

# MEANING AND UNDERSTANDING IN THE HISTORY OF CONSTITUTIONAL IDEAS: THE INTELLECTUAL HISTORY ALTERNATIVE TO ORIGINALISM

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## INTRODUCTION

Constitutional originalism continues to have a strong hold on American political discourse, and an even stronger hold on academic debate about the Constitution.<sup>1</sup> The most recent development in this story is the rise of the “new originalism.”<sup>2</sup> There has been a flurry of writing about new originalism and much of it has been critical of the theory.<sup>3</sup> One area that

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1. See generally JONATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005). On the cultural and political appeal of originalism, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009). Randy Barnett argues that originalism has made “quite a splash” and “has proven to be significant in litigation.” See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013). Others have argued that the actual impact of originalism on American law has been far more modest. See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1232–42 (2012) (arguing that the number of cases actually resolved by originalist methodology remains small).

2. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). On the notion of a new originalism, see Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004). For some leading examples of new originalist approaches, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007) [hereinafter McGinnis & Rappaport, *Original Interpretive Principles*]; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]; Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 925–26 (2009) [hereinafter Solum, *Heller and Originalism*]; Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law Research Paper No. 07–24, 2008), available at <http://ssrn.com/abstract=1120244> [hereinafter Solum, *Semantic Originalism*].

3. For a recent critique of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009). A number of commentators have argued that a relatively

remains underdeveloped in this burgeoning literature is the relationship between originalism and history.<sup>4</sup> Although originalism focuses on the meaning of historical texts, originalist practices are largely antithetical to accepted historical methodology.<sup>5</sup> The fact that originalists have used and abused history in a variety of academic debates has been well documented by a number of scholars.<sup>6</sup> Far less attention has been devoted to analyzing the flaws in the underlying historical theory associated with originalism.<sup>7</sup>

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anemic form of originalist argument is so pervasive in contemporary American law that the theory has been drained of any real power. See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 749–55 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–67 (2009); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1796–99 (1997); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 722–24 (2011).

4. Two important historical critiques of originalism may be found in Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, and Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011). This essay builds on these astute critiques of originalism. For a forceful statement that rigorous originalism must adhere to the methods of intellectual history, see David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137 (2011). A few originalists have employed the tools of intellectual history to explore questions about the original meaning of the Constitution. See William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983 (2009) [hereinafter Treanor, *Against Textualism*]; William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) [hereinafter Treanor, *Judicial Review Before Marbury*]; Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823 (2012).

5. See ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 57 (2011); Barnett, *supra* note 2, at 621; Solum, *Semantic Originalism*, *supra* note 2, at 112; see also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 399–402 (2012); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551 (2012).

6. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties As "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (2004). On the historical problems with Second Amendment scholarship, particularly in *District of Columbia v. Heller*, 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); Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246, 272–73 (2008); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 38–40; see also Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639–40 (2008); Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

7. Much originalism takes the form of law office history. Such work is typically result-oriented, generally ignores recent scholarly developments in the relevant historiography, and approaches historical texts in an anachronistic manner. For critiques of various aspects of law office history, see generally EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003). Some

This Article considers the problems of originalist methodology in light of recent work in intellectual history and the philosophy of language.<sup>8</sup>

Part I of this Article explores the contextualist methodology favored by most contemporary American intellectual historians. Although there is considerable methodological eclecticism among intellectual historians working in American universities, the field of American intellectual history has coalesced around a common set of interpretive practices.<sup>9</sup> In contrast to recent work in originalism that generally eschews a focus on communicative intent, recent writing in both the philosophy of language and intellectual history remains committed to linking meaning with intention.<sup>10</sup> While such inquiries necessarily start with the semantic meaning of texts, in many cases, the words on the page often underdetermine meaning. Rather than fix constitutional meaning, readers of the original Constitution would have drawn on a range of interpretive rules and background assumptions to help them make sense of the meaning of the text. Constitutional theory must move beyond a focus on the semantic content of legal texts to an analysis of the historical pragmatics of constitutional communication.<sup>11</sup> It is impossible to reconstruct an accurate account of what the Constitution or other legal texts meant in the eighteenth century without some understanding of these pragmatic processes.

Part II analyzes the philosophical and historical flaws in contemporary originalist theory and practice. There are many different strains of originalism, but all of them suffer from similar historical problems. Most

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originalists have countered that history and originalism seek different types of meaning. See Solum's argument in BENNETT & SOLUM, *supra* note 5, at 54. Other originalists have waged a counterattack and argued that historians are prone to engage in forms of history office law—a sort of mirror image of law office history, an approach that fails to understand legal and constitutional ideas. See Michael P. O'Shea, *Modeling the Second Amendment Right To Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585 (2012); see also Nicholas J. Johnson, *Rights Versus Duties: History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent*, 39 FORDHAM URB. L.J. 1503 (2012) (presenting a somewhat more petulant argument). Robert Post notes that historians are typically most comfortable with externalist explanations. Legal scholars are steeped in doctrinal analysis, which is a type of internalist explanation. See Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539. Post recognizes that internalist and externalist forms of analysis are both essential in constitutional and legal history. *Id.* at 548.

8. See generally PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW (Andrei Marmor & Scott Soames eds., 2011); Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423 (2008); A.P. Martinich, *A Moderate Logic of the History of Ideas*, 73 J. HIST. IDEAS 609 (2012).

9. See generally James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 MODERN INTELL. HIST. 201 (2012); cf. William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997) (concluding that the field lacked a common method).

10. See *infra* Part I.

11. Scott Soames, *What Vagueness and Inconsistency Tell Us About Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 8, at 31, 35. On pragmatics, see Képa Korta & John Perry, *Pragmatics*, STAN. ENCYCLOPEDIA PHIL. (Mar. 21, 2011), <http://plato.stanford.edu/archives/win2012/entries/pragmatics/>.

originalists assume the existence of a constitutional consensus where none existed and gather evidence in an arbitrary and highly selective fashion.<sup>12</sup> Early American history was not characterized by broad agreement on constitutional matters, but rather was deeply divided on a variety of fundamental issues about constitutional interpretation and meaning. Selecting texts and evaluating their probative value requires some understanding of how texts were produced, distributed, and consumed by different groups in the Founding era. For originalists all texts are created equal, an approach that has facilitated ideological distortions and generated a deeply flawed account of America's constitutional past.<sup>13</sup>

Part III analyzes the originalist methodology employed in *District of Columbia v. Heller*. Although praised by originalists and hailed by gun rights activists, the decision has been vigorously attacked from scholars at both ends of the academic political spectrum. Rather than vindicate originalism, Justice Scalia's methodology provides a catalogue of the types of errors, distortions, and manipulations that originalism encourages. Justice Scalia's use of dictionaries rests on a set of false assumptions about the relationship between early dictionaries and the history of the English language. These early dictionaries were not compiled according to modern scholarly rules, but were idiosyncratic reflections of their authors who generally sought to prescribe, not describe, contemporary patterns of usage. Even more troubling is Justice Scalia's misreading of the Quaker opposition to bearing arms. Quakers (Members of the Religious Society of Friends) did not oppose bearing guns, but they did oppose bearing arms, a vital distinction blurred by Justice Scalia's ahistorical approach. Rather than cite Quaker sources to support his warped view of history, Justice Scalia substitutes his own interpretation of what Quakers believed for the actual beliefs of eighteenth century Friends. Finally, Justice Scalia compounds his distorted reading of history by ignoring Founding-era legal rules and applying interpretive conventions drawn from decades after the framing of the Second Amendment to justify reading the text backwards. This is an interpretive move that allows him to effectively discount the preamble's discussion of a well-regulated militia.

Part IV examines the original debate over freedom of the press in 1788. Federalists and Anti-Federalists used different rules of construction to make sense of what the words "freedom of the press" meant.<sup>14</sup> Adopting the

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12. On the problem of multiple intents and constitutional meaning, see generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997), and Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). On the tensions within Anti-Federalism, particularly between elite and popular opposition to the Constitution, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828 (1999).

13. See *infra* Part II.

14. A number of originalists distinguish between the task of interpretation, which is what the Constitution meant, and construction, which is the application of constitutional meaning to legal problems. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 455–57 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). The Founding

rules favored by most originalists for reading constitutional texts would require overturning core elements of First Amendment doctrine. In short, a rigorous and neutral application of originalist theory leads to highly undesirable outcomes.

Part V briefly contrasts the more sophisticated model provided by contemporary intellectual history with the flawed approach to the past favored by originalists. Abandoning originalist method in favor of intellectual history would encourage scholars and judges to grapple with the different meanings that various provisions of the Constitution had at the Founding moment. Building on this more solid historical foundation would facilitate a more serious debate over the proper role of history in the future of constitutional theory and adjudication.

#### I. INTELLECTUAL HISTORY AND THE PROMISE OF PRAGMATICS

In a recent essay on the state of American intellectual history, Harvard historian James Kloppenberg provides a concise overview of this vibrant field.<sup>15</sup> Kloppenberg notes that most contemporary American intellectual historians have written about ideas and beliefs with three guiding precepts in mind. Intellectual historians, he observes, strive to write about ideas as “embodied, embedded, and extended.”<sup>16</sup>

While ideas were once studied in a disembodied way, most intellectual historians now believe that historical texts must be connected to the intentions of the individual authors who created them. In the case of anonymous authors and collective authorship, most intellectual historians would follow David Hollinger’s model of rooting texts within particular discursive communities.<sup>17</sup> It is easy to see how this new model of intellectual history differs from the classic approach to the history of ideas found in the pioneering studies of scholars such as Perry Miller. In his pathbreaking study, *The New England Mind*, Miller wove together different Puritan texts to create a single Puritan mind.<sup>18</sup> His emphasis lay on systematic thought, such as Ramist logic and the “Augustinian strain of piety.”<sup>19</sup> Although more recent studies of Puritanism have not abandoned

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era’s own understanding of construction seems rather different. In the Founding era, “construction” referred to the complex process of discovering the meaning of a legal text. The term appears hundreds of times in Founding-era cases and in legal writing. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In contrast to Solum, many within the Founding era recognized that construction was as much a political process as it was a legal one. For a good illustration in the context of freedom of the press, see TUNIS WORTMAN, *A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS* 228 (N.Y., George Forman 1800).

15. *See generally* Kloppenberg, *supra* note 9; *see also* James T. Kloppenberg, *Intellectual History, Democracy and the Culture of Irony*, in *THE STATE OF U.S. HISTORY* 199 (Melvyn Stokes ed., 2002).

