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## Historicism and Holism: Failures of Originalist Translation

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# HISTORICISM AND HOLISM: FAILURES OF ORIGINALIST TRANSLATION

Jonathan Gienapp\*

## INTRODUCTION

For as long as the U.S. Constitution has existed, Americans have appealed to the history of its creation to interpret its meaning. But only since the advent of originalism—the well-known constitutional theory that requires interpreting the Constitution today in accordance with its original meaning—has historical study been so immediately implicated by constitutional interpretation. Despite potential, though, for meaningful exchange between originalists and historians, little has taken place. That originalism plays an ever-growing role in contemporary political culture only makes the lack of dialogue all the more unfortunate.

For these reasons, Lawrence Solum and Saul Cornell's recent exchange provokes a refreshing, long-overdue debate that ultimately implicates a fundamental issue: What relationship does historical inquiry as practiced by professional historians have to the theories of originalism that legal scholars have refined?<sup>1</sup> At first glance, Cornell's claim that the recovery of original meaning would necessarily involve historical reasoning as historians practice it seems intuitive.<sup>2</sup> Solum, however, contends that historical methods play a far more limited role in this recovery than historians would like to believe. Indeed, he effectively argues for an originalism without history. That is tendentiously put, as Solum acknowledges that originalists must draw upon the eighteenth-century American past. Nevertheless, he thinks the goal can be accomplished largely without traditional historical knowledge or practice.

This argument suffers from several fatal difficulties, however, and none more problematic than its treatment of a central matter implicated by any kind of originalism: historical translation. The Constitution has a different meaning now than it did when it was created, so recovering its original

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1. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 722 (2013); Lawrence B. Solum, *Intellectual History As Constitutional Theory*, 101 *VA. L. REV.* 1111, 1113 (2015) [hereinafter Solum, *Intellectual History As Constitutional Theory*]; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *NOTRE DAME L. REV.* 1 (forthcoming 2015) [hereinafter Solum, *The Fixation Thesis*]; Lawrence B. Solum, *Originalism and History* (Aug. 29, 2014) (unpublished manuscript) (on file with the *Virginia Law Review*) [hereinafter Solum, *Originalism and History*].

2. Cornell, *supra* note 1, at 725–40.

meaning requires engaging in some kind of translation that will transform the Constitution back into its eighteenth-century form (or transform the eighteenth-century Constitution into twenty-first-century language). Originalists, led by Solum, acknowledge the centrality of this requirement, but misunderstand what it entails. By failing to historicize the American Founding, their method of translation proceeds from the faulty premise that the Founding generation and we today occupy more or less the same linguistic world, an assumption that enables their translation to take a narrow and atomistic form. Accordingly, as a result of this failure to historicize, they fail to appreciate the holistic character of meaning—that individual utterances earn their meaning based on how they fit into a linguistic whole—and, accordingly, target the wrong object of interpretation, focusing on individual words and statements when they must first grasp the broader idioms from which those component parts issued. By appreciating the necessity of historicism, and with that the holistic requirements of meaning and translation, it becomes clear that no matter which sort of original meaning is targeted, the only suitable method of translation is an avowedly historical one.

#### I. ORIGINALISM WITHOUT HISTORY

Solum marginalizes historians in at least three unpersuasive ways. First, he confuses originalist method and theory. Second, he claims that originalists and historians target distinct kinds of meaning. Finally, he contends that historians cannot provide the necessary method to discover the appropriate kind of original meaning.

##### A. *Theory or Method?*

Solum downgrades history, first, by confusing the issue, by needlessly exploring the potential for intellectual history to replace constitutional interpretation.<sup>3</sup> No historian has ever suggested that this is a proper use for history, so proving that such an imaginary project is misguided is a distraction. The question that should be explored is: What role should historical method play in understanding what the Constitution meant circa 1787 through 1788 (or at any other relevant historical moment)? Subsequent implications for constitutional theory and jurisprudence are matters entirely separate from the purely methodological issue of recovering original meaning.

##### B. *What Kind of Meaning?*

But even when Solum correctly focuses on the methodological debate, he is clear that historians can play no more than a “supplementary and complementary” role in the recovery of original meaning because “[o]riginalists and historians have different understandings of ‘meaning’ that reflect fundamentally different purposes of constitutional history and

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3. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1112–14.

contemporary originalist practice.”<sup>4</sup> The kind of meaning that originalists are after is what he calls “communicative content,” the elucidation of which leads Solum to reiterate a set of interlocking arguments he has made in several other settings.<sup>5</sup> Constitutional meaning is divided into two categories—communicative content and legal content—and two activities that discover them—interpretation and construction.<sup>6</sup> Communicative content should not be confused with legal effect. But, it should also not be confused with other kinds of meanings, either the “motivations or purposes” that lay behind its construction or the “consequences or applications” that might have been expected to follow from it.<sup>7</sup> Communicative content is simply the “meaning of a text in the linguistic sense,” and because this kind of meaning “is not the primary aim of historians,” they cannot offer originalists “a distinctive method for the determination of the communicative content of the constitutional text.”<sup>8</sup> Thus, historians who insist that originalists need to acquire a deeper familiarity with historical practice are simply guilty of “conceptual confusion.”<sup>9</sup>

Solum is partial to communicative content because he champions “public meaning originalism.”<sup>10</sup> As is by now well-known, this brand of the theory privileges the original public meaning of the Constitution over the subjective intent of its Framers, the subjective understanding of its ratifiers, and the expected applications that many originally assumed would follow from the document.<sup>11</sup> Dominant today among originalists, public meaning originalism is built on a conventions-based understanding of language, which means both that meaning is regulated by publicly shared conventions and that the only constitutional meaning that can have legal force is its

4. Solum, *Originalism and History*, *supra* note 1, at 1; *see also* Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1155.

5. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 455 n.3 (2013); *see also* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479, 480 (2013) [hereinafter Solum, *Communicative Content and Legal Content*]; Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 924 (2009) [hereinafter Solum, *District of Columbia v. Heller and Originalism*]; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 *U. ILL. L. REV.* 1935, 1937 [hereinafter Solum, *Originalism and the Unwritten Constitution*]; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 96 (2010); Lawrence B. Solum, *Semantic Originalism* (Il. Pub. Law & Legal Theory, Research Paper No. 07-24, 2008).

6. This distinction pervades Solum’s writings, but also has proved critical in recent originalist scholarship. *See, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 129 (2011); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 3 (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOYOLA L. REV.* 611, 622 (1999).

7. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1123, 1115–16.

8. *Id.* at 1155; Solum, *Originalism and History*, *supra* note 1, at 1, 2.

9. Solum, *Originalism and History*, *supra* note 1, at 1; *see* Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1164.

