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The Nagging in Our Ears and Original Public Meaning

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THE NAGGING IN OUR EARS AND ORIGINAL PUBLIC MEANING

PERRY DANE*

The debate over how to understand the meaning of legal texts once pitted intentionalism against a variety of other views united by the conviction that a legal enactment takes on a meaning not reducible to anybody's mental state. Both these approaches are supported by powerful intuitions. This Article does not try to referee between them. Instead, it takes aim at a third set of views—theories of "original public meaning"—that in recent decades has upended the traditional debate and has now become gospel for the new majority on the United States Supreme Court.

The method of original public meaning has a distinct, deadly, bit of intractable incoherence: It is, uniquely, largely useless in interpreting the meaning of contemporaneous legal enactments. If we, today, are trying to figure out the meaning, not of a provision enacted years ago, but of a text enacted today or recently, then looking to original public meaning will usually be a circular, empty, effort. After all, we—the interpreters of a contemporaneous text—are the original public.

This hole in the fabric of original public meaning theory is roughly analogous to the chasm at the heart of variants of predictive legal realism. Just as defining the law as a prediction of what judges will do is of no help to judges themselves in deciding what the law is, defining the meaning of the law by reference to the views of the original public is of no help to the original public in deciding what the meaning of the law is.

That small hole ends up unraveling the entire fabric of original public meaning. If the original public cannot look to original public meaning to decide the meaning of a contemporaneous legal text, it must have some other way to determine legal meanings. The original interpreters of older texts were readers, just like us. They had a way of reading contemporaneous texts, as do we. We can conclude that they applied their own method incorrectly. We can also

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decide that our way of reading—which continues to whisper in our ear even when we read older text—is better suited to the task of understanding those texts.

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I. Introduction

Conversations about constitutional and other legal interpretation have been dominated in recent years by theories of “original public meaning.”¹ That approach has now become a gospel of sorts for the new majority on the United States Supreme Court, with some recent decisions looking like nothing less than the method of original public meaning on steroids.²

It was not always so. Not that long ago, the debate over how to understand the meaning of constitutional and other legal texts³ instead pitted two different approaches against each other. One was intentionalism, which looks to the intent of the author of the text.⁴ The other was a family of views, which I am calling object-ism, united by the conviction that a legal enactment is an object, so to speak, that takes on a meaning of its own that is not reducible to the intention behind it.

The intuition behind intentionalism is powerful and straightforward.⁵ It emphasizes that laws are enacted by flesh-and-blood human beings who use texts to communicate specific directives.⁶ The model here is everyday communication. Imagine if my friend asks me to meet him at the train station, but the station is big and I am not sure where to look for him.⁷ I will, if I can, ask him. But if I cannot ask,⁸ I will do my best to infer my friend’s actual mental

1. See *infra* notes 33–38 and accompanying text.

2. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (Establishment Clause); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment).

3. Much of that discussion has centered on constitutional provisions rather than ordinary laws. Through most of this Article, I will be eliding that distinction. Occasionally, though, I will suggest how a given specific argument might apply differently in the two contexts. See, e.g., *infra* notes 119–36 and accompanying text (discussing the idea of the Constitution-as-contract).

4. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704–05 (2009).

5. See generally Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation*, 85 CORNELL L. REV. 1609 (2000); Kay, *supra* note 4.

6. See Greenawalt, *supra* note 5, at 1617.

7. Consider, for example, the current ambiguity in New York City as to whether “meet me in Penn Station” should be read to mean “meet me in the Moynihan Train Hall,” the new complex in the repurposed majestic post office building across the street from the ghastly facility that riders had lived with for many years. See MOYNIHAN TRAIN HALL, <https://moynihantrainhall.nyc/> [<https://perma.cc/6NSM-Y5CJ>]. The difficulty is compounded because even the official website seems equivocal as to whether the Moynihan Train Hall is *part* of a now-expanded Penn Station or a companion to it.

8. This qualification is crucial. Utterances produced in the context of “talk exchanges” can ideally reveal their meaning iteratively as the conversationalists engage in “cooperative efforts” guided

intent. Or say that a doctor orders that a patient receive a certain drug “200 mg b.i.d.” A nurse reading that order should care whether the doctor intended that it mean two 200 mg tablets a day for a total of 400 mg, or two 100 mg tablets for a total of 200 mg.⁹ In both cases, it would be churlish or even dangerous to ignore subjective intent even if the authors should have been clearer.¹⁰ An even more apt analogy might be to recipes, which might or might not take the form of interpersonal communications. Consider here the hilarious exchange in a famous scene in the television sitcom *Schitt’s Creek* as to the meaning of “fold in the cheese” in an enchilada recipe.¹¹

The traditional opposing view, which I am calling object-ism is, as noted, really a family of views.¹² But the common kernel of all those object-ist approaches is based on an equally straightforward and powerful intuition. The claim of object-ists of all stripes is that the formal process of enactment takes a

by a set of maxims to which the participants in the conversation can be expected to adhere. See Paul Grice, *STUDIES IN THE WAY OF WORDS* 22–23 (1989).

9. This is a real problem. See Institute for Safe Medication Practices, *Ambiguous Drug Doses on Discharge Forms*, ISMP NURSE ADVISE-ERR (Mar. 2008), https://web.archive.org/web/20161130104617/http://www.ismp.org/Newsletters/nursing/articles/2008_03.asp [<https://perma.cc/W8H8-53FZ>].

10. Cf. STEPHEN D. SMITH, *LAW’S QUANDARY* (2004).

11. See *Schitt’s Creek*, “*Fold in the Cheese!*”, YOUTUBE (Mar. 22, 2016), <https://youtu.be/NywzrUJnmTo> [<https://perma.cc/U564-337L>]. The humor in the scene plays on David’s reasonable puzzlement about how to “fold in . . . broken cheese like that” and his mother Moira’s deflective insistence that “she cannot be any clearer” about what it means. That the recipe was handed down from Moira’s own mother only accentuates the intergenerational interpretive difficulty. Professor Gary Lawson famously argued that “meaning of a recipe is its public meaning—the meaning that it would have to the audience to which the document addresses itself.” Gary Lawson, *Response: On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1826 (1997). Cf. ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 31–35 (2017). This strikes me as wrong, or at least incomplete. Responsible recipe authors should try to word their instructions in terms that the “public” would understand. And an intention too much at odds with what I call below the “pre-interpretive, self-evident, range of meaning” of the words being used might justify dismissing the recipe as an instance of bad faith. See *infra* text accompanying notes 166, 240–43. Nevertheless, in the usual case, as the exchange between David and Moira illustrates, readers trying to follow the original recipe faithfully to its successful conclusion on its own terms would naturally be most interested in what the author had in mind. For a similar argument rejecting Lawson’s assumptions and favoring a directly intentionalist approach to the interpretation of recipes, see Zachary B. Pohlman, *Revisiting the Fried Chicken Recipe*, 98 NOTRE DAME L. REV. REFLECTION 76 (2022). For a non-originalist argument suggesting that every new chef is entitled to read existing recipes in the light of his or her own sensibilities and style, see John Vlahoplus, *Living Recipes . . . And Constitutions*, 98 NOTRE DAME L. REV. REFLECTION 133 (2023). I leave it to the culinary community to decide between these two stances.

