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## Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning

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## FORUM

### HISTORIANS AND THE NEW ORIGINALISM: CONTEXTUALISM, HISTORICISM, AND CONSTITUTIONAL MEANING

#### FOREWORD

*Martin S. Flaherty\**

#### INTRODUCTION

Little appreciated, in an otherwise greatly appreciated opinion, is Justice Robert Jackson's lyrical rejection of originalism in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>1</sup> There, he waxed that "just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. . . . [T]hey largely cancel each other."<sup>2</sup> He deftly underlined the point with a footnote demonstrating how two of the most prominent Founders, who were also two of the three personalities that made up "Publius" (the author of *The Federalist*)—James Madison and Alexander Hamilton—utterly disagreed with one another about the Constitution's meaning as soon as major controversies arose.<sup>3</sup>

Yet, as with Mark Twain, the announcement of originalism's death has proven to be premature. As this forum shows, whatever else originalism is, it is alive and well. Fortunately, the Essays in this forum come from historians. As such, the contributions issue from the very discipline on which originalism's claims depend. Precisely that insight serves as the dominant, though not necessarily unanimous, theme of this collection. From this insight comes ways to confine originalism to a possibly legitimate, but far more circumscribed, role than its adherents desire.

Toward that end, this Foreword addresses three matters. First, it considers why the use of history in constitutional interpretation is inescapable. Next, it suggests that the Essays in this forum do not go far enough in debunking the idea of "public meaning" originalism as a serious

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1. 343 U.S. 579 (1952).
2. *Id.* at 634–35 (Jackson, J., concurring).
3. *Id.* at 635 n.1.

alternative to previous approaches. Finally, the balance of this Foreword reviews the also perhaps inescapable misuses of history that constitutional interpretation invites and considers the type of misuse that public meaning originalism represents.

### I. HISTORY TRIUMPHANT

Oliver Wendell Holmes, Jr. once wrote that “a page of history is worth a volume of logic.”<sup>4</sup> Nowhere has that adage been applied more consistently than in the pages of the U.S. Reports. Historical arguments have featured in constitutional interpretation from the Supreme Court’s earliest decisions. Just as Justice Jackson’s dismissal of originalism is overlooked in *Youngstown*, so too is Chief Justice John Marshall’s embrace of the approach in *Marbury v. Madison*.<sup>5</sup> Typically, commentators focus on *Marbury*’s use of text and structure. Yet there, almost in passing, Marshall justifies the primacy of constitutional law, stating:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.<sup>6</sup>

Marshall offered no citations for the proposition, probably because he personally participated in the events on which he relied, one reason why this originalist aspect of *Marbury* evades attention.

Two hundred years later, justices relying on history cite to Founding sources, and they do so obsessively, regardless of political bent. Recent opinions relying heavily on the history of particular constitutional provisions include: *Zivotofsky v. Kerry*,<sup>7</sup> *Medellín v. Texas*,<sup>8</sup> *District of Columbia v. Heller*,<sup>9</sup> *Sosa v. Alvarez-Machain*,<sup>10</sup> *Boumediene v. Bush*,<sup>11</sup> *Printz v. United States*,<sup>12</sup> *New York v. United States*,<sup>13</sup> *Harmelin v. Michigan*,<sup>14</sup> *Morrison v. Olson*,<sup>15</sup> *INS v. Chadha*,<sup>16</sup> and others.

As Jonathan Gienapp notes, originalism’s modern incarnation comes from the efforts of conservative advocates and scholars dating back to the

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4. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

5. 5 U.S. 137 (1803).

6. *Id.* at 176.

7. 135 S. Ct. 2076 (2015).

8. 552 U.S. 491 (2008).

9. 554 U.S. 570 (2008).

10. 542 U.S. 692 (2004).

11. 553 U.S. 723 (2008).

12. 521 U.S. 898 (1997).

13. 505 U.S. 144 (1992).

14. 501 U.S. 957 (1991).

15. 487 U.S. 654 (1988).

16. 462 U.S. 919 (1983).

Reagan Administration.<sup>17</sup> Though sometimes overlooked, progressive scholars and advocates in short order countered with originalist and/or historical arguments of their own. So dominant has the turn to history been that Randy Barnett only slightly overstated his proclamation that originalism has triumphed.<sup>18</sup> Given this reality, constitutional lawyers cede historical arguments to the opposing side at their peril.