10. Solum, *Originalism and History*, *supra* note 1, at 1.

11. For the shift to public meaning originalism, *see* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 377 (2013); Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 609–10 (2004).

conventional one. Unlike in ordinary conversation, public meaning originalists argue, great distances (geographic and contextual) separated speaker and audience when the Constitution was created, meaning that those who initially probed the Constitution did not have access to the communicative intentions of its Framers (especially not the complex drafting history that accounted for its creation). Instead, they only had access to the text itself and the linguistic conventions at the disposal of any competent reader.<sup>12</sup> Moreover, because the document was a product of popular approval, all that can be enforceable is what a person competent in Founding-era linguistic conventions would have taken it to mean.<sup>13</sup> Solum privileges communicative content because of these justifications.<sup>14</sup>

### C. What Kind of Method?

There are many ways to critique Solum's narrow conception of communicative content, including by insisting that Founding-era intent and understanding cannot be so easily bracketed from public meaning.<sup>15</sup> But, conceding for now (no matter how problematic it might otherwise be) that originalists can exclusively target conventions-based meaning, is Solum justified in thinking that by narrowing the target he has escaped reliance on history? He implies that if authorial intents, expected purposes, or other kinds of meaning were indeed the object of interpretation, then traditional historical methods would prove necessary. Are similar methods really not relevant to discovering public meaning?

Put another way, no matter which kind of constitutional meaning Solum privileges, he still needs a method of historical translation. He acknowledges as much because language changes over time, affording words different meanings than they once had, a notable fact for any

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12. See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1115 (2003).

13. See generally JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

14. See Solum, *Communicative Content and Legal Content*, *supra* note 5, at 494–502, 507 (explaining the communication constraints inherent to the Constitution); Solum, *Originalism and the Unwritten Constitution*, *supra* note 5, at 1937–38 (describing the conventional character of language); Solum, *Originalism and History*, *supra* note 1, at 11–12 (explaining the normative-historical justification of public meaning originalism); *id.* at 16–17 (claiming that the Framers' intentions, if discoverable, likely converged with the public meaning of the text).

15. This point has been emphasized by several constitutional scholars and historians alike. See Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 968 (2004); Saul Cornell, *St. George Tucker's Lecture Notes, The Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. 1541, 1544 (2009); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 556–60 (2003); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011); 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, 504 (2007).

originalist because, according to what Solum has called the “fixation thesis,”<sup>16</sup> “original meaning was *fixed* or determined at the time each provision of the [C]onstitution was framed and ratified.”<sup>17</sup> The matter thus comes down to this: for Solum’s broader claim about the relationship between history and originalism to stand, it is not enough to pinpoint communicative content as the goal of interpretation; he must also demonstrate how he can translate communicative content back into its original form without requiring historical methods. Solum stakes his argument to a distinction in meaning: originalists target public meaning, historians something else. But this distinction is insufficient, for no matter which kind of original meaning he privileges, he must demonstrate that he can recover it without the historical translation techniques practiced by historians. Only *then* can public meaning originalists claim to have escaped reliance on history.

If Solum’s argument rests on his method, rather than its object, how, then, does Solum propose locating original communicative content? His approach begins with identifying the simple meaning of various words or phrases, or their combination based on the operative rules of grammar, which he variously calls “plain meaning,” “literal meaning,” or “semantic meaning.”<sup>18</sup> Some of these meanings might have differed in the eighteenth century, so the interpreter must study the patterns of Founding-era linguistic usage to grasp original semantic meaning.<sup>19</sup> Of course, this definitional and grammarian work can be done well or poorly, as illustrated by some notoriously flawed originalist work.<sup>20</sup> But assuming semantic meaning is recovered in a credible way, it is important to recognize, Solum explains, that it is not communicative content because legal utterances typically communicate far more than their literal content. “The gap between semantic content and full communicative content is filled by what we can call ‘contextual enrichment,’” which requires two things.<sup>21</sup> The first is to set the Constitution in the “publicly available context of constitutional communication” that existed at the time of its inception.<sup>22</sup> The second requirement is to grasp the lessons of pragmatic enrichment drawn from the philosophy of language, which really seems to mean the work of Paul

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16. 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) (ebook).

17. *Id.*; see Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1150 (acknowledging that originalism must avoid anachronism); Solum, *The Fixation Thesis*, *supra* note 1, at 13–16, 62–68 (identifying “linguistic drift”).

18. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1116–18, 1125–26.

19. Solum, *Originalism and History*, *supra* note 1, at 12–13.

20. Cornell, *supra* note 1, at 740–42; 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, 1302 (2009).

21. Solum, *Originalism and History*, *supra* note 1, at 2, 13.

22. Solum, *Originalism and the Unwritten Constitution*, *supra* note 5, at 1942.

Grice.<sup>23</sup> Because lots of things go without saying, these techniques are necessary to grasp what was presupposed or implied by constitutional utterances.<sup>24</sup> Solum spends far more time discussing Grice than eighteenth-century linguistic usage for reasons that, while only implied, profoundly shape his argument. Repeatedly, he suggests that philosophy, in being conceptually prior to history, enables originalists to bypass the latter. Accordingly, as originalists have dedicated themselves to Grice (some of them anyway), they are on surer interpretive footing than historians. And, to the extent that historians have turned to language philosophy, doing so only reinforces Solum's deeper point: that originalist method is not grounded in history. So then it would seem that attention to Founding-era semantic usage plus, especially, appreciation of Grice, provides originalists with a complete, historian-free method.

To be sure, Solum does not speak for all public meaning originalists, let alone all originalists. But given what they have otherwise argued, it is hard to believe that any leading public meaning originalist would dispute the fundamental logic of Solum's method.<sup>25</sup> Meanwhile, even if other originalists were to take issue, public meaning originalism has come to so dominate the field that the point would still be of far-reaching significance. Thus, if Solum's conception of originalist translation cannot withstand scrutiny, then such a revelation sheds light more broadly on the originalism-history relationship.

## II. ISSUES WITH ORIGINALIST TRANSLATION: HOLISM AND HISTORICISM

Solum can escape historical method only if he presents a workable alternative method, a method that can satisfactorily recover some kind of original constitutional meaning without doing what historians do. Ultimately, though, his method, like so many commonly found in originalist work, suffers from major deficiencies. Understanding these failings, as well as the makings of a suitable alternative, reveals why, contrary to Solum's insistence, historical method and practice is in fact essential to any brand of originalism.

To adequately map all aspects of a proper method of originalist translation is beyond the scope of this brief response, even if the focus is limited just to public meaning. But, as a beginning, I will attend to two critical aspects of historical translation, indeed perhaps the most important ones and certainly the ones that most immediately correct the deficiencies in Solum's method. Recovering any meaning—and *especially* the public meaning—of a historical text is simply impossible without appreciating these two critical aspects of historical translation.

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23. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1125–32; Solum, *Originalism and History*, *supra* note 1, at 13–14.

