series of overlapping or nested speech communities, not a single homogenous speech community. *See generally* MARCYLIENA H. MORGAN, *SPEECH COMMUNITIES* (2014). Grice's model has been heavily criticized by linguistic anthropologists and sociolinguists for its ethnocentric assumptions—it assumes that all forms of communication resemble philosophy seminars at Oxford or other elite academic institutions. *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)). *See generally*, ALESSANDRO DURANTI, *THE ANTHROPOLOGY OF INTENTIONS: LANGUAGE IN A WORLD OF OTHERS* (2015).

97. Cornell, *supra* note 6, at 827.

98. Contrary to the claims of modern originalists, there is very little commonality between the communicative situation speakers or readers faced in 1788 or 1791 and the standard model of communication that most philosophers of language take as a given. For criticism of the standard communication model's applicability to founding-era approaches to reading constitutional texts, see generally Cornell, *supra* note 6.

99. On the standard conversational model and Grice, see Soames, *supra* note 95.

100. Originalists might point out that ratifiers would simply reflect the dominant assumptions of the broader reading population. The truth of this claim is itself an empirical question that requires an ethnography of founding-era reading practices. *See* Cornell, *supra* note 6. In the case of Second Amendment originalism, Justice Antonin Scalia rejected the patterns of linguistic usage of the First Congress, then wrote in favor of a selective use of dictionary-based semantic parsing of the text, so originalists have not been very consistent in applying this view of ordinary meaning. *See generally* Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 *Nw. U. L. REV.* 923 (2009) (describing Scalia's originalism in approving terms).

renders the comparison to ordinary face-to-face acts of communication dubious. Similarly, attempting to analogize interpreting the Constitution to activities such as reading recipes or grocery lists is just silly.¹⁰¹ We do not typically turn over our recipe or grocery list in a supermarket and ask a group of strangers what they think a recipe list containing the term “nice cut of stew meat” ought to mean.¹⁰² Indeed, one might find very different answers if this question is asked in a kosher butcher shop versus an Italian one.

Indeed, the irony of comparing constitutional communication to a recipe is compounded if one is familiar with the vast corpus of founding-era writings produced during ratification. The idea of treating such texts like recipes was used as a joke by Federalists to mock anti-Federalists.¹⁰³ Obviously, modern originalists have not gotten the punch line of that joke. Humor, of course, has always been a serious matter, as any comedian or linguistic anthropologist could tell you.¹⁰⁴ To understand a joke, one must attain a level of fluency in a language, something few originalists have managed. Sadly, most originalists still do not get the joke.¹⁰⁵

It is also important to recognize that Madison’s early attempt to formulate a coherent theory of constitutional interpretation in the 1790s was provisional at best, a preliminary effort that was subject to revision. Indeed, it is worth recalling that no theory of constitutional interpretation advanced by anyone in the founding era, including Madison’s, was ever officially sanctioned.¹⁰⁶ Although the Constitution was ratified by a legal process, the legal methods used to interpret it were contested throughout this period and no consensus ever emerged. None of the methods, including Madison’s, has the force of law.¹⁰⁷ Madison’s theory represented his best attempt at a particular constitutional moment to articulate one plausible model of constitutional interpretation that was consistent with his larger commitment to his theory of popular sovereignty.¹⁰⁸ Although some modern interpreters may find

101. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–36 (1997). For a devastating critique of the recipe analogy, see Michael Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1859–62 (1997).

102. See generally Lawson, *supra* note 101.

103. See *A Receipt for an Antifederalist Essay*, PA. GAZETTE, Nov. 14, 1787.

104. See generally NOËL CARROLL, *HUMOR: A VERY SHORT INTRODUCTION* (2014); Salvatore Attardo, *Semantics and Pragmatics of Humor*, 2 LANGUAGE & LINGUISTICS COMPASS 1203 (2008).