12. Object-ism, which is my coinage, does not mean “objectivity.” Nor should it be confused with objectivism or even with objectism, a view that figures in some theories of poetry. See Alan Marshall, *Charles Olson Changes Objects: A Reinterpretation of Projective Verse*, 33 TEXTUAL PRACTICE, no. 7, 2018, at 1220.

legal text out of the realm of ordinary communication and creates something that is an object in its own right, with its own meaning, freed from the internal mental state of its original creator.¹³ One rough analogy here is to a machine, which will do what it does regardless of the subjective hopes of its builder. Another analogy is to a poem, novel, painting, or musical composition, which many readers, viewers, or listeners are inclined to try to understand as founts of expressive and aesthetic meaning no longer reducible to the intent of their creators, though—not surprisingly—literary¹⁴ and artistic critics¹⁵ and theorists have for many years engaged in their own similar debate between intentionalism and forms of object-ism.

Legal object-ists agree that they are looking for the meaning or best interpretation¹⁶ of a relevant legal object, but they divide sharply about how to understand the nature and boundaries of that object. Some object-ists try, with

13. For an especially direct articulation of this view, see Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809–10 (1982), which argues that intentionalism is not a useful model, for it fails to capture the sense in which a text is authoritative as a text. No amount of looking into the minds of the framers, or constructing fictionalized intentions at various levels of abstraction, can render the text less authoritative. The text is not only the starting point, but is also in some special way the finishing point as well. See, e.g., Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (“We do not inquire what the legislature meant; we ask only what the statute means.”); Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 904 (1985) (framers of the Constitution themselves accepted “the common law’s objective approach to discerning the meaning of a document”); Lawrence Tribe, *Judicial Interpretation of Statutes: Three Axioms*, 11 HARV. J.L. & PUB. POL’Y 51, 51 (1988) (“Our search in statutory interpretation . . . must be not for a subjective, unenacted intent but for an objective, enacted meaning of a legal text.”). For a recent important expression of the object-ist position in a statutory context, see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (“Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result But the limits of the drafters’ imagination supply no reason to ignore the law’s demands Only the written word is the law, and all persons are entitled to its benefit.”)

14. The scholarship on the debate between intentionalist and non-intentionalist approaches to interpreting literary texts is vast. For a sense of the classic exchange, compare W.K. Wimsatt & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468 (1946), with E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967). See generally JOHN MAYNARD, *LITERARY INTENTION, LITERARY INTERPRETATION, AND READERS* (2009); *INTENTION AND INTERPRETATION* (Gary Iseminger ed., 1995); Stephen Davies, *Authors’ Intentions, Literary Interpretation, and Literary Value*, 46 BRITISH J. AESTHETICS 223 (2006). For the broader range of approaches being argued about in literary theory, see generally TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* (2008).

15. For a defense of “modest actual intentionalism” in the interpretation of works of art, see *Interpretation and Intention: The Debate Between Hypothetical and Actual Intentionalism*, 31 METAPHILOSOPHY 75, 76 (2000).

16. In this Article, I generally use terms such as “interpretation” in their ordinary colloquial sense to refer to the entire process of extracting meaning from a legal provision. I discuss at *infra* Section V.D. the distinction that some theorists draw between “interpretation” and “construction.”

limited success, not to stray far beyond the words themselves.¹⁷ Others, while sensitive to the text, argue that legal language is typically embedded in some context or a larger web of meaning.¹⁸ That context or background might be other legal texts and their intertextual relationships. Or the larger legal landscape in which specific provisions are embedded. Or the abstract structure revealed by both legal texts and legal landscapes. Or the political theory that animates the law. Or the most analytically compelling answer to specific doctrinal puzzles. Or the application of traditional aids to understanding such as canons of construction. Or “tradition” itself, understood either as the enduring, popularly-ratified, practices and wisdom of the past¹⁹ or, more dynamically, as a “living thing.”²⁰

Object-ists might also look to deeper structural concerns.²¹ For some object-ists, most famously Ronald Dworkin,²² the most powerful context is the

17. Saul Cornell, *Early Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulations, and the Lessons of History*, 17 STAN L. & POL'Y REV. 571, 575–76 (2006).

18. *Id.*

19. See Marc O. Degirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1661–72 (2020); see also *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) for proposition that “ ‘History and tradition of regulation’ . . . [are] relevant when considering the scope of the First Amendment”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39–40 (1991) (Scalia, J., concurring in the judgment) (“Since jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.”). Reliance on this sort of “tradition” can also be abused, though a fuller discussion of that problem is beyond the scope of this Article.

20. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”). For an especially robust, subtle, account of the role of “living tradition” in constitutional interpretation, see Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 558 (1985) (“By tradition I mean a particular history or narrative, in which the central motif is an aspiration to a particular form of life, to certain projects, goals, ideals, and the central discourse (in the case of a living tradition is an argument—in MacIntyre’s terms, an historically extended, socially embodied argument—about how that form of life is to be cultivated and revised.”)). Cf. JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984) (“Tradition is the living faith of the dead, traditionalism is the dead faith of the living.”).

21. See, e.g., Glen E. Thurow, *The Separated and Balanced Constitution*, 21 TEX. TECH. L. REV. 2389, 2389–90 (1990).

22. Dworkin worked out successive versions of this general approach in, for example, RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORIN, *LAW’S EMPIRE* (1986); RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997). For a more recent example of this view of interpretation, albeit born of a radically different moral and political ideology, see ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022). For the complicated role that Dworkin’s ideas might play in European legal theory, see Gustavo Zagrebelsky, *Ronald Dworkin’s Principle Based Constitutionalism: An Italian Point of View*, 1 INT’L J. CONST. L. 621 (2003).

background of moral discourse.²³ For others, it is a compelling historical narrative.²⁴ For yet others, the context is just the set of accepted moves of legal

23. The Supreme Court has also, at various points, articulated a reading of certain clauses in the Constitution that rested on some version of the notion of informed moral conscience usually in combination with an aspirational account of the nation's legal tradition. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding the Fourteenth Amendment only incorporates those rights in the Bill of Rights that are "of the very essence of a scheme of ordered liberty"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Substantive liberty guaranteed by the Fourteenth Amendment includes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

24. Object-ist resort to history can take several forms. One tries to extract a coherent, doctrinally useful, and normatively compelling, account from the legal and factual background of the provision or principle at issue. Often, that involves elevating other texts, by dint of their own quality of argument, to semi-canonical status in their own right. Consider the role that the Federalist Papers have played in constitutional interpretation. *See* William N. Eskridge, Jr., *Cycling Legislative Intent*, 12 INT'L REV. L. & ECON. 260, 261 (1992) ("Judicial interpreters of the Constitution often rely heavily upon the Federalist Papers . . . because they are authoritative statements, because they have become focal points, and (perhaps most of all) because they are intelligent analysis based upon sophisticated political theory."). I also have in mind, for example, the use of James Madison's Memorial and Remonstrance in *Everson v. Bd. Of Educ.*, 330 U.S. 1 (1947). That document reflects, not necessarily the intent of the framers of the Establishment Clause, but rather a compelling narrative that makes sense of the distinctive American church-state dispensation. And the Memorial and Remonstrance, like the Federalist Papers, is a brilliant document whose own intellectual force, in combination with its place in history, has put it in our nation's syllabus of constitutionally relevant texts. For Professor Michael Dorf's similar description of a certain sort of appeal to history, and more especially the use of "ancestral" and "heroic" originalist arguments, see, e.g., Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997). This sort of difference between historian's history and normative coherent and compelling narrative is nothing to be embarrassed about; it is integral to other normative inquiries as well. *See, e.g.,* BERNARD WILLIAMS, *THE SENSE OF THE PAST: ESSAYS IN THE HISTORY OF PHILOSOPHY* (2009) (distinguishing between the history of philosophy, which looks to history to help open the philosophical imagination, and the history of ideas, which seeks to situate past philosophical work in the context of its own times). A second form of object-ist use of history comes closer to employing rigorous historical study to say something about the background of a legal provision and the facts of its enactment and reception. The goal is to provide a context that might otherwise be obscure with the passage of time and thus to expand and even unsettle the legal imagination. *See, e.g.,* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017); Cornell, *supra* note 17. A third form looks to the legal tradition out of which certain provisions arose and in which they might be embedded. The key here is that, with respect to some of its provisions, the Constitution is one link in a long chain of legal development. For more discussion of this sort of use of history, see *infra* notes 234–38 and accompanying text. *Cf.* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STANFORD L. REV. 551, 551 (2006) (proposing to regard "the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as