24. Solum, *Intellectual History As Constitutional History*, *supra* note 1, at 1125–32.

25. See BALKIN, *supra* note 6, at 3–58; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 389–95 (2014); MCGINNIS & RAPPAPORT, *supra* note 13, at 123–26; SCALIA & GARNER, *supra* note 13, at 15–28.

### A. Meaning Holism

The first of these is “meaning holism,” the doctrine that the meaning of the part only be understood by situating it in the context of the whole. The meaning of individual linguistic components—words, phrases, or utterances—can only be understood in terms of their relations within the conceptual vocabulary of which they are a part.

Solum and other originalists fail to grasp this point. Rather than seeing meaning and translation holistically, they conceive of it in thoroughly atomistic terms, believing that effective translation can be conducted at the level of term-for-term without engaging in any broader form of substitution. Solum’s favorite examples of translation—“domestic violence” in the eighteenth century and “deer” in the twelfth—are substituted against an otherwise steady background of putative conceptual objects being picked out.<sup>26</sup> He unwittingly keeps the structure of linguistic conventions constant between present and past while merely filling in that structure with discreet component content.

But this approach fails to fully construe language as a *social convention*, that is, an intersubjectively constructed set of norms. Public meaning originalism is entirely premised on the fact that linguistic meaning is conventional, yet at least Solum advances a decidedly shallow brand of linguistic conventionalism. Language, in being a social practice, is necessarily contingent, a fact that applies as much to the *structure of conventions* as to the *individual meanings of words* within that structure. One is reminded of Clifford Geertz’s objection that human scientists have all too often problematically set the diversity of culture against the unity of the human mind. The things thought are multiple, but the mode of thinking itself is assumed unitary across space and time.<sup>27</sup> Applied to language, this powerful distinction juxtaposes the cacophony of different linguistic uses with a unifying structure of logical linguistic relations presumed to underlie the entirety of that diversity.<sup>28</sup> Holistic translation nullifies this distinction by targeting the logical sinews of language every bit as much as its discreet parts. It translates *all* of language.

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26. Solum, *District of Columbia v. Heller and Originalism*, *supra* note 5, at 945–46; Solum, *The Fixation Thesis*, *supra* note 1, at 15–16.

27. Clifford Geertz, *The Way We Think Now: Toward an Ethnography of Modern Thought*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 147, 152–53 (1983).

28. As a crucial upshot of the linguistic turn in philosophy was recognition that having a mind is, in essence, having the ability to use a language, Geertz’s observation about the human mind proves all the more applicable to understanding human language. *See, e.g.*, ROBERT B. BRANDOM, *PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT, AND CONTEMPORARY* 22–23 (2011); MICHAEL DUMMETT, *FREGE: PHILOSOPHY OF LANGUAGE* (1993); 4 RICHARD RORTY, *PHILOSOPHY AS CULTURAL POLITICS* 176 (2007); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); WILFRID SELLARS, *EMPIRICISM AND THE PHILOSOPHY OF MIND* (1997); Donald Davidson, *Seeing Through Language*, in *TRUTH, LANGUAGE, AND HISTORY* 127–41 (2005).



*B. Historicism: The Foreignness of the Founding Era*

Solum and many originalists unwittingly adopt their atomistic mode of translation because interpretation commonly takes this form. Novel remarks are typically uttered by speakers inhabiting more or less the same conceptual and linguistic world as the listener. By sharing this background, the speaker and listener already share enough of the whole language to make atomistic translation possible. But when the utterance is not made today but instead several hundred years ago, in a very different conceptual-linguistic world than the one in which we currently reside, matters change, and decisively so. Originalists' flawed method of translation is a direct result of failing to appreciate this crucial lesson. They uncritically assume that the Founding generation and we more or less reside in the same linguistic-conceptual world. So even though they acknowledge differences between the Founders' usage of words and our own, critically, originalists set such differences against a common linguistic structure apparently shared by all.

But the first key to understanding the American Founding is appreciating that it is a foreign world. Originalists talk often about recovering the "lost constitution," but with little awareness for why it merits this label.<sup>29</sup> Not because modern justices have abandoned it, but because its original meaning has been obscured by changes in conceptual vocabulary. Understanding the American Founding, and recovering the "lost constitution," requires appreciating this historical distance. "The past is a different world," as Bernard Bailyn has aptly instructed.<sup>30</sup> "Whether one moves away from oneself in cultural space or in historical time," Rhys Isaac has added in the same vein, "one does not go far before one is in a world where the taken-for-granted must cease to be so . . . . Ways must be found of attaining an understanding of the meanings that the inhabitants of other worlds have given to their own everyday customs."<sup>31</sup> Grasping these unfamiliar meanings involves historicizing the past and reckoning with it on its own foreign terms.<sup>32</sup> It involves, as Bailyn has put it, "penetrat[ing] into the substructures of thought and behavior, into the silent assumptions, the perceptual maps, the interior experiences that shape overt expressions and events" to decode "the perceptual universes of the participants."<sup>33</sup>

For modern Americans, perhaps few past periods seem more recognizable—in terms of the questions its people asked, the concepts they deployed, the theories they generated, the causes they endorsed, and the issues they debated—than the American Founding. But, in fact, appreciating the inherent differentness of the past is *most* important when it

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29. See generally BARNETT, *supra* note 25; Lino A. Graglia, *How the Constitution Disappeared*, in *STILL THE LAW OF THE LAND?* 37–61 (1987).

30. BERNARD BAILYN, *SOMETIMES AN ART: NINE ESSAYS ON HISTORY* 22 (2015).

31. RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740–1790*, at 5 (1999).

32. For more on historicism, see generally Jonathan Gienapp, *Using Beard to Overcome Beardianism: Charles Beard's Forgotten Historicism and the Ideas-Interests Dichotomy*, 29 *CONST. COMMENT.* 367 (2014).

33. BAILYN, *supra* note 30, at 22.

seems otherwise familiar. The field-changing scholarship of Bernard Bailyn and Gordon Wood that long ago revised our understanding of the Revolutionary era was driven by precisely this insight, beginning from the premise that the revolutionaries' guiding assumptions were different than our own and that their distinct linguistic behavior needed to be grasped on its own terms.<sup>34</sup> As Wood himself put it in his magnum opus, *The Creation of the American Republic*, "As I explored [the revolutionaries'] pattern of beliefs, it became evident that" the prevailing interpretive approach to the American Founding had "been deeply ahistorical, there had been too little sense of the irretrievability and differentness of the eighteenth-century world."<sup>35</sup> Those who assume that no such historicism is required to understand the Founding generation will be chronically perplexed by that generation's seemingly paradoxical obsession with representation but apathy toward voting, their state-level debates over bicameralism that showed little interest in the separation of powers, and their simultaneous obsession with bills of rights and commitment to test oaths. Examples of this kind could be indefinitely multiplied. But by understanding the Founders' uncommon vocabulary, such confusion washes away. In the process, crucially, the parts that appear familiar take on different meanings. Historicism and holism can be taken to extreme lengths—and have been by some in the past<sup>36</sup>—but that lesson should not minimize their essential importance.

Solum, like most originalists, perpetuates the flawed assumption that Founding-era utterances are fairly easy to understand because they were spoken and written in English.<sup>37</sup> As he problematically asserts, "[C]ontemporary American English is not identical to late eighteenth-century American English. In many particular cases, however, the contemporary meanings of the words and phrases in the constitutional text today are identical to the meanings at the time the Constitution was framed

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34. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* (1993); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969). For more on the historiographical revolution they initiated, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 22 (1992).

35. WOOD, *supra* note 34, at xvi. Ironically and revealingly, originalists often cite Wood's masterful study approvingly, with little awareness that its fundamental conceit often undermines much of what they are otherwise arguing. For an illustrative example, see Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933–34 (2003).

36. For discussions of such extremes, see Mark Bevir, *Why Historical Distance Is Not a Problem*, 50 HIST. AND THEORY 24, 24 (2011); Donald Davidson, *On the Very Idea of a Conceptual Scheme*, in INQUIRIES INTO TRUTH AND INTERPRETATION 183–98 (2001); A. P. Martinich, *A Moderate Logic of the History of Ideas*, 73 J. HIST. IDEAS 609, 610 (2012); Richard Rorty, *The World Well Lost*, in CONSEQUENCES OF PRAGMATISM 3, 4 (1982).

37. This problem is pervasive. See, e.g., MCGINNIS & RAPPAPORT, *supra* note 13; Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1540 (2005). For legal scholars who have issued versions of these lessons to no avail, see, for example, Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 673 (1987).

and ratified.”<sup>38</sup> Similarly, to explain that understanding historical texts requires no prior knowledge of an author’s motivations or background, on another occasion he blithely asserts:

When you encounter a stranger who shares competence with you in a natural language (English), then usually you can communicate about a wide variety of topics with very thin information about the stranger . . . rely[ing] on widely shared conventional semantic meanings and the kind of contextual information that strangers are likely to possess.<sup>39</sup>

According to Solum, making sense of Alexander Hamilton, William Findley, or the average man on the eighteenth-century street (a popular public meaning originalist figure) is as simple as confronting an English-speaking stranger today, because it can be happily assumed that both parties share a common semantic structure and common abilities for contextualizing discursive antics.

To the contrary, recovering eighteenth-century communicative content requires putting aside our working linguistic knowledge—how we trace logical connections between meanings, how we enrich ambiguous utterances, and how we relate meaning to context—and replacing it with Founding-era linguistic knowledge. Because Solum and other originalists fail to historicize, they fail to grasp the necessity of holistic translation.

### III. TOWARD REMEDYING ORIGINALIST TRANSLATION

Appreciating the lessons of historicism and linguistic holism do not just expose the deficiencies of originalists’ most popular brand of historical translation, but also help supply a remedy. More is needed. Many critical and related points cry out for examination, and, in work currently in progress, I attempt to map all of the relevant contours of originalist translation.<sup>40</sup> Nonetheless, drawing attention to holism and historicism furnishes an essential start.

#### A. *The Convergence of History and Philosophy*

The holistic-historicist point is not only the cure for many kinds of originalism, but it is also precisely the one upon which much edifying work in the philosophy of language and intellectual and cultural history have commonly converged. Neither is prior to the other, and each could be emphasized independently. Indeed, one could absorb a great deal about historicism and holism purely by studying historical work—either implicitly from empirical studies or explicitly from penetrating methodological pieces.<sup>41</sup> However, because Solum and other public

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38. Solum, *Communicative Content and Legal Content*, *supra* note 5, at 498.

39. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1144.

40. See generally Jonathan Gienapp, *Historical Translation and Constitutional Originalism* (Sept. 1, 2015) (unpublished manuscript) (on file with author).

41. Examples abound. See, e.g., KEITH MICHAEL BAKER, *INVENTING THE FRENCH REVOLUTION: ESSAYS ON FRENCH POLITICAL CULTURE IN THE EIGHTEENTH CENTURY* (1990);

meaning originalists suggest that they can bypass history by way of philosophy, it is of the utmost importance to shine a light on the philosophical path of this convergence. While I could easily draw upon historians' methodological reflections to reach similar points, and while I can gladly agree with Jack Rakove that historians can "happily pass their lives without worrying how much allegiance they owe to the work of Chomsky, Austin, Wittgenstein, or . . . Grice,"<sup>42</sup> given Solum's selected tact, it is critical to meet him on his chosen ground. While philosophy does not afford foundations (as Solum at times implies), it does offer powerful tools, ones that strikingly reinforce historians' own methodological instincts.<sup>43</sup> Thus, the most effective way to reveal why historical practice is indispensable for originalism is to place an emphasis, at least for now, on how language philosophy otherwise points in that direction.

Moreover, Solum's portrayal of language philosophy is effectively based on one philosopher—Paul Grice—who is presented almost folk heroically, as evidently the key to unlocking all constitutional mysteries. While Grice's standing in modern philosophy is undeniable, because he never investigated what was necessary to bridge *historical* differences between speaker and listener, compared to other leading philosophers he offers much less to specifically originalist interpretive inquiries.<sup>44</sup> Indeed, his work is only of use *after* the Constitution has been translated and does not otherwise help on this front. The work of a different cadre of analytic philosophers of language provides a much more useful collection of tools for the matter at hand, tools that parallel many of those that leading intellectual and cultural historians have themselves sharpened.

### B. Skinner and Wittgenstein

To better see this convergence of intellectual history and analytic language philosophy, we ought to begin with the intellectual historian who has drawn most consciously and extensively upon analytic philosophy and about whom Solum has the most to say: Quentin Skinner. Perhaps because others have alerted him that Skinner's arguments do damage to his own, Solum goes to considerable, vituperative lengths to try to expose Skinner's mistakes. Where he could have simply dismissed Skinner's work on the

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MARK BEVIR, *THE LOGIC OF THE HISTORY OF IDEAS* (1999); ELIZABETH A. CLARK, *HISTORY, THEORY, TEXT: HISTORIANS AND THE LINGUISTIC TURN* (2004); IAN HACKING, *HISTORICAL ONTOLOGY* (2002); J. G. A. POCKOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* (1985); WILLIAM H. SEWELL, JR., *LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION* (2005); Gabrielle M. Spiegel, *History, Historicism, and the Social Logic of the Text in the Middle Ages*, 65 *SPECULUM* 59, 59–86 (1990).

42. Rakove, *supra* note 15, at 588.

43. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1122, 1128–29 (betraying an almost Kantian commitment to the logical priority of philosophical reasoning in contending that any historical or legal account of communication *must* be reconciled with the work of philosophers and linguists). My proposed understanding of the relationship between philosophy and history echoes that of *PHILOSOPHY IN HISTORY* (Richard Rorty et al. eds., 1984).