105. For another example of originalists’ reliance on a simplistic model of communication that views constitutional interpretation as something akin to reading a recipe, see ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 5, 31–35 (2017). Wurman’s metaphor assumes that there is a single universal approach to writing and reading recipes that applies to all cultures, in all places, and at all times. See *id.* For a useful corrective to such a naïve and ethnocentric assumption, see HENRY NOTEAKER, *A HISTORY OF COOKBOOKS: FROM KITCHEN TO PAGE OVER SEVEN CENTURIES* 52–54 (2017).

106. LEONARD & CORNELL, *supra* note 10, at 135.

107. The failure to appreciate these undeniable historical facts about founding-era law mars the approach of original methods originalism and original law originalism. On original methods originalism, see *supra* note 93. On original law originalism, see William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U.L. REV. 1455 (2019).

108. Baude & Sachs, *supra* note 107, at 1455.

Madison's theory normatively appealing, it is not hardwired into our constitutional jurisprudence any more than the rival theories that Elbridge Gerry or others proffered in the First Congress. Indeed, none of the theories floated by different actors during the founding period can claim any special status in this regard.¹⁰⁹

Finally, making sense of Madison's evolving ideas about the problem of constitutional meaning requires grappling with his views of the indeterminacies of language and his recognition that politics would invariably trump legal interpretation in almost every instance.¹¹⁰ Mere parchment barriers, even when buttressed with a theory of constitutional interpretation, would never be a match for the will of the people or the machinations of the politically powerful organized as a faction.¹¹¹ This recognition did not lead Madison to despair, but it should temper modern efforts to elevate Madison's theory above contemporary rivals. For Madison and many others within the founding generation, it was politics all the way down.

Madison had little faith in recourse to abstract arguments about the Constitution's text as a method to resolve controversial legal issues. Instead, constitutional meaning would be worked on a case-by-case basis, by actors engaged in constitutional politics.¹¹² Madison called this process constitutional "liquidation."¹¹³ In a letter to Virginia jurist Spencer Roane, Madison observed that it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a Charter," particularly, the language of federalism that "divide[d] legislation between the General and the local Governments."¹¹⁴ Accordingly, "it might require a regular course of practice to liquidate" the language.¹¹⁵ The issue of the bank's constitutionality offered the clearest example of "liquidation."¹¹⁶ Nearly two decades of politics and practice had transformed the bank's role in American life. Agents of the federal government had done official business with the bank, implying a kind of tacit constitutional recognition.¹¹⁷ The bank had also gained a measure of popular approval, evidenced in its growth and

109. While some decisions of the Marshall Court established strong precedents, the actions of the Taney Court, which rejected many of these Federalist legal ideas, caution against treating these decisions as establishing fixed interpretive principles. See LEONARD & CORNELL, *supra* note 10.

110. *Id.* at 135–36.

111. *Id.* at 135.

112. *Id.* at 135–36.

113. *Id.* at 136.

114. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908).

115. *Id.* Of course, 1819 was another tumultuous moment in American constitutional history, a fact that ought to shape how one interprets this letter.

116. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 21–29 (2019); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 53 (2020); Nelson, *supra* note 94, at 525–53.

117. LEONARD & CORNELL, *supra* note 10, at 136.

prosperity. Moreover, the failure of efforts to defund or abolish it only underscored its broad acceptance.¹¹⁸

Lastly, the bank, as a party to a number of proceedings, had been recognized by the courts.¹¹⁹ All three branches of government, and the people themselves, had by their actions conferred legitimacy on the bank, which was now an accomplished legal fact. Madison accounted for all these factors in 1811 as he devised his position on the constitutional legitimacy of the bank.¹²⁰ Constitutional meaning had emerged from the dynamic world of constitutional politics.¹²¹

Nonetheless, Madison's position over the bank recharter shocked many Republicans who deemed it a betrayal of strict construction and a repudiation of states' rights principles: two of the core beliefs that had undergirded their opposition to the Federalists since the 1790s.¹²² One of the most vociferous critics in the press, writing under the pen name "Tammany," derided Madison's theory of the Constitution as "chameleon-like."¹²³ Tammany wondered if the Constitution's meaning "changes its hue according to the times and positions in which it may viewed."¹²⁴