16. Kloppenberg, *supra* note 9, at 201.

17. DAVID A. HOLLINGER, *IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS* (1985).

18. PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1954).

19. *Id.* at 3.

theology, the field has adapted the insights of cultural history, bringing a fresh perspective to one of the most studied fields in American history. David Hall's work is representative of the recent trends in contemporary intellectual history. His analysis of the Puritan diarist Samuel Sewall devotes as much attention to the way Puritans in New England experienced darkness as it does to the traditional questions that vexed Miller, issues such as covenant theology.<sup>20</sup>

The notion of embedding intellectual history in multiple contexts has shifted the focus away from an entirely internalist approach to ideas.<sup>21</sup> The impact of this approach on legal history has been especially profound. Studies of legal doctrine or Supreme Court-centered histories have not disappeared, but many newer studies strive to move beyond these sources to illuminate constitutionalism outside of the courts and other aspects of popular constitutionalism. The theory of popular sovereignty figures prominently in standard constitutional histories of the pre-Civil War era. Typically this body of scholarship focuses on the ideas of legal and political elites. Important events such as the Kansas-Nebraska Act, the *Dred Scott v. Sandford* case, or the Lincoln-Douglas debates once framed the scholarly discussion of this issue.<sup>22</sup> By contrast, legal historian Elizabeth Dale uses a sensational antebellum murder case to analyze the way ordinary Americans understood issues of law and constitutionalism in the same era, providing a bottom-up perspective to complement the traditional top-down approach.<sup>23</sup>

The practice of much traditional intellectual history was analogous to rummaging among the volumes in the library of the great thinkers of the past. A classic model of such an inquiry is H. Trevor Colburn's *Lamp of Experience*, a book that charted the role of historical thought in the world of the Founders.<sup>24</sup> More recent writing in intellectual history has moved well beyond the libraries of great men and the four corners of individual printed texts. Louis Menand's celebrated study of pragmatism, *The Metaphysical Club*, ranges widely over major and minor intellectual thinkers and canvasses a host of cultural movements in an effort to understand

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20. DAVID D. HALL, *WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND* (1989).

21. Compare LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* (1995) (following the traditional approach to constitutional history), with 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher Tomlins eds., 2008) (applying the methods of social history and intellectual history to legal history and constitutional history).

22. DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (1981). For a more recent discussion of the issue, see Christopher Childers, *Interpreting Popular Sovereignty: A Historiographical Essay*, 57 *CIV. WAR HIST.* 48, 49, 63 (2011).

23. For an example of how popular sovereignty and popular constitutionalism can be studied by looking at a less traditional type of source, see Elizabeth Dale, *Popular Sovereignty: A Case Study from the Antebellum Era*, in *CONSTITUTIONAL MYTHOLOGIES: NEW PERSPECTIVES ON CONTROLLING THE STATE* 81 (Alain Marciano ed., 2011).

24. H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (1965).

pragmatism, America's best known philosophical movement.<sup>25</sup> The connection between Dewey's thought and major philosophers such as Charles Pierce and William James receives its due, but so does the influence of less familiar sources, including the Vermont Hegelians who shaped Dewey's first exposure to philosophy at the University of Vermont. Non-philosophical influences also figure prominently in Menand's account, including Dewey's influential friendship with Jane Addams and his exposure to popular political radicalism in Chicago during the Pullman Strike.<sup>26</sup>

Finally, the last of Kloppenberg's guiding principles, the extension of the range of subjects worthy of historical attention, recognizes the profound impact of social history on intellectual historians. One subfield that has blossomed in recent years is the history of the book. Indeed, the second volume of the American Antiquarian Society's five-volume *History of the Book in America* focuses on the print culture of the Founding era.<sup>27</sup> As Kloppenberg notes, the history of the book has refined the way that scholars approach the "production, distribution, circulation, and reception of texts."<sup>28</sup> Appreciating the dynamics of this vibrant sphere of print culture is essential for any scholar interested in understanding the original debate over the Constitution's meaning.

Intellectual biographies remain a popular genre, particularly with the general reading public. In the case of the Founding era, the phenomenon of "Founders Chic" shows no sign of disappearing anytime soon. New biographies of leading Founders and forgotten Founders appear with some regularity and often grace the *New York Times's* Best Sellers list.<sup>29</sup> Although biographies of Thomas Jefferson show no sign of going out of fashion, historical attention has broadened its focus to take in the other denizens of Monticello. Annette Gordon Reed's prize-winning study of the African American Hemings family has taken its place alongside the many fine studies of Thomas Jefferson.<sup>30</sup> Intellectual history is no longer exclusively a study of the history of intellectuals and other elites, but rather is a study of individuals and groups, men and women—thinking, acting, and creating.

Contemporary intellectual history has not abandoned classic texts such as the Declaration of Independence, but the treatment accorded these texts has

25. LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

26. *Id.* at 264–66, 306–12, 353–58.

27. 2 DAVID D. HALL ET AL., *A HISTORY OF THE BOOK IN AMERICA: AN EXTENSIVE REPUBLIC: PRINT, CULTURE, AND SOCIETY IN THE NEW NATION, 1790–1840* (2010).

28. Kloppenberg, *supra* note 9, at 206. For a study of ratification that focuses on the production, distribution, and reception of Anti-Federalist pamphlets, broadsides, and newspaper essays, see CORNELL, *supra* note 12.

29. H.W. Brands, *Founders Chic: Our Reverence for the Fathers Has Gotten Out of Hand*, 292 *ATLANTIC MONTHLY* 101 (Sept. 2003); David Waldstreicher, *Founders Chic As Culture War*, 84 *RADICAL HIST. REV.* 185 (2002).

30. See ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY* (2008).

been transformed by new approaches. Morton White's classic study, *The Philosophy of the American Revolution*, approached the Declaration with the tools of philosophy, focusing considerable attention on John Locke.<sup>31</sup> More recent work on the Declaration has highlighted topics ranging from the way Francesco Geminiani's treatise on violin playing shaped the cadences of Jefferson's writing, to the role that popular political discourses played in the origins of the Declaration of Independence.<sup>32</sup>

Finally, Kloppenberg reminds us that ideas often cross conventional political boundaries. One can discern an increasingly transnational trend in recent intellectual history, a development that Kloppenberg's own work on pragmatism has helped to encourage.<sup>33</sup> It is no longer remarkable to explore American ideas in a transatlantic context. In her recent study of America's reception of Nietzsche's thought, historian Jennifer Ratner-Rosenhagen crisscrosses the Atlantic and surveys more than a century of shifting responses to one of Germany's most enigmatic but influential intellectuals.<sup>34</sup> In one sense, Ratner-Rosenhagen's study parallels Merrill Peterson's classic study of the shifting assessments of Jefferson in American culture, *The Jefferson Image in the American Mind*.<sup>35</sup> What marks her work as emblematic of the new approach to intellectual history is its anti-essentialist approach to texts. Her study fits historian Daniel Rodgers's notion that intellectual history ought to be framed around narratives about "men and women thinking: making, consuming, and remaking ideas and language, arguing and conversing."<sup>36</sup>

The current model of intellectual history, what Kloppenberg calls pragmatic hermeneutics, also acknowledges an important debt to the work of the Cambridge School's approach to the history of political thought. The leading theoretician associated with the Cambridge School, Quentin Skinner, published a number of influential essays using modern language philosophy to ground the contextualist method of intellectual history. In an early essay elaborating his approach to interpreting historical texts, Skinner concisely states one of his most important theoretical claims about contextualist historical method: to understand a historical text one must first define the range of possible meanings an utterance might have had at a given historical moment.<sup>37</sup> The first rule of any truly historicist method, he asserts, is that: "[N]o agent can eventually be said to have meant or done something which he could never be brought to accept as a correct

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31. See MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978).

32. See JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE* (1993); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997).

33. See JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870–1920* (1986).

34. See JENNIFER RATNER-ROSENHAGEN, *AMERICAN NIETZSCHE: A HISTORY OF AN ICON AND HIS IDEAS* (2012).

35. MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* (1960).

36. Daniel T. Rodgers, *Thinking in Verbs*, 18 *INTELL. HIST. NEWSL.* 21, 21–22 (1996).

37. See generally Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 *NEW LITERARY HIST.* 393 (1972).



description of what he had meant or done.”<sup>38</sup> This rule might be dubbed the injunction against anachronism. In the view of philosopher Richard Rorty, this aspect of Skinner’s method is central to any effort to understand the meaning of historical texts, including texts in the history of philosophy.<sup>39</sup> The second rule states, “The success of any act of communication necessarily depends on . . . a whole complex of conventions, social as well as linguistic.”<sup>40</sup> Skinner’s point is not that meaning is objective, but rather that it is public and hence intersubjective.<sup>41</sup> Moreover, the public and intersubjective nature of language enjoins historians to recognize that the meaning of a text is determined by a range of contextual factors, some linguistic and others social. Cast in these terms, the task of the historian is similar to the cultural anthropologist. Indeed, in his later work, Skinner acknowledged the profound influence of anthropologist Clifford Geertz, whose theory of “thick description” inspired a generation of intellectual and cultural historians.<sup>42</sup> In a much-cited essay, Geertz explored how an anthropologist might distinguish a wink from a facial tick.<sup>43</sup> To understand

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38. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29, 48 (James Tully & Quentin Skinner eds., 1988); see also 1 QUENTIN SKINNER, VISIONS OF POLITICS: REGARDING METHOD (2002).

39. Richard Rorty, *The Historiography of Philosophy: Four Genres in Philosophy in History*, in PHILOSOPHY IN HISTORY 50 (Richard Rorty et al. eds., 1984).

40. For an endorsement of this aspect of Skinner’s method, see Thomas L. Haskell, *Responsibility, Convention, and the Role of Ideas in History*, in IDEAS, IDEOLOGIES, AND SOCIAL MOVEMENTS: THE UNITED STATES EXPERIENCE SINCE 1800, at 5 (Peter A. Coclanis & Stuart Bruchey eds., 1999). Among originalists, Solum has been especially critical of Skinner. Solum’s critique of Skinner’s earliest theoretical writings anachronistically argues that Skinner’s forays into the philosophy of language were obviously wrong-headed at the time they were published. See BENNETT & SOLUM, *supra* note 5, at 57. It is hard to reconcile this claim with the fact that Skinner’s essays were published in the leading peer reviewed British philosophy journal in a special issue on the philosophy of language. Quentin Skinner, *Conventions and the Understanding of Speech Acts*, 20 PHIL. Q. 118, 133 (1970). Skinner’s article responded to one of the most influential articles in the modern philosophy of language, P.F. Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439 (1964). Admittedly, Skinner’s article drew two critical responses, but this does not diminish the article’s significance at the time; rather, it suggests that his article was taken very seriously by philosophers of language. See Peter Mew, *Conventions on Thin Ice*, 21 PHIL. Q. 352 (1971); B.C. O’Neill, *Conventions and Illocutionary Force*, 22 PHIL. Q. 215 (1972). Skinner’s early writings now seem dated, especially given that the ascendant paradigm in the philosophy of language seems to favor Strawson and Grice’s intentionalism over Skinner’s conventionalism. For an overview of the debate concerning speech act theory in the philosophy of language, see Mitchell Green, *Speech Acts*, STAN. ENCYCLOPEDIA PHIL. (July 3, 2007), <http://plato.stanford.edu/archives/spr2009/entries/speech-acts/>. On the danger of reading the history of philosophy in an anachronistic manner, see generally PHILOSOPHY IN HISTORY, *supra* note 39.

41. For an example of one prominent originalist who argues in favor of the idea of objective meaning, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011).

42. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 9–10 (1973).