argument.²⁵ Some object-ists might even want to factor in consideration of the author's intent, though not in the same exclusive and reductionist fashion as intentionalists.²⁶ Some object-ists see the meaning of some constitutional provisions or other legal texts as works-in-progress, capable of revision with changing times, either because the "majestic generality" of those texts necessarily invites continuing reflection on their implications,²⁷ or (as in the Canadian approach) because the Constitution is a "living tree".²⁸ Yet other

supplying the terms of a debate about certain concepts . . ."). For a related though crucially distinct approach, see some of the defenses of "original law" originalism. *E.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POLY 817 (2015); Stephen Sachs, Meanings, Intentions, Original Law: Another way to understand what originalists are doing, VOLOKH CONSPIRACY (Mar. 12, 2021), <https://reason.com/volokh/2021/03/12/meanings-intentions-original-law/> [<https://perma.cc/57Y6-4TQA>] [hereinafter Sachs, Original Law] ("What we need to know isn't really the meaning of the words 'Cases' or 'in Law,' so much as the scope of the common-law jurisdiction those words would have conferred. If common-law courts in general could hear these sorts of cases at the Founding, it's harder to argue that Article III forbade the federal courts from doing so."). In any event, each of these forms of resort to history is dramatically different from intentionalism's resort to mental states. And, as I explain below, they are also different from standard original public meaning theory's effort to construct a glossary of semantic or legal meanings. *See infra* notes 61–62 and accompanying text.

25. *See* DENNIS PATTERSON, LAW AND TRUTH 21 (1999).

26. *See* Dorf, *Integrating Normative and Descriptive Theory: The Case of Original Meaning*, *supra* note 24, at 1766–67; Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313 (1996) (describing a "soft originalist" as one who "will take the Framers' understanding to a certain level of abstraction or generality").

27. *See, e.g.*, William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 GUILD PRAC. 1, 2, 7 (1986) (discussing the "majestic generalities and ennobling pronouncements" in the Constitution and arguing that the "genius of the Constitution rests . . . in the adaptability of its great principles to cope with current problems and current needs"); *see infra* notes 142–46 and accompanying text (discussing Brennan's lecture). Justice Brennan traced the term back to Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639–40 (1943) (pondering "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century").

28. *See* Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.) ("[O]ur Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."); *Edwards v. Canada*, [1930] AC 124, 1 D.L.R. 98, 106 (PC) (appeal taken from Can.) ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."). A similar metaphor employed in the context of statutory interpretation in the United Kingdom and some other jurisdictions is that statutes should be interpreted as "always speaking," thus taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law. Very importantly it does not matter that those changes could not have been reasonably contemplated or foreseen at the time that the provision was enacted.

object-ists find relevant the actual practice of government as it has developed over time, the practical “gloss” that “life has written” to animate the bare words of the text.²⁹

Many object-ists combine these various approaches or venture beyond and between them³⁰; they might shift interpretive strategies depending on the context (as many judges have traditionally done) or search for the most coherent way to take account of a wide range of such strategies.³¹ The common conviction of most object-ists, though, whatever their differences, is that constitutional provisions and other legal texts can, at least in the workings of the legal imagination, be said to reveal a deeper immanent meaning that demands to be plumbed and understood.

I will not try here to decide among the varieties of object-ism. Nor do I want to referee between object-ism writ large and intentionalism. As I said, both approaches and their variants are based on powerful intuitions. I am more of an object-ist, but that is immaterial.³²

My goal here instead is to examine that third set of views—theories of “original public meaning”—that in recent decades has upended the traditional debate between intentionalists and object-ists and whose supporters have touted it as the more sophisticated alternative to both older positions.³³ Theories of

News Corp. UK & Ireland Ltd v. Revenue & Customs [2023] UKSC 7, at ¶ 29 (affirming “always speaking” canon, but rejecting its application when a statute specifically requires resort to a “historic or frozen interpretation”); *see also* R (Quintavalle) v Sec’y of State for Health, [2003] UKHL 13.

29. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Some more recent ideologically conservative Justices have also looked to “tradition,” though not in the same way. *See, e.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2092–94 (2019) (Kavanaugh, J., concurring) (looking to “history and tradition” to help decide the constitutionality of specific religious displays on public property against Establishment Clause challenge).

30. *See generally* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1984). For a similar account of the modalities of constitutional interpretation, *see* András Jakab, Arthur Deyve & Giulio Itzcovich, *Introduction*, in *COMPARATIVE CONSTITUTIONAL REASONING* (András Jakab, Arthur Deyve & Giulio Itzcovich, eds., 2017) (listing “plain meaning, original intent (teleological-historical interpretation), purposive interpretation (teleological-textual interpretation), analogy, coherence (conciliation of conflicting constitutional requirements) and interpretation in light of international law” as possible modes of constitutional interpretation).

31. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

32. For some thoughts on how certain of the ideas in this Article might be of help to intentionalists, *see infra* Section VI.F.

33. Some friends of “original public meaning” might argue that it is really a form of object-ism. Others might suggest that it is best understood as a cousin of intentionalism within the broader ambit of originalism. Both arguments are plausible. But my heuristic treatment of original public meaning as a distinct third way helps highlight its ironic failure as an attempted compromise between the two older traditions and the unique element of intractable incoherence that is the focus of this Article.

original public meaning have morphed and split over the years. Some look to the original public's interpretation of the specific constitutional provisions in question.³⁴ Others are equally interested in the meaning that the original public attached to some of the words or phrases that the drafters ended up including in the constitutional text.³⁵ Some treat original public meaning as entirely conclusive in principle.³⁶ Others posit that the inquiry into original public meaning is only the first step in a more complex interpretive inquiry.³⁷ I will allude to some of those variations below. But the kernel of all these views is that either the entirety or at least the beginning of the meaning of a constitutional or other legal text should depend on the interpretation placed on it by its first readers, the "original public."³⁸

I do not argue that finding original public meaning is impossible. I will even point later in this Article to a limited but significant role for one tiny thin slice of original meaning in a broader account of constitutional interpretation.³⁹ But I do argue that, as a primary theory or even as a framework, the method of original public meaning has a unique and deadly bit of intractable incoherence—a small spot of a problem that ends up infecting the force of the entire theory.⁴⁰ The deadly flaw is that original public meaning, alone among

34. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2020).