Madison concluded that his answer was yes. This was the opposite view of Old Republicans, who clung to an anti-Federalist conception of constitutionalism. Writing for the *Richmond Enquirer*, Harmodius "challenged the idea that the Constitution might evolve by means of judicial precedents."¹²⁵ In other words, Old Republicans saw Madison's theory of liquidation as constitutional heresy. Rather than conform to the "changing and uncertain light of precedent," elected officials, including judges, representatives, and even presidents, ought to be bound by the unchanging "words and spirit of the Constitution."¹²⁶ For Tammany and Harmodius, the meaning of the Constitution's text had been fixed at the time of enactment and ought to constrain subsequent interpreters.¹²⁷ Ironically, modern originalists are the heirs of Tammany and Harmodius, not Madison. Originalists' commitment to the ideas of fixation and constraint are closer in spirit to the Old Republican critics and their anti-Federalist views of constitutional interpretation than they are to the ideas championed by Madison or the Marshall Court.¹²⁸

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Harmodius, *To the Virginia Legislature*, RICH. ENQUIRER, Dec. 13, 1810.

127. LEONARD & CORNELL, *supra* note 10, at 137.

128. On the Marshall court, see *id.* at 84–115.

Madison had never had much faith that language, particularly constitutional texts, could ever effectively fix meaning.¹²⁹ He made his concerns explicit in *Federalist No. 37*:

[T]he medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctively and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate, by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty Himself condescends to address mankind in their own language, His meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.¹³⁰

Madison's pessimistic view of the limits of language was not shared by many anti-Federalists, particularly those who viewed written texts through a lens provided by popular Bible-based modes of reading, which were strongly textualist.¹³¹ Rather than approach language from the perspective of John Locke or enlightenment theory, these popular radicals were far more likely to approach language from a set of assumptions about meaning derived from the more egalitarian strains of evangelical Protestantism.¹³² At its most extreme, anti-Federalism inclined toward a form of constitutional literalism, demanding that legal texts be written clearly in simple, precise language.¹³³

Originalists are fond of quoting Madison's letter to Henry Lee to support their claim that Madison was a modern-style originalist when it came to interpreting the Constitution. It is worth taking a closer look at Madison's argument in that letter. After disparaging the baneful influence of party on American politics and constitutional debate, Madison wrote:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient

129. See JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 13–37 (2004); Rakove, *supra* note 3, at 599.

130. THE FEDERALIST NO. 37, *supra* note 69, at 198 (James Madison).

131. On traditions of intensive Bible reading and anti-Federalist constitutional hermeneutics, see Cornell, *supra* note 4, at 25.

132. *Id.* at 24–25.

133. *Id.* at 25.

phraseology were to be taken in its modern sense. *And that the language of our Constitution is already undergoing interpretations unknown to its founders, will I believe appear to all unbiassed Enquirers into the history of its origin and adoption.*¹³⁴

The first point worth noting is that Madison's description of prevailing practice underscores that a dynamic view of constitutional interpretation had already taken hold of American constitutional law. Madison was on the losing side of this battle, so it is unclear what his prescriptions means for modern legal interpretation.¹³⁵

Secondly, the text that preceded this passage so beloved by public meaning originalists suggests a very different understanding of Madison's views of constitutional interpretation. Madison was not defending a strong textualist approach but rather endorsing an approach to constitutional interpretation that was more holistic. The Constitution, he wrote, ought to be given "that just construction, which with the aid of time and habit, may put an end to the more dangerous schisms otherwise growing out of it."¹³⁶

Arriving at a just construction of the Constitution had proven to be anything but simple or straightforward in Madison's experience.¹³⁷ The liquidation of meaning that Madison envisioned was never intended to be a strongly textualist mode of analysis divorced from the realities of constitutional politics. Although the meaning of the words may not have changed, a just construction of them would shift in response to changes in constitutional politics. Construction, in Madison's view, provided the flexible tools necessary to adapt the Constitution to changing times.¹³⁸

Madison's view of construction should not be confused with the way modern originalists use this term.¹³⁹ Some modern originalists have argued that the terms "interpretation" and "construction" ought to be used in a highly technical and totally anachronistic sense, at odds with founding-era usage. This seems an odd choice for those claiming to seek the original meaning of

134. Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 114, at 190, 191 (emphasis added).