44. See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989).

basis of relevance (for simply targeting the wrong kind of textual meaning), he instead opts for theoretical incompetence, contending that Skinner is “deeply confused” about interpretive method itself.<sup>45</sup> Clearly this is the place to start in understanding Solum’s missteps, because highlighting how Solum misses Skinner’s historicism and holism helps to reveal precisely what Solum’s method of historical translation lacks.

At first glance, it is no small irony that Solum finds Skinner so offensive. After all, Skinner was a thorough-going linguistic conventionalist who was almost exclusively interested in public meaning. Interpretive efforts, he felt, needed to begin with an understanding of texts as speech acts and, thus, “the *conventions* surrounding the performance of” them.<sup>46</sup> Moreover, he claimed that both dimensions of meaning that were essential to textual interpretation—locutionary meaning (an utterance’s sense and reference) and illocutionary force (the meaning of making such an utterance)—fully derived from publicly legible conventions. Skinner certainly stressed the importance of recovering authorial intent, but always intent *in* acting as opposed to intent *to* act.<sup>47</sup> He had no interest in confusing motive with intent and thus no interest in confusing mental states that preceded speech acts with the public meaning of performing such acts. The intentions that most interested him were to be “inferred from an understanding of the significance of the act itself.”<sup>48</sup> As Skinner famously argued, the meaning (understood as the force) of Machiavelli’s well-known advice in *The Prince*, that a prince “should know how to follow evil courses if he must,”<sup>49</sup> varied depending on whether all other contemporaneous advice books for princes offered identical advice or none did.<sup>50</sup> This was not a matter of prior mental states or subjective aims. It was concerned with the *public* meaning of that statement to a reader immersed in the relevant communicative context.

What about any of this should merit Solum’s opposition? Skinner’s convention-based understanding of both linguistic meaning and performative utterances seems to parallel the approach defended by Solum and other public meaning originalists. Skinner’s disaggregation of illocutionary intent from either prior motive or anticipated goal squares precisely with what Solum gets at in his extended Gricean discussion of communicative intentions.<sup>51</sup> Skinner’s distinction between locutionary meaning and illocutionary force parallels Solum’s own distinction between

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45. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1153; Solum, *Originalism and History*, *supra* note 1, at 26.

46. Quentin Skinner, “*Social Meaning*” and the Explanation of Social Action, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 94 (James Tully ed., 1988).

47. On this point, Skinner is frequently misunderstood. For his clearest statement, see Quentin Skinner, *A Reply to My Critics*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS*, *supra* note 46, at 231, 278–80.

48. *Id.* at 279.

49. MACHIAVELLI, *THE PRINCE*, *reprinted in* 36 *THE HARVARD CLASSICS* 1, 68 (Charles W. Eliot ed., 1910).

50. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS*, *supra* note 46, at 61–63.

51. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1132–36.

semantic meaning and contextual enrichment.<sup>52</sup> Skinner's insistence that deciphering illocutionary force requires "delineat[ing] the whole range of communications which could have been conventionally performed on the given occasion by the utterance of the given utterance"<sup>53</sup> sounds strikingly similar to Solum's own insistence that meaning must be enriched based on the public context of conventional communication. Maybe Solum does not fully grasp the inner logic of Skinner's approach. But there must be some awareness of these parallels because one of the two major criticisms that Solum levels against Skinner is that, in relying so heavily on Grice's account of "speaker's meaning," Skinner turns out to be little more than an originalist. The parallels in this regard are actually stronger still. For to the extent that Solum draws any distinction on this front between Skinner and himself, it is only that Skinner appears to privilege original intentions originalism. Except, as Solum himself tells us, "under normal circumstances, the communicative intentions of the author of a legal text will converge with the public meaning of a text," meaning that public meaning originalists and sophisticated original intent originalists are after much the same thing.<sup>54</sup> Add to this that Skinner's most compelling critics have assailed him for too simply reducing authorial intent to ruling linguistic conventions, for believing that "the intentions with which anyone performs any successful act of communication must, *ex hypothesi*, be publicly legible," and the similarities are more striking.<sup>55</sup>

Yet, despite all of this, Solum clearly has no interest in enlisting Skinner as an ally, as illustrated by his second major criticism, in which he criticizes Skinner not on the basis of being banal, but for being confused, by paradoxically weaving together a Gricean account of illocutionary performances with Ludwig Wittgenstein's meaning-use doctrine.<sup>56</sup> Solum assumes that by equating meaning with use, Wittgenstein must have been saying what has otherwise been advanced by many critics of originalism: that "the meaning of an expression is the use to which it [was] put,"<sup>57</sup> a formulation poised to fallaciously equate communicative content with purposes or motives. Thus, in simultaneously using Grice (and gesturing

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52. Perhaps by favorably citing A. P. Martinich, *Four Senses of "Meaning" in the History of Ideas: Quentin Skinner's Theory of Historical Interpretation*, 3 J. OF PHIL. & HIST. 225 (2009), Solum disagrees that illocutionary force is an important part of public meaning. But Martinich's criticism is only that sentences, not entire texts, can have illocutionary dimensions, an accommodation that might lead us to question whether the Constitution conceived as a single utterance carries illocutionary force, but not one that denies that its clauses have such force.

53. Skinner, *supra* note 50, at 63–64.

54. Solum, *Originalism and History*, *supra* note 1, at 17; see also Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1134.

55. Skinner, *supra* note 47, at 279. For Skinner's most penetrating critic, see Bevir, *supra* note 36, at 40–50, 135–36 (arguing that "linguistic meaning," which is established on the basis of conventions, cannot fix "hermeneutic meaning," which is the intended performance of a specific utterance).

56. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1151.

57. Solum, *Originalism and History*, *supra* note 1, at 25 (alteration in original).

toward communicative content) and Wittgenstein (and diverting from it), Skinner's project proved incoherent.

We historians might have reason to thank Solum for exposing such a false idol. But it is not Skinner who is confused. Solum is certainly right that Skinner's reliance on Wittgenstein is of the utmost importance, but not for the reasons he identifies. Better understanding why Skinner made extensive use of Wittgenstein requires comprehending what the Austrian-British philosopher actually meant by his well-known dictum that linguistic meaning follows linguistic use. According to Solum:

It is true that Wittgenstein is associated with the notion that meaning is use, or as he put it, "Words are deeds." The idea is that the meaning of an expression is the use to which it is put. Wittgenstein was onto something, but it was not a theory of communicative content. Words are used to accomplish deeds, but the deeds are not the meaning of the words in the relevant sense of meaning. We can extend Wittgenstein's observation about words to texts. Put crudely, texts can be used to accomplish deeds. Locke's *Second Treatise* could be part of Lord Shaftesbury's political program. Thomas Hobbes's *Leviathan* could be restoration ideology. John Rawls's *A Theory of Justice* could be an apology for the Great Society. There is nothing wrong with calling the political purposes of these historical texts their "meaning," so long as we are clear that this is not their meaning in the sense of communicative content.<sup>58</sup>

Whatever Solum might mean here, this is absolutely not what the later Wittgenstein meant when he famously wrote: "For a *large* class of cases . . . in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."<sup>59</sup> Far from abandoning a search for communicative content, Wittgenstein instead was describing *precisely* what was necessary to grasp it: holism and historicism.