35. *Id.* at 1982–83.

36. See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2057 (2006).

37. See *infra* notes 172–77 and accompanying text.

38. Larry Solum's recent, especially subtle and sophisticated, piece understands the search for "original public meaning" not as a stark alternative to intentionalism but as a broadly Gricean effort to identify those authorial intents that could effectively convey public meanings. See Solum, *supra* note 34, at 2002. At the end of the day, though, he argues that when public meaning diverges from even discoverable authorial intent, public meaning must prevail.

39. See *infra* Part V.

40. Note that my argument here is both narrower but also more sharply honed than the sort of criticisms of original public meaning that, for example, challenge its adequacy as a matter of constitutional jurisprudence or challenge the good faith of some its judicial exponents. See, e.g., ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 75, 90–91 (2022); ERIC J. SEGALL, ORIGINALISM AS FAITH 3–4 (2018). Cf. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (criticizing both intentionalism and original public meaning theory to the extent that they claim to provide the exclusive guide to constitutional interpretation). I might sympathize with the general thrust of some of those judgments, but my attention here is simply drawn elsewhere. The critique that might most resonate with mine, though, is Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 104 VA. L. REV. 1421 (2021). I reference some of the similarities and differences between our two approaches at *infra* notes 75, 97, 98, 131, 135, 180, & 215. My most distinctive contribution in this Article, as the paragraph in text here suggests, is that I am less interested than Professor Fallon is in whether the inquiry into some type of original public

all theories of legal interpretation, is useless in interpreting contemporaneous texts. A contemporaneous reader must have some *other* theory or approach to do the job. And that *other* theory or approach, whatever it is, cannot lose its force—will continue nagging in the ear—even when the reader turns to older texts.

The main contribution of this essay is exploring that deeply consequential gap in theories of original public meaning. Part I of this essay clears the ground. It challenges any idea that resorts to concluding that original public meaning might be a happy synthesis of the intuitions behind intentionalism and object-ism. Part II introduces the essay’s main argument, explaining that deadly bit of intractable incoherence, the tiny hole in the theory. Part III tries to show how that small hole ends up unraveling the entire fabric. Part IV responds to some defenses. Part V pinpoints the genuine insight buried underneath the appeal to original public meaning and its real but limited significance. The Article concludes with a brief thought about why the legal culture would have been drawn to this theory in the first place.

II. ORIGINS

A. One Step Forward

The genesis of the theory of original public meaning has credibly been described in substantive ideological terms.⁴¹ But I want to approach it here as a

meaning is illusory (I agree with his argument that it is “chimerical,” but am often willing here to concede, if only for the sake of argument, that it is not) than in the fact that *we, as readers*, will always have at our disposal and “nagging in our ears” whatever method or principles we find useful and even compelling to interpret our own contemporaneous legal texts.

41. See, e.g., AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 19–20 (2015); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 446 (2013); Jesse Merriam, *Is Legal Conservatism as Accomplished as It Thinks It Is?*, L. & LIBERTY (July 1, 2019), <https://www.lawliberty.org/liberty-forum/is-legal-conservatism-as-accomplished-as-it-thinks-it-is> [<https://perma.cc/F4EA-5G2C>]. For unabashedly conservative or libertarian ideological uses and defenses of originalism, see, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006). But see Lawrence B. Solum, *Originalism vs. Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 N.W. U. L. REV. 1243, 1269–70 (2019) (observing that some originalists are politically progressive and that many originalists consider originalism to be ideologically neutral and arguing that the practical consequences of originalism are in any event ideologically and politically mixed). Among the most prominent examples of apparently “liberal” originalists is Professor Jack Balkin. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550–59 (2009).

theoretical development.⁴² In that story, the modern argument for resort to original public meaning evolved out of an effort to build on, but also refine, the late twentieth century campaign on behalf of constitutional intentionalism.⁴³

The singular virtue of intentionalism, according to this sympathetic but critical argument, is that it tries to be faithful to the original meaning of a legal enactment. But both those sympathetic critics and other less friendly commentators came to see that intentionalism's effort to treat legal enactments as if they were ordinary communications misfires.⁴⁴ (I should be clear that I am only narrating these critiques here, not endorsing them. As noted earlier, I am not an intentionalist myself, but this article's arguments are not aimed at intentionalism.⁴⁵)

Legal enactments, argued the critics, are public acts. They are meant to have public effect and to be understood in public terms.⁴⁶ Intentionalism tries to

42. For another account, see LAWRENCE B. SOLUM, WHAT IS ORIGINALISM? THE EVOLUTION OF CONTEMPORARY ORIGINALIST THEORY, GEORGETOWN L. FACULTY PUBL'NS & OTHER WORKS (2011), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub> [<https://perma.cc/FMY7-TZXF>].

43. Prominent defenses of intentionalism in that period included RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 364 (1977); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986); Earl Maltz, *Some New Thoughts on an Old Problem - The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811–12 (1983) (“Judges should be guided by the intent of the Framers of the relevant constitutional provisions.”); Edwin Meese III, U.S. Attorney Gen., Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in OFFICE OF L. POL'Y, U.S. DEP'T OF JUST., ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 96 (1987). Many of these early proponents of intentionalism eventually adopted some version of original public meaning theory. But others did not. See, e.g., Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353 (1988) (arguing that the “essence of communication” is for “the writer to explain what his words mean; the reader may dispute the proposition, but he may not insist in the face of the writer's own explanation that the writer meant something different”).

44. For one of the classic critiques of earlier forms of intentionalism, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

45. See *supra* note 32. For some of the leading continuing defenses of intentionalism in legal interpretation, see, e.g., Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander & Saikrishna Prakash, “*Is that English You're Speaking?*” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21 (2009). For a sympathetic account of intentionalism, though only as part of a more holistic approach to legal interpretation, see Greenawalt, *supra* note 5, at 1612.

46. See Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1402 n.36 (2014) (reviewing AKHIL REED AMAR, THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012)) (“There is a fundamental distinction between the formal content of a rule stated in a legal text—its objective meaning—and the mere subjective expectations or intentions held by some (or many) persons about how that rule would or should be applied.”).

reduce those public acts to something like the subjective mental states of an author, but that effort is misguided. “It is the law that governs, not the intent of the lawgiver.”⁴⁷

This critique implicates all resorts to original intentions. But it is illustrated at the extreme by the possibility that the author of a legal enactment will have a secret and entirely idiosyncratic meaning in mind.⁴⁸ That might be tolerable in some forms of expression.⁴⁹ But it is not, according to the opponents of intentionalism, consistent with the character of law.

To be sure, intentionalists do not aspire to read the minds of authors. They look to evidence of intention.⁵⁰ But this does not solve the supposed problem. To begin with, evidence of authorial intention is not necessarily reliable,⁵¹ and—as with respect to the records of the original constitutional convention—

47. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997). Justice Scalia’s pithy formulation restates what was, before the advent of modern intentionalism, long a standard trope of legal interpretation. *See, e.g.*, *Aldridge v. Williams*, 44 U.S. 9, 24 (1844) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.”)

48. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 620–29 (1999) (discussing the problem of “secret intentions.”). Secret, idiosyncratic, and purely private meanings of this sort should be distinguished from originally secret *evidence* of intent, as for example the long-sealed records of the constitutional convention. The former is an ontological problem. The latter is a merely epistemological challenge. For a defense of the use of once-lost deliberative records as part of an effort to discern the original understanding of the Constitution, *see* Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1115–18 (2001).

49. It is an interesting question whether one should count as “secret” in this sense an intent to produce meanings that the original public would not appreciate because of its own blinders but which a later generation might more easily accept. *See infra* notes 64–66 and accompanying text. That goes especially for traditions of esoteric writing that specifically aim to obscure the deeper meaning of a text from casual, unsophisticated, or hostile readers. *Cf. infra* note 66. It is also important to distinguish the question of the secret intentions of *authors* from the possibility that *readers* will read meanings into texts that overflow their literal or intuitive sense. *Cf. infra* notes 183–184 and accompanying text.

50. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *N.W. U. L. REV.* 226, 244 (1988) (“Nevertheless, it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent. The confidence in these judgments will be different in different situations.”) *Cf.* H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659, 660 (1987) (“It is therefore intrinsic to the argument for originalism that the interpreter is obligated to determine, using methods of data and history, what that intent objectively was before he can address what the Constitution now means.”).

51. *See generally* MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2017); *see also* 3 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 400–09 (1980).

its public availability might not be contemporaneous with the legal enactment itself,⁵² so that, even if reliable as evidence of intent, it cannot really be said to fix the meaning of the enactment in the public realm.

More fundamentally, even if evidence of intention is publicized, that does not itself make it “public” in the relevant sense if the enactment of law is understood as an official act and not merely an effort to communicate.⁵³

At least one more problem is endemic to legal texts in particular: They often have collective authors and there is no easy way to combine their disparate individual understandings into a single “intention.”⁵⁴ Moreover, the force of a constitutional provision or other legal text *as an authoritative enactment* depends, not only on drafting decisions made by its authors, but on the deliberation and consent of other actors, such as state bodies ratifying the Constitution, who might have their own possibly different understandings.⁵⁵

The various forms of object-ism avoid intentionalism’s allegedly wrongheaded reduction of meaning to internal mental states. But—according to what I am calling the sympathetic critics—they end up sacrificing intentionalism’s effort to be faithful to the “original” meaning of an enactment.⁵⁶ They presumptuously abandon fidelity to the original understanding of the text by imposing on that text other criteria of meaning.⁵⁷

52. James Madison’s notes on the proceedings of the constitutional convention, even assuming their reliability, *but see supra* note 51, were not published until 1840. *See generally* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Adrienne Koch ed., 1984). The only earlier publicly available records were some excerpts of Robert Yates’s notes published in a pamphlet in 1808, the official *Journal of the Convention* printed and published in 1820, and Yates’s full notes published in 1821. *See* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 278–80 (1997).

53. A better case can be made for the sort of evidence of intention that is itself part of the official legal record or is treated as canonical by the legal culture. But that takes us beyond intentionalism itself to something more akin to a form of object-ism.

54. *See* Brest, *supra* note 44, at 212–13.

55. Indeed, James Madison argued in 1796 that any intentionalist reading of the Constitution would need to consider the views expressed in the ratifying conventions, going so far as to suggest that the text produced by the Constitutional Convention “was 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.” James Madison, *in* 16 THE PAPERS OF JAMES MADISON 295–96 (J.C.A. Stagg, Thomas A. Mason, Jeanne K. Sisson eds., 1989); *see also* Raoul Berger, *Jack Rakove’s Rendition of Original Meaning*, 72 IND. L.J. 619, 640–41 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 511 (1988).

56. Schauer, *supra* note 13, at 809–11.

57. *Id.*

Enter original public meaning.⁵⁸ The proponents of this approach argue that it shares intentionalism's fidelity to original meaning. But it rejects intentionalism's reliance on the private meaning that the original authors might have thought they were memorializing in those texts and looks instead to either the shared, public interpretation of the readers of those texts or the public meaning more generally attached at the time to the words, phrases, and concepts enacted by those texts. Original public meaning thus combines object-ism's insistence that legal texts are *enactments* and therefore different from ordinary communication with intentionalism's insistence that we respect the original meaning of those texts *as enacted*. In that sense, original public meaning combines the best of both worlds.

B. Two Steps Back

Or not. The first thing to notice here is that whatever the possible virtues of original public meaning theory, it is in some ways an odd compromise between intentionalism and object-ism. It has going for it *neither* (a) the argument that legal texts are real communications from flesh-and-blood people whose imperatives we should respect and obey *nor* (b) the argument that legal texts are irreducible objects whose immanent meaning our distinctive calling and duty as lawyers it is to discover. Original public meaning, rather than combining the normative intuitions behind the two traditional alternatives, sacrifices them both.⁵⁹ Worse yet, it combines the putative defects of both its alternatives. Like intentionalism, it is reductionist. And like object-ism, it separates legal texts from the real-life execution of actual political will by the actual political actors who produced them.

This points to a deeper problem. Intentionalism and object-ism, in their own ways, are both efforts at *understanding*. Intentionalism tries to make sense of what the drafters had in mind for us. Object-ism tries to dig deeply into the pregnant possibilities of the work that the drafters bequeathed to us. These are both profoundly contextual enterprises. But original public meaning theory, as Saul Cornell has emphasized⁶⁰ and as some original public meaning theorists

58. For an account of this transition, see Randy E Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L. J. 1, 9–10 (2018). For a critique of the shift, and a defense of intentionalism in its original form, see Kay, *supra* note 4, at 704.

59. But see Solum, *supra* note 34 (suggesting an account of original public meaning that tries to draw on both author's intention and reader's understanding).

60. Cornell, *supra* note 17, at 576 (“Context is generally given short shrift in originalist scholarship. Indeed, plain meaning originalism is deeply anti-contextualist in method.”).

acknowledge,⁶¹ is radically acontextual. Its aspiration is less to *understand* than to draw up a sort of glossary of meanings.⁶²

C. Looking Back, Looking Ahead

In addition, the inquiry into original public meaning does not even necessarily result in a *practical* compromise between intentionalism and objectism. It is possible that in some contexts, the authors of a legal text will intend a vision for it that their own “original public” does not discern but which later generations can retrieve.⁶³

This sort of convergence between the authors and later readers might be purposeful. For example, although the “original public” might not have understood the Fourteenth Amendment to “incorporate” against the States the rights enumerated in the Bill of Rights, the principle drafters arguably intended the text to have that effect and looked to the day when a “sympathetic court” would read the ambiguous language of the Amendment as they did.⁶⁴ In that sense, we might understand the drafters to resemble novelists, poets,

61. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 107 (2001). As Barnett explains it, in applying the method of original meaning,

Where the chosen words had more than one established meaning, evidence of usage outside the context of drafting and ratification may mislead us as to what the particular words of a particular measure meant at the time of its enactment. Far from providing useful ‘context,’ such historical evidence may instead cloud what was otherwise a fairly clear meaning. . . . more “historical context” is not automatically preferred.

Id.