135. For good examples of how originalists have misread Madison's letter by focusing on a single point and ignoring the rest of the letter, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 628 (1999); John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 101 NW. U. L. REV. 1919 (2007). Barnett notes that Madison's political actions were not always consistent with an originalist approach but that we ought to ignore how Madison actually behaved and instead focus on those threads of his thinking that fit with modern originalism. This approach to constitutional theory turns reality on its head. It is Madison's behavior and his immersion in constitutional politics that shaped American law, not his isolated musings and shifting theoretical speculations about constitutional theory.

136. Barnett, *supra* note 135, at 628. During the debate over the removal power of the president in 1789, Madison talked about "fair" or "proper" construction and "the spirit and principles, contained in that instrument." See 1 ANNALS OF CONG. 387–90 (1789) (Joseph Gales ed., 1834).

137. GIENAPP, *supra* note 4, at 935–36.

138. See *supra* notes 88–131 and accompanying text.

139. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 486 (2013).

the text. The most vociferous champion of this ahistorical framework is originalist Lawrence Solum.¹⁴⁰ According to Solum, “interpretation” is the process of establishing the “enriched” linguistic meaning of a legal text. “Construction,” in his view, is a separate task that ascertains the legal effect or legal meaning of a text.¹⁴¹ Solum’s model imposes a set of modern jurisprudential categories on founding-era texts that would have made little sense to Madison and others. Apart from a few cases, such as the language describing the age requirements for holding office, there were few parts of the Constitution’s text that could be understood without engaging in a process of just or rational construction. Solum’s model erroneously assumes that the relevant background assumptions and interpretive rules needed to make sense of the Constitution were fixed in the founding era and were simply part of the context. In fact, these assumptions and rules were deeply contested at the time and individual actors had to decide which assumptions and rules were applicable to the text. Rational and just construction was the process of choosing which of these assumptions and rules ought to be employed when making sense of the Constitution. Apart from a few trivial constitutional questions, there was no constitutional meaning without a process of construction. Solum and other originalists have foisted their own ahistorical interpretive framework on founding-era texts and the results have been a systematic distortion of the meaning of those texts; in some instances the process of distortion has produced an inversion of reality in which originalist interpretation yields conclusions almost diametrically opposite of what the historical reality reveals.¹⁴²

Rather than turn to Paul Grice, a philosopher whose insights have been challenged by sociolinguists and linguistic anthropologists who study how

140. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

141. See Solum, *supra* note 139. Solum has shifted his approach from a largely semantic one to one in which there is greater focus on “pragmatic enrichment.” Unfortunately, Solum continues to approach context as fixed and continues to ignore the work of sociolinguistic and linguistic anthropology. See *supra* note 96.

142. The systematic distortion of founding-era texts has been most egregious in the case of the Second Amendment. For a good example, see Solum, *supra* note 100. Solum makes a number of ahistorical assumptions and interpretive errors in this article, including misreading the founding-era rule on preambles. For a corrective to his error, see David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009). Moreover, Solum’s critique of Justice John Paul Stevens’s dissent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is inconsistent with his purported, but philosophically distorted, Gricean model. The discussion of the Second Amendment in the First Congress would, in a genuinely Gricean model, offer important evidence of how terms such as “bear arms” were typically understood by founding-era speakers. True Griceans, unlike Solum, would seek to establish the connections between speakers’ intentions and patterns of usage in Congress and the society at large. By contrast, Scalia’s *Heller* opinion’s heavy reliance on dictionaries, earlier English authors, and later nineteenth-century authors and cases is not consistent with a genuinely Gricean approach, a fact that Solum seems unaware of in his petulant and cantankerous essay.

language functions in complex literate societies,¹⁴³ a better alternative would be to adopt a pragmatic-inferentialist model of legal meaning, not the Gricean semantic-pragmatic one originalists have adopted.¹⁴⁴ An inferentialist model seems far closer to Madison's theory of just construction than the model of fixation and constraint, or interpretation and construction, favored by many modern originalists.¹⁴⁵

