

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Res Gestae

---

7-7-2015

### Originalism As Thin Description: An Interdisciplinary Critique

Saul Cornell  
*Fordham University*

Follow this and additional works at: [https://ir.lawnet.fordham.edu/res\\_gestae](https://ir.lawnet.fordham.edu/res_gestae)



Part of the [Constitutional Law Commons](#)

---

#### Recommended Citation

Saul Cornell, Originalism As Thin Description: An Interdisciplinary Critique, 84 Fordham L. Rev. Res Gestae 1 (2015), <http://fordhamlawreview.org/assets/res-gestae/volume/84/Cornell.pdf>.

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Res Gestae by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## ORIGINALISM AS THIN DESCRIPTION: AN INTERDISCIPLINARY CRITIQUE

*Saul Cornell\**

More than a half century ago, the distinguished American historian John Higham noted the emergence of intellectual history as a vital tool for humanists across a variety of disciplines. Writing with an enviable lucidity and a generosity of spirit, Higham observed that “intellectual history has been the work of many hands, and we have come to do it from all the points of the academic compass. Philosophers, literary scholars, historians, and others have converged upon one another, bringing their various interests, backgrounds and methods to a common task.”<sup>1</sup>

Since Higham made his observations more than fifty years ago, the field has seen its ups and downs. Despite some predictions that intellectual history might not survive the assault of post-structuralist theory and post-modernism more generally, its methods are now nearly ubiquitous in the humanities.<sup>2</sup> Even beyond the humanities, intellectual history has become an important tool in other fields, such as law.<sup>3</sup>

Given these facts, it is a bit puzzling to read Lawrence Solum’s discussion of intellectual history in his recent essay, *Intellectual History as Constitutional Theory*.<sup>4</sup> Rather than acknowledge how widely accepted its methods have become, he treats intellectual history as if it were some type of esoteric knowledge, a form of cabalistic teaching shrouded in mystery whose techniques are jealously guarded by its disciples.<sup>5</sup> Quite the opposite is true—the field is not only extremely vital, but it embraces a dazzling range of topics and methodological eclecticism. Given intellectual history’s

---

\* Paul and Diane Guenther Chair in American History, Fordham University.

1. John Higham, *Intellectual History and Its Neighbors*, 15 J. HIST. IDEAS 339, 399 (1954).

2. For an overview of trends in the field over the last half century, see generally Anthony Grafton, *The History of Ideas: Precept and Practice, 1950–2000 and Beyond*, 67 J. HIST. IDEAS 1 (2006). On intellectual history and philosophy, see Richard Rorty, *The Historiography of Philosophy: Four Genres*, in PHILOSOPHY IN HISTORY: ESSAYS ON THE HISTORIOGRAPHY OF PHILOSOPHY 49 (Richard Rorty et al. eds., 1984). On intellectual history in literary studies, see Richard Macksey, *The History of Ideas at 80*, 117 MLN 1083 (2002).

3. See generally DAVID M. RABBAN, FREE SPEECH IN AMERICA: ITS FORGOTTEN YEARS (1997); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (2003).

4. Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015).

5. For an examination of such esoteric teachings, see GERSHOM SCHOLEM, MAJOR TRENDS IN JEWISH MYSTICISM (1954).

pervasive influence in contemporary American scholarly life, it is odd that Solum would fault my article for not providing him with a simple recipe for practicing it.<sup>6</sup> Instead of providing a primer for using intellectual history, which I assumed was unnecessary, I highlighted a number of specific developments in recent American intellectual history that I believed might be particularly helpful to constitutional historians.<sup>7</sup> Specifically, I noted that recent work in the history of the book and historical studies of reading suggest a range of strategies for reconstructing how individuals and distinctive interpretive communities might have read various constitutional texts at the time of the Founding.<sup>8</sup>

My essay was intended as a critique of originalism from the perspective of intellectual history. I pointed out that originalism lacked a rigorous empirical method for analyzing what texts meant in the past.<sup>9</sup> I suppose in some sense it is flattering that Solum has devoted much of his recent article to an attack on my earlier essay. Of course, flattery aside, it would have been more useful if Solum had stated my thesis correctly.<sup>10</sup> For purposes of clarity, I have juxtaposed Solum's description of my argument with what my essay actually said. Readers will be able to judge for themselves if Solum correctly captured the original meaning of my words.