62. This is especially apparent in the recent fascination among some original public meaning theorists with the *corpus linguistics*, electronic databases of word usages. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Lawrence Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2018); Lee J. Strang, *The Original Meaning of “Religion” in the First Amendment: A Test Case of Originalism’s Utilization of Corpus Linguistics*, 2017 BYU L. REV. 1683 (2018); Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

63. Cf. Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1633–34 (2009) (noting that some “constitutional provisions may be best understood, at least in retrospect, as aspirations for future change, rather than as a hedge against such change. . . . a kind of message in a bottle from the past”). Professor Dorf’s observation, though evocative of mine here, does not depend on the actual subjective intent of the framing generation. *Id.*

64. See Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 368 (2009). For a more cynical view that one intent behind the Fourteenth Amendment’s Due Process and Equal Protection Clauses, which only bore fruit later, was “to enlarge the sphere of national control over the states” with respect to the regulation of artificial persons such as corporations, see CHARLES A. BEARD & MARY R. BEARD, 1 THE RISE OF AMERICAN CIVILIZATION 111–14 (1927).

playwrights,⁶⁵ and philosophers⁶⁶ who subtly protest the orthodoxies of their day in ways that their contemporaries might not appreciate.

But even apart from such virtual conspiracies, the possibility that the original author and later readers might both see something in a text that the original public does not is present in any text, and is especially powerful for great, conceptually rich, texts.⁶⁷ Original public meaning theorists rightly point out that later readers bring their own assumptions and prejudices into their efforts at interpretation. But the original public had its own assumptions and prejudices. Those assumptions and prejudices might not only have blinded the original public to the intentions of a provision's authors, they might also have dulled its sensitivity to the deepest, truest meanings of the text itself.

None of this is dispositive. The theory of original public meaning might still be getting it right. But these oddities in the theory's relationship to its older alternatives—intentionalism and object-ism—should give us pause.

III. THE HOLE IN THE FABRIC

A. Original Public, Original Readers

Pause taken. The central claim of this essay is that the theory of original public meaning suffers from a more basic problem.

65. See, e.g., JOHN P. ANDERS, *WILLA CATHER'S SEXUAL AESTHETICS AND THE MALE HOMOSEXUAL LITERARY TRADITION* (2001); Michael McGaha, *Is There a Hidden Jewish Meaning in Don Quixote*, in 24 *CERVANTES: BULLETIN OF THE CERVANTES SOCIETY OF AMERICA* 173, 173–88 (2004).

66. The twentieth-century thinker Leo Strauss famously, if not always plausibly, argued that older political philosophers often framed their views in esoteric code to avoid persecution by their contemporaries. See Leo Strauss, *Persecution and the Art of Writing*, in *PERSECUTION AND THE ART OF WRITING* 22, 22–37 (1952); Leo Strauss, *What is Political Philosophy?*, in *WHAT IS POLITICAL PHILOSOPHY* 9, 9–55 (1959). For a more general introduction to the long tradition of encoding esoteric meanings in philosophical writing from the Ancient Greeks up to at least the nineteenth century, see ARTHUR M. MELZER, *PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING* (2014).

67. For a fascinating example of this potential at work in the interpretation of great literature, see ZACHARY LESSER, "HAMLET" AFTER Q1: AN UNCANNY HISTORY OF THE SHAKESPEAREAN TEXT (2014). Lesser is especially interested in Hamlet's "To be or not to be" soliloquy, which has notoriously divided interpreters as to whether, for example, its subject is suicide, revenge, or existential angst and whether it ultimately affirms religious piety or skepticism. Lesser concludes, on the basis of a long-forgotten variant text of the play, possibly an earlier draft, that Shakespeare's meaning might have been closer to that of some of his modern readers than that of his own original readers. For an effort to reinterpret the original intentions behind the work of a great political thinker—intentions that were profoundly misunderstood by his original public—see PATRICK BOUCHERON, *MACHIAVELLI: THE ART OF TEACHING PEOPLE WHAT TO FEAR* (2020).

Understanding the problem and its implications begins with this observation: The method of original public meaning, *uniquely*, is useless, except in the least interesting cases,⁶⁸ in interpreting the meaning of a contemporaneous legal enactment. If we are trying to figure out the meaning, not of a constitutional provision or other legal text enacted many years ago, but of a text enacted today or recently, then looking to original public meaning will usually be an entirely circular, empty, effort. After all, we—when we interpret a contemporaneous text—are the original public. And even if we assume that the so-called original public is a term of art referring to a subset of the larger public—lawyers or educated people—that subset of folks cannot use the method of original public meaning to help it decide what it should think the original public meaning (more narrowly defined) is.

We could direct judges interpreting contemporaneous legal texts to look to the views of public opinion or even the views of, say, lawyers or educated persons. That would save the judge from being stuck in an infinite regress. But it would still leave the actual original public—however defined—out at sea. Similarly, it would not help to reify the original public, as some theorists do, by defining it in terms of how a “reasonable” reader of the time would interpret the text.⁶⁹ For if we are dealing with a contemporaneous legal enactment, we are the original readers, and while we would certainly aspire to be “reasonable” readers, we would need to decide for ourselves what that means; the theory of original public meaning would be of no help.

Examples of this dilemma abound. Consider the amendment to the New Hampshire Constitution adopted in 2018 that provides that “An individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”⁷⁰ As Professor David Post has pointed out, not only is this provision painfully obscure, but trying to apply the method of

68. See *infra* Part V.

69. See, e.g., BARNETT, *supra* note 41, at 92 (looking to the “meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”); Gary Lawson & Guy Seidman, *Originalism as A Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (“The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution. Thus, when interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people - whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been - but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 991 (2008) (“I believe that the single correct method of constitutional interpretation is to attempt faithfully to apply the meaning that the words would have had, in context, to a reasonably well-informed speaker or reader of the English language at or about the time the text was adopted.”).

70. N.H. CONST. part I, art. 2-b.

original public meaning to uncovering its meaning would be a bit mad.⁷¹ In fact, the problem is worse than Post suggests. The members of the “original public” could rationally try to reach some conclusions about the meaning of this text. They could employ any number of interpretive strategies to reach those conclusions. Those methods could run the gamut from informal to philosophically sophisticated. They might even choose to look at the intent of the framers of the provision. But the one method they could not use would be the method of original public meaning. For they *are* the original public. Someone could take an opinion poll of relevant readers. But that would not help those readers, individually or collectively, reach the conclusions about which they are being polled.

This hole in the fabric of original public meaning theory is roughly analogous to the often-noticed chasm at the heart of the least defensible variant of predictive legal realism.⁷² As H.L.A. Hart and others have emphasized, defining the law as a prediction of what judges will do is of no help to judges themselves in deciding what the law is.⁷³ Similarly here, defining the meaning

71. David Post, *The Meaning of Constitutional Meaning*, VOLOKH CONSPIRACY (Nov. 15, 2018), <http://reason.com/volokh/2018/11/15/the-meaning-of-constitutional-provisions> [https://perma.cc/WW34-RVGF].

72. The predictive theory of law is often traced, justifiably or not, to Oliver Wendell Holmes’s aphorism that law consists of the “prophecies of what the courts will do in fact, and nothing more pretentious . . .” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). For one account of the theory, see Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1236–38 (1987). I do not want to suggest, though, that “legal realism” as a complex intellectual movement is reducible to the predictive theory of law. See BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 17–18, 68–69 (2007).