The later Wittgenstein was casting doubt on the classic representational picture of language (in which the content of sentences was a product of the prelinguistic referents that words sought to mirror) and putting in its place a functionalist account of meaning (in which the content of sentences was a product of how words were used in contingent discursive contexts).<sup>60</sup> For too long, he felt, philosophers had been obsessed with pinning down the essential meanings of words by locating the concepts that those words putatively represented. He began *Philosophical Investigations*, his most important work, with the central features of this picture: "[E]very word has a meaning. This meaning is correlated with the word. It is the object for which the word stands."<sup>61</sup> The assumption was that there was something essentially common to all possible uses of a word that, by capturing its uniform essence, amounted to its meaning. But to isolate this meaning—

58. Solum, *Intellectual History As Constitutional Theory*, *supra* note 1, at 1151–52.

59. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 43, at 20e (G. E. M. Anscombe trans., 1953). For how Wittgenstein's later work was a dramatic revisal of his earlier philosophy, see Richard Rorty, *Wittgenstein and the Linguistic Turn*, in *PHILOSOPHY AS CULTURE POLITICS* 160, 160–75 (2007).

60. See Rorty, *supra* note 59, at 160–75.

61. WITTGENSTEIN, *supra* note 59, pt. I.

these necessary and sufficient conditions for using a word—philosophers had been forced to abstract language from its messy, everyday contexts in order to analyze it in the sublime setting of pure logic.<sup>62</sup> Consequently, Wittgenstein surmised, they would do so at the cost of learning anything about linguistic meaning at all. As he wrote, “We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need *friction*. Back to the rough ground!”<sup>63</sup> By analogy, philosophers had effectively tried to analyze a single chess piece or chess move, removed from the context of the game of chess itself. Only when the chess piece was returned to the context of the game could one understand the moves that could be made with it. The same went for language: only when language was returned to the messy reality of its everyday usage could usage, and thus meaning, be illuminated.

In this regard, Wittgenstein likened using language to playing a game in order to recapture that it was a situated, contextualized activity.<sup>64</sup> Philosophers had gone wrong assuming that language had a single purpose, when it was evident that it had a multiplicity of purposes captured in the multiplicity of “language games” that people played.<sup>65</sup> Depending on the language game one was playing—whether one was giving an order, describing an object, or making a joke—language functioned differently. Each of these games exhibited regularities, or what Wittgenstein called “grammars,” that governed their operations. But such grammars were implicit, built-in norms rather than technical, formal rules given down from on high. Just as there was no essential, underlying structure to all games (basketball, cricket, hide and seek)—but rather only what could be called family resemblances—there was no common feature, only numerous overlaps, in the multiplicity of ways in which people used words and sentences. Meaning varied depending on the language game in question.<sup>66</sup>

Because Wittgenstein saw language as fundamentally a social practice—rather than as a medium essentially tied to something external—he considered the constitutive elements of language to be contingent and historical. Language games were subject to change. “[T]his multiplicity is not something fixed, given once for all . . . new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten.”<sup>67</sup> To study language historically, then, was not simply to study different individual uses of words but, far more broadly, to study the different language games at play. To isolate an utterance from

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62. Wittgenstein was referring to the long representationalist tradition in philosophy, stretching back to Plato, but more immediately to then dominant trends in analytic philosophy, particularly logical positivism, which tried to break language down to its atomic properties to engage in logical conceptual analysis. *See id.* §§ 23, 46.

63. *Id.* § 107.

64. *Id.* §§ 7–42.

65. *Id.* § 7 (discussing the concept for the first time).

66. LUDWIG WITTGENSTEIN, ON CERTAINTY § 65 (G. E. M. Anscombe & G. H. von Wright eds., Denis Paul & G. E. M. Anscombe trans., 1969).

67. WITTGENSTEIN, *supra* note 59, § 23.



this context meant imposing the interpreter's own language games on the utterance and, in so doing, obscuring its original meaning.

Thus, a Wittgensteinian reading of a historical text would not, pace Solum, focus on the purposes to which the text was being put. Instead, it would situate the utterances that make up the text in the original language game (or games) in which they developed. Restoring original meaning was thus primarily about recovering original language games. In other words, it necessitated holism. By construing meaning as use, Wittgenstein was not abandoning communicative content in favor of purposes, but instead explaining what was actually entailed in grasping it.

Three conclusions can be drawn from these Wittgensteinian insights. First, Skinner's reliance on Wittgenstein was not incoherent. Indeed, most of the speech act theorists upon whom Skinner drew took Wittgenstein's turn toward ordinary language as their inspiration.<sup>68</sup> Skinner's approach might well demand refinement, and there are those whom Solum favorably cites who suggest just this, but these criticisms are not premised on the notion that Wittgenstein and ordinary language philosophy constitute mutually exclusive approaches—far from it.<sup>69</sup>

Second, beyond redeeming Skinner's coherence, appreciating Skinner's reliance on Wittgenstein reveals how, despite otherwise sharing an interpretive commitment to linguistic conventionalism, Skinner is nonetheless deeply at odds with public meaning originalists. The divergence is not explained by Skinner's inconsistency or infidelity (that, as Solum claims, Skinner turns out to be an inauthentic originalist). To the contrary, Skinner diverges from constitutional originalists because he turns out, by comparison, to be a far more authentic public meaning originalist and precisely because he appreciated Wittgenstein's foundational philosophical lessons—that an appropriately historicist brand of public meaning requires contextualizing original utterances holistically. Indeed, Skinner had a penetrating understanding of the foreignness of the past. His methodological writings were largely aimed at those (then dominant in the history of political thought) who tended to read historical texts in deeply ahistorical and decontextualized ways, confident that great texts were autonomous from their time and place because their authors spoke to eternal problems.<sup>70</sup> Far from being autonomous, Skinner argued that historical texts were a product of reigning linguistic conventions, ones that were often strange in light of our own. In the place of an ahistorical essentialism that placed texts in the transhistorical context of perennial debates, Skinner opted for a historicist nominalism. He refused to see words as a transitory medium through which thinkers accessed unchanging concepts and instead saw concepts as an extension of knowing how to contingently use words. While Plato, Machiavelli, and Hobbes might all have referenced the “state,” their uses of the word—regulated by such distinct language games—were

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68. See, e.g., J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

69. See generally Martinich, *supra* note 52.

70. See Skinner, *supra* note 50, at 43–56.

so different that it proved illusory to assume that they were picking out identical concepts.<sup>71</sup> Accordingly, Skinner grasped that anybody interested in extracting the original public meaning of a text needed to see how a word specifically functioned in the language games of its epoch.

While Skinner helps illustrate the virtues of a Wittgensteinian approach, the third, and most important, conclusion to draw takes us well beyond Skinner. It is now much clearer why whole languages must be the object of originalist translation. Because the original meaning of an utterance cannot be separated from the language game in which it appeared, translation cannot atomistically focus on individual words or expressions. In order to properly elucidate any single Founding-era utterance, it is imperative that it be restored to its original discursive context, understood just as Wittgenstein described.

### C. Wittgenstein's Successors

Leading philosophers—chief among them Donald Davidson and Robert Brandom—have picked up where Wittgenstein left off, extending his historicism and holism.<sup>72</sup> As Davidson has argued,

If sentences depend for their meaning on their structure, and we understand the meaning of each item in the structure only as an abstraction from the totality of sentences in which it features, then we can give the meaning of any sentence (or word) only by giving the meaning of every sentence (and word) in the language.<sup>73</sup>

Put succinctly, “[O]nly in the context of the language does a sentence (and therefore a word) have a meaning.”<sup>74</sup> These holists vividly reveal the limitations of atomistic originalist translation by tackling two important targets that undergird it: semantic atomism and the meaning-belief distinction.

Semantic atomism is premised on the belief that semantic properties can be supplied to individual linguistic units independent of the attribution of other such properties. Purely through the powers of reference or ostensive definition one can intelligibly grasp the meaning of a word. The essential attributes of a semantic term, in other words, can be isolated from the rest of a language.

The holistic doctrine of inferentialism challenges this atomism by asserting that a sentence’s semantic content is a product of the inferential relations it has with other sentences. No single sentence (like no single perceptual experience) can have conceptual content on its own. This point was first introduced vis-à-vis the tradition of atomistic empiricism, most prominently by Wilfrid Sellars, who referred to the atomistic account of

71. See Skinner, *supra* note 47, at 278–81.

72. The best overview of post-Wittgensteinian work on specifically these themes is Richard Rorty’s *Wittgenstein and the Linguistic Turn*. See Rorty, *supra* note 59, at 176.

73. Davidson, *supra* note 36, at 17, 22.

74. *Id.*

knowledge by acquaintance as “the Myth of the Given.”<sup>75</sup> He argued that such so-called knowledge by acquaintance improperly conflated causation with justification, or the physical processes that caused an empirical episode with the ability to count that episode as evidence for knowing something. For it to qualify as the latter, that is to have propositional conceptual content, one would also have to know how to inferentially relate it to lots of other beliefs or, more simply, to know how to use it as a logical premise or conclusion in reasoning.<sup>76</sup> (Put another way, the physical processes that cause an observer to think that the sky is blue can only lead the observer to actually formulate that belief if he is already programmed with a particular conceptual vocabulary. The world can cause people to formulate a belief, but only other beliefs can actually justify the belief.) The content of an individual episode, then, is a function of how it fits into these relations, which implicates all that surrounds and comes before the episode as much as anything about the physical causes or processes of the episode itself. To know something is not to give an episode an “empirical description,” but rather to “plac[e] it in the logical space of reasons, of justifying and being able to justify what one says.”<sup>77</sup> Hence why Sellars famously concluded, that “*all* awareness . . . is a linguistic affair”—knowledge of perceptual episodes is a function of knowing how to place those episodes in chains of inferential reasoning.<sup>78</sup> Language, tied together by a series of inferential relations, makes a conceptual whole through which human beings navigate the world.<sup>79</sup>

Robert Brandom has most extensively worked out the implications of this inferentialism by constructing a fully expressivist account of meaning, in which “grasping the *concept* that is applied in” a sentence amounts to “mastering its *inferential* use.”<sup>80</sup> Conceptual—and thus semantic—content, he has argued, is, in character, interrelated. Because “one must have many concepts in order to have any,” one cannot understand the content of any one concept without “mastery of the proprieties of inference that govern the use of other concepts and contents as well.”<sup>81</sup> Thus, Brandom has contended that “the inferential notion of semantic content is essentially holistic.”<sup>82</sup> He has revealingly elaborated,

Inferences involve both premises and conclusions. The inferential role of one of the premises essentially depends on that of the conclusions, and vice versa. One could not know something about the inferential role of one content without knowing at least something about the inferential roles

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75. SELLARS, *supra* note 28, at 32–34.

76. *Id.* at 13–25.

77. *Id.* at 76.

78. *Id.* at 63.

79. *Id.* at 76.

80. ROBERT B. BRANDOM, ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM 11 (2000). For a suggestive take on how Brandom’s philosophy could enhance intellectual history, see David L. Marshall, *The Implications of Robert Brandom’s Inferentialism for Intellectual History*, 52 HIST. & THEORY 1 (2013).

81. ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 89–90 (1994).

82. *Id.* at 90.

of others that could be inferred from it, or from which it could be inferred.<sup>83</sup>

As Richard Rorty put it, succinctly summing up Brandom's insight, "[T]he inferences drawn from and to assertions made with the sentence constitute the only content that the sentence has."<sup>84</sup> By the logic of inferentialism, successfully translating a sentence necessitates also translating its associative relations to other sentences. Only then will its meaning be preserved. Grasping the original meaning of any constitutional phrase means *first* knowing how to use it, at its time of creation, as a premise or conclusion in other inferences.

Philosophical holism also has targeted the meaning-belief distinction. This distinction imagines a two-stage process in which human beings first devise a language and next apply those meanings to the world to form beliefs. In its most influential philosophical form, it became known as the "analytic-synthetic distinction," under which analytic beliefs were those true by meaning alone, as opposed to synthetic beliefs, which were true based on the empirical state of the world. "All bachelors are unmarried" offered a famous example of an analytic belief (one true solely by the meaning of the words), while "there are some bachelors" offered an example of a synthetic belief (one true not because of what the words meant but because of a contingent state of the world). But W. V. O. Quine famously upended this distinction by suggesting that there was no such categorical distinction to be drawn between analytic and synthetic statements. He showed that when confronted with recalcitrant experiences that challenge established beliefs, adjustments in meaning or belief could both just as successfully accommodate a novel experience.<sup>85</sup> Rather than being *prior* to beliefs, meanings are inextricably *intertwined* with beliefs in a single, holistic understanding of human rationality. Astutely drawing out these broader implications, Brandom has asserted, "[T]o understand natural languages, we have to understand how the *one* thing we do, *use* the language, can serve at once to settle the meanings of our expressions *and* determine which of them we take to be true."<sup>86</sup> In other words, meaning cannot be discerned independent of belief. Language use (applying meanings to form beliefs) is, contrary to what atomists maintain, a unitary, indivisible process.

The interdependence of meaning and belief has been explored most extensively by Davidson, specifically in his discussion of "radical interpretation" (which was built on Quine's "radical translation"), in which he sought to understand how one could interpret the meanings of people whose language was completely unknown.<sup>87</sup> His goal was to expose the

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83. *Id.*

84. Rorty, *supra* note 59, at 120, 123.

85. See generally W. V. O. Quine, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW: LOGICO-PHILOSOPHICAL ESSAYS 20 (1953).

86. BRANDOM, *supra* note 28, at 25.

87. See generally Davidson, *supra* note 36, at 125; W. V. O. Quine, *Translation and Meaning*, in WORD AND OBJECT 26 (1960).

knowledge upon which all linguistic understanding is based, to capture the problem of translation in its purest form. But his project also promised more general insights about translation and meaning. As he put it, “The problem of interpretation is domestic as well as foreign . . . [a]ll understanding of the speech of another involves radical interpretation.”<sup>88</sup> He concluded that decoding the meanings of another’s utterances necessarily relies upon an entwined project of ascribing beliefs by realizing that “radical interpretation” necessarily entails the “principle of charity.”<sup>89</sup> An interpreter would need to supply some basic beliefs to begin hashing out the speaker’s meanings by determining when a speaker had at least acceded to certain sentences, even if they remained unknown sentences.<sup>90</sup> From there, one could supply enough working beliefs to allow for the establishment of enough provisional meanings to then refine the now-existent working theory of belief, through which the now-existent working theory of meaning could be further refined, and so on. Interpreting the speech of another “from scratch” showed how fundamentally intertwined meaning and belief were. Meanings could only be understood against a background of assumed belief, and beliefs could only be understood against a background of assumed meanings. The two formed an “interlocked” whole, because “[e]ach interpretation and attribution of attitude is a move within a holistic theory.”<sup>91</sup>

The implications of these reflections for a proper understanding of constitutional originalism are momentous. For if meaning and belief are intertwined, then *even if* public meaning originalists insist that neither subjective intents nor purposes play any role in the discovery of original meaning, they still must concede that a wider understanding of commonly held Founding-era beliefs plays a constitutive role. It is impossible to hash out the meaning of any utterance without understanding the background of beliefs against which it was set. Deducing what a speaker means is unfeasible without understanding what the speaker *might* believe. I say “might” because even if the listener does not know what the speaker actually believes (what public meaning originalists are loathe to legitimize), the listener must still have familiarity with the kind of historically specific beliefs that otherwise inform the utterance to properly deduce its meaning. Meaning and belief, quite simply, are inextricably intertwined. To invoke one nontrivial example: even if it is reasonable to bracket Madison and his congressional peers’ intent in drafting what became the Second Amendment, it is not possible to bracket the general constellation of beliefs (widely held circa 1791) from which anybody at the time would have relied to give its wording meaning. Only through a deep inquiry into the period’s unfamiliar beliefs can one decipher the period’s unfamiliar meanings. As Davidson surmised: “Perhaps there are some who think it would be possible to establish the correctness of a theory of interpretation without

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88. DAVIDSON, *supra* note 36, at 125.

89. *Id.* at xviii–xx, 36.

90. *Id.* at xviii–xx, 27.

91. *Id.* at 154.

knowing, or establishing, a great deal about beliefs, but it is not easy to imagine how it could be done.”<sup>92</sup> If it seems possible to public meaning originalists, then that is only because they have not, as Davidson put it, “ke[pt] assumptions from going unnoticed” by unwittingly supplying modern beliefs as the necessary background against which meanings are stabilized.<sup>93</sup> Not only, then, have originalists been prone to impose modern language games on eighteenth-century utterances, but they have been prone to impose modern beliefs on them as well. In so doing, they insure that they never, in fact, read the original Constitution at all.

#### CONCLUSION

Translation must run deeper than the atomistic meanings of words, no matter how extensive the array of examples from which that analysis is culled. The amount of evidence is not the issue—the object of interpretation is. Systematically recovering the original meaning of Founding-era utterances requires translating eighteenth-century language holistically. Only then can we recover the connective tissue that linked one meaning to the next and the web of inferential relations that gave individual utterances their specific content.

Getting at this holism can only be done by recreating the debates in which key constitutional terms were implicated in considerable detail.<sup>94</sup> Any thickly historicist study of the Founding period has attended to such debates—sometimes to trace intellectual influences or to detect personal or political motives, but always to situate meaning in the flow of discursive activity.<sup>95</sup> Nothing can substitute for carefully working through the logic of whole arguments. Because not only will the inferential content of expressions become clear, but so too will the broader architecture of meaning. Only then will the hidden presuppositions and silent logical connectives begin to emerge. Wittgenstein suggested that we habitually learn language games from within.<sup>96</sup> We only come in contact with grammar through cases. We should heed that advice and recreate the Founding era’s games and attendant practices from within—based on real moves within them.

No doubt the work will be demanding. Learning how to make moves in such games is tantamount to mastering a conceptual vocabulary. One must take up residence with the natives, painstakingly observing their linguistic behavior to learn how to speak as they once did. But there is no credible alternative. Keyword searches or corpus linguistics will miss too much of what went into meaning by losing sight of holistic connections *between*

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92. *Id.* at 143.

93. *Id.* at 125.

94. For my own attempt to provide such an account, see Jonathan Gienapp, *Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 J. EARLY REPUBLIC 375 (2015).

95. The best example continues to be JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

96. WITTGENSTEIN, *supra* note 59, § 31.

meanings.<sup>97</sup> Only by seeing those connections can original meaning once again come into sight.

Regardless of whether most historians are familiar with Wittgenstein, Davidson, or Brandom, most would recognize their lessons because they have long been central to the rigors of historical method. Beyond Skinner, the work of Keith Baker, J. G. A. Pocock, and Mark Bevir especially demonstrates this fact.<sup>98</sup> Beyond even them, though, historians do not need to be told that thick, discursive context is indispensable to grasping the meaning of historical utterances. Nonetheless, showing how this philosophy reinforces historical instinct helps sharpen the point. Linguistic holism engenders much the same historicist perspective that historians have long favored. Originalists should appreciate the viewpoint.

Appreciating holism and historicism only begins to reveal what is entailed in a complete translation of Founding-era discursive practices. But, for now, appreciating them at least shows some of the crucial limitations of Solum and other originalists' methods of translation, including, especially, why targeting public meaning, despite what Solum insists, in no way frees them from historians' techniques. All originalists, no matter which kind of original meaning they privilege, must demonstrate sensitivity to historicism and holism. Which is just another way of saying that, in order to genuinely recover the original meaning of the constitutional text, originalists of any stripe must behave as historians.

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97. Solum, *Originalism and History*, *supra* note 1, at 12–13 (encouraging these methods).

98. *See supra* note 46 and accompanying text.