---

6. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013) [hereinafter Cornell, *Meaning and Understanding*]. The methods of the history of the book discussed in that essay were based, in part, on anthropological and ethnographic methodology. The theoretical implications of ethnography for questions about original meaning are discussed *infra* pp. 6–7.

7. Cornell, *Meaning and Understanding*, *supra* note 6, at 725–33.

8. *Id.*

9. *Id.* at 740–47.

10. In his recent *Virginia Law Review* essay, Solum calls for disciplinary modesty. This claim is hard to reconcile with his previous writing on this topic. In a long footnote in his article defending *District of Columbia v. Heller*, Solum suggests my claim that legal scholar Stephen M. Griffin's critique of new originalism, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008), provided a thoughtful critique of semantic originalism was literally irrational: "No passage in the article that Cornell cites can reasonable [sic] be construed as 'a thoughtful critique of Solum's variant of originalism.'" Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 947 n.113 (2009). As is generally true with his writings on originalism, Solum appears to have missed the philosophical forest for the trees. My point was very simple, even if I failed to communicate that point clearly enough for him. Griffin's theory was a general critique of new originalism and hence applied to all variants of new originalism with equal force. Therefore, logically, the critique would also apply to Solum's new originalism. If my premise is true, the logic of the argument is difficult to challenge. Admittedly, Solum may disagree with my premise, which is an interpretive question, not a logical one. His claim that my argument is literally irrational is not only pompous, but also intellectually ludicrous.

Originalist Solum's Reading of Cornell	Cornell's Original Text
<p>“It might be argued that intellectual history could constitute a theory and method of constitutional interpretation—or to be more precise, of constitutional interpretation and construction. Professor Saul Cornell has discussed this possibility in his recent article, <i>Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism</i>.”<sup>11</sup></p>	<p>“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. <i>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.</i>”<sup>12</sup></p>

Although, I suppose, Solum is technically correct to say it may be argued that intellectual history could provide a theory of constitutional interpretation, that was not the thesis I advanced. In fact, my essay made the opposite argument. My argument was fairly simple: if one wishes to understand what the Constitution meant at a particular point in the past, one needs a rigorous historical method to recover the range of meanings it might have had for various groups living at the time. I argued that intellectual history provided a tried and true method for accomplishing this goal.<sup>13</sup> The relevance of this historical information to constitutional theory and jurisprudence is not itself a historical question, but a legal and political one. My goal was not to enhance the importance of history to constitutional theory, but to diminish it.

There is little point in responding to Solum's facile critique of intellectual history and to his glib dismissals of the work of eminent scholars such as

11. Solum, *supra* note 4, at 1113.

12. Cornell, *Meaning and Understanding*, *supra* note 6, at 755 (emphasis added).

13. There are a variety of interpretive strategies available to explore the meaning of historical texts that do not follow the American model of intellectual history or the Cambridge School. For a brief overview of these alternative methods, see Grafton, *supra* note 2.