73. H.L.A. HART, *THE CONCEPT OF LAW* 147 (1972); see also, e.g., Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 624 (2007); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 659 (1995) (“A conscientious judge who wishes to apply the law receives no more guidance from, and is no more constrained by, a theory that tells her to do what she thinks best than one that gives her the circular advice: predict what you yourself will do.”). For an earlier similar critique, see Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 17 (1937) (“When a judge puts [a question of law], in the course of writing his opinion, he is not attempting to predict his own behaviour.”). This argument applies most directly to courts of last resort charged with deciding legal questions on their own authority. See Dorf, *supra* at 659. But its normative reach is much broader. See *id.* at 660 (“Nonetheless, Hart’s argument could be adapted to show that prediction inaccurately describes what lower courts typically do.”). A corollary flaw of the unvarnished version of the “predictive theory of law” is that it cannot account for judges making mistakes. See JEFFREY BRAND, *PHILOSOPHY OF LAW: INTRODUCING JURISPRUDENCE* 8 (2013). This critique also echoes my argument *infra*, at Part III, that the “original public” can make mistakes in its understanding of a legal text. For efforts to understand the “predictive theory of law” more charitably, see, e.g., JEFFREY G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 35, 33–36 (1990); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 131 (1993).

of the law by reference to the views of the original public is of no help to the original public in deciding what the meaning of the law is.

As noted, the complication here is—crucially—unique to the method of original public meaning. An intentionalist trying to make sense of the “original intent” of the authors responsible for a contemporaneous legal text can look to evidence of what those authors might have had in mind. A Dworkinian can try to give the text its most coherent reading consistent with background norms of political morality. A structuralist can try to fit the meaning of a specific text into a broader legal fabric. An old-fashioned lawyer might consult canons of construction. *Only* the method of original public meaning is stuck, as it can get no purchase on how the original public should decide original public meaning.

B. Sitting on the Shoulder, Nagging in the Ear

All this might seem like a quibble, a tiny gap in the coverage of the method of original public meaning. But its implications run much deeper. If the original public cannot look to original public meaning to decide the meaning of a contemporaneous legal texts, it must have some other method—whether a formal theory or an incompletely articulated discursive practice—that guides its search for meaning. Indeed, it is likely that there will be several such methods on the field, either working together or competing in any given instance. Members of the original public, collectively or individually, must have one or more such interpretive methods, approaches, discourses, or moves—*not including the method of original public meaning*—that they find normatively compelling and fit to the task.

More simply, if we ask any judge, lawyer, scholar, or citizen what his or her approach is to interpreting constitutional and other legal texts, the answer cannot *just* be “I rely on the original public meaning” or even “I look to the original public meaning first.” For that method will not work for a contemporaneous text. Therefore, when dealing with contemporaneous legal texts, the judge, lawyer, scholar, or citizen must have some *other* approach that he or she would argue is analytically and normatively compelling. And the crucial corollary, to which I will attend shortly⁷⁴, is that if the arguments supporting that other approach are at all convincing, they will not disappear when the judge, lawyer, scholar, or citizen is trying to interpret a legal text that is not contemporaneous. They will, to the contrary, keep their normative force, sitting on the interpreter’s shoulder, insistently nagging in the interpreter’s ear, even when she is interpreting legal texts that are not contemporaneous. (The original public does differ from later readers in their facility with the semantics

74. See *infra* at Part III.

of their own language. That is the kernel of insight in original public meaning theory. But as I argue in detail later in this Article, this is less significant than original public meaning theorists think.)

C. Hip-Hop, Circa 1793

Lurking in my observation here is a second crucial point. Supporters of the method of original public meaning sometimes treat original public meaning as a raw fact in the heads of the original public.⁷⁵ But we know, from our own experience with legal texts contemporaneous to our own time, that this is rarely true for any interesting interpretive question.⁷⁶ Every day, judges, lawyers, scholars, and citizens grapple with disputes over the meaning of contemporaneous or almost contemporaneous legal provisions. And we know how they try to navigate those disputes—either by choosing among or combining the various competing normative accounts of interpretation.

The same was true for the Constitution's original readers. A dramatic example is the debate during George Washington's administration about whether the President's power to abrogate a treaty without getting the consent of any part of the legislative branch.⁷⁷ The debate concerned the constitutionality of Washington's 1793 proclamation of neutrality in the war

75. Larry Solum, as usual, has a much more sophisticated and challenging account. He argues that the raw words of a constitutional text gain their more determinative meaning by virtue of a variety of forms of "contextual enrichment," including implicature and modulation. Solum, *supra* note 34, at 1983–86. Some of his examples, though, would come easily to any reader, whether the original reader or a later one. And others depend on reasoned interpretive *arguments*—arguments that, as I suggest in my own account here, we as later readers are perfectly entitled to dispute. As I observe at *supra* note 8, the situation is very different for actual conversationalists who can come to shared understandings of their utterances through an iterative process of cooperative exchange. For a similar observation, see Fallon, *supra* note 40, at 1426–27. Fallon also points out, correctly, that successful "conversational interpretation" (as opposed to the interpretation of enacted legal texts) depends significantly on the identity of the speaker and the "interpretive common ground" between speaker and listener. *Id.* at 1428. See also *id.* at 1454 ("[T]he identification of richly determinate conversational meanings often depends on variables that lack precise analogues in constitutional interpretation.").

76. Interestingly, some legal systems have experimented with the practice of judges referring difficult questions regarding the meaning of legal enactments back to the legislature. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* 375–76 (1967) (discussing French Constituent Assembly's enactment in 1790, influenced by Montesquieu's distrust of the judiciary, requiring judges "to address themselves to the legislature whenever they think it necessary either to interpret a law or to make a new one"). American law has obviously charted a different path. So, for that matter, has Jewish law, even though the presumed author of the legal rules in question was God. See Babylonian Talmud, Baba Metzia 59b.

77. The musical *Hamilton* includes a splendid song rehearsing the policy debate over whether President Washington should have aborted the treaty. See Lin-Manuel Miranda, *Cabinet Battle # 2 Lyrics* — *Hamilton: An American Musical*, ALL MUSICALS, <https://www.allmusicals.com/lyrics/hamilton/cabinetbattle2.htm> [https://perma.cc/4JK2-KZBX].

between France and its neighbors that broke out after the French Revolution.⁷⁸ That declaration arguably abrogated terms of the Treaty of Alliance, which the United States signed with France back in 1778 as the American army was struggling to win the War of Independence against Great Britain.⁷⁹ The fight over the wisdom and morality of the Declaration of Neutrality has recently become familiar to many Americans as the inspiration for a scene and a song in the Broadway musical *Hamilton*.⁸⁰ The larger controversy, including most interestingly its constitutional dimensions, played itself out not only in the deliberation of Washington's Cabinet, but in a series of famous opposing pamphlets written by Alexander Hamilton writing under the pseudonym *Pacificus* and James Madison writing as *Helvidius*.⁸¹

The Constitution does not explicitly address the question of the President's independent authority to abrogate treaties.⁸² So, not surprisingly, both Hamilton and Madison resort to several different interpretive techniques in making their respective cases for and against the constitutionality of the Declaration of Neutrality. Part of each of their arguments is textual. Madison, for example, looks to various pieces of circumstantial textual evidence to suggest that Congress has the primary responsibility for both the making and the unmaking of treaties.⁸³ Hamilton, on the other side, points to the difference between the opening to Article I of the Constitution and the opening to Article II.⁸⁴ Article I, dealing with the legislative branch, grants to Congress "All legislative Powers *herein granted*."⁸⁵ Article II, dealing with the President, declares simply that "*The executive Power shall be vested in a President of the United States of America*."⁸⁶ Hamilton writes that this difference in wording "serves to confirm [the] inference" that President's authority, unlike that of Congress, is

78. George Washington, *Neutrality Proclamation*, 22 April 1793, in 12 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 472, 472–74 (Christine Sternberg Patrick & John C. Pinheiro, eds., 2005), <https://founders.archives.gov/documents/Washington/05-12-02-0371> [<https://perma.cc/7ACM-F76B>].