## II. THE PROMISE OF PUBLIC MEANING

None of this is to say that originalism's path to dominance has been easy or ultimately a good thing. At every step it has met significant challenges. Public meaning originalism, which the Essays in this forum address, is simply the most recent attempt to salvage the approach from those challenges. These Essays rightly suggest that the public-meaning gambit will not just fail to meet some of the more serious objections that originalism faces. They also rightly suggest that, if anything, this new incarnation of the method robs it of whatever legitimacy it might otherwise claim. If these responses have any weakness, it is that they do not venture far—or, more accurately, deeply—enough.

The first assaults on modern originalism were mainly fought on the fields of theory. Responding to Attorney General Edwin Meese III, Justice William J. Brennan, Jr. set the terms of popular debate, arguing that at the end of the day, constitutional interpretation should be about justice rather than democratic dead-hand control.<sup>19</sup> Prominent constitutional theorists, sometimes grouped under the banner of “justice seeking,” elaborated Brennan's objections.<sup>20</sup> Among other things, they argued that the Constitution's legitimacy lay not in the will of the long dead majorities who ratified its provisions, but rather in the justice and moral authority of the principles that those provisions enshrined.<sup>21</sup> Just for this reason, theoretical opponents in originalism debates tended to talk past each other. Either the Constitution rested on the democratic authority of “We the People,” expressed through ratification, or it rested on principles of fundamental justice. Competing sets of these first principles tend to result in a stalemate.

Enter the historians, whose objections tended to be less fundamental but more threatening. It did not take long before those suspicious of Reagan-era originalism noted that its practitioners attributed original intentions to the Founders that invariably supported modern conservative positions. That suspicion only grew once legal scholars turned either to historians or to the

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17. See generally Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 55–70 (Steven G. Calabresi ed., 2007); Attorney General Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra*, at 47, 47–54.

18. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999).

19. Brennan, *supra* note 17, at 57–58, 70.

20. See Martin Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565, 1565–66 (1997).

21. *Id.*

historical sources themselves. The result was several damning objections, even conceding originalism's theoretical underpinnings.

The first set of objections was what I long ago categorized as “procedural.”<sup>22</sup> These stem from a proposition that all but one of the contributors to this forum take as a given. That is, when a legal advocate invokes the authority of a separate discipline to add weight to her legal argument, it follows that the advocate has no choice other than to play by the rules of that separate discipline. Take, for example, a claim about tort law based upon a scientific proposition. The legal claim derives additional weight only to the extent that the scientific claim rests upon recognized scientific procedures. To say, therefore, that the rules of one discourse should not be imposed upon another gets the matter exactly wrong. The practitioners of one discipline—constitutional law—seek to strengthen their arguments with the conclusions drawn from another discipline—constitutional history. They do so on the belief that historically based arguments provide authority that legal assertions cannot alone. The additional weight derives precisely because the two forms of discourse are different. An argument for a “unitary” executive may proceed solely based on conventional legal materials, such as text or inference from structure. When, however, a supporter of that position further contends that the “Founding generation” in some way supported this position, assuming such support is a good and weighty thing, then it tends to matter whether the Founders actually did any such thing—especially when it turns out that they did not.<sup>23</sup>

It follows that the external authority that history affords depends upon following at least the basic procedural rules that history demands. These may be briefly stated. As Jack Rakove<sup>24</sup> and Saul Cornell<sup>25</sup> in particular emphasize, first is a concern for context. Without understanding how different the past can be, misconstruing words or deeds through modern eyes becomes almost inevitable. A perhaps counterintuitive corollary is reliance on the secondary works of professional historians, who have the time and training to scour original sources that even legal academics do not. Only after this should anyone, especially lawyers, venture into the thickets of primary sources, and they should be scrupulous about reviewing all relevant material, broadly defined. The need to cast a wide net raises a further basic stricture: anyone consulting history must be open to the likelihood of complexity.<sup>26</sup> Jack Rakove himself nicely captured the idea when he titled his book on the framing and ratification as *Original*

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22. Martin Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554–55 (1995).