David Hollinger, James Kloppenberg, and Quentin Skinner. Until Solum takes the time to read deeply and thoughtfully the literature of intellectual history, and obtains more than a smattering of familiarity with the scholars he criticizes, there is nothing to be gained from engaging with a critique based on a superficial reading of a few texts, some of which are now almost half a century old. Any serious evaluation of these scholars would require a careful examination of their theoretical writings, empirical scholarship, and the complex connections between theory and practice in their writing.<sup>14</sup>

In a brief essay it would be impossible to address all of the theoretical and methodological flaws in Solum's simplistic model of constitutional communication.<sup>15</sup> Solum describes his approach as follows: "Because constitutional communication (like legal communication generally) is simply a form of human communication, theories of constitutional interpretation must be reconciled with the general theory of the way linguistic communication works that has been developed in the philosophy of language and theoretical linguistics."<sup>16</sup>

The first problem with such a claim is that it mistakenly asserts that there is a clear consensus in the philosophy of language about how to approach issues of meaning. This statement is clearly false. Philosophers remain deeply divided over these types of questions.<sup>17</sup> Even if one assumes that some variant of Gricean pragmatics (the model Solum favors) is the correct theory to understand constitutional communication, Solum's adaptation of Gricean ideas is idiosyncratic at best and arguably is simply wrongheaded. The claim that constitutional communication is just another form of ordinary communication and must conform to the models used to

---

14. Solum admits that he has not bothered to read widely in the vast body of scholarship produced by the scholars he criticizes, a confession that would be shocking in almost any other field outside of originalism. Cf. Solum, *supra* note 4, at 1139. Solum's claims about Skinner's interpretation of Wittgenstein and Grice ignore the divisions over the philosophy of language in the postwar period. For a very different account of those debates by one of the leading participants in them, see generally John Searle, *Grice on Meaning: 50 Years Later*, 26 *TEOREMA* 9 (2007). In much the same way that Solum and other originalists approach the Founding era in terms of a consensus model of history, Solum's discussion of the reception of thinkers such as Wittgenstein and Grice is similarly reductionist. For a good example of a recent critique of Skinner that acknowledges the need to look at theory and practice, see Peter E. Gordon, *Contextualism and Criticism in the History of Ideas*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 32 (Darrin M. McMahon & Samuel Moyn eds., 2014).

15. A full exploration of all of the theoretical problems with Solum's adaptation of Grice is beyond the scope of this essay. Most of Grice's important essays are available in *PAUL GRICE, STUDIES IN THE WAY OF WORDS* (1989). For a good introduction to Grice's theory and its significance, see Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 *LINGUISTICS & PHIL.* 509 (1992).

16. Solum, *supra* note 4, at 1122.

17. For a good overview of these debates, see Jeff Speaks, *Theories of Meaning*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/entries/meaning/> [<http://perma.cc/MB66-8CXF>]. Other scholars have also acknowledged the ongoing nature of these debates. See Michael Wolf, *Philosophy of Language*, *INTERNET ENCYCLOPEDIA OF PHILOSOPHY* (June 7, 2015), <http://www.iep.utm.edu/lang-phi/> [<http://perma.cc/U4CU-NEWB>]; see also WILLIAM G. LYCAN, *PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION* 86–97 (2d ed. 2000); MICHAEL MORRIS, *AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 248–70 (2006).

comprehend ordinary language is also questionable.<sup>18</sup> There are many forms of communication that do not conform to the rules governing ordinary language, for example, poetry, politics, and oratory.<sup>19</sup> Rather than solve the problems traditional intentionalist versions of originalism faced, Solum has simply smuggled many of these problems through the back door and camouflaged them under a new philosophically inflected discourse.<sup>20</sup>

Solum assumes the goal of constitutional speech is analogous to ordinary speech—an assumption that seems dubious at best and is most likely false.<sup>21</sup> Grice’s theory assumes that speech is a cooperative process guided by a set of conversational maxims that facilitate the goals of communication. Philosopher of language Andrei Marmor has persuasively argued that Grice’s maxims are not a good match for the goals of legal speech, which are often strategic, not cooperative.<sup>22</sup> One can extend Marmor’s important insight by noting that many of the texts Solum and other originalists use to determine original meaning were originally uttered in a contentious public political debate. The suggestion that political speech, particularly speech in post-Revolutionary America, was typically truthful, concise, relevant, and maximally informative is hard to reconcile with the evidence from ratification.<sup>23</sup> This was certainly not how Federalists viewed Anti-Federalist texts.<sup>24</sup> The opponents of the