43. See *id.* Skinner notes that during his appointment at the Institute for Advanced Study in Princeton, his work took a more Geertzian turn. See Skinner, *Reply to My Critics*, in MEANING AND CONTEXT, *supra* note 38, at 231, 234 & n.15. Skinner also credits his discussion with other members of the Institute, most notably Thomas Kuhn and Richard

the meaning of this gesture, one must embed the action in a “web of signification” and recover the actor’s intention, assuming that what had been witnessed was a wink and not an involuntary muscle spasm.<sup>44</sup>

Skinner’s earliest writings drew heavily on J.L. Austin’s theory of speech acts. According to Skinner, the recovery of meaning required analyzing both the locutionary act and its illocutionary force.<sup>45</sup> Scholars must not only pay attention to what an author said, but must also ask what an author was doing by making a particular statement on a given occasion.<sup>46</sup> Skinner’s use of Austin and his conventionalist account of meaning has prompted a lively debate among historians, political theorists, and philosophers of language.<sup>47</sup>

In responding to his critics, Skinner has stressed that his own early views, based on Austin’s speech act theory, have evolved in light of insights derived from subsequent scholarship by Paul Grice, P.F. Strawson, and John Searle.<sup>48</sup> Unfortunately, Skinner has never fleshed out what a full-scale revision of his method would look like at a theoretical level. Instead, he has focused most of his scholarly energy on substantive historical questions in the history of political thought.<sup>49</sup> The task of envisioning what such a Gricean revision of intellectual history would look like has been made somewhat easier to imagine because of the efforts of philosophers of language working on issues of historical method and legal interpretation.<sup>50</sup>

One of Skinner’s more sophisticated theoretical critics, the philosopher of language A.P. Martinich, has framed such a neo-Gricean model of intellectual history. Martinich notes that intellectual historians must begin with the semantic content of texts, but he also emphasizes that historians must move beyond semantics, to discern commutative intent, which is what a speaker meant by using a particular sentence on a given occasion.<sup>51</sup>

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Rorty. *Id.* Among the tangible outcomes from that period was the important volume, *PHILOSOPHY IN HISTORY*, *supra* note 39; *see also* GEERTZ, *supra* note 42.

44. GEERTZ, *supra* note 42, at 9. Skinner’s emphasis on Grice’s notion of non-natural meaning is very close to his gloss on Geertzian thick description. *See generally* GEERTZ, *supra* note 42; PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989); *MEANING AND CONTEXT*, *supra* note 38. Recent intellectual history probably owes a much greater debt to Geertzian thick description than it does to modern philosophy of language. On historians’ debt to Geertz, see William H. Sewell Jr., *Geertz, Cultural Systems, and History: From Synchrony to Transformation*, 59 *REPRESENTATIONS* 35, 35 (1997).

45. Skinner, *supra* note 38, at 61.

46. *See generally id.*

47. *See generally* *MEANING AND CONTEXT*, *supra* note 38. Mark Bevir casts his critique of Skinner in the antifoundationalist terms of postanalytical philosophy. MARK BEVIR, *THE LOGIC OF THE HISTORY OF IDEAS* (1999); Mark Bevir, *Anglophone Historicism: From Modernist Method to Post-analytic Philosophy*, 3 *J. PHIL. HIST.* 211 (2009).

48. Quentin Skinner, “*Social Meaning*” and the *Explanation of Social Action*, in *MEANING AND CONTEXT*, *supra* note 38, at 79, 89.

49. For two recent works representative of Skinner’s historical work on early modern political thought, see QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998), and QUENTIN SKINNER, *REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS* (2009).

50. *See infra* notes 51–61 and accompanying text.

51. Martinich, *supra* note 8, at 610–11.

Philosophers of language working on legal interpretation have made much the same point.<sup>52</sup>

Martinich's application of Gricean insights to the practice of intellectual history is an important step forward in the evolving effort to clarify the practice of intellectual history.<sup>53</sup> The essays gathered in *Philosophical Foundations of Language in the Law* provide additional insights on how pragmatics can clarify the search for constitutional meaning.<sup>54</sup> Although they do not offer a detailed critique of contemporary originalist theory, they do analyze the textualist methods of statutory construction employed by Justice Scalia, a methodology which closely parallels aspects of new originalist methodology. Scott Soames and Andrei Marmor note that Justice Scalia's textualism conflates and confuses two distinct conceptions of meaning elaborated in recent scholarship in the philosophy of language: the semantic content, which is the linguistic meaning of a text, and the assertive content, which is what a text stipulates or asserts. Soames and Marmor make a powerful argument that it is asserted content, not semantic content, that ought to define the legal meaning of a text.<sup>55</sup>

In many situations, determining assertive or communicative intent requires moving beyond the actual words on the page to consider the pragmatic features of communication. In other words, determining semantic meaning is not the end of the inquiry, it is merely the start. If one follows Grice's program, particularly the way it has been developed in contemporary philosophy of language, one must move beyond semantics to pragmatics. As Marmor notes regarding semantic theories of constitutional meaning: "[T]he semantic considerations employed in this debate are inconclusive; the way concepts are used in a given context depends on various pragmatic determinants, and those, in turn, depend on the nature of the conversation in question."<sup>56</sup>

Elaborating the differences between ordinary communication and legal communication is a first step in analyzing the pragmatics of legal communication.<sup>57</sup> Marmor's work in this area is especially useful in

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52. For an interesting critique of Skinner's methodology in expressly Gricean terms, see Martinich, *supra* note 8, and A.P. Martinich, *Four Senses of "Meaning" in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. PHIL. HIST. 225 (2009). For another critique of the methods of the Cambridge School from the perspective of English constitutional history, see D. Alan Orr, *A Prospectus for a "New" Constitutional History of Early Modern England*, 36 ALBION 430, 448 (2004).

53. Martinich, *supra* note 8, at 610–11.

54. See generally PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 8.

55. *Introduction*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 8, at 8; Marmor, *supra* note 8, at 423; Soames, *supra* note 11, at 42.

56. See Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577, 577 (2013).

57. For a discussion of the problems of applying ordinary conversational models to legal texts, see generally Mark Greenberg, *Legislation As Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 8, and Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990). Soames concedes that collectively authored texts complicate the process of discerning intent, but he does not believe that this poses an insurmountable problem. See

thinking about the practice of constitutional history. Legal texts are not typically produced according to the cooperative rules of communication that govern ordinary language situations, but are generally modeled on strategic, not cooperative, principles. In many cases, Marmor observes, legal texts are often products of “tacitly acknowledged incomplete decisions.”<sup>58</sup> Another distinguishing feature of legal communication is that it is not always clear who the relevant parties to a legal conversation are, particularly when the text in question is a constitutional document. The relevant parties might be framers, ratifiers, judges, or some other body of actors, depending on the background assumptions of the participants in the “conversation.”<sup>59</sup>

Grice’s method has a number of important consequences for understanding the historical meaning of the Constitution and other Founding-era legal texts.<sup>60</sup> Most originalists have assumed that constitutional communication involves a process of fixation that is largely anchored by the semantic content of the Constitution’s text.<sup>61</sup> Marmor’s neo-Gricean framework suggests that meaning may not be fixed by the semantic content of the Constitution’s text. To achieve consensus at the moment a text is enacted, the parties involved might agree on a common language but not on a common meaning. By compromising on language that underdetermines constitutional meaning, legal actors can leave the resolution of what a text means to subsequent actors to sort out through politics or judicial determination. If Marmor is correct, there may well be no original constitutional meaning to discover for many of the more open-ended provisions of the Constitution. Instead of establishing a fixed original meaning, the text of the Constitution may do no more than set some minimal constraints on a range of possible constitutional meanings to be determined by pragmatic features of the original constitutional conversation. If this is true, then the fixation thesis, central to so much of originalism, may rest on a philosophical error. The process of fixation of constitutional meaning would not be semantically encoded at a Founding moment, but would be resolved by pragmatic processes. Indeed, the

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Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 232 (2011). The problem of collective intent has attracted considerable interest among philosophers. See Abraham Sesshu Roth, *Shared Agency*, STAN. ENCYCLOPEDIA PHIL. (Dec. 13, 2010), <http://plato.stanford.edu/archives/spr2011/entries/shared-agency/>; Deborah Tollefsen, *Collective Intentionality*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/coll-int/> (last updated Aug. 4, 2004).

58. Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 8, at 83, 97.

59. *Id.* at 96–97.

60. Grice’s conversational model assumed that communication was cooperative. See GRICE, *supra* note 44; Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS AND PHIL. 509 (1992).

61. See BENNETT & SOLUM, *supra* note 5, at 12; Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011).

resolution of these issues may be even more complex. There may have been conflicts over which sets of assumptions and interpretive rules were part of the background knowledge available to the actors. Indeed, there may well have been disagreements over who the relevant parties to the original constitutional conversation were: Framers, ratifiers, judges, or some other segment of the population of America in 1788. All of these issues are empirical questions that require historical investigation to answer.

### B. *Originalism and the Flight from Historical Reality*

According to Lawrence Solum, “original public meaning originalists believe that the original meaning of the Constitution is a function of the original public meaning—or ‘conventional semantic meaning’—of a given constitutional provision at the time the provision was framed and ratified.”<sup>62</sup> Semantic meaning, in his view, is largely a function of the “linguistic facts” at the time the Constitution was written and adopted.<sup>63</sup> Moreover, “[n]ew Originalists (or original public meaning originalists) believe that patterns of usage by the public at the time of adoption fixed the meaning of the Constitution.”<sup>64</sup> Another advocate for a semantic version of originalism, Randy Barnett, adopts much the same stance: “What defines originalism as a method of constitutional interpretation is the belief that . . . the semantic meaning of the written Constitution was fixed at the time of its enactment.”<sup>65</sup>

Semantic originalist theories reject the search for intent that characterized earlier versions of originalism. Intentionalists sought something akin to Gricean speaker meaning, the communicative intent, or what a speaker intended to communicate on a given occasion.<sup>66</sup> Gricean theory uses ordinary face-to-face conversation as its model, a situation where speakers conform to a set of conversational maxims aimed at promoting mutual understanding. Supporters of semantic originalism acknowledge that constitutional communication does not fit the model of a simple conversation. Building on this insight, they accept the earlier critique of originalism that the collective authorship of the Constitution confounds any attempt to identify speakers’ intent. Abandoning speakers’ meaning, semantic originalists turn to another Gricean concept: sentence meaning. Solum describes this concept as follows: the “sentence meaning (or ‘expression meaning’) of an utterance is the conventional semantic meaning

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62. Solum, Heller and *Originalism*, *supra* note 2, at 946.

63. *Id.* at 944.

64. *Id.* at 947.