23. *Id.*

24. Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 972–73 (2015).

25. Saul Cornell, “*To Assemble Together for Their Common Good*”: *History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915, 917 (2015).

26. See Flaherty, *supra* note 22, at 550–52.

*Meanings*,<sup>27</sup> plural. By these standards, not surprisingly, much first-wave originalist work fared poorly.

But the historical challenge did not end there. Substantively, scholars and even judges pursuing sound historical method discovered just the type of complexity that a good historian would expect from a nationwide debate about an untested frame of government open to numerous interpretations. Consider, for example, separation of powers. Here Justice Antonin Scalia set the terms for the initial originalist case by claiming that the Founders more or less all understood the precise scope of “Executive Power” in Article II, including the exclusive power to remove federal officers.<sup>28</sup> Several legal scholars ostensibly confirmed the historical case. Studies adhering to even the most basic historical methods quickly revealed that no such Founding-era consensus existed. While the Founders did generally embrace separation of powers as a basic idea, they wildly disagreed on what it meant with regard to numerous “details,” such as removal of federal officers.<sup>29</sup>

Occasionally, the substantive challenges that historians and history-minded advocates mounted went beyond demonstrating complexity and found consensus that was diametrically opposed to the positions that many conservative originalists put forward. Perhaps the best example here is the Declare War Clause.<sup>30</sup> Certain originalists sought to demonstrate that the original intent of the provision sought merely to give Congress the power to announce that the nation was formerly in a state of war, rather than the exclusive power to authorize the President to introduce troops into hostilities. Closer historical scrutiny, however, did more than show simply that the Founding generation held many views on the subject that “cancel[ed] each other.”<sup>31</sup> Rather, the overwhelming weight of secondary studies themselves, relying on both a reconstruction of historical context and close examination of the primary sources, concluded that there was a clearly dominant view of the Declare War Clause—to grant Congress the power to authorize the use of troops except in certain emergency situations during which it was not in session.<sup>32</sup>

In the face of these challenges, originalists might have simply moderated their initial claim. They might have conceded that history generally will not furnish one clear original understanding and that when it does, the understanding might not confirm the modern result that they expected or desired. These sensible concessions, however, may have ceded too much ground to originalism’s “original vision.”

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27. JACK N. RAKOVE, ORIGINAL MEANINGS (1996).

28. *Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting).

29. *Id.* at 703–04.

30. U.S. CONST. art. I, § 8, cl. 11.

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35, 635 n.1 (1952) (Jackson, J., concurring).

32. See, e.g., William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 715 (1997).

Perhaps for this reason, originalism instead rebranded itself in a way that claimed to obviate the challenges that issued from history as a discipline. This was a shift from “original intention” to “original understanding,” which ultimately came to be defined as a quest for the original public meaning. The goal would no longer be to seek the subjective intentions and motivations of James Madison, James Wilson, Alexander Hamilton, Gouverneur Morris, or other Founders, either at the ratification debates or at the closed Federal Convention. That search got inevitably bogged down in just what historians prized: placing individual Founders in the context of their day, looking at the numerous personalities who participated, and accepting the complexity and confusion that often resulted. Public meaning promised to cut the historical Gordian knot. The goal would now be to fix the meaning of a constitutional provision by asking how a literate member of the public would have understood its words at the time. In theory, this approach might often require no more than consulting a contemporary dictionary to unlock the operative meaning of “executive,” “commerce,” or “due process.”

Each of the contributions to this forum demonstrates that, when it comes to history’s demands, public meaning originalists can run, but they cannot hide. Helen Irving correctly doubts whether judges are up to relying on history as a dispositive authority at all, but argues that because they will try anyway, they should be held accountable to some historical standards.<sup>33</sup> With prodigious sophistication, Jonathan Gienapp convincingly argues that attempts to base public meaning on linguistic philosophers such as Grice are, among other things, inapposite.<sup>34</sup> Saul Cornell both practices and preaches rigorous historical method with a compelling account of the use of liberty poles during the Whiskey Rebellion and with not just a contextual approach, but also an anthropological approach, reviews contemporary attitudes—plural—toward free speech.<sup>35</sup> Most simply, Jack Rakove rightly asserts that almost any historical claim that ignores context, inclusion, and complexity will not be credible and that seeking the range of meanings that a literate American might have attributed to the Constitution in 1788 or 1791 is not different.<sup>36</sup>

Each of these authors counters the public meaning narrative convincingly. Yet there remains an even more basic objection: What basis would there be to believe that the understanding of a randomly selected participant in either the framing or formal ratification debates of the Constitution would be any different from the understanding of a randomly selected, literate member of the general public?