18. See generally Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011).

19. The complex connections between philosophy and literature are well beyond the scope of this essay; for a range of views, see generally GARRY HABERG & WALTER JOST, *A COMPANION TO THE PHILOSOPHY OF LITERATURE* (2010). For an ambitious, but not entirely successful, effort to try to develop a speech act theory of literature using Grice and other philosophers of language, see MARY LOUISE PRATT, *TOWARD A SPEECH ACT THEORY OF LITERARY DISCOURSE* (1977).

20. A number of traditional originalists have argued that Solum’s theory is parasitic on earlier intentionalist theories. See Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539 (2013); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703 (2009). Rather than solve the traditional summing of intents problem, Solum simply takes semantic meaning as a proxy for communicative intent. For a philosophical critique of this assumption, see Gregory Bassham & Ian Oakley, *New Textualism: The Potholes Ahead*, 28 *RATIO JURIS* 127 (2015).

21. See 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 (Andrei Marmor & Scott Soames eds., 2011) (discussing how legal speech deviates from ordinary conversation and speech).

22. *Id.* As Marmor notes, the maxims governing constitutional communication are shaped by strategic concerns, not cooperative principles. *Id.* An additional complication arises from the fact that in contrast to ordinary conversation or even normal legislation, it is unclear who the parties to the constitutional conversation are and how their potentially divergent assumptions and interpretive rules impact meaning.

23. For a useful discussion of Gricean maxims, see A. P. MARTINICH, *COMMUNICATION AND REFERENCE* 17–37 (1984).

24. Alexander Hamilton warned readers about “passions and prejudices little favorable to the discovery of truth” that would warp public debate over the Constitution. *THE FEDERALIST* NO. 1 (Alexander Hamilton). He also reminded readers about the danger of being duped by “the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye.” *THE FEDERALIST* NO. 85 (Alexander Hamilton).

Constitution were no less likely to treat their opponents' speech as rhetorical and hence deeply suspect.<sup>25</sup> To understand these political expressions, one must situate them in the rhetorical and ideological contexts of post-Revolutionary era debate.

Solum's claim that his theory is supported by contemporary linguistics is hard to reconcile with the evidence gathered by linguistic anthropologists.<sup>26</sup> Solum either has not consulted any works in this field or he has missed the central insights gathered by this discipline over the last forty years of scholarship. One of the foundational concepts in this field is the distinction between the interrelated concepts of linguistic community and speech community. Although English speakers in America in 1788 may have been part of the same linguistic community, they were not all members of the same speech community.<sup>27</sup> As the distinguished linguistic anthropologist Alessandro Duranti notes, "one of the reasons for taking the speech community as the starting point for linguistic research was to avoid the assumption that the sharing of the same 'language' implies shared understanding of its use and meaning in various contexts."<sup>28</sup> Put simply, Solum's entire analytical framework violates the most basic research protocols in ethnographic inquiry: to identify and define the complex relationships among the different speech communities within a particular

---

25. Anti-Federalists made similar charges about Federalists. See Commentaries on the Constitution (Sept. 27, 1787), reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION (John P. Kaminski et al. eds., 2009), <http://csac.history.wisc.edu/cato1.pdf> [<http://perma.cc/C2VW-LQT5>]. Many political utterances are marked by so-called sneaky intentions, a category Grice expressly excluded from his model. On the problem sneaky intentions pose for the Gricean model, see Peter Pagin, *Assertion*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/spr2015/entries/assertion/> [<http://perma.cc/HR89-6KBN>]. Solum ignores this issue, which provides another example of his failure to grasp an important aspect of Gricean theory. The result is a type of "law office philosophy," an analogue to the more common genre of "law office history" typical of originalism. For a brief discussion of the problem of law office history and originalism, see Cornell, *Meaning and Understanding*, supra note 6.

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

27. In his unpublished manuscript, Solum briefly deals with multiple speech communities as an unlikely possibility. See Lawrence B. Solum, *Semantic Originalism* (Nov. 22, 2008) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) [<http://perma.cc/4CZQ-MD3Y>]. The theoretical fix Solum proposes to deal with this situation is a "linguistic division of labor." *Id.* at 110. The existence of a division of labor in matters of constitutional meaning is yet another empirical question. Rather than determine if this was the actual practice in the Founding era, Solum simply borrows a neat concept from a philosophy book on his shelf. This purported theoretical "solution" is yet another example of his ahistorical and anachronistic approach to Founding era texts, practices, and issues of meaning. It affords an additional example of his inability to grasp the power dynamics shaping discursive practices in the Founding era.

28. See Duranti, supra note 26, at 217.

linguistic community.<sup>29</sup> The degree of linguistic consensus Solum posits for post-Revolutionary America exceeds anything linguistic anthropologists have ever documented in decades of field research.<sup>30</sup>

Solum's theory is not only hard to reconcile with the empirical evidence gathered by anthropologists about linguistic diversity, it also does not fit the available historical evidence about Founding era constitutional culture. The Founding era was not characterized by consensus, but rather was defined by profound conflicts over the meaning of the Constitution's terms, constitutional interpretive methods, and constitutional aspirations. Yet, reading Solum's work, one would be hard pressed to see any recognition of this process of contestation.<sup>31</sup> Solum's flawed method effectively blinds him to the existence of these conflicts. Although English-speaking members of the Founding generation may have been part of a common linguistic community, they were not all members of the same constitutional "speech community."<sup>32</sup> The farmers who took up arms against the government of Massachusetts during Shays' Rebellion and the wealthy merchants in Boston who opposed them may have each spoken eighteenth-century American English, but their constitutional discourses were distinctive and different in important ways. The meanings of key terms such as "contract," "debt," "justice," and "bear Arms" were not the same in these two speech communities.<sup>33</sup> Founding-era America was a complex society in which constitutional speech was inflected by distinctive regional, class, and ideological differences.<sup>34</sup> Solum and other originalists have simply ignored these differences, and the result is an account of the past that reduces its polyphony to a monotonous drone. Indeed, if Solum and other originalists' consensual models of constitutional speech were correct, it would mean that Founding-era America attained a level of linguistic and ideological homogeneity never achieved in any society studied by anthropologists.<sup>35</sup> This is the discredited theory of American exceptionalism on steroids.<sup>36</sup>

---

29. MURIEL SAVILLE-TROIKE, *THE ETHNOGRAPHY OF COMMUNICATION: AN INTRODUCTION* 14–18 (3d ed. 2003).

30. See ALESSANDRO DURANTI, *LINGUISTIC ANTHROPOLOGY* 82 (1997).

31. See Seth Cotlar, *The View from Mount Vernon Versus the People Out of Doors: Context and Conflict in the Ratification Debates*, 69 WM. & MARY Q. 369, 371 (2012); see also Todd Estes, *Power and Point of View in the Ratification Contest*, 69 WM. & MARY Q. 398, 400 (2012).

32. Duranti, *supra* note 30; see also Peter L. Patrick, *The Speech Community*, in *HANDBOOK OF LANGUAGE VARIATION AND CHANGE* 573 (J.K. Chambers et al. eds., 2002).

33. LEONARD L. RICHARDS, *SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE* (2002); see also ROBERT GROSS, *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* (1993).

34. WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007). If one includes distinctions of race and gender, the heterogeneity of Founding-era America is even more pronounced. See JEFFREY L. PASLEY ET AL., *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* (2004).

35. For another originalist who shares this ideological view, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011). For other problematic strains of new originalism that assume the existence of a consensus where none existed, see Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L.



Solum claims that his theory deals with context, but the approach he takes is one of thin description. By contrast, most historians, ethnographers, and anthropologists prefer approaches to context that favor thick description.<sup>37</sup> Solum proudly boasts that his account of early American constitutional meaning rests on an analysis of the linguistic facts.<sup>38</sup> In this regard, Solum has assumed a role analogous to the detective in the iconic postwar television cop show *Dragnet*. When interrogating witnesses, “Officer Joe Friday” routinely informed them that he was interested in “just the facts.”<sup>39</sup> Solum has adopted much the same method. The problem with this approach is that individuals do not communicate with lists of linguistic facts. The ratification debate was not a struggle between Federalist and Anti-Federalist dictionaries. The newspaper essays, pamphlets, and convention speeches that constitute the primary body of sources for understanding the public debate over ratification were complex rhetorical constructions shaped by the conventions of post-Revolutionary era political and legal discourse.<sup>40</sup> Semantic originalism’s pursuit of the linguistic facts makes no distinction between different types of texts, rhetorical styles, or the settings in which speech occurs; nor does Solum’s

---

REV. 1539 (2005); 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 (2009); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037 (2006).

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

37. Ethnography and anthropology have each had major impacts on American Studies. See Gene Wise, “Paradigm Dramas” in *American Studies: A Cultural and Institutional History of the Movement*, 31 AM. Q. 293, 322 (1979). On their influence on history, see William H. Sewell Jr., *Geertz, Cultural Systems, and History: From Synchrony to Transformation*, 59 REPRESENTATIONS 35, 35 (1997); Hans Medick, “Missionaries in the Row Boat”? *Ethnological Ways of Knowing as a Challenge to Social History*, 29 COMP. STUD. IN SOC’Y & HIST. 76 (1987). On the notion of constitutional ethnography, see Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC’Y REV. 389, 390–91 (2004). On the need to merge studies of pragmatics with insights from ethnography and linguistic anthropology, particularly regarding the nature of language and power, see Elizabeth Mertz, *Legal Language: Pragmatics, Poetics, and Social Power*, 23 ANN. REV. ANTHROPOLOGY 435 (1994).

38. See Solum, *supra* note 4, at 1128; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 479 (2013).

39. ERIC PARTRIDGE, A DICTIONARY OF CATCH PHRASES 14 (Paul Beale ed., 2d ed. 1985).

40. On Anti-Federalist patterns of reading during ratification, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999) [hereinafter CORNELL, THE OTHER FOUNDERS]. Once again, Solum’s focus on “linguistic facts” ignores the role of setting, scene, genre, and other basic categories of analysis central to the ethnography of speech. Dell Hymes’s influential SPEAKING model has become a standard starting point for ethnographic inquiry; for a concise explication of this model, see Donal Carbaugh, *Ethnography of Communication*, in THE BLACKWELL INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (Wolfgang Donsbach ed., 2007). The foundational text in this field remains DELL HYMES, FOUNDATIONS IN SOCIOLINGUISTICS: AN ETHNOGRAPHIC APPROACH (1974). On the methodological and theoretical convergence of sociolinguistics and linguistic anthropology, see John J. Gumperz & Jenny Cook-Gumperz, *Studying Language, Culture, and Society: Sociolinguistics or Linguistic Anthropology?*, 12 J. OF SOCIOLINGUISTICS 532 (2008).

model deal with the divergent interpretive practices that were in place in different speech communities during the Founding era.<sup>41</sup> Ironically, Solum and other originalists are much more gullible readers than most eighteenth-century historical actors. Readers in the Founding era were exceedingly sensitive to the tone, style, and ideology of the texts they read and the speeches they heard.<sup>42</sup> Solum likens constitutional texts to messages in a bottle.<sup>43</sup> Context in his model functions like a bucket filled with facts—pour the contents of the bottle into the bucket and out comes meaning. This is a simplistic model of constitutional communication. Reducing complex and contentious events such as the American Revolution, the Articles of Confederation, or the common law to simple contextual facts is yet another illustration of the profound problems with Solum’s “Joe Friday” approach to meaning.<sup>44</sup> Rather than treat contexts in this static fashion, linguistic anthropologists and ethnographers acknowledge that speakers must dynamically construct contexts from among the myriad available options. Although historical actors retain some agency in this process, the process of constructing a relevant context for any utterance is not simply time bound as Solum maintains, but it is also ideologically constrained.<sup>45</sup>

One of the biggest problems with Solum’s model is his failure to attribute any agency to individual historical actors. In Solum’s theory, individuals are used by language; they do not use language. Originalism in this sense is literally an “idiotic” constitutional theory.<sup>46</sup> It treats most Americans in the Founding era as if they were voiceless: empty vessels for holding linguistic

---

41. Solum places a great deal of emphasis on Grice’s concept of implicature. Yet, without an ability to discern Gricean speaker meaning for the Constitution, the utility of this concept seems questionable. Moreover, discerning Gricean conversational implicature requires a clear sense of the relevant conversational maxims, something Solum has never identified in his extensive writings on this topic. On Gricean implicature, see Wayne Davis, *Implicature*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/entries/implicature> [<http://perma.cc/8SJX-XMNQ>]. Most recently, Solum has invoked the concept of pragmatic enrichment. See François Recanatì, *Pragmatic Enrichment*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE* 67 (Gillian Russell & Delia Graff Fara eds., 2012). While this construct represents some thickening of his conception of context, his treatment remains radically underdeveloped, under-theorized, and exceedingly thin.

42. On patterns of reading during ratification, see CORNELL, *THE OTHER FOUNDERS*, *supra* note 40.

43. ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 57 (2011).

44. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning* (Feb. 3, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559701](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559701) [<http://perma.cc/EK5G-T75T>].

45. ALESSANDRO DURANTI & CHARLES GOODWIN, *RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON* 5–6, 8–9 (1992) (discussing the role of ideology in shaping the ability of actors to construct linguistic contexts and challenging the static approach to pragmatics typical of much philosophical analysis).

46. Idiocy in this sense builds on Hannah Arendt’s classically inflected analysis of politics. HANNAH ARENDT, *THE HUMAN CONDITION* 38 (2d ed. 1998); *see also* DAVID MILLER, *POLITICAL PHILOSOPHY: A VERY SHORT INTRODUCTION* (2003). For a discussion of originalism and the problem of constitutional idiocy, see 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, 300–04 (2011).

and contextual facts. By ignoring human agency, originalists, including Solum, are guilty of succumbing to the “enormous condescension of posterity,” a pernicious and ahistorical bias that the great English historian E.P. Thompson warned against in his classic study, *The Making of the English Working Class*.<sup>47</sup> By effectively silencing discordant voices and turning what was a lively and raucous public debate into a dull placid affair, Solum produces an ideologically distorted vision of the Founding. This approach drains politics from one of the most politically contentious moments in American history. To the extent that it was possible to fix the constitutional meaning for any provision of the Constitution (apart from the most trivial constitutional questions), such a process was a function of political and ideological forces, not the neutral philosophical application of a set of universal truths about language.

The time has surely arrived to abandon the simplistic approach to language and history associated with nearly all versions of originalism, including Solum’s semantic originalism. Rather than dismiss intellectual history, Solum and other originalists would do well to master a few of its more basic techniques.

---

47. E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 12 (1964). For an evaluation of Thompson’s influence on legal history, see Robert W. Gordon, *E.P. Thompson’s Legacies*, 82 *GEO. L.J.* 2005 (1994). For other examples of originalist scholarship that display “the condescension of posterity,” see Prakash & Yoo, *supra* note 35, and McGinnis & Rappaport, *supra* note 35.