65. Barnett, *supra* note 41, at 66.

66. For a discussion of Gricean speaker meaning and its relevance to intentionalist theories of originalism, see Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 540–41 (2013). Alexander argues that when multiple authors of a collectively authored text have different understandings of what they intended to communicate, the resulting text would have no meaning at all. *Id.* at 542. It would be more accurate to describe such a text as having a range of possible meanings. Fixing the meaning of such a text would generally be accomplished by pragmatic processes.

of the words and phrases that constitute the utterance.”<sup>67</sup> This approach purports to avoid the problem of discerning intent by focusing on commonly shared public meanings. Accordingly, semantic originalists accord considerable weight to historical dictionaries as a source for recovering these linguistic meanings. The problem with such an approach is it rests on a misreading of Grice and a misunderstanding of the history of dictionaries. Grice’s entire philosophical project was to link sentence meaning to his intentional understanding of speaker meaning.<sup>68</sup> In other words, to build a theory of historical meaning from Grice’s idea of sentence meaning requires establishing what speakers in the Founding era typically intended when they uttered specific sentences.<sup>69</sup> Sampling dictionaries, a favorite tactic of semantic originalists, will not suffice.<sup>70</sup> Even if one expanded the range of sources consulted and examined other usages, this would not be adequate to illuminate sentence meaning. To analyze Gricean sentence meaning historically one would need to look at how patterns of *usage* correlated with patterns of *intentionality* at a given historical moment. In other words, new originalists would need to engage in precisely the forms of historical inquiry the theory was designed to obviate: reconstructing, weighting, and summing the multiple and potentially conflicting intents of Framers, ratifiers, and other relevant populations. Rather than mark a step forward, semantic originalism leaves us essentially at the same impasse traditional originalism faced over the problem of

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67. Solum, Heller and *Originalism*, *supra* note 2, at 949.

68. For two general discussions of Grice and his project linking an intentionalist theory of speaker meaning with sentence meaning, see WILLIAM G. LYCAN, *PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION* 86–97 (2000), and MICHAEL MORRIS, *AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 248–70 (2007).

69. Stephen Neale notes that “sentence meaning (more broadly, *utterance-type* meaning) can be analyzed (roughly) in terms of regularities over the intentions with which utterers produce those sentences on given occasions.” Neale, *supra* note 60, at 6. Solum has refined his notion of context and now accords greater significance to forms of pragmatic enrichment in the current version of his theory: “‘Public Meaning Originalism’ names the version of originalist theory holding that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens.” See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 459 (2013). The role of pragmatic enrichment in Solum’s theory remains under-theorized. Finally, the current form of the theory does not acknowledge the need to link usage with intent. When one acknowledges this flaw in semantic originalism, the theory becomes just another variant of intentionalism. For a critique of the new originalism along these lines, see Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique* 23 (San Diego Legal Studies, Paper No. 13-120, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277790](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277790) (arguing that new originalist theory is actually parasitic in relation to intentionalist theories of meaning).

70. See generally, e.g., Barnett, *supra* note 2. Barnett has expanded his research agenda beyond dictionaries to include a wider range of sources, but his approach is still essentially ahistorical. For the latest statement of Barnett’s methodology, see Barnett, *supra* note 1; *supra* note 41 and accompanying text.

intentionality—it lacks a genuine empirical historical methodology to deal with multiple and potentially conflicting intents.<sup>71</sup>

A number of prominent new originalists have adopted a less philosophically self-conscious approach, and advocated the use of a variety of different types of fictive readers as a means of reconstructing original meaning: a representative Founding-era lawyer, a competent speaker of American English, the typical rational man on the street. These fictive personas are then used as the basis for reconstructing what the Constitution meant in 1788.<sup>72</sup> Gary Lawson favors a hypothetical reasonable person trained in the law.<sup>73</sup> Michael Stokes Paulsen posits a reasonable reader as the ideal construct.<sup>74</sup> Scholars invoking such imaginary readers do not seem to be familiar with the rich scholarly literature on reader-response literary criticism, the history of publishing and reading, or recent historical writing on the social and cultural history of the Founding era. The use of fictive readers in literary criticism was all the rage about thirty years ago, but the practice fell out of favor among many literary scholars when problems with this methodology became evident. Once literary critics began investigating actual readers and comparing their responses to the ideal readers posited by theorists, it soon became apparent that many of their critical assumptions about reading practices were simply false. Equally troubling was the discovery that many critics unconsciously poured their own ideological prejudices into the ideal readers they constructed.<sup>75</sup> While work on the history of publishing and reading has evolved over the last two decades, recovering the actual reading practices of long dead readers is still among the most elusive historical goals.<sup>76</sup> None of the originalist advocates for using fictive readers appears to be aware of these methodological problems or the scholarly controversies occasioned by them. Indeed, Lawson argues that the advantage of using fictive readers over the actual historical readers is that this approach avoids the political biases that may have distorted the views of individuals who actually read

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71. This critique of originalism is most closely associated with Paul Brest, *supra* note 12.

72. On the history of reader-response criticism, see generally Philip Goldstein, *Reader-Response Theory and Criticism*, in *THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM* 793 (Michael Groden et al. eds., 2d ed. 2005). For an effort to use Gricean theory in literary criticism, see generally MARY LOUISE PRATT, *TOWARD A SPEECH ACT THEORY OF LITERARY DISCOURSE* (1977).

73. Gary Lawson & Guy Seidman, *Originalism As a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 79 (2006).

74. Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1144–45 (2003).

75. See generally JANICE A. RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR LITERATURE* (1984).

76. See generally Martyn P. Thompson, *Reception Theory and the Interpretation of Historical Meaning*, 32 *HIST. & THEORY* 248 (1993). On the empirical problems of using reader theory on historical texts, see Ian Jackson, *Approaches to the History of Readers and Reading in Eighteenth-Century Britain*, 47 *HIST. J.* 1041 (2004), and Eric Slauter, *Reading and Radicalization: Print, Politics, and the American Revolution*, 8 *EARLY AM. STUD.* 5 (2010).

the Constitution and interpreted it two hundred years ago.<sup>77</sup> Apparently, Lawson believes that the historical actors who wrote, ratified, and later interpreted the Constitution were somehow compromised by their political biases, but a modern law professor is able to rise above any similar ideological blindness or bias.<sup>78</sup>

John McGinnis and Michael Rappaport dub their approach “original methods originalism.”<sup>79</sup> This theory argues that “to find what an informed speaker of the language would have understood the Constitution’s meaning to be, one must look to the interpretive rules that were customarily applied to such a document.”<sup>80</sup> The two scholars define an informed speaker as “a competent and reasonable speaker at the time of the Constitution’s enactment.”<sup>81</sup> Exactly what criteria define such a person is a bit of a mystery. The theory does not articulate any clear rules for constructing such a person. Nor does the theory make clear what body of historical sources would define this imaginary person’s worldview.<sup>82</sup> The basic assumption undergirding this theory is that there was a broad consensus on interpretive methods in the Founding era. In reality, the Founding era was characterized by serious divisions and conflict, including a deep rift separating Federalists from Anti-Federalists and an even larger divide between popular and elite approaches to constitutional texts.<sup>83</sup>

McGinnis and Rappaport insist that the Constitution must be read as a legal document, but they treat Founding-era legal culture in an anachronistic manner and assume the existence of a consensus on issues that were actually deeply contested in 1788. Consider their ungrounded assertion that ordinary Americans would have simply deferred to lawyers when interpreting the Constitution. To justify this approach, McGinnis and Rappaport make the following unsubstantiated claim:

It is a common, if not universal, reaction for a layperson to read a legal document—whether a contract, a statute, or a constitution—and have the following reaction: “Well, it seems to mean X to me, but I am not a lawyer. To be sure of its meaning, we will need a lawyer to read it.”<sup>84</sup>

The assertion that a deferential attitude toward lawyers represents some type of universal transhistorical truth about the way Americans have

77. Lawson, *supra* note 2, at 341 n.51.

78. One need not subscribe to radical skepticism or nihilism to recognize that there is no objective scholarly stance from which to understand the past. Historians are just as historically situated as the historical actors they study. This does not mean that efforts to understand the past are impossible or that all accounts of the past are equally plausible or hold the same analytical power. For a refutation of such a simplistic claim, see Richard Rorty et al., *Introduction*, in *PHILOSOPHY IN HISTORY*, *supra* note 39, at 1, 8.

79. See generally McGinnis & Rappaport, *Original Interpretive Principles*, *supra* note 2; McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 2.

80. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 2, at 752.

81. *Id.* at 761.

82. See examples *infra* note 84 and accompanying text.

83. See *infra* notes 92–93.

84. It is odd that such a sweeping claim would be unsubstantiated by any scholarly support. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 2, at 765.



approached legal documents, including texts as different as contracts, statutes, and constitutions, is hard to reconcile with existing scholarship about contemporary attitudes toward the law in America.<sup>85</sup> In particular, it blurs the vital distinction between the way Americans approach constitutional texts and other legal texts such as contracts. While some Americans might defer to lawyers when reading a contract, there is no compelling evidence that they show the same deference when looking at the meaning of the Constitution. Many Americans have very clear views about what they think the Constitution means, and on the issues that matter to them, such as the right to bear arms, the idea that they would defer to lawyers who opposed their views seems wildly out of touch with reality and is contradicted by a mountain of evidence.<sup>86</sup>

The deference hypothesis makes even less sense in the context of the Founding era. Ratification was not marked by polite deference, but by vocal contestation. Anti-Federalist Amos Singletary's impassioned speech at the Massachusetts Ratification Convention is perhaps the best known and most often repeated example of the profound antilawyer sentiment articulated during ratification.<sup>87</sup> Clearly, McGinnis and Rappaport have not spent enough time with Founding-era sources, or they would have encountered other texts articulating similar attitudes:

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.<sup>88</sup>

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85. For a very different view of popular attitudes toward lawyers in modern America, see MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005). In a November 2012 survey of how Americans view various professions in terms of honesty and ethics, lawyers ranked near the bottom of the list. *Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited Oct. 21, 2013). Interestingly, Congress scored even lower. Only 10 percent of Americans surveyed believed members of Congress were honest and ethical. *Id.* Among the professions listed, only car salespersons were seen as less honest and ethical. *Id.*

86. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2042 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)) (noting, correctly, that most gun owners would not change their view of the Second Amendment if scholarly evidence contrary to their view was presented to them). Indeed, most gun owners and gun rights advocates never accepted the orthodox collective rights view of the Amendment that most courts and legal experts adopted in the seventy years leading up to *Heller*. See Siegel, *supra* note 6, at 211–12.

87. *Convention Debates, 25 January, A.M.*, in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1344–48 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

88. *Id.* at 1346–47. Illiteracy in this context connotes the absence of formal learning, particularly knowledge of Latin, and not an inability to read or write. For a discussion of Singletary's speech in this context, see MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* (1992).

McGinnis and Rappaport do not cite any of the rich scholarly literature on the history of publishing and reading that has transformed the way historians and literary scholars approach Founding-era texts. Rather than grounding their approach in this scholarly literature, they engage in a typical originalist dodge, citing another originalist scholar with no expertise to support propositions that are well beyond the scholarly expertise of the person being cited. In the case of the publishing history of ratification, McGinnis and Rappaport cite the work of originalist scholar John Yoo. Setting aside the controversial nature of Yoo's work on executive authority and foreign affairs, the decision to treat him as an authority on Founding-era political, social, or cultural history is hard to fathom. Based on Yoo's pedestrian observation that pamphlets were used to help spread ideas during ratification, McGinnis and Rappaport jump to the following wildly inaccurate conclusion:

[T]he people decided whether to ratify the Constitution based on an explanation of its meaning by those with legal knowledge. Pamphleteers of all kinds wrote lengthy explications of the Constitution precisely so that the people could be informed. It is not too much to say that they translated the condensed, sometimes technical language of the legal document into familiar language more easily accessible to the electorate as a whole.<sup>89</sup>

At the time the Constitution was framed, most lawyers were trained by an apprenticeship system. In contrast to modern law, there was no system of accredited schools, no standard textbooks, and no uniform examination system to determine who passed the bar. In the Founding era, none of these attributes of a modern profession existed. James Wilson was one of the most eminent lawyers in the new nation. Although respected by many, Wilson was not well regarded by all Pennsylvanians. Anyone familiar with ratification in Pennsylvania would know that Wilson was mocked, denounced, and burned in effigy because of his status as a member of the state's legal elite.<sup>90</sup> He stood at one extreme of this legal spectrum. At the other extreme were ordinary citizens who gained most of their knowledge

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89. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 2, at 771 (citing John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997)). Yoo bases his assessment on a "glance" at the *Documentary History of the Ratification of the Constitution* and does not cite any relevant historical scholarship on the complex history of ratification. On the controversy around Yoo's abuse of historical sources, see Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012). Other scholars have also challenged Yoo's approach to history. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Martin S. Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565 (1997); see also Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377 (2011).

90. On attitudes toward Wilson in Pennsylvania, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, at 121 (2010), and Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 324 (2011).

from the popular press.<sup>91</sup> In the middle of this vast spectrum were the majority of practicing lawyers who had served in an apprenticeship and may have owned a modest law library of a small number of essential texts such as Blackstone. On almost any constitutional question of any significance debated during ratification, there was likely to be a range of possible views.<sup>92</sup>

As a generation of scholarship in the history of the book has shown, American readers seldom acted like empty vessels into which elites might pour their own ideological wine. Reading the Constitution was no exception to this general pattern. Singletary's charges at the Massachusetts Ratification Convention that Federalists wished to cram the Constitution down the people's throats were hardly unique; Anti-Federalists made similar claims in many states. Anti-Federalists rejected Federalist pleas for deference and were not passive consumers of constitutional texts. The surviving evidence clearly demonstrates that Americans actively sought out a range of different texts to read and drew their own conclusions about what the words of the Constitution meant. Thus, an essential first step to reconstructing constitutional meaning in this era requires analyzing the process of literary production, the circulation of published materials, and, most crucially and where possible, the reader responses of individuals and particular groups within both the Federalist and Anti-Federalist movements. Only once we have fully analyzed these processes can scholars begin to understand the pragmatics of constitutional communication in the Founding era.

The circulation of Mercy Otis Warren's *Columbian Patriot Essays* is a good illustration of the complexity of these processes. The New York City Anti-Federal Committee forwarded 1,700 copies of the essay to various Anti-Federal committees throughout the state. The Albany Anti-Federal Committee expressed its gratitude for this gesture, but remarked that the pamphlet was "a well composed piece, . . . [but] in a stile too sublime and florid for us common people in this Part of the Country."<sup>93</sup> Clearly, the preferences of leading Anti-Federalists in New York City did not mirror those in other parts of the state. Backcountry Pennsylvania provides another example of the same dynamic. William Petrikin, an Anti-Federalist from Carlisle, Pennsylvania, also made clear his ideological preferences about what sort of pamphlets and newspaper essays would be most welcome among common folk in western Pennsylvania. He requested that copies of *Centinel*, one of the most radical democratic voices within the ranks of the Anti-Federalist opposition, be forwarded to him for distribution. *Centinel's* popularity and influence among ordinary readers in the Pennsylvania backcountry was considerable. Rather than follow the

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91. See Cornell, *supra* note 90, at 329–30.

92. See Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA, *supra* note 21, at 68.

93. On the differences between popular and elite reactions to various Anti-Federalist pamphlets, see CORNELL, *supra* note 12, at 36.

simplistic top-down model in which constitutional meaning trickles down from elites—the view implicit in virtually all originalist scholarship—it would make far more sense to heed Kloppenberg’s advice and study the production, distribution, and reception of constitutional texts in the Founding era. Only after one has mapped the interpretive landscape of the Founding era and arrived at a plausible account of how to weight the different texts surviving from this period, can one begin to explore the pragmatics of constitutional meaning in 1788 or 1791.

## II. ORIGINALISM AS CONSTITUTIONAL SCAM:

### *DISTRICT OF COLUMBIA V. HELLER*

*District of Columbia v. Heller*<sup>94</sup> has been praised by originalists as the best example of the interpretive power of their methodology. Criticism of the decision has been equally scathing and has been leveled from across the contemporary ideological spectrum. Ironically, some of the most intense attacks have come from conservatives who have accused Justice Scalia of abandoning judicial restraint for activism, applying his own methodology in a selective fashion, constructing an incoherent theory of the Constitution, and conjuring up a fantasy version of America’s constitutional past.<sup>95</sup>

Leading advocates of new originalism are among the most conspicuous defenders of Justice Scalia’s methodology in *Heller*. Lawrence Solum praises the decision, observing that “*Heller* is certainly the clearest and most prominent example of originalism in contemporary Supreme Court jurisprudence.”<sup>96</sup> Randy Barnett extols Justice Scalia’s “textual analysis” as “state of the art.”<sup>97</sup> Barnett may well be right about the artfulness of Scalia’s opinion, but the art in *Heller* is more akin to a surrealist painting than a faithful effort at rendering the past. Rather than reconstruct the historical reality and meaning of the Second Amendment as Americans in 1791 understood it, Justice Scalia constructs a Salvador Dalí-like historical landscape of melted clocks, eerie landscapes, and grotesque caricatures.

Lawrence Solum applauds Justice Scalia’s emphasis on semantic meaning and commends his methodology, particularly his decision to use historical dictionaries to ferret out the meaning of the Second Amendment. The most obvious problem with using historical dictionaries to sort out the meaning of key terms in the Second Amendment is that contemporary dictionaries did not define the term “bear arms.” This fact did not deter Justice Scalia, who simply chose to treat the words “bear” and “arms” separately, concluding that the former simply meant carry and the latter

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94. 554 U.S. 570 (2008).

95. For criticism on the right, see Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171 (2008), Charles Fried, *The Second Annual Kennedy Lecture: On Judgment*, 15 LEWIS & CLARK L. REV. 1031 (2011), and Wilkinson, *supra* note 6, at 264–75. For an equally devastating critique from a liberal perspective, see Siegel, *supra* note 6.

96. Solum, *Heller and Originalism*, *supra* note 2, at 980.

97. For Barnett’s view of the case, see Barnett, *supra* note 1, at 423.

referred to guns. Through this sleight of hand, he effectively rewrote the Second Amendment so that it read: the right of the people to keep and carry guns shall not be infringed.<sup>98</sup>

Given that there were a small number of English dictionaries to consult from this era, one might have expected Justice Scalia to look at them all with some care. One text he obviously did not consult was Nathan Bailey's *Universal Etymological English Dictionary*, which actually uses the phrase "bear arms."<sup>99</sup> Bailey discusses this term in the context of defining another key concept from the period, "political arthmetick," the forerunner of modern social science, the "application of arithmetical calculations to political uses."<sup>100</sup> After summarizing one author's statistical observations about birth rates and mortality rates, Bailey notes that another important ratio of interest for students of political economy was "the proportion of men able to bear arms, which he reckons from 18 to 56 years old, and accounts about a quarter of the whole."<sup>101</sup> Bailey clearly understood the term "bear arms" to define a portion of the population able to participate in military activity.

Yet, even if Justice Scalia had not cherry-picked his evidence from early dictionaries, and had consulted the full range of extant sources, there are still serious limits to using these types of texts to research the historical meaning of words. Early dictionaries were not assembled according to the

98. See generally *Heller*, 554 U.S. at 576. American dictionaries postdate the Second Amendment, a fact that Scalia ignores. Thus, Scalia cites the *American Dictionary of the English Language* from 1828, but shows no awareness that the forty year gap separating the drafting of the Second Amendment and the publication of Webster's dictionary was a period of profound change in American culture. Indeed, the radical transformation in American life in this period is central to one of America's most important literary tales from this era, *Rip Van Winkle*. On Justice Scalia's *Rip Van Winkle* problem, see Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss,"* 56 UCLA L. REV. 1095 (2009). Historian Gordon Wood uses Washington Irving's story of Rip Van Winkle's slumber and rude awakening as the narrative anchor to open his prize-winning contribution to the *Oxford History of the United States*. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* (2009).

99. NATHAN BAILEY, *THE UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* 606 (London, Thomas Cox 1731). Rickie Sonpal notes that Justice Thomas used three Founding-era English dictionaries in his *Lopez* opinion: Samuel Johnson's *A Dictionary of the English Language* (1773), Nathan Bailey's *An Universal Etymological English Dictionary* (1789), and Thomas Sheridan's *A Complete Dictionary of the English Language* (1796). Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177 (2003). It is curious that only two of these three were consulted in *Heller*. Bailey, the only one to actually use the term "bear arms," was curiously omitted. Scalia's manipulation of evidence is further compounded by the fact that Bailey was clearly popular in America. Advertisements for Bailey's dictionary in American newspapers underscores this fact. See PENN. PACKET, September 21, 1784, at 3.

100. On the history of political arithmetic and its relationship to modern statistics and social science, see TED McCORMICK, *WILLIAM PETTY AND THE AMBITIONS OF POLITICAL ARITHMETIC* (2010).

101. BAILEY, *supra* note 99, at 606. None of the dictionaries cited by Justice Scalia include an entry for "bear arms." SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (Edinburgh, Tho. Brown, R. Ross & J. Symington, 11th ed. 1797); TIMOTHY CUNNINGHAM, *A NEW AND COMPLETE LAW-DICTIONARY* (Dublin, Sar. Cotter, Hen. Saunders & Jam. Williams, 1764).

rigorous scholarly procedures developed by modern lexicographers. Historical dictionaries were far from complete, were generally assembled in an idiosyncratic manner, and were often prescriptive, not descriptive in nature. Indeed, as the example of Bailey suggests, Justice Scalia did not even bother to fully survey all the dictionaries from the period.<sup>102</sup> Rather than document and analyze the actual usage of “bear arms” in a systematic fashion, Justice Scalia simply plucks a few isolated examples to further his ideological agenda.<sup>103</sup>

*Heller’s* manipulations and misrepresentations of the past are not simply a function of a failure to sample enough sources. Scalia’s opinion does not lack evidence, but the sources are selected for ideological reasons, not according to any neutral scholarly criteria. All surviving texts are of equal weight because they can be invoked as evidence of original public meaning. Once one severs meaning from communicative intent, words can be read in almost any way that serves the ideological agenda of contemporary judges and lawyers. This approach leads to absurd conclusions in *Heller*. One of the most egregious examples of this process of ideological manipulation occurs in *Heller’s* treatment of Quaker opposition to bearing arms. In essence, Justice Scalia substitutes his own twisted interpretation of Quaker belief for the actual historical ideas and practices of eighteenth-century Friends.<sup>104</sup>

Quakers in several states, including Pennsylvania, sought exemptions from mandatory service in the militia because they were religiously scrupulous about bearing arms. Indeed, Madison’s original draft of the Second Amendment included a provision that would have exempted those scrupulous about bearing arms from militia service. This language was dropped when Elbridge Gerry raised the alarm that a potentially tyrannical government might use this power to decide who was scrupulous about bearing arms and disarm them, effectively undermining the state militias. There was no discussion of private uses of arms in this Congressional debate, but Justice Scalia simply discounts this fact because he treats the entire episode as a type of legislative history and hence irrelevant to

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102. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 242–62 (1999). See generally ANTHONY PAUL COWIE, *THE OXFORD HISTORY OF LEXICOGRAPHY* (2009). America’s first dictionaries postdate the Constitution. See RICHARD ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* 123 (1980). The modern Oxford English Dictionary, by contrast, does include a listing for “bear arms” and offers this definition: “to serve as a soldier, do military service, fight.” 2 THE OXFORD ENGLISH DICTIONARY (Edmund S. Weiner & John Simpson eds., 1989).

103. Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right To Bear Arms*, 29 J. EARLY REPUBLIC 585, 585–606 (2009) (documenting that the vast majority of the uses of the term “bear arms” support the modern *Oxford English Dictionary’s* historical definition and contradict Justice Scalia’s claims in *Heller*).

104. On the complex history of the Quaker Peace Testimony, see generally MEREDITH BALDWIN WEDDLE, *WALKING IN THE WAY OF PEACE: QUAKER PACIFISM IN THE SEVENTEENTH CENTURY* (2001).

establishing original public meaning.<sup>105</sup> Even if one accepted Justice Scalia's somewhat incoherent objections to the use of legislative history and his philosophically flawed claim that one can understand meaning without establishing communicative intent, his tendentious reading of Quaker belief is an example of *ipse dixit* bordering on the hallucinatory.<sup>106</sup>

Justice Scalia provides his own novel interpretation of Quaker pacifism. According to him, Quaker teaching prohibited going to war and "personal gunfights."<sup>107</sup> "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever."<sup>108</sup> It is not exactly clear what Justice Scalia is alluding to when he talks about Quaker opposition to "personal gunfights." This term conjures up an image more appropriate for the classic Hollywood westerns of Justice Scalia's youth than it does to the realities of the eighteenth century.<sup>109</sup> Quakers opposed dueling, as did many others in eighteenth-century America, and the practice was illegal in many places. Rates of interpersonal violence among Quakers living in Pennsylvania were among the lowest in America.<sup>110</sup> Justice Scalia seems to suggest that because Quakers opposed all forms of violence, their appeals to be exempt from legal arms-bearing requirements were simply an extension of a more general opposition to the use of guns. Quaker attitudes toward self-defense and guns are a bit more complex than Justice Scalia's account suggests. Friends acted as magistrates and justices of the peace in Pennsylvania and were responsible for keeping the peace (peace officers were not always armed in the Founding era, so it is not clear if Quakers would have ever been armed in this context). The orthodox interpretation of the Quaker Peace Testimony categorically prohibited any "war-like" action of any kind. Quakers took the ideal of peace and harmony seriously and could be disciplined by their local meeting for offenses as minor as striking another individual or spreading malicious gossip. Yet, the use of guns by Quakers was never an issue for Friends. Indeed, the distinguished

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105. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998). For critiques, see Abner S. Greene, *The Missing Step of Textualism*, 74 *FORDHAM L. REV.* 1913, 1919–22 (2006), and Soames, *supra* note 11, at 42–43.

106. See Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 *HASTINGS L.J.* 1371 (2009); Wilkinson, *supra* note 6. The temporal distortions of *Heller* are discussed in Siegel, *supra* note 6.

107. District of Columbia v. Heller, 554 U.S. 570, 590 (2008).

108. *Id.*

109. Scalia's reference to gun fighting Quakers is bizarre and profoundly anachronistic. On the importance of the "gun fighter" myth in modern Hollywood Westerns, see RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1860* (2000). The gun fighter became one of the most powerful and iconic images to emerge in post-war America cinema. Interestingly, Quakers figure prominently in two of the most popular and celebrated westerns of this period: John Wayne's *Angel and the Badman*, and Gary Cooper and Grace Kelly's *High Noon*. In *Angel and the Badman*, John Wayne plays a gun fighter who becomes involved with a family of Quakers and ultimately gives up his gun. *ANGEL AND THE BADMAN* (Republic Pictures 1947). In *High Noon*, Gary Cooper is saved by Grace Kelly, his Quaker wife, who rejects her faith's nonviolence and takes up a gun to save her husband. *HIGH NOON* (Universal Pictures 1952).

110. See RANDOLPH ROTH, *AMERICAN HOMICIDE* 92 (2009).

Quaker historian Jack Marietta notes that neither the Disciplinary Rules of the Friends nor the extant records of the sect's monthly meetings in Pennsylvania reveal any evidence that Friends were ever disciplined for owning or using firearms outside of the context of militia service.<sup>111</sup> Quakers owned guns for a variety of different purposes, including pest control and hunting.<sup>112</sup> In revolutionary-era North Carolina, a well-known *Quaker gunsmith* attracted some notoriety when he tried to buy back guns he had sold to his neighbors to prevent them from being used for military purposes.<sup>113</sup> Thus, Quaker belief posed no challenge to bearing a gun in a variety of contexts, but it absolutely prohibited Friends from bearing arms. The use of a gun or any weapon in legal self-defense was a more complex religious question for Quakers, but one that would have been dealt with internally by Friends within the forum of the monthly meeting.<sup>114</sup> There would have been no reason for Quakers to petition their government for an exemption from being forced to use a gun in self-defense. The right of self-defense was well established at common law, and the decision to use a gun to defend oneself was a private one. Justice Scalia clearly confused Quaker theology with the historical and legal reality faced by Quakers in Pennsylvania and other states. As a theological matter, Quaker opposition to violence derived from the New Testament's belief that one ought to "turn the other cheek," rather than meet violence with violence. This was clearly not the issue Quakers were addressing in their repeated efforts to gain a religious exemption from bearing arms from individual states and eventually from Congress. Quakers were seeking to avoid involvement with the military.<sup>115</sup>

Justice Scalia violates an elementary rule of any sound historical inquiry: he substitutes his own views of the motivations behind Quaker action and belief for the Friends' own account of their behavior and ideals. Here is how one Quaker described the sect's position on bearing arms to non-

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111. Posting of Jack Marietta, to Pennsylvania@h-net.msu.edu (Jan. 30, 2008) (on file with author); see also J.D. MARIETTA & G.S. ROWE, *TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682–1800*, at 50 (2006) (concluding that levels of interpersonal violence within the Quaker communities of Pennsylvania were remarkably low and vindicate the Friend's vision of themselves as a peaceful community).

112. See generally Kevin Sweeney, *Firearms, Militias, and the Second Amendment*, in SAUL CORNELL & NATHAN KOZUSKANICH, *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 310 (2013). Quakers did oppose hunting for sport.

113. SETH HINSHAW, *QUAKER INFLUENCES ON AMERICAN IDEALS: AN OVERVIEW* 17 (1976).

114. Quakers did use arms to defend Indians during the Paxton uprising in 1763, a fact that prompted considerable commentary in the contemporary press and was addressed in the monthly meeting. See Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right To Bear Arms*, 38 *RUTGERS L.J.* 1041, 1051–53 (2007).

115. In the colonial era, some colonies required individuals to bring guns to church. See, e.g., 1631 Va. Acts 155. No similar law was enacted in Pennsylvania where Quakers dominated politics for much of the colony's history. Indeed, Pennsylvania was the only colony without a militia for much of the colonial era. See Kozuskanich, *supra* note 114, at 1048.



Quakers: “We have a clear and strong Testimony to bear against Wars and Bloodshed; we cannot appear ourselves in Person, as *Soldiers, Military Men*, nor can we hire one another to or serve in our stead, neither comply with the Payment of any Fine or procure another Man to supply our Place.”<sup>116</sup> This prohibition also extended to procuring items that might further the goals of warfare, including the purchase of “Drums, Colors, and other Military Attire.” If one looks at documents intended strictly for consumption by other Quakers, the exclusive military focus of this concern is even more clearly articulated by Friends. To enforce religious discipline within the Quaker meeting, Friends used a series of “Queries” designed to ascertain the level of conformity to Quaker teachings on a variety of issues. The Queries touched on belief and behavior, including attendance at meetings, abstinence from consumption of alcohol, demeanor in public, and care for the poor. Although there was no discussion of private use of arms in the Queries, the question of military use was a major issue. One set of Queries written and distributed to monthly meetings throughout New England makes this clear: “Do you maintain a faithful testimony against the payment of priests [sic] wages, bearing of arms, training, or other military matters?” Quakers clearly understood bearing arms to refer to military matters exclusively.<sup>117</sup> Nor was this understanding limited to members of the Society of Friends. When the subject came up in the press, this issue dominated discussion. One of the clearest expressions of this concern may be found in an essay authored shortly after ratification of the Constitution. It addressed the need for an amendment to the Constitution to protect the militia and responded to Quaker demands for an exemption to bearing arms:

I am, and ever have been a decided friend to the principle of not compelling men to fight, who are from religious principles averse to bearing arms, but it would be improper to have an article to that purpose in the frame of government; it ought merely to be part of the militia law, and a precise definition should be made of what should really be deemed conscientious scruples, such as being actually in unity with the Quakers, Methodists, Menonists, Dunkers, or some other society, who are really conscientiously scrupulous of bearing arms. — Then people cannot pretend to conscientious qualms, in case of invasion or insurrection, merely as a cloak to conceal their cowardice.<sup>118</sup>

Quakers did not fear that the state would force them to take up a gun to protect their homes or meeting houses, but Quakers did fear that they would be forced to serve in the militia or pay a fee or fine in place of such service. There is simply no evidence that Quakers or anyone in the Founding era understood the notion of being religiously scrupulous about bearing arms to

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116. A COLLECTION OF SOME WRITINGS OF THE MOST NOTED OF THE PEOPLE CALLED QUAKERS 6 (Phila., W. & T. Bradford 1767).

117. The queries were reprinted as a broadside. NEW ENG. YEARLY MEETING OF FRIENDS, QUERIES (1782), available at [http://tritych.brynmawr.edu/cdm/ref/collection/SC\\_Broad/id/872](http://tritych.brynmawr.edu/cdm/ref/collection/SC_Broad/id/872).

118. PENN. PACKET, September 10, 1789, at 4.

be anything other than a concern over militia service or other involvement with the military.

Justice Scalia also distorts the interpretive conventions familiar to eighteenth-century authors and readers of the Second Amendment. The first clause in the Amendment not only referenced “[a] well regulated Militia,”<sup>119</sup> but the clause was framed as a preamble. The use of preambles in legal texts was quite common in the Founding era.<sup>120</sup> In *Heller*, Justice Scalia detached the purpose stated in the preamble from the rest of the Amendment’s text, claiming that “a prologue can be used only to clarify an ambiguous operative provision.”<sup>121</sup> The justification for approaching legal texts in this manner comes not from Founding-era sources or practices, but from a set of legal rules elaborated by two nineteenth-century authors of legal treatises written over a half a century after the Second Amendment was framed and adopted.<sup>122</sup> Justice Scalia literally read the text of the Second Amendment backwards, setting aside the meaning of the preamble until he arrives at his preferred reading of the enacting clause. Indeed, Justice Scalia not only read the text of the Amendment backwards, he read history backwards, drawing on interpretive canons elaborated in texts written decades after the Second Amendment’s composition to unravel how Americans in the Founding era would have understood the right to bear arms.<sup>123</sup> Approaching history and texts backwards lends Scalia’s *Heller* opinion an *Alice in Wonderland* quality.<sup>124</sup>

It seems odd that Justice Scalia does not cite any of the Founding-era cases on preambles. One might have thought that Supreme Court Justice John Jay’s summary of the relevant rule of construction regarding preambles would have been highly relevant to the facts before the Court in *Heller*: “A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.”<sup>125</sup> According to Jay, a preamble may not be used to abrogate the text, but in cases in which two competing readings of the text are proffered,

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119. U.S. CONST. amend. II, cl. 1.

120. Historian David Konig notes that the only case Scalia cites is an early eighteenth-century English case that had come into some disrepute. Konig, *supra* note 6.

121. *District of Columbia v. Heller*, 554 U.S. 570, 578 n.4 (2008).

122. See JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 51 (Bos., Little, Brown 1882); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 268–69 (P. Potter ed., N.Y.C., William Gould & Sons 1871); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (Fred B. Rothman & Co. 1980) (2d ed. 1874).

123. Justice Scalia’s approach to preambles employs a “Cheshire Cat Rule of Construction”: now you see the preamble, now you don’t. For a discussion of this feature of *Heller*’s *Alice in Wonderland* methodology, see Cornell, *supra* note 98.

124. Ironically, in *Heller*, Justice Scalia chided Justice Stevens for his *Alice in Wonderland* methodology. See *Heller*, 554 U.S. at 570.

125. Jay’s view is developed in *Jones v. Walker*, 13 F. Cas. 1059, 1065 (C.C.D. Va. 1800) (No. 7,507). The issue was also central to the resolution of *Lloyd v. Urison*, 2 N.J.L. 212, 202 (Sup. Ct. 1807).

the preamble can be employed to illuminate the intention of the lawgiver and decide which meaning of a disputed text is more consistent with the purpose of the law.

Jay's view of preambles was hardly unique in the Founding era. Although Justice Scalia cites the Pennsylvania Constitution as good authority, he conspicuously ignores its detailed treatment of preambles.<sup>126</sup>

To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and *for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.*<sup>127</sup>

In his manual on parliamentary procedure, Thomas Jefferson also favored the use of preambles as a guide to interpreting statutes.<sup>128</sup> Finally, the most popular lay guide to the law, a text published in multiple editions and available in most of the new states, the *Conductor Generalis*, included a brief guide to interpreting statutes. Among the rules it reprinted were Lord Coke's maxim: "The preamble or rehearsal of a statute is deemed true: and therefore good argument may be drawn from the preamble."<sup>129</sup> The dominant approach to preambles in the Founding era does not support Justice Scalia's backwards reading of the Second Amendment.

There are many lessons to be drawn from *Heller's* tortured use of evidence. Rather than vindicate public meaning originalism, *Heller* shows that its methods are easily manipulated and prone to abuse. *Heller* demonstrates the danger of focusing on a disembodied "public meaning" hovering somewhere in the constitutional ether. Public meaning originalism makes it far too easy for ideologically motivated judges and lawyers to consciously or unconsciously manipulate the text to suit their political agendas.<sup>130</sup>

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126. *Heller*, 554 U.S. at 584–85.

127. PA. CONST. of 1776 § 15 (emphasis added).

128. THOMAS JEFFERSON, MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES 79 (Wash. City, Samuel Harrison Smith 1801).

129. RICHARD BURN & JAMES PARKER, THE CONDUCTOR GENERALIS, OR, THE OFFICE, DUTY & AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, & OVERSEERS OF THE POOR (Phila., Matthew Carey 1801). The fact that the two leading proponents of "original methods" originalism endorsed this erroneous view of Founding-era practice only underscores the problems with the method. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 2, at 767.

130. By shifting attention away from individuals and particular groups, such as Framers and ratifiers, public meaning originalism actually facilitates the manipulation of evidence by allowing scholars to engage in more subtle forms of manipulation. See generally Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

III. HISTORICAL PRAGMATICS AND CONSTITUTIONAL MEANING  
IN 1787–88: THE ORIGINAL DEBATE OVER FREEDOM OF THE PRESS

The best way to illustrate the method of historical pragmatics is to examine a specific Founding-era example. A substantial modern scholarly literature on the meaning of “freedom of the press” has developed over the last two generations. One case that typically appears as a footnote in this story, *Respublica v. Oswald*,<sup>131</sup> merits further attention because it affords a rare glimpse into Founding-era conflict over how to read constitutional texts.<sup>132</sup>

As news of ratification spread in the summer of 1788, the outspoken Pennsylvania Anti-Federalist printer Eleazer Oswald became embroiled in a libel case when he attacked Federalist Andrew Brown in the pages of his newspaper, *The Independent Gazetteer, or The Chronicle of Freedom*. The Pennsylvania case of *Respublica v. Oswald* took several unexpected legal turns before being resolved, including a controversial contempt citation of Oswald and an unsuccessful attempt by Oswald to impeach Chief Justice Thomas McKean, the presiding judge in the case.<sup>133</sup> The unusual twists in the case prompted a much more extensive discussion of constitutional questions in the press, and the issues raised by the case eventually reached beyond the courts to the halls of the Pennsylvania state house, where the legislature considered a petition to impeach Chief Justice McKean.<sup>134</sup> Although it was adjudicated under state law and did not directly involve any legal issues presented by the new federal Constitution, the controversy engendered by the case illuminates the pragmatic processes in play when Americans tried to make sense of constitutional texts. Indeed, the *Oswald* case was the first significant public debate over the general principles of constitutional interpretation to occur in the wake of the adoption of the federal Constitution, and merits further scrutiny for that reason alone.

Ratification in Pennsylvania had been exceedingly contentious. The Pennsylvania press teemed with criticism and defenses of the Constitution. Crowds took to the streets on multiple occasions to vent their frustrations, affirm their own political views, and on several occasions engage in violent protest, including burning James Wilson in effigy. The state ratification

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131. 1 U.S. (1 Dall.) 319 (Pa. 1788).

132. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (discussing the case but making several errors in describing the facts and the holding in the case); see also NORMAN L. ROSENBERG, PROTECTING THE BEST MAN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1990); JEFFERY ALAN SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM (1988). For an interesting critique of historical scholarship on this topic by a prominent legal scholar, see David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985). Rabban’s critique of Levy makes a strong case that historians can easily fall into the trap of writing law office history. *Id.*

133. *Oswald*, 1 U.S. (1 Dall.) at 326.

134. The case report was also published as a pamphlet. See, e.g., *A Gentleman of the Law, in THE CASE OF THE COMMONWEALTH AGAINST ELEAZER OSWALD* (Phila., William Spotswood 1788).

convention also witnessed a number of dramatic moments as Federalists and Anti-Federalists clashed over the Constitution.<sup>135</sup>

Anti-Federalists pounced on the absence of a bill of rights as a serious flaw in the Constitution and were particularly troubled by the Constitution's failure to expressly protect freedom of the press. In his widely reprinted *State House Speech*, James Wilson argued that the Constitution did not need a bill of rights. He also derided fears that the Constitution threatened freedom of the press as absurd. Anti-Federalists rejected Wilson's arguments, including his suggestion that the Constitution posed no threat to freedom of the press. Writing as "[a]n Officer of the Late Continental Army," Anti-Federalist William Findley identified the use of libel as a particularly effective tool to destroy freedom of the press and stifle political dissent. In the Pennsylvania Ratification Convention, Wilson responded to this argument by invoking Sir William Blackstone's analysis of the law of libel. Wilson reminded his audience, "What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual."<sup>136</sup>

Findley became Wilson's most vocal opponent in the state ratification convention. Each man approached the process of constitutional interpretation from a radically different set of assumptions about how one ought to read constitutional texts. The two sparred frequently on the floor of the convention. One of the most dramatic moments in the convention occurred during one of these verbal tussles. Findley claimed that Sweden had once enjoyed the right of trial by jury but had lost it. Wilson mocked Findley's claim as preposterous. Angered by Wilson's arrogance, Findley, a weaver who had turned to the law and politics and had become a powerful figure in Pennsylvania, returned the next day and produced a volume of history and a volume of Blackstone to buttress his historical claims. Rather than drop the issue and move on, Wilson snidely dismissed his opponent's dramatic gesture as pretentious; he reminded the Convention that: "I do not pretend to remember everything I read."<sup>137</sup> By contrast, his opponent was one "whose stock of knowledge" was "limited to a few items," which meant he could "easily remember and refer to them."<sup>138</sup>

The sharp exchange between Wilson and Findley illustrates the profound rift between the legal vision of Federalist elites and a more popular democratic vision of law championed by backcountry Anti-Federalists.

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135. MAIER, *supra* note 32.

136. *James Wilson's Speech in the State House Yard*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 87, at 167, 168; *The Pennsylvania Convention, Saturday, 1 December 1787*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 87, at 444, 454–56 (statement of James Wilson); see also *An Officer of the Late Continental Army*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 87, at 211, 211.

137. See *James Wilson's Speech Pennsylvania Ratification Convention*, *supra* note 136, at 528, 532, 551.

138. *Id.*

Wilson's approach to the law was grounded in the traditions of Anglo-American jurisprudence; Blackstone's science of the law set out clear rules for interpreting legal texts. Findley rejected this elite vision of the law. His approach to constitutional interpretation was shaped by precepts drawn from Anti-Federalist popular constitutionalism. To the extent that Findley found any use for texts such as Blackstone, it was not as a model of legal reasoning to be emulated, but as a simple reference work from which isolated facts could be extracted. In this sense he viewed Blackstone as little different from a farmer's almanac. Wilson appreciated the vast difference that separated his vision of law from his opponent's. In the notes Wilson kept of the convention debates, he aptly summarized Findley's fundamental objection to the Constitution: "the system ought to speak for itself; and not need explanations."<sup>139</sup> From Wilson's point of view, Findley's approach to constitutional texts was simply untenable. The law never spoke for itself; law always required the application of a set of interpretive canons. In good Enlightenment fashion, Wilson saw the law as a science and mastery of it, including the new Constitution, presupposed a familiarity with a well-established body of rules and methods gleaned from a close study of legal decisions. Blackstone and others had attempted to systematize this science of the law, and rough-hewn democrats, including Findley, simply failed to appreciate that the law required considerably more than a competency in English to master. In short, from Wilson's elite perspective, Findley's radical textualism was antithetical to orthodox legal practices in both England and America.

In contrast to the recently ratified federal Constitution that contained no declaration of rights, the 1776 Pennsylvania Constitution contained a provision protecting freedom of the press. Pennsylvania's provision read: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."<sup>140</sup> Among Pennsylvania printers, Oswald had emerged as one of the state's most ardent defenders of an expansive vision of this right. Indeed, his aggressive advocacy for press freedom had landed him in McKean's court on libel charges in 1782. On that earlier occasion he had avoided prosecution by appealing to a sympathetic grand jury that refused to indict him. In 1788, Oswald once again faced his old enemy Justice McKean, and had things gone according to plan, the jury might once again have saved the printer. It might have worked out exactly as it had in 1782, but Oswald overplayed his hand and published an attack on McKean while his case moved to trial. McKean cited him for contempt, effectively depriving him of a chance to make his case before a jury.<sup>141</sup>

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139. *James Wilson's Notes on Speech of William Findley*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 87, at 506. For a discussion of the contrast between Findley's popular vision of the law and Wilson's more elitist views, see Cornell, *supra* note 90, at 323.

140. PA. CONST. of 1776 art. XII.

141. See generally Cornell, *supra* note 98 (discussing this case).

Although the 1788 *Oswald* case technically focused on the scope of contempt under Pennsylvania law, Justice McKean used the opportunity to expound on what freedom of the press meant in Pennsylvania. In matters of constitutional interpretation, McKean was a strong intentionalist. The “meaning of the [language of the] Constitution,” he intoned, was to be sought in “its spirit and intention.”<sup>142</sup> Oswald and his supporters had used considerable “ingenuity” to “torture the expressions.”<sup>143</sup> The proper understanding of freedom of the press, the true meaning of these words could only be ascertained when one applied the correct canons of construction that had been elaborated by learned English commentators such as Blackstone. These rules instructed judges to look first to the words of the law, and then to follow a prescribed series of rules to ascertain the intention of the lawgiver. McKean also shared the Federalist view that the language of the law had to be read against a set of background legal assumptions, which were well “settled in England, so far back as the reign of William the Third.”<sup>144</sup>

The interpretive rules and assumptions McKean extolled in court were also defended by Federalist lawyer William Lewis when Oswald brought his case before the Pennsylvania legislature. Infuriated by McKean’s imperious behavior, Oswald demanded McKean’s impeachment for violating the constitution of the state.<sup>145</sup> Lewis defended the Chief Justice against Oswald’s attacks, beginning his disquisition by “rescu[ing] Sir William Blackstone from the stigma of being a *courtly* writer.”<sup>146</sup> Oswald’s paper had reviled Federalists for invoking the authority of the notorious Tory-leaning judge.<sup>147</sup> Having absolved Blackstone of the charge of being hostile to American liberty, Lewis provided “a historical narrative” demonstrating that the intent of Pennsylvanians in framing such a provision in their own constitution had been clear: to protect the traditional understanding of freedom of the press inherited from English law. In addition to the arguments that McKean had proffered in court, Lewis invoked another interpretive principle derived from Blackstone: he identified the baneful consequences that would flow from the opposing rule of construction favored by Oswald. Moving beyond intention, to identify the potentially negative “effect and consequences” of Oswald’s Anti-

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142. *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788).

143. *Id.*

144. *Id.*

145. Blackstone’s rule was as follows:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.

1 WILLIAM BLACKSTONE, COMMENTARIES \*59. In addition, Blackstone counseled, “Lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.” *Id.* at \*59–61.

146. *Oswald*, 1 U.S. (1 Dall.) at 329 n.(a).

147. See generally Cornell, *supra* note 12 (discussing the press debate).

Federalist approach to interpreting the law, Lewis claimed that his opponents' legal method would "prostitute to the most ignoble purposes" the venerable idea of freedom of the press and produce licentiousness, not liberty.<sup>148</sup>

Oswald's champion in the legislature was William Findley, who rejected virtually every aspect of his Federalist opponents' Blackstonian method. Findley was a strong textualist, who resolved to stick to the "explicit language of the text."<sup>149</sup> In his view, formal legal knowledge was not necessary to understand constitutional texts.<sup>150</sup> "Every man," Findley asserted, "who possessed a competent share of common sense, and understood the rules of grammar, was able to determine, on a bare perusal of the bill of rights and constitution" what its words meant.<sup>151</sup> To interpret a constitution, one need simply have the ability to read ordinary English. Federalists, by contrast, applied the "jargon of the law," an approach Findley believed perverted the plain meaning of the text.<sup>152</sup> "If it was once established, that the technical learning of a lawyer is necessary to comprehend the principles laid down in the great political compact between the people and their rulers," such a development, would "be fatal, indeed, to the cause of liberty."<sup>153</sup> American constitutionalism was not heir to British ideas about freedom of the press, but rather marked a clean break with English legal ideas. The presuppositions that guided Findley's approach to constitutional interpretation were an interlocking set of democratic principles: the Revolution marked a sharp break with English law and the interpretation of constitutions required no technical knowledge of the law. The gulf separating Findley's popular constitutional vision from the orthodox Blackstonian vision of the law defended by Federalist elites including James Wilson, Thomas McKean, and William Lewis, was enormous.<sup>154</sup>

Most originalists have simply assumed the existence of a broad consensus on questions of constitutional meaning and interpretation during the Founding era. Historical scholarship over the last fifty years, by contrast, has demonstrated that conflict, not consensus, was the norm in this period.<sup>155</sup> The historical divisions within the Founding generation also encompassed profound disagreements over the most basic questions about how to read constitutional texts.<sup>156</sup> The controversy over the meaning of freedom of the press in Pennsylvania supports the idea that there was no interpretive consensus on the most basic issues of constitutional

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148. *Oswald*, 1 U.S. (1 Dall.) at 329 n.(b).

149. *Id.* at 329 n.(e).

150. *See id.*

151. *Id.*

152. *Id.* at 329 n.(e).

153. *Id.*

154. *Id.* at 329.

155. *See supra* note 57 and accompanying text.

156. Treanor, *Against Textualism*, *supra* note 4, at 1006.



interpretation in the Founding era.<sup>157</sup> If one moves beyond the borders of Pennsylvania and recognizes that thinking about constitutional interpretation was evolving in the 1790s, the prospect of identifying any constitutional consensus on such matters seems unlikely.<sup>158</sup>

A number of originalists have argued that we ought to read the Constitution's text from the perspective of a fully informed or rational lawyer. The notion that we might identify a single interpretive paradigm that such an informed lawyer would have employed when reading constitutional texts seems illusionary. James Wilson and William Findley were both lawyers, but each figure approached constitutional interpretation from a different set of assumptions about the law. Wilson was indisputably the better-educated lawyer, and Wilson's career in the law would likely be viewed as more illustrious than Findley's, at least if one uses the conventional measures that the modern legal profession esteems. Wilson attended one of the leading universities in the English-speaking world, St. Andrews in Scotland. He held a prestigious professorship in law at the University of Pennsylvania, and became an Associate Justice of the U.S. Supreme Court. Yet, taking one's interpretive cues from the Federalist Wilson, one of the finest legal minds in America, produces some odd, if not ironic, outcomes. An originalist interpretation using Wilson as a model would inevitably be forced to conclude that prosecutions for seditious libel were perfectly consistent with the original meaning of freedom of the press. By contrast, following the methodology of the less well-educated Anti-Federalist William Findley leads to a result closer to the accepted modern doctrine and more consistent with a view most modern Americans would likely endorse.<sup>159</sup> Thus, in the case of freedom of the press, interpreting the Federalist Constitution with Findley's more democratic and less "lawyerly" methodology actually produces better results than using the methods of the better-educated and decidedly more legalistic Federalist James Wilson.<sup>160</sup> An interpretive methodology built on the methods of the Anti-Federalist

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157. See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Treanor, *Judicial Review Before Marbury*, *supra* note 4.

158. If one moves beyond the borders of Pennsylvania, one finds a wider range of interpretive models. Adding developments within the 1790s complicates matters even further. One of the most important developments in this period was Madison's evolving theory of ratifier intent. See generally Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996).

159. This example casts further doubt on the claims of McGinnis and Rappaport that originalism yields desirable outcomes. A neutral application of originalist methods actually produces highly undesirable outcomes. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 388 (2007); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

160. Anti-Federalists' views on freedom of the press were not monolithic. Findley represented the approach of middling democrats. Elite Anti-Federalists were closer to Federalist elites, and were generally more sympathetic to a Zengerian model and its emphasis on the rights of juries to determine the facts and the law. For the diversity of Anti-Federalist thought on this issue, see CORNELL, *supra* note 12, at 121–136.

losers applied to a Constitution written and ratified by the victorious Federalists leads to a jurisprudence that would have been historically impossible to implement in either 1788 or 1791. While one might justify interpreting the Federalist Constitution with Anti-Federalist techniques, it would be hard to defend a claim that this was the dominant original understanding that prevailed in the Founding era. Originalists seem unaware of this Anti-Federalist paradox.

Discussions of originalism often speak of a “*Brown* problem.” Any viable theory of constitutional law that does not vindicate *Brown v. Board of Education* must be cast aside as defective.<sup>161</sup> Originalism not only suffers from a *Brown* problem, it also suffers from a serious First Amendment problem as well. Applying originalist theory in an intellectually honest and historically rigorous fashion leads to the inescapable conclusion that most of modern First Amendment doctrine is incompatible with the original understanding of freedom of the press.<sup>162</sup>

#### IV. THE LIMITS OF ORIGINALISM AS A SCHOLARLY METHODOLOGY

What, if any, significance does the intellectual history critique of originalism, especially new originalism, mean for normative questions of constitutional theory? Despite ambitious claims made by new originalists that they have solved many of the historical problems associated with traditional originalism, many of these problems persist. If anything, the shift to a focus on original public meaning has exacerbated these problems. New originalism has made it easier, not harder, for scholars and judges to manipulate evidence. Neither the recent turn to the philosophy of language nor the use of fictive readers has solved any of the serious historical problems associated with traditional intentionalist variants of originalism.<sup>163</sup>

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161. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 82 (1990); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161 (2012); see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (providing an originalist defense of *Brown*). But see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (opposing McConnell’s view).

162. There is a vast literature on the First Amendment and originalism. For a useful overview that concludes that the modern doctrine is hard to reconcile with any neutral application of originalism, see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011). Originalism would undermine many other well-established features of modern constitutional law. See Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 392–93 (2007).

163. The profound flaws in new originalism have prompted more than one scholar to quote the lyrics of the rock band The Who’s generational anthem, “Won’t Get Fooled Again,” which offered this prophetic critique: “Meet the new boss, same as the old boss.” SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 94 (2007) (quoting THE WHO, *Won’t Get Fooled Again*, on WHO’S NEXT (MCA Records 1971); Cornell, *supra* note 98 (same)).

If legal scholars and judges wish to continue to make serious claims about what the Constitution meant in the Founding era, they will need to master the basic methods of intellectual history. Jettisoning originalism in favor of a method grounded in intellectual history will not eliminate all ideological distortion. Better history will not end results-oriented judging, but it will facilitate a more honest and intellectually rigorous discussion about what various provisions of the Constitution meant to different legal audiences in the Founding era.<sup>164</sup> Deciding which, if any, of these different historically grounded interpretations ought to guide us when interpreting the Constitution today is not a question that history can answer. These choices are inescapably philosophical or political decisions. Until originalists embrace a truly historical approach, originalism will continue to be little more than an ideology masquerading as a methodology.

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164. Some scholars argue that originalism is more ideological than methodological. See Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2011); Robert Post & Reva B. Siegel, *Originalism As a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006). But see Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29 (2011) (opposing this argument). For a good critique of how liberal originalist textualism leads to an equally distorted and warped version of history, see William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007).