Consider this thought experiment. Two New Yorkers and a Virginian walk into a bar. The first New Yorker is Alexander Hamilton, the Virginian

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33. Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 962 (2015).

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

35. See generally Cornell, *supra* note 25.

36. Rakove, *supra* note 24.

is James Madison, and the bar into which they walk is owned by the other New Yorker, Samuel Fraunces. Assume they all read the first clause of the new Constitution's Article II. Hamilton, an advocate of a strong executive, reads it expansively, though not as expansively as many presidentialist originalists assume. Madison, more circumspect, comes to read it more narrowly. Each Founder takes the core meaning of the "Executive Power" vested in the President as implementing the laws passed by Congress. Hamilton, however, interprets it to mean a power to proclaim neutrality, though he gets there through an expansive reading of other specific grants of power in Article II.<sup>37</sup> Madison soon makes clear that he opposes any such unwarranted expansion of what the Chief Executive may do.<sup>38</sup> And what about Samuel Fraunces, our proxy for a literate member of the general public? Without any specific information, we might speculate that he understands executive power as no more or less than enforcing the laws. Or he might read it to include more additional powers, such as a power to proclaim neutrality, or an exclusive power to terminate treaties or remove federal officeholders.<sup>39</sup>

The point is that there is no reason to think that, where the well-known Founders entertained a range of views on a provision, issue, or question, a literate member of the public at the time would have held any views outside that range. In fact, given that the general public outnumbered the elite Founders by the tens of thousands, there is every reason to believe that the range of possible meanings literate members of the public had would have been broader, with idiosyncratic views at the margins. And where the elite Founders might have agreed on one precise meaning, such as the requirement that a President be at least "thirty-five years old," it is likely such a provision would have held the same meaning for the general public. Only if we assumed that the Framers at the Convention or the Founders at the ratification debates were speaking in a secret Masonic code known only to them would we have any basis to think that the range of subjective intentions that they had concerning a given provision would significantly diverge from the public meaning understood by publicans such as Samuel Fraunces. At the end of the day, the Hamiltons and Madisons are merely a subset of literate members of the general public.

All of which means that the challenges of finding the original intention(s) of the Framers at Philadelphia, the original understanding(s) of the Founders at the ratification debates, or the public meaning(s) of a provision that prevailed at a good ale house would yield appreciably different results. Each task is by definition historical—and valuable to originalists only to the extent it is historical—and so subject to historical procedures and

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37. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 590–91 (2004).

38. See Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, in PRESIDENTIAL POWER STORIES 21, 38 (Curtis A. Bradley & Christopher H. Schroeder eds., 2009).

39. For an account of Fraunces, see KYM S. RICE, *A DOCUMENTARY HISTORY OF FRAUNCES TAVERN: THE 18TH CENTURY* (1985).



methodology. That means doing the hard work of considering context, breadth, and, more often than not, complexity.

The contributions to this forum nonetheless mount a powerful case against sparing originalism from historical scrutiny by way of public meaning. They may not make the threshold point that the original intentions of the Founders would not likely diverge from the original understandings of the American public. Even so, Cornell, Gienapp, Irving, and Rakove provide compelling reasons why the search for public meaning requires the same historical rigor as the quest for the Founders' intentions.

### III. HISTORIES ABUSED

This collective refutation, however, might go further. This forum suggests that public meaning originalism is bad, but does not explain how bad. This question suggests flipping the usual point/counterpoint between originalists and their historian critics. As noted, the story has largely consisted of originalists advancing claims, historians responding with skepticism, and originalists countering with modified approaches. Yet historians might make a more effective contribution if they turned the tables. In particular, historians might affirmatively chronicle different types of originalism to the extent they consistently do or do not fail to offer credible historical accounts to support their constitutional claims. A more precise definition of the problem might in theory lead to more effective responses.

With this in mind, let me advance certain pathologies identified elsewhere,<sup>40</sup> but that will be further developed here. First is what is widely known as "law office" history.<sup>41</sup> This practice entails relying on historical sources, usually selectively, when they are perceived to support preconceived results.<sup>42</sup> Typically, "law office" history involves using quotations and other materials often wrenched out of context.<sup>43</sup>

More subtle, and today perhaps more prevalent, is what I once ago designated as history "lite."<sup>44</sup> The allusion to a then-popular beer campaign referred to historical arguments that were not as rigorous as "full-bodied" history, but were just as "satisfying" as any historian's account. History lite implies a genuine attempt to find historical answers, yet an attempt that is nonetheless undercut by the different demands of legal advocacy that Irving recounts.<sup>45</sup> Legal advocacy leaves lawyers and judges little time to become immersed in a subject outside the law. What applies to lawyers, moreover, also applies to legal scholars. Law professors usually have to produce more

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40. Martin S. Flaherty, *Can the Quill Be Mightier than the Uzi?: History "Lite," "Law Office" and Worse Meets the Second Amendment*, 37 *CARDOZO L. REV.* (forthcoming Dec. 2015).

41. Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss"*, 56 *UCLA L. REV.* 1095, 1098 (2009).

42. *Id.*

43. *Id.*

44. See Flaherty, *supra* note 22, at 552–53.

45. Irving, *supra* note 33, at 961.

pieces on more varied topics in less time than their counterparts in history. They can do this because they typically submit their work to student-edited reviews rather than peer-reviewed journals. The result is that there is very little to filter shoddy historical work.<sup>46</sup>

Perhaps most pernicious, though ultimately more readily detected, is a further misuse of history that I more recently termed history “bullshit.” The term as applied refers to a minor bestselling essay by Princeton philosophy professor Harry Frankfurt entitled, *On Bullshit*.<sup>47</sup> Frankfurt rejected the common definition of the term as a false statement. He argued instead that the idea had a more nihilistic meaning as a claim that was indifferent to whether truth or falsehood existed in the first place. According to Frankfurt, cable and radio talk shows, social media, and other outlets create an insatiable need for bullshit because the premium is to fill time with claims that are merely provocative rather than true.<sup>48</sup> Applied to originalism, the idea means an assertion about the past that ultimately has no concern for whether the claim is correct or incorrect, but instead considers whether the claim offers the kinds of originality, boldness, and cleverness that lead either to academic or Article III life tenure.

#### CONCLUSION

Where does “public meaning” originalism fall? As is true of many legal inquiries, the answer is, “it depends.” Consider three originalists who argue that “the right of the people to bear arms” had an original public meaning of an individual right to own and carry guns. One does so already convinced that the Second Amendment protects such a right, and so genuinely reads “bear” and “carry” as synonymous, based either on a presentist reading or a source—perhaps a dictionary entry—that confirms the preconception, never bothering to subject the conclusion to more rigorous historical scrutiny. Such would be classic “law office” history. Another originalist may attempt a real historical inquiry but, due to the constraints of time or perspective, simply fail to understand the importance of the eighteenth-century militia system in relation to the concept of bearing arms for military use only after sufficient training and drilling. Still, one more originalist may be indifferent to what Founding attitudes were altogether, but refer to them anyway en route to making a clever or provocative argument that includes an individual right to own pistols, assault weapons, or even drones.<sup>49</sup>

The problem with public meaning originalism, as with its predecessors, is that it invites all three pathologies. As each of the contributors makes clear, it offers a way to invoke history without actually doing history. This promise makes it all too easy to believe that the past genuinely supports one’s present agenda, to believe that a good faith but insufficient inquiry

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46. See Flaherty, *supra* note 22, at 552–53.

47. HARRY G. FRANKFURT, *ON BULLSHIT* (2005).

48. *Id. passim*.

49. For a concise, historically rigorous account of the Second Amendment by a nonhistorian, see MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* (2014).

clearly supports a particular result, or to make provocative arguments that invoke the past on the theory that no one will or should look at the past too closely. As such, public meaning originalism ought to be recognized for the many ways that the promise it offers is false. Professors Cornell, Gienapp, Irving, and Rakove deserve kudos for helping to make this clear.