If early American constitutional debate resembled an academic discussion around a seminar table, perhaps originalist assumptions might be apt, but the history of early American constitutional politics shares few features with discussions around conference tables or polite exchanges in a faculty lounge. If one looks closely at Madison's evolving constitutional theory in the period between the adoption of the Constitution and the end of his presidency, one would be hard-pressed to claim Madison's views or actions were shaped by any of the ideas that define modern originalism. Madison believed that political actors outside of the courts would play a major role in shaping constitutional development.¹⁴⁶

CONCLUSION

History has always been relevant to American law. Getting that history right is important if originalism is to become a more serious scholarly enterprise and move beyond an ideological practice.¹⁴⁷ Ironically, modern originalist theories and interpretive methods are far closer to the anti-Federalist losers than the Federalist winners. In this sense, originalism

143. For a critique of Gricean assumptions that contrasts them with the work of empirical linguistics, particularly sociolinguists and linguistic anthropologists, see generally Elizabeth Mertz & Jothie Rajah, *Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example*, 10 ANN. REV. L. & SOC. SCI. 169 (2014).

144. See *supra* note 96 and accompanying text.

145. On the philosophical tenets of inferentialism, see Robert Brandom, *Inferentialism and Some of Its Challenges*, 74 PHIL. & PHENOMENOLOGICAL RSCH. 651, 656 (2007). Brandom distinguishes between two forms of inferentialism: "What may be called 'weak' inferentialism claims only that the inferential connections among sentences are *necessary* for them to have the content that they do, in the sense that unless at least some of those inferential involvements were as they are, the sentence would mean something different." *Id.* This theory was counterposed to another that Brandom dubs hyperinferentialism: "At the other end of the spectrum is what might be called 'hyperinferentialism.' It is the claim that the inferential connections among sentences, *narrowly construed*, are *sufficient* to determine the contents they express." *Id.* Although the latter view remains controversial among philosophers, the former claim is widely accepted across a variety of fields and is consistent with both the late Ludwig Wittgenstein's views of language and the weak-meaning holism most historians embrace. On historians' weak-meaning holism, see generally Mark Bevir, *Contextualism: From Modernist Method to Post-analytic Historicism*, 3 J. PHIL. HIST. 211 (2009); A. P. Martinich, *A Moderate Logic of the History of Ideas*, 73 J. HIST. IDEAS 609 (2012). On the promise of inferentialism for legal interpretation, see Damiano Canale & Giovanni Tuzet, *On Legal Inferentialism: Toward a Pragmatics of Semantic Content in Legal Interpretation*, 20 RATIO JURIS 32 (2007).

146. On Madison's departmentalism, see generally LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

147. See generally Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443 (2016); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

produces a constitutional paradox: applying modern originalist approaches yields a Constitution that could never have existed in the founding era because it would have implemented the anti-Federalist vision of the document.¹⁴⁸ Rather than continue to approach the American Constitution as if it were written by the anti-Federalist losers, it makes far more sense to start with the historical fact that it was the Federalist winners who actually wrote the Constitution, shaped the amendment process, and dominated politics in the first two decades after ratification. Anti-Federalist reservations and criticism played an important role in shaping Federalist responses during this time, and these concerns continue to echo in American public discourse today. There may well be some useful lessons and cautionary warnings to be gleaned from a close study of anti-Federalism, but it is important to distinguish between history's winners and losers.¹⁴⁹ Modern originalists would do well to acknowledge this fact in the next iteration of their theory.

148. See, e.g., Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 716 (2013). For examples of other approaches, see Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

149. The Federalist victory proved to be short-lived, as Jacksonian constitutionalism swept away much of the Federalist Constitution. See LEONARD & CORNELL, *supra* note 10. Although anti-Federalist ideas continue to inspire constitutional dissent, it is important to avoid confusing the two sides in the original debate over the Constitution. On the persistence of anti-Federalism as a source for a potent dissenting constitutional tradition, see generally CORNELL, *supra* note 68.