79. *Treaty of Alliance Between the United States of America and His Most Christian Majesty, U.K.-U.S.*, Feb. 6, 1778, 8 Stat. 6, 6–11. I ignore here the various legal arguments about whether the terms of the Treaty of Alliance required the United States to take France's side in the circumstances of 1793. *See, e.g.*, ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794*, at 19 (Morton J. Frisch ed., 2007) (arguing that the Treaty of Alliance was only defensive).

80. *See* Miranda, *supra* note 77.

81. *See generally* HAMILTON & MADISON, *supra* note 79.

82. Interestingly, Congress itself annulled the Treaty of Alliance in 1798. Act of July 16, 1798, Ch. 67, 1 Stat. 578.

83. HAMILTON & MADISON, *supra* note 79, at 60–61.

84. *Id.* at ix.

85. U.S. CONST. art. I, § 1 (emphasis added).

86. U.S. CONST. art II, § 1, ¶ 1 (emphasis added).

“comprehensive” and “general,” limited only by the express qualifications set out in the text.⁸⁷

More essentially, though, Hamilton and Madison propose different structural and philosophical accounts of the nature of the “executive power” itself and the nature of treaties. Hamilton argues that the President, of necessity, is “the *organ* of intercourse between the Nation and foreign Nations.”⁸⁸ The Constitution does grant to Congress some role in foreign affairs, such as the authority to declare war and (by a two-thirds vote of the Senate) to consent to treaties, but these “express restrictions or qualifications” do not derogate from the President’s more general mandate.⁸⁹ Madison, on the other hand, defines the President’s brief more narrowly: Congress (with some involvement by the President) makes “laws,” including enactments such as treaties and declarations of war. The President’s only independent duty is to “execute” those pre-existing laws.⁹⁰ Similarly, Hamilton emphasizes that treaties are tools of the nation’s foreign relations, while Madison stresses that treaties are “laws” and that the power to make them is therefore primarily “legislative.”⁹¹ He buttresses his case with further structural and textual arguments, observing that treaties can have domestic legal effects⁹² and that the Constitution emphatically declares them, along with the Constitution and valid federal statutes, to be “the supreme law of the land.”⁹³

I have gone on at some length here to show that both Hamilton and Madison employ sophisticated and resonant arguments in their efforts to understand presidential authority under the Constitution. They are hampered by the Constitution’s silences and even sloppiness, though that is often the challenge in reading difficult texts. But neither Hamilton nor Madison tries to consult

87. HAMILTON & MADISON, *supra* note 79, at 12.

88. *Id.* at 11.

89. *Id.* at 12.

90. *Id.* at 59.

91. *Id.* at 59–60.

92. *Id.* at 59.

93. *Id.* at 61 (citing U.S. CONST. art. VI, § 2). Madison is not articulating a general theory of treaties as much as a theory of treaties in a “monistic” jurisdiction (using a later parlance) in which treaties automatically become incorporated into domestic law. The “monistic” approach to treaties differs from a “dualistic” one in which treaties of their own force only create international obligations and are not incorporated into domestic law absent further legislation. Although the Supremacy Clause suggests that the United States follows the monistic model, practice and Supreme Court decisions have confounded any simple monistic/dualistic dichotomy. See D.A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM AND DUALISM (Marko Novakovic ed., 2013); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 94 (2009). For a comparative discussion, see David Thor, *THE INTERSECTION OF INTERNATIONAL LAW AND DOMESTIC LAW* (2015).

“original public meaning” in the sense that modern theorists use that term. Nor could they. They are, after all, among the leading members of the “original public.” They are the ones trying to figure out what the “original public” *should* think. And they put forward their arguments in the service of that project. Moreover, even if Hamilton and Madison did try to shift responsibility to other members of the original public, each of those contemporaneous readers would face the same challenge: to come up with arguments one way or the other on this important and still contentious⁹⁴ constitutional question.

For that matter, it does not even matter to my own argument that Madison and Hamilton, or any members of the original public, disagreed about the President’s authority to abrogate treaties. Even if the members of the original public agreed on a given view of presidential authority to abrogate treaties, they would be basing their conclusions on some set of arguments, however sketchy. And that in turn would require that they adopt, whether explicitly or implicitly, an approach or set of approaches, or a method or set of methods, with which to conduct the search for constitutional and other legal meaning. Those methods or approaches could run the gamut. Those approaches could be intentionalist or object-ist. And if they were object-ist, they could be structural, analytic, prudential, political-philosophical, or whatever.⁹⁵ But the one type of method that members of the original public would not *and could not* employ is one grounded in “original public meaning.”⁹⁶

D. Of Angels and Readers

To put it another way: Supporters of the method of original public meaning sometimes seem to imagine that the original public arrives at the meaning of a text through what medieval thinkers called *intellectus*—immediate, self-

94. See generally Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432 (2018).

95. Members of the original public might also employ historical methods and arguments. As I explain at *supra* note 24, however, historical arguments are not necessarily originalist arguments. And they could not *for the original public* be arguments grounded in “original public meaning.”

96. Interestingly, Richard Primus has argued that original public meaning should be *most* relevant for recently enacted constitutional texts. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 193–95 (2008). That appears to contradict my argument here, but not really. Primus is proposing a normative account of original democratic authority, whose force he argues declines over time. That still leaves open the question of how the original public would come to its original public meaning in the first place. Cf. Mark Graber, *Original Expectations*, 52 CONN. L. REV. 1573, 1580–81 (2021) (arguing that the original public, and not later generations should rely on original *intent*).

evident, cognition.⁹⁷ Meaning arrived at through immediate, self-evident, cognition is just known to be true. Admittedly, some decisions about meaning are the product of immediate, self-evident, cognition.⁹⁸ I will return to that category in Part V. But only angels can reach all their conclusions by immediate, self-evident, cognition.⁹⁹ Most interpretive decisions, including interpretive decisions by the original public, require large doses of what medieval thinkers called *ratio*¹⁰⁰—step-by-step consideration¹⁰¹ or what might loosely be called argument.¹⁰² That need for *ratio* is why the original public needs to choose, and likely argue about, both the best method to figure out the meaning of a text and the implications of that method for any given specific question.

Yet another way of putting it is that, while old-fashioned intentionalism looked to the meaning intended for a text by its *authors*, the method of original

97. C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE* 157 (2012). As noted earlier, one notable exception is Larry Solum, who outlines a more systematic view of how the original public would have reached its own understanding of constitutional texts. See Solum, *supra* note 34. For my brief effort to respond to Solum, see *supra* note 75. See also Fallon, *supra* note 40, at 1426–27.

98. The idea that some layers of meaning can be understood by way of *intellectus*—immediate, self-evident, cognition—echoes Professor Fallon’s observation that some constitutional provisions can have “minimal original meanings.” Fallon, *supra* