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# Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism

JACK N. RAKOVE\*

Originalism is hot. A couple of decades ago, one might have thought that its death knell had sounded when the Supreme Court nomination of Robert Bork failed in the Senate. Although one wondered exactly what kind of originalism Justice Bork might have performed in practice, he was regarded as the theory's leading academic spokesman, and the defeat of his nomination might have served as a fatal blow to the cause. Within a few years, however, Justice Antonin Scalia published his lecture *Originalism: The Lesser Evil*,<sup>1</sup> signaling that the cause remained alive and well. Although Justice Scalia's views of the practice of originalism have also evolved—and in ways that embarrass originalism's leading academic theorists<sup>2</sup>—his endorsement offered a more sophisticated defense of the theory than had appeared, for example, in Attorney

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1. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

2. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (denouncing Justice Scalia's opinion in *Heller* as "an embarrassment for the interpretive approach that the Court purported to employ"); see also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (evaluating Justice Scalia's lecture *Originalism: The Lesser Evil* and contending that Justice Scalia is not really an originalist at all).

General Edwin Meese's public remarks on the subject.<sup>3</sup> Today all observers of the Supreme Court know that Justices Scalia and Thomas are avowed originalists. Equally important, discussions of originalism flourish in law reviews, and the law school of this university has become a high temple of originalist pronouncements and conferences. To the casual observer musing without a data count to rely upon, originalism appears to number among the liveliest—if not the liveliest—topics of current writings in constitutional theory, and the effort to exploit it is no longer confined to a monopolistic pool of conservative academics.<sup>4</sup>

Like any theory of textual interpretation, originalism has been subject to an array of refinements and criticisms, as well as elaborations of methodology. As a working historian, I do not feel wholly competent to evaluate all of the theoretical nuances this discussion has produced, much less predict where it will all end. But I can still offer some comments based on my own efforts to develop a historically grounded approach to the subject and to contrast that approach with the dominant form of originalism being practiced today, which goes under the heading of “public meaning” or “semantic” originalism.

Originalism is a subject that first attracted my interest when I was a graduate student studying history in the early 1970s. It did so not as a topic I was actively studying but rather because a series of political disputes, mostly revolving around the conduct of American foreign policy and the impeachment of Richard Nixon, engaged my interest as someone who was working on the political background to the Constitution. As a member of an organization known as Reservists Committee To Stop the War, I had a passing interest in its lawsuit against Secretary of Defense James Schlesinger, which sought to apply Article I, Section 6, Clause 2 of the Constitution to require all members of Congress holding commissions in the Armed Forces Reserves to resign either their commissions or their seats.<sup>5</sup> Fresh from reading my graduate mentor Bernard Bailyn's great book *The Ideological Origins of the American Revolution*, it seemed wholly plausible to me that our suit had the issue right—that the Framers of the Constitution would have regarded the placement of military officers in Congress as one of those marks of political corruption that had allowed the Crown to control the House of Commons, and that reform-minded Americans in the late

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3. See Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC, Dec. 1986, at 77, 77–78.

4. Perhaps the articles collected in Symposium, *Original Ideas on Originalism*, 103 NW. U. L. REV. 491 (2009), present the best current guide to the state of play in this field.

5. See *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 209–11 (1974).

eighteenth century would have wanted to prohibit.<sup>6</sup> A few years later, the Court's decision in *Goldwater v. Carter*<sup>7</sup> got me thinking about how the adopters of the Constitution would have understood the legal character of treaties, which encouraged me to write my pioneering foray into historical originalism, a discussion of the origins of the treaty power.<sup>8</sup> That essay, coupled with the rising public debate over originalism generated by remarks by Attorney General Edwin Meese and Justice William Brennan,<sup>9</sup> in turn led me to write a whole book on the subject explicitly addressed not to assessing jurisprudential theories of originalism but to describing how a historian would attempt to answer what the Constitution—or more specifically, its clauses—originally meant.<sup>10</sup>

A historian's answer to a query about the original meaning of a constitutional clause need not depend on a prior understanding of the lawyers' debate about originalism. After all, historians ask what documents originally meant all the time. Indeed, asking that question is the essence of what we do, and the answers we provide often deal with both the original intentions of a document's author(s) and the impact the document had on its recipients, whether a lone individual or a great social collective.<sup>11</sup> What would seem strange to a historian is not the idea of recovering the original meaning of a document, which we try to do all the time, but the greater ambition of originalism, which is to equate that original meaning, however ascertained, with a document's permanent meaning. Documents,

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6. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 47–51 (1967).

7. *Goldwater v. Carter*, 444 U.S. 996 (1979).

8. See Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *PERSP. AM. HIST.* 233 (1984).

9. See Rakove, *supra* note 3, at 77–78 (discussing that although Attorney General Meese called for a return to “a jurisprudence of original intention,” Justice Brennan objected to Meese’s position as “arrogance cloaked as humility” (internal quotation marks omitted)).

10. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); see also *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990).

11. The past generation or two of historical scholarship has been an extraordinarily productive period in this respect, not least because of the enormous influence of the so-called Cambridge School for writing the history of political ideas. For its origins and legacy, the best place to begin would be with *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* (James Tully ed., 1988), which includes several of Sir Quentin Skinner’s leading methodological essays. One monument to this approach is the impressive series of monographs in intellectual history that Cambridge University Press publishes under the heading *Ideas in Context*. See, e.g., HANNAH DAWSON, *LOCKE, LANGUAGE, AND EARLY-MODERN PHILOSOPHY* (2007).

once written, enter into the stream of historical time, and their meaning changes as those who come later ascribe their own understandings to the original text. The meanings Americans now assign to the Declaration of Independence, to take one nontrivial example, have relatively little to do with the circumstances of its creation or Thomas Jefferson's purposes, and everything to do with the ideas of equality that, inadvertently or otherwise, it eventually created.<sup>12</sup>

Historians can therefore be originalists in their own way without worrying too much about the lawyers' rules for originalism. But a historian who wants to contribute to the lawyers' debate needs to know their premises and disputes. When I set out to become an originalist, I took counsel from both informed colleagues<sup>13</sup> and an existing body of writings, and I tried to make sense of how a historian's approach might fit their problem. The propositions that follow provided the initial framework for my thinking.

First, originalism is the theory of constitutional interpretation that says that the meaning of a constitutional text or provision is locked into it at the moment of adoption, and the proper goal of constitutional interpretation is to ascertain and apply that meaning to the case at hand. In a republic in which the adoption of a constitutional text depends directly on the authority of the people, knowing how a text was understood by both ordinary citizens and their elected delegates and legislators matters more than the original intentions of its authors.

Second, in pursuing this mode of interpretation, the nominal objective is to constrain judicial decisionmaking, but the actual result may be to liberate judges from the constraint of precedent. Originalism is often described and justified as a means of preventing modern courts from imposing their moral preferences on cases because it requires justices and judges to be faithful to the meaning of the constitutional text in its pure, unsullied form. At the same time, an appeal to this particular sense of high judicial duty can be enormously liberating in other respects because it allows courts to ignore well-grounded precedent in the pursuit of a vision of original constitutional meaning. Whether originalism does more to constrain than liberate would be hard to measure. Historical answers may be just as indeterminate as other forms of legal reasoning,

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12. Compare DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 25–62 (2007) (stressing the Declaration of Independence's international function), with PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 154–208 (1997) (discussing, in the concluding chapter, the Declaration of Independence's later history).

13. I owe personal debts of this kind to my Stanford colleagues Paul Brest and Thomas Grey, and to an old graduate school friend then residing across the Bay, Robert Post, who is now dean at the celebrated oracle of American constitutional theory, Yale Law School.

allowing judges to pick and choose the evidence that satisfies their predispositions.<sup>14</sup>

Third, originalism, though primarily the business of judges, has both democratic and antidemocratic grounds. Like other theories of judicial review, it rests upon the premise, originally laid down by Alexander Hamilton in *The Federalist No. 78*, that when courts preserve the meaning of the Constitution against improper acts of government, they act in behalf of the exercise of popular sovereignty that makes a written constitution supreme law.<sup>15</sup> That is democracy in a very high sense of the term. Yet in other ways, a decision imposing the distilled will of a democratic sovereign from a distant constitutional past over the political preferences of modern democratic majorities seems to belie the whole promise (and premise) of popular government. The reign of democracy is an endless present in which majorities form, dissolve, and reform with little knowledge of the past and less of the future. As John Quincy Adams once memorably put it, “Democracy has no forefathers, it looks to no posterity, it is swallowed up in the present and thinks of nothing but itself.”<sup>16</sup> Whatever one makes of our culture’s fascination with the founding generation—the literary phenomenon of “Founders chic”<sup>17</sup>—democratic culture is not patriarchal in nature.

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14. For an observation of this point, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 5 (1988).

15. See *THE FEDERALIST NO. 78*, at 524–30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

16. This comment appears as the epigraph to my concluding coda for *Original Meanings*. See RAKOVE, *supra* note 10, at 366. Its original source for me was the lecture *Democracy and the Past: Jefferson and His Heirs*, which the late Professor Judith Shklar presented at Stanford as part of the Robert Wesson Lecture Series in April 1988. The lecture was subsequently printed as part of a collection in JUDITH N. SHKLAR, *REDEEMING AMERICAN POLITICAL THOUGHT* (Stanley Hoffmann & Dennis F. Thompson eds., 1998). The quoted passage comes from a December 11, 1831 entry in the diary of John Quincy Adams, and its immediate subject is whether a visiting Swiss collector will be able to sell to some American institution a small set of “ancient medals.” Adams thinks he will not find a buyer, and he goes on to complain: “Democracy has no monuments; it strikes no medals; it bears the head of no man upon a coin; its very essence is iconoclastic. This is the reason why Congress have never been able to erect a monument to General Washington.” 8 *MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 433 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1876). Times have evidently changed, and perhaps Adams’s observation should not be over-generalized. Still, I think its wisdom applies to something more than medals, and so did Professor Shklar.

17. See generally H.W. Brands, *Founders Chic*, *ATLANTIC MONTHLY*, Sept. 2003, at 101 (discussing a resurging interest in the Founding Fathers).

These strictures are essentially prefatory to determining what originalists would actually do in practice. When I began thinking about the matter in the early 1980s, just before originalism became a public topic, it seemed ineluctable that any serious approach to ascertaining the original meaning of a constitutional text or provision would have to be essentially historical in nature. Of course, there was always the “law-office history” version of doing things—meaning something like, “Look in *The Federalist* and get me a cite,” or, “Did Madison say something about this?” But I assumed one could develop higher standards that would involve identifying the relevant sources that could be brought to bear on a question, considering the sources’ provenance and weighing their authority, and assessing how and what each contributed to answering whatever question was being posed. What those sources are and how one should think about them will be discussed briefly below. But the starting position demands emphasis now. It is, quite simply, that the only possible way in which one could satisfactorily reconstruct the original meaning of a constitutional text must necessarily involve an essentially historical inquiry. Such an inquiry would have to take careful account of the sources, explaining how and why a document was drafted, debated, and finally approved. It would involve immersion in the kinds of sources that historians ordinarily use and would need to consider the array of purposes shaping their action. Whether it would ever produce dispositive answers on every problem could well be open to question. Law school colleagues like the title of my book *Original Meanings*, in the plural. But such an approach should be able to produce more or less authoritative accounts of how and why particular provisions made their way into the constitutional text, thereby establishing interpretive baselines for both original meaning and subsequent interpretation and construction.

As I tried to think systematically about what a historically grounded form of originalism would entail, my approach came to depend on three definitions and four sets of sources. At the outset, I thought it was important to distinguish original meaning, intention, and understanding from each other, rather than use those terms interchangeably or promiscuously as synonyms for one endeavor. Ascertaining the meaning of a text is the goal of constitutional interpretation, and meaning therefore is best applied to the text itself. One guide to that meaning could be the purposes of its authors—their *intentions* in including a particular provision in the larger Constitution and the verbal choices they made in expressing their specific goals. A classic example of this problem would be the Constitutional Convention’s decision to replace the verb *make* with *declare* in the clause establishing the power of Congress to authorize

or initiate a war.<sup>18</sup> Another could be the last minute, silent acceptance of Gouverneur Morris's editorial condensation of the Vesting Clause of Article II from two sentences into one.<sup>19</sup> Original understanding, by contrast, appeared to apply more aptly to the way in which the Constitution was read by its ratifiers, which could refer both to the members of the state conventions and to the public they represented. To speak of their intentions as a useful term in approving the Constitution made little analytical sense because the only action the ratifiers could literally take was to approve or reject the document in its entirety. Their intentions, in other words, were sharply constrained by the structure of the decision the Convention and its Federalist supporters imposed on the process of ratification. Yet the evidence of how they understood the Constitution was also amply documented in the extant records of the ratification debates, now being reproduced in the twenty-one fat volumes—with eight still to come—of *The Documentary History of the Ratification of the Constitution*.<sup>20</sup>

Beyond these distinctions between the original meaning of the text, the original intentions of its authors, and the original understandings of its ratifiers, there remained the separate, though hardly unrelated, question of sources. Four sets of sources, broadly defined, seemed relevant to my query. Two of these have just been identified: (1) the documents that bear directly on the intentions of the Framers, meaning the records of the debates at the Federal Convention of 1787, supplemented by collections of their personal papers; and (2) those that describe the ratification process of 1787–1790—counting the original rejecting states, North Carolina and Rhode Island, in the process—along with materials bearing on the adoption of the first ten amendments, all of which illustrate popular understandings of constitutional provisions.

Two other sets of sources could be labeled as contextual. These would involve bodies of evidence that set the intellectual and political background upon which the Framers and ratifiers acted. One set seemed fairly obvious: the sources that shaped the vocabulary and grammar of

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18. See James Madison, Notes on the Constitutional Convention (Aug. 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314, 318–19 (Max Farrand ed., rev. ed. 1937).

19. See Report of Committee of Style (Sept. 12, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 590, 590–603.

20. For the latest volume to be published, see 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 2009).

political discussion, or the traditions and texts that historians sometimes describe as political languages. Machiavelli, Hobbes, Locke, Harrington, Montesquieu, Hume, Blackstone, and other authorities would all have their place here. So would other modes of reasoning associated, say, with classical learning, or common law jurisprudence, or the Commonwealth or Real Whig tradition for which Trenchard and Gordon remain the most representative figures. Finally, one other set of sources appeared highly relevant to a historically grounded inquiry. That would involve the real political world the Revolutionary generation inhabited—a world filled with a dazzling array of public policy issues and disputes shaped by the hard course of events. That, of course, is exactly the intellectual world I inhabited as a political historian of the Revolution, and it identified a setting where historians should be able to add layers of meaning that other scholars, especially the dilettantes in the law schools, would rarely master. The constitutionmakers of the late 1780s did not come to their task having labored solely in the realm of works of political theory and legal dictionaries. They heralded instead from a decade of intense involvement in public life, much of it predicated upon the task of implementing the constitutions they originally wrote in the mid-1770s at both the state and national level of politics. In this world, it might be the case that the construction of the foreign policy powers of the presidency owed as much to the Mississippi controversy of 1786 as it did to reading Locke or Blackstone on the prerogative of the Crown.

The key point again was that I found it impossible to imagine how any account of original meaning could not be essentially historical in nature. Perhaps it would not be wholly or solely historical in nature. One could imagine a linguistic exercise in which reliance on dictionaries, for example, would be helpful—although the fact that Americans produced no dictionaries until Noah Webster took up the task after the Revolution would also seem relevant.<sup>21</sup> Even so, the idea that a constitutional text, itself the product of a supreme exercise of political decisionmaking by both its framers and ratifiers, could be approached in ahistorical terms by originalists struck me then, as it still does now, as oxymoronic. Instead, I enroll myself in the ranks of “simple-minded originalists,” to borrow Larry Alexander’s succinctly apt description, who stumble at the idea of preferring “a hypothetical author’s intended meaning (the meaning the

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21. Recall the old saying that Americans and Englishmen are two peoples divided by a common language, which is why I would rather be redundant (repetitive) in California than redundant (unemployed) in Oxfordshire, which I have twice visited to teach in Stanford’s program there.

hypothetical member of the public would erroneously assume was intended by the actual authors) over the actual authors' intended meaning."<sup>22</sup>

It has therefore come as something of a surprise to me to discover that the now-dominant form of originalism—public meaning or semantic originalism—has taken just the path I have disdained, eschewing the value of reconstructing the historical context(s) in which the Constitution was adopted in favor of a primarily linguistic exercise that reduces the use of sources that historians would turn to first in order to evade, not answer, the problems that dealing with those sources entails. My account of public meaning originalism may well be eligible for correction because public meaning originalism appears to depend on nonsimple notions of linguistic meaning; and being a fact-obsessed historian, parts of the theory may lie beyond my conceptual grasp.<sup>23</sup> What follows, nonetheless, is my understanding of what public meaning originalism entails.

The records of debates upon which historians would rely—whether relating to the framing of the Constitution at Philadelphia in 1787 or its ratification by the states in 1787–1788—are simply inadequate to providing an authoritative account of the original intentions of the Framers and the understandings of the ratifiers of the Constitution. There are too many gaps in the evidence, too many silences, and usually too few voices to provide an adequate account of the original meaning of the text. Moreover, even if the sources were more complete, significant collective action problems would make it impossible to satisfy the standards of certainty that originalists would hope to obtain. Having evidence of what was being debated without being able to resolve conclusively the grounds on which these debates were resolved would not go far enough to satisfy the originalists' desire for interpretive certainty. Historians could be content with this level of description because they have no legal issues to resolve; originalist jurists could not.

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22. Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* (Grant Huscroft & Bradley Miller eds., forthcoming 2011) (manuscript at 4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1235722](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235722).

23. I am, however, deeply grateful to Randy Barnett, Keith Whittington, and (*primus inter pares*) Larry Solum for their efforts to explain the theory to me over pizza in Chicago during an October 2009 conference we jointly attended—even though I remain somewhat surprised to have observed later that Solum and Barnett could merely split a single apple pancake between them at Walker Brothers Original Pancake House, which must be another version of what Barnett elsewhere calls faint-hearted originalism. Any failure in my depiction of public meaning originalism is due to my conceptual inadequacies, and perhaps a whimsical authorial mood, rather than any shortcomings in their efforts.

Public meaning originalism thus abandons the idea that the Constitution is to be understood or approached primarily as the outcome of a set of political deliberations. As true as that proposition may (indeed must) be historically, it is insufficient legally. Instead, public meaning originalists treat the Constitution primarily as a legal text, and their interpretive goal is to understand how an informed reader of the time would have understood the legal commands it issued. That understanding cannot be the product of active political engagement in the process from which the Constitution was produced. It supposes instead that the imagined reader of the past exists in a disinterested world, detached from political commitments. His goal instead is to make a good faith effort to interpret the text in question, and this exercise is first and foremost a linguistic act. We want to imagine this reader—and *imagine* seems to be operatively correct here—as an honest citizen interested in interpreting the Constitution with the best resources available but free of any political engagements to the Federalist or Antifederalist side, which would return us to the collective action problem of asking how public opinion could be most accurately represented.<sup>24</sup>

Exactly who this imaginary reader is nonetheless remains something of a mystery, especially for historians who work only with really existing figures from the past. For want of a better term, our putative interpreter of the Constitution deserves a name, and in a spirit of political bonhomie, we may christen him Joe the Ploughman in *un petit homage* to Samuel Joseph Wurzelbacher, the legendary Joe the Plumber of 2008 election fame. Dropping into his humble farmhouse one day—where of course there was no plumbing—we look on Joe’s shelves to discover what literary resources he had ready to hand. If his background were firmly Protestant, a Bible and Foxe’s *Book of Martyrs* would be good bets, though how these would help Joe in the realm of constitutional interpretation seems a puzzle; perhaps reading Foxe would encourage him to wonder, as John Locke had doubted a century earlier,<sup>25</sup> whether the free exercise of religion should extend to Catholics at all. A set of almanacs would come in handy, particularly if the weather were concerned. If Mrs. Joe,

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24. My colleague Dean Larry Kramer has suggested to me, however, that this treatment may err in treating the putative public meaning originalist as a citizen, when his preferred identification should be an eighteenth-century jurist. That may be a fair criticism, and if so, it exposes my limitations as a reader of the contemporary originalist debate. On the other hand, how we think about the intellectual characteristics of such a jurist would itself remain a suitable problem for historical reconstruction; a definition based on modern usage and practice cannot simply be applied to our construction of the interpretive identity of this imagined eighteenth-century judge. But for a far more sophisticated account of this identity, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

25. See JOHN LOCKE, *AN ESSAY ON TOLERATION* (1667), *reprinted in* LOCKE: *POLITICAL ESSAYS* 134, 152 (Mark Goldie ed., Cambridge Univ. Press 1977).

his wife, liked to read novels, Richardson's *Pamela* or *Clarissa* would be a prize possession.<sup>26</sup> We would be better off, though, if we could suppose that our imaginary reader had a copy of Sir William Blackstone's *Commentaries on the Laws of England* at hand. "I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations," Edmund Burke told the House of Commons in March 1775.<sup>27</sup> "The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England."<sup>28</sup>

Yet in constructing Joe the Ploughman's literary identity, why would we want to rely solely on works like these? Someone reading the Constitution in 1787–1788—a citizen engaged in the original effort to ascertain its original meaning—likely would have joined the intense political debates that preoccupied concerned Americans. The citizen also probably would have read the political literature of the Revolutionary era. Of course, for the purposes of public meaning originalism, perhaps Joe would be better qualified had he ignored those debates entirely. Ignoring what his compatriots were arguing about presumably would place him in a better position to judge the meaning of the Constitution solely on the basis of its linguistic attributes, as opposed to the political noise surrounding its adoption. Yet that would leave us in another awkward position, assuming that independent, undecided, or median voters—or better, those who proved too lazy to vote at all—would be the optimal readers of the text. If one worries that such voters or citizens may often be the least committed or knowledgeable of all, there may be some reason to doubt that they provide the ideal type of disinterested reader that public meaning originalism desires.

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26. See, for example, the following excerpt from the private writings of Esther Edwards Burr, daughter of Jonathan Edwards and mother of Aaron Burr, Jr., dated March 12, 1755:

I am quite angry with Mr. Fielding. He has degraded our sex most horridly, to go and represent such virtue as Pamela, falling in love with Mr. B in the midst of such foul and abominable actions. I could never pardon him if he had not made it up in Clarissia.

THE JOURNAL OF ESTHER EDWARDS BURR 1754–1757, at 99 (Carol F. Karlsen & Laurie Crumpacker eds., 1984) (footnote omitted). To clarify, Burr confused Henry Fielding with Samuel Richardson. *Id.* at n.12.

27. Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775), in 1 THE FOUNDERS' CONSTITUTION 3, 4 (Philip B. Kurland & Ralph Lerner eds., 1987).

28. *Id.*

For historians, however, the fundamental problem with the idea of Joe the Ploughman stems from the basic matter of definition. In the end, the imaginary disinterested original reader of the Constitution remains nothing more nor less than a creature of the modern originalist jurist's imagination. What other existence can that reader possibly have? The reader's projected understanding of the Constitution will be cobbled together arbitrarily from some set of sources that true original readers might not have possessed or used in the way imagined and that can only be the product of a modern intelligence creating a figure who did not exist. All historical thinking, on the contrary, begins with the supposition that we are bound in our statements about the past to evidence of what its inhabitants actually said and thought. That is the cruel tyranny imposed by the historian's respect for the authority of documents. An imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind. How the existence of such a figure can offer a constraint on the excesses of judicial discretion seems equally a fabrication as well. It is, in effect, a legal fiction in a novel sense of the term.

A different and arguably more disturbing kind of legal fiction also figures in the defects of public meaning originalism. All disputes about the proper interpretation of the Constitution rest on the entirely correct and textually demonstrable proposition that the Constitution is law, indeed the supreme law of the land, as the Supremacy Clause explicitly reminds us. Moreover, the interpretations that matter most in our governance are those that emerge from courts of law, which reinforces the idea that the act of interpretation is essentially legalistic in nature, even when we suspect that the prior political commitments of judges and justices often shape, if they do not indeed determine, outcomes. Yet to concede that the Constitution is *necessarily* a legal text is not the same thing as saying it is *solely* a legal text, or even that its legal meaning is its paramount characteristic. A historian would rather say that the determination to ensure that the Constitution of 1787 would be treated as fundamental law was itself one of the major outcomes of the process of constitutional experimentation that began in 1776 and culminated in the late 1780s. But that determination alone neither exhausts nor eclipses the other dimensions of constitutionmaking that were equally part of that process. Once these other dimensions are taken into account, the fiction of the imaginary disinterested reader as an authoritative guide to constitutional meaning becomes more problematic still.

It would indeed be a curious conception of American constitutionalism to conclude that, for interpretive purposes, the best way to read the text is to divorce oneself from the history that produced it. The marvel of the Constitution, after all, is that it was produced by exceptional and

unprecedented debates that were conducted by a group of statesmen who were deeply self-conscious of the historical significance of what they were doing. Nor was the adoption of the Constitution the work of a select group of lawgivers alone. For in many respects, the process of securing an effective popular approval of the Constitution within less than a year of ample public debate is an equally remarkable part of the story—as we now know better, and in greater detail, with the publication of Pauline Maier’s recent volume *Ratification: The People Debate the Constitution*.<sup>29</sup> A similar judgment applies equally well to the Reconstruction debates that produced the Thirteenth, Fourteenth, and Fifteenth Amendments. Comparable stories, though less dramatic, attach to all of the other provisions that make up the constitutional text, down to the half-comic tale that explains how the Twenty-Seventh Amendment was allowed to make its way into the Constitution a mere two centuries after it was originally proposed. None of these deliberations were conducted under the assumption that the best way to ascertain the meaning of the text would be to imagine how an anonymous, informed, but politically noncommitted member of the American public would read its language. As William Nelson has argued in one specially important case, the best way to read the Fourteenth Amendment might require understanding that its authors favored some levels of generality in the text because they had to take into account its likely impact on Republican politicians in the North.<sup>30</sup> Alternatively, it might be the case, as Akhil Amar has argued, that the best reading of the Fourteenth Amendment depends on knowing that its key framers were all *Barron* contrarians—meaning that they believed the Supreme Court’s 1833 decision<sup>31</sup> holding that the Bill of Rights applied only against the federal government had been mistaken all along.<sup>32</sup> In either case, whatever the difficulties imposed by any collective action reading of framing or ratification, the result still

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29. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

30. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 51–53 (1988).

31. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (“We are of opinion that the provision in the fifth amendment to the constitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”)

32. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 145–46 (1998).

seems more likely to illustrate the really existing meaning of the Constitution than the public meaning alternative.

Thus far I have juxtaposed a historicist understanding of the Constitution against one that can be labeled linguistic in nature. In effect, readers are asked to choose between two rival approaches: one grounded firmly in the records of debates, explicitly acknowledging their political character and willing to concede that a narrowing of possible meanings may be the more likely result than one dispositive interpretation; the other based on a linguistic approach to the nature of meaning. But historians hardly can be obtuse to the nature of language itself. They may not have broad theories of how language works, and they can happily pass their lives without worrying how much allegiance they owe to the work of Chomsky, Austin, Wittgenstein, or Donald Grice—the last being the one philosopher of language who appears to be exerting the greatest influence over public meaning originalism.<sup>33</sup> But an awareness that the meaning of words changes conventionally with usage is an assumption that historians have to carry with them, lest they plunge precipitously into the traps of anachronism, or worse, fail to detect changes in their objects of study. Nor can historians of events that were clearly as politically creative as those of the Revolutionary era avoid asking what happened to key terms of political discourse, with little terms that bedevil us still, such as *constitution* or *executive power* or *declare war* or *establishment of religion*, not to forget the ever-popular *to keep and bear arms* or *militia*. It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in quiet times, but it is quite another to apply that assumption to a period like the late 1780s or the Revolutionary era more generally. *In rerum natura*, constitutionmaking itself may offer a supreme example of how political concepts—fine instances of what John Locke called “mixed modes” in Book III of his *Essay Concerning Human Understanding*<sup>34</sup>—acquire whatever meaning they may obtain through processes of collective deliberation that themselves subject prior understandings of terms to further refinement.

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33. See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 947–51 (2009). I profess great intellectual respect for Solum’s careful development of arguments on the nature of language, meaning, and the like. At the same time, if given a choice between imagining jurists having to master modern academic theories of language or immersing them in the sources from the Revolutionary era—asking them to know Madison and Hamilton, say, better than Grice—I will stick with my eighteenth-century friends.

34. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 428–33 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689) (discussing his theory on mixed modes).

To illustrate this point, consider two nontrivial terms that remain essential to any serious discussion of constitutional interpretation: the key word *constitution* itself, and the term *executive power*, which the opening sentence of Article II vests in a single President of the United States.<sup>35</sup>

Americans talked about constitutions often during the Revolutionary era, from their initial skirmishes of 1765–1766 over Parliament’s claims of authority to tax and legislate for them “in all cases whatsoever,”<sup>36</sup> through the adoption of the first state constitutions of 1776, the reactions against their errors, and on to the great national discussion of the late 1780s. Several evidentiary “data points” from this period suggest the difficulties involved. In his “Clarendon” essays of 1766, John Adams struggled to explain how Americans could invoke the “true” or “real constitution” of the empire of which they were a part. Because there was no text of a constitution to invoke for either Britain itself or its empire, Adams found himself deploying metaphors instead to explain what the term really meant, comparing the imperial constitution to both the human body and a machine (a clock) to give the term a meaning it would otherwise lack.<sup>37</sup> A decade later, when Americans began drafting constitutions, they had to distinguish the documents they were adopting from the prior constitutional tradition from which they were adopting. As one polemical author—possibly Thomas Paine, but the point is controversial<sup>38</sup>—asserted, whereas the British had been mistaken to think they actually possessed a constitution, the rebellious Americans now enjoyed an opportunity to produce a better definition of the term. The last of the *Four Letters on Interesting Subjects* opens with a bold but eminently sensible claim: “Among the many publications which have appeared on the subject of political Constitutions, none, that I have seen, have properly defined what is meant by a *Constitution*, that word having been bandied about without any determinate sense being affixed thereto.”<sup>39</sup> The Americans were now in a position to make a fresh start,

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35. U.S. CONST. art. II, § 1, cl. 1.

36. Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at [http://avalon.law.yale.edu/18th\\_century/declaratory\\_act\\_1766.asp](http://avalon.law.yale.edu/18th_century/declaratory_act_1766.asp).

37. John Adams, *The Earl of Clarendon to William Pym*, BOS. GAZETTE, Jan. 27, 1766, reprinted in JACK N. RAKOVE, DECLARING RIGHTS 55, 55–61 (1998).

38. The suggestion that Paine authored *Four Letters on Interesting Subjects* was made in A. OWEN ALDRIDGE, THOMAS PAINE’S AMERICAN IDEOLOGY 219–39 (1984). I consider the attribution plausible but unconfirmed.

39. FOUR LETTERS ON INTERESTING SUBJECTS 18–24 (1776), reprinted in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 637, 637.

distinguishing a true constitution from a mere “form of government”; but for our purposes, it is the “bandied about” remark that suffices as evidence of underlying linguistic uncertainty.

The best evidence for this point comes, however, from Thomas Jefferson, in a well-known passage from his *Notes on the State of Virginia*. While Jefferson was stuck in Philadelphia writing the Declaration of Independence, he really wanted to be back in Virginia contributing to the drafting of the Virginia Constitution.<sup>40</sup> Having lost that opportunity, Jefferson remained critical of various facets of the Commonwealth’s new constitution, and his criticism extended to the mode of its adoption. When he drafted his *Notes on the State of Virginia* in the early 1780s, Jefferson made this uncertainty about the legal status of the constitution an essential charge in his appeal for reform, and his passage deserves quotation at length. Writing in opposition to the defenders of the constitution, he noted that:

They urge, that if the convention had meant that this instrument should be alterable, as their other ordinances were, they would have called it an ordinance: but they have called it a *constitution*, which [by force of the term] means ‘an act above the power of the ordinary legislature.’ I answer that *constitutio*, *constitutum*, *statutum*, *lex*, are convertible terms. [A *constitution* is called that which is made by the ruler. An *ordinance*, that which is rewritten by emperors or ordained. A *statute* is called the same as law.] *Constitution* and *statute* were originally terms of the civil law, and from thence introduced by Ecclesiastics into the English law. Thus in the statute 25. Hen. 8. c. 19. §. I. ‘*Constitutions* and *ordinances*’ are used as synonymous. The term *constitution* has many other significations in physics and in politics; but in Jurisprudence, whenever it is applied to any act of the legislature, it invariably means a statute, law, or ordinance, which is the present case. No inference then of a different meaning can be drawn from the adoption of this title: on the contrary, we might conclude, that, by their affixing to it a term synonymous with ordinance, or statute, they meant it to be an ordinance or statute. But of what consequence is their meaning, where their power is denied?<sup>41</sup>

Jefferson’s critique was, of course, part of the broader movement required to produce a new American understanding of exactly what a constitution was—an expression of supreme fundamental law, not a description of a form of government—and how it attained that status—by being adopted

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40. See JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 157–97* (2010), for my account of the first state constitutions. Of course, like all historians, I have relied on GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969), for the broader story.

41. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (1787), reprinted in THOMAS JEFFERSON: *WRITINGS* 123, 248–49 (Merrill D. Peterson ed., 1984) (footnote omitted). For a broader discussion of this issue, see RAKOVE, *supra* note 10, at 94–130; Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 35–54 (Terence Ball & J.G.A. Pocock eds., 1988); WOOD, *supra* note 40, at 259–305.

through a specially elected convention, rather than a legislature, and then securing popular ratification as well.

Any attempt to define *constitution* independently of the political discussions and developments that took place after 1765—on the basis, say, of previously conventional British usage—would necessarily be defective not merely as an exercise in definitions but as a failure to understand how political events and debates would have led any citizen intelligently involved in this process to rethink the prior understanding—and it is noteworthy that one of the earliest statements of the emerging American theory of a constitution came from the townspeople of Concord, Massachusetts, as early as October 1776.<sup>42</sup> One could make a similar case for another pregnant phrase, *executive power*, which has figured prominently in modern discussions of the nature and extent of presidential authority based on the authority ascribed to the Vesting Clause of Article II. We should know, as legislative historians, that that clause appeared in two distinct forms at Philadelphia in 1787. The original version, produced by the Committee of Detail in early August, now seems quaintly worded. The Committee proposed that “[t]he Executive Power of the United States shall be vested in a single person. His stile shall be, ‘The President of the United States of America;’ and his title shall be, ‘His Excellency.’”<sup>43</sup> In early September, that language, unaltered, went to the Committee of Style, which meant the editorial pen of Gouverneur Morris, and it emerged in a more concise form, which the Convention approved without discussion, in the clause we now love and vehemently dispute: “The executive Power shall be vested in a President of the United States of America.”<sup>44</sup>

One could speculate whether the deletion of the phrase “of the United States” after “executive power” was meant to transform a peculiarly republican form of executive power, distinct to the United States, into a bolder vision of executive power tied, for instance, to the known prerogative of the British Crown. If so, one would also expect that the Framers might at least have discussed this point because consequential results would flow from it. That they made no comment on the revision indicates that they would have perceived the change as merely editorial, not

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42. See *Resolution of Concord, Massachusetts, October 21, 1776*, BOS. GAZETTE, Oct. 29, 1776, reprinted in DECLARING RIGHTS, *supra* note 37, at 74, 74–75.

43. James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 176, 185.

44. U.S. CONST. art. II, § 1, cl. 1.

substantive. But anyone interested in how the Framers thought about executive power would also want to answer that question in terms of the broader legislative history of how the presidency was constructed in 1787. The historian who wishes to explain how the presidency emerged from what Madison characterized as “tedious and reiterated discussions”<sup>45</sup> soon learns that the Framers did not have one handy model of executive power at hand but wrestled down to their final days of debate with the difficult task of constructing a national republican executive for which they discovered no useful precedents.<sup>46</sup>

The beginnings of this process would also reveal that the Framers agreed that they had to formulate their own definition of executive power at the outset. Article 7 of the Virginia Plan proposed “that a National Executive be instituted . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.”<sup>47</sup> When this clause was debated, James Wilson objected to the latter set of powers, noting that “the Prerogatives of the British Monarch” were not “a proper guide in defining the Executive powers” because “[s]ome of these prerogatives were of a Legislative nature” while others were “of war & peace &c.”<sup>48</sup> Wilson cited the authority of “Writers on the Laws of Nations” to support this view.<sup>49</sup> James Madison, though himself the principal author of the Virginia Plan, seconded Wilson, noting that “executive powers ex vi termini, do not include the Rights of war & peace &c.”<sup>50</sup>

This debate illustrates a fundamental point. Although Wilson’s reference to prior authorities on the law of nations indicates that knowledge of the background intellectual history was relevant to the project, the debate as a whole also suggests that the definition of executive power remained a source of controversy. Someone relying on the conventional British conception of the prerogative powers of the Crown—another obvious source of a definition—would not be well positioned to square that prior

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45. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS 142, 144 (Jack N. Rakove ed., 1999).

46. For my account of this process, see RAKOVE, *supra* note 10, at 244–87.

47. James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 17, 21 (Max Farrand ed., 1911).

48. James Madison, Notes on the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 64, 65–66 (Max Farrand ed., 1911).

49. William Pierce, Notes on the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 73, 73–74 (Max Farrand ed., 1911).

50. Rufus King, Notes on the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 70, 70 (Max Farrand ed., 1911).

definition with the republican ideas that had flourished in America since 1776 but that the Framers of the Constitution were also in the process of modifying. Did *executive power*, as Americans used the term, retain a robust element of prerogative or not? No attempt to answer this or related questions could possibly succeed on the basis of existing definitions if it did not actively analyze the multiple ways in which Americans spoke about executive power after 1776.

All of this is simply to restate the historian's obvious point. When one is dealing with a period as politically and intellectually creative as the Revolutionary era obviously was, one could not possibly understand what the adopters of the Constitution were doing without reconstructing their debates in some detail. One would also have to recognize that the use of political language, like other forms of speech, is necessarily creative, and that key words develop and acquire new shades of meaning precisely because they are subjected to the pressures of active controversy. The adopters of the Constitution inhabited a world that was actively concerned with the nature of language, or more to the point, the instability of linguistic meanings, and commentators on the ratification debates have observed the extent to which arguments about the definitions of key words and concepts were themselves central elements of political debate. As Gordon Wood once observed in one of his many brilliant *aperçus*, the Federalists' account of the Constitution left their opponents "holding remnants of thought that had lost their significance."<sup>51</sup>

Nor would this observation itself surprise many of the original adopters of the Constitution, which in turn supports one final criticism of public meaning originalism. Simply put, it shows no interest in how inhabitants of the eighteenth century thought about these issues of political language. That question does not seem to matter, even though that concern might be deemed relevant to an inquiry into how the problem of constitutional interpretation was originally understood. There is no place in this story, for example, for the one comment from the constitutional debates of 1787–1788 that historians might regard as most relevant to the current debate. This is a famous passage from *The Federalist No. 37*, in which Madison attempted to explain why constitutionmaking was so difficult a task and to compare the necessary uncertainties of political reasoning with other forms of knowledge. "Besides the obscurity arising from the

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51. WOOD, *supra* note 40, at 524.

complexity of objects, and the imperfection of the human faculties,” Madison observed, summarizing two previous epistemological difficulties,

the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment. The use of words is to express ideas. Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.<sup>52</sup>

Readers of this passage familiar with the relevant historical and philosophical sources will immediately recognize the source of Madison’s ideas. Madison was concisely distilling major elements of John Locke’s discussion of language in Book III of the *Essay Concerning Human Understanding*. That radical criticism of the fallibility of language expressed by Locke continued to frame, even dominate, eighteenth-century discussions. It contributed to the efforts of eighteenth-century Anglo-Americans to give their common tongue a fixity it seemed to lack, inspiring numerous efforts to produce works of grammar and dictionaries that would provide English with greater stability.<sup>53</sup>

Reading Madison in the light of Locke can lead to some striking conclusions, especially if one understands Locke as his writings have recently been presented by a young English scholar, Hannah Dawson, in work that makes plain just how radical Locke’s assault on the fixity of language actually was.<sup>54</sup> Writing with a remarkable literary verve and personal engagement one rarely encounters in a subject of this nature, Dawson brilliantly describes the depth of Locke’s concern with “semantic instability”<sup>55</sup> and how much further he went than any of his predecessors in confronting the difficulty of making words attain the “perspicuity”<sup>56</sup>—the accuracy and clarity—that he, like Madison a century later, desired. Locke, in Dawson’s account, is relentlessly drawn back to the subjectivity

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52. THE FEDERALIST NO. 37, *supra* note 15, at 236–37 (James Madison).

53. JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 13–37 (2004).

54. See generally DAWSON, *supra* note 11 (discussing language in the context of Locke’s *An Essay Concerning Human Understanding*); Hannah Dawson, *Locke on Language in (Civil) Society*, 26 HIST. POL. THOUGHT 397 (2005) (discussing the impact that Locke’s philosophy on language had on his political beliefs).

55. DAWSON, *supra* note 11, at 129–53.

56. *Id.* at 218.

with which ordinary users of language ascribe meaning to text, especially when they are dealing with the mixed modes, where the human mind is free to group ideas together in complex relations that do not wholly correspond to observations of substances in nature.<sup>57</sup> Locke understood that his broad concerns about semantic instability extended to law and religion just as readily as they did to other realms of discourse.<sup>58</sup> “Locke’s contingent, readerly view of meaning seems sometimes to shake the authority of the law and the Bible,” Dawson observes.<sup>59</sup> “They are not necessarily the public and fixed standards by which we know how to order our lives.”<sup>60</sup>

No doubt Locke is much less an authority for modern understandings of language than Donald Grice, and perhaps only a pure historicist like me might think that his concerns, as absorbed by Madison, remain relevant to our own. Still, as a closing example from the Supreme Court’s most recent and self-confessed avowal of public meaning originalism, the majority opinion written by Justice Scalia in *District of Columbia v. Heller*<sup>61</sup> suggests that Locke’s and Madison’s worries about semantic instability should not be casually dismissed. Indeed, if one wishes to find a perfect example of why Locke and Madison were right to worry about the slippery nature of political language, Justice Scalia’s verbal sleight of hand in *Heller*, nominally waged in behalf of public meaning originalism, is a great place to begin.

Consider two passages from Justice Scalia’s opinion, one dealing with the role of legislative history in constitutional adjudication, the other with the substantive question of whether the Constitution ever recognizes a collective people, rather than individual persons, as rights bearers. Both should alarm anyone who believes that history has a role to play in constitutional adjudication or who is rash enough to think that jurists, like constitution writers, have some obligation to use language carefully.

“It is always perilous,” Justice Scalia observes, “to derive the meaning of an adopted provision from another provision deleted in the drafting process.”<sup>62</sup> Let us start with that opening phrase, “always perilous.” Literally speaking, this cannot possibly be true; indeed, it verges on the

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57. *Id.* at 224.

58. LOCKE, *supra* note 34, at 480.

59. DAWSON, *supra* note 11, at 214–15.

60. *Id.* at 215.

61. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

62. *Id.* at 590.

absurd. *Always* would mean without exception, yet surely there are some occasions when it is indeed helpful to know that one term has been substituted for another. No responsible commentator could discuss the origins of the War Powers Clause of Article I, Section 8 of the Constitution, for example, without noting that the Framers substituted *declare* for *make* in the clause defining congressional authority over the initiation of war.<sup>63</sup> Sometimes legislative history will demonstrate that the Framers of a clause preferred a more ambiguous formulation over a more specific one, strongly implying that some leeway for interpretation or construction was consciously being left to those who would come later.<sup>64</sup> *Always* therefore cannot possibly mean always.

An even stronger objection lies against the word it modifies. *Perilous* means “full of or involving peril,”<sup>65</sup> and *peril* means “exposure to the risk of being injured, destroyed, or lost,” or “something that imperils.”<sup>66</sup> Used in this sense, it is difficult, though hardly *perilous*, to see how an effort to trace the legislative history of a constitutional provision could ever risk consequences so grave. It does no harm to consider, as Justice Scalia then goes on to do, whether the deletion of the phrase “but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person” is illustrative of the purpose of the Second Amendment or not.<sup>67</sup> It may well be *problematic* to weigh the importance of such a deletion, but surely it always is *informative* to consider how a turnip of a text from which interpretive blood must be extracted—speaking figuratively, of course—took the form it did.

This first objection might seem frivolous, though it does illustrate how Justice Scalia’s aversion to legislative history in statutory construction passes over into his constitutional jurisprudence as well. The second passage, however, bears more closely on the substance of reading a constitutional text. Here Justice Scalia attempts to evade the idea that when the Constitution identifies the people as the bearer of rights, that need not necessarily mean all persons:

Three provisions of the Constitution refer to “the people” in a context other than “rights”—the famous preamble (“We the people”), § 2 of Article I (providing that “the people” will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with “the States” or “the people”). Those provisions arguably refer to “the people” acting collectively—but they deal with the exercise or reservation of powers, not rights.

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63. See Madison, *supra* note 18, at 318–19.

64. A notable example would be the Establishment Clause of the First Amendment.

65. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 920 (11th ed. 2003).

66. *Id.*

67. See *Heller*, 554 U.S. at 589.

Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right.<sup>68</sup>

Which word merits special attention in this passage? The obvious choice must be *powers* in the second sentence. It does the heavy—or one could say shifty—work of explaining why two rather substantive provisions of the original Constitution that seem to recognize the existence of collective rights, vested in the entity of “the people” rather than individual persons, do no such thing. These provisions therefore need not contravene Justice Scalia’s prior claim that on the two other occasions when “[t]he unamended Constitution and the Bill of Rights use the phrase ‘right of the people’”—in the Petition and Assembly and the Search and Seizure Clauses—“these instances unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”<sup>69</sup>

Is there anything objectionable in classifying the “We the People” of the Preamble and the people who elect the lower house of Congress in Article I, Section 2 as powers, not rights? Indeed there is, and it takes only a moment’s historical reflection to determine why. It is difficult to imagine that anyone possessing any familiarity with eighteenth-century political discourse—again, not the imaginary musings of Joe the Ploughman but really existing republican constitutionalists—would suppose that Justice Scalia’s usage would pass its linguistic muster. The “We the People” of the Preamble is manifestly an expression or instantiation of a people’s fundamental right, proclaimed in the Declaration of Independence, “to alter or to abolish [governments], and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”<sup>70</sup> The same thought is repeated in numerous other constitutional

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68. *Id.* at 579–80.

69. *Id.* at 579. One might object, however, that the use of the conjunction *and* in the Assembly and Petition Clause makes it a collective right, not to be reduced to the traditional right of individuals or private associations to petition legislative assemblies for some legal favor or the resolution of some dispute. Here, again, the legislative history, far from being always perilous to consider, might seem highly pertinent because the discussion of the clause in the House of Representatives in 1789 centered on proposals to add a provision explicitly authorizing the people to issue instructions to their representatives. See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 611–21 (1999). Such a right could only be exercised collectively. It would make no sense to say that I have a right to instruct my representative.

70. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

documents of the era, notably in the declarations of rights that accompanied the first state constitutions. Here the common formula, as expressed, for example, in the Massachusetts Constitution of 1780, holds that “the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”<sup>71</sup> Whatever *power* the people may legitimately exercise in adopting a new government is dependent upon the prior possession of their right “to alter and abolish” an old government; otherwise, their assertion of that power would always be subversion. Interestingly, in his June 8, 1789 speech introducing amendments to the Constitution, Representative James Madison included a comparable statement in the first set of three provisions that he proposed to prefix to the Constitution and then noted that this introductory article “relate[d] to what may be called a bill of rights.”<sup>72</sup>

One could similarly object to Justice Scalia’s categorization of the election of the House of Representatives as a power of the people rather than a right. True, Article I, Section 2 does not speak expressly of the right to vote. It simply says that the lower house shall be “chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>73</sup> Acknowledging the full force of this provision is always perilous to those who allege that our Constitution speaks only of personal rights or equates the rights of the people with the rights of all persons. The plain meaning of the text is that the right of representation vests in the people collectively, yet the positive exercise of that right can be legally limited to whichever section of the population state legislatures recognize as qualified to hold it. It requires no leap of constitutional construction to conclude that a popular right to keep and bear arms could similarly reside only in some members of the population, depending on

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71. MASS. CONST. OF 1780, pt. 1, art. VII, *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 7, 8. In the Virginia Declaration of Rights of 1776, this “indubitable, unalienable, and indefeasible right” vests in “a majority of the community.” VA. DECLARATION OF RIGHTS, art. III, *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 3, 3. Pennsylvania uses the same wording and vests the right simply in “the community.” PA. CONST. OF 1776, art. V, *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 6, 7. The enduring significance of this right is the main theme of CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008).

72. James Madison, Speech to the House of Representatives (June 8, 1789), *in* DECLARING RIGHTS, *supra* note 37, at 170, 175. “That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.” *Id.* at 173.

73. U.S. CONST. art. I, § 2, cl. 1.

their fitness to serve in a militia that Congress is given the constitutional authority to organize, arm, and discipline.<sup>74</sup>

Justice Scalia's abuse of these terms thus suggests that John Locke was indeed onto some serious issues with the misuse of language and that James Madison shared Locke's concerns when he explained why words were as much a problem as a solution to constitutional disputes. The answer to this problem, Madison thought, was to do as much as one could to secure some measure of fixity in constitutional meanings. Part of that endeavor involved attempting to use the original understanding of the Constitution, as voiced in the ratification debates of 1787–1788, as an essential source of meaning, which is exactly why Madison can be regarded as a founding father of originalism. This was the concluding theme of his April 6, 1796 speech on the Jay Treaty, referring to the Constitution as “nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions.”<sup>75</sup> That was where interpreters were entitled to look for original meaning. But Madison also would have repudiated—and perhaps even “refudiated”<sup>76</sup>—the idea that original meaning could be ascertained simply by reverting to preexisting linguistic sources to ascertain what the Constitution meant.

Madison also believed that resort to external authorities antedating the actual experience of Revolutionary constitutionmaking would be of limited value to Americans, as he made clear in his opening essay as Helvidius in 1793, in which he criticized Alexander Hamilton's tacit reliance on Locke and Montesquieu to support a broad reading of executive power.<sup>77</sup>

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74. One could also criticize Justice Scalia's abuse of language in one other respect. Setting up powers and rights as a dichotomy—the activity must be one thing or the other—also falsifies how some commentators at the time viewed the relation between these two mixed modes of characterizing aspects of governance. As James Hutson has argued in a review of the American understanding of constitutional rights, the two words were often used synonymously in the political writings of the era. The existence of a right presupposed the capacity—the power—to exercise it. James H. Hutson, *The Bill of Rights and the American Revolutionary Experience*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 62, 91–95 (Michael J. Lacey & Knud Haakonssen eds., 1991).

75. James Madison, Speech in Congress on the Jay Treaty (Apr. 6, 1796), in *JAMES MADISON: WRITINGS*, *supra* note 45, at 568, 574.

76. Henry Alford, *The 10 Things To Talk About This Weekend*, N.Y. TIMES, July 22, 2010, at E7, available at 2010 WLNR 14580390 (“Sarah Palin uses word ‘refudiate,’ then likens her word-coining ways to Shakespeare’s.”).

77. James Madison, Helvidius No. I (Aug. 1793), in *JAMES MADISON: WRITINGS*, *supra* note 45, at 537, 540.

In a typically understated way, Madison mused about the problem of employing venerated European writers who labored under the disadvantage “of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period”—meaning the Revolution.<sup>78</sup> Or again, had Locke “written by the lamp which truth now presents to lawgivers,” he might not have conceded so easily that the categories of executive and federative power were “*hardly to be separated into distinct hands.*”<sup>79</sup> That “lamp,” of course, was a second reference to Revolutionary constitutionmaking. Far from thinking that the provisions of the Constitution could be understood by reference to some preexisting set of understandings and definitions, Madison’s originalist approach to interpretation presupposed that the document could only be understood in light of the historical experience of its framing.

Of course, under the rubric of public meaning originalism, Madison’s particular concerns, experiences, and insights have no special relevance to the inquiry—except as they illustrate more general linguistic usage—and recognizing his authorial agency in drafting the Constitution, *The Federalist*, and the Bill of Rights would lead us hopelessly down the treacherous path of political subjectivity. Still, I have learned a great deal about how the Constitution was framed, ratified, and understood by immersing myself in Madison’s writings these past decades, and I happen to think that your originalism, whenever or however you practice it, would benefit from similar attention. This is neither faint-hearted originalism, as practiced by Justice Scalia, nor an originalism that is an intellectual feint. It is simply the best way I know to think about what the Constitution originally meant. Spending a little time with Locke on language will not do you any harm, either. If it worked for Madison, it might help us too.

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78. *Id.*

79. *Id.* It is important to note here that Madison read the important chapter on prerogative in the *Second Treatise* to mean—in my view correctly—that the rationale that accepted the merger of ministerial (executive) and federative power remained subject to revision and control by the legislature; in other words, prerogative, whatever its origins and character, could not be viewed as an independent source of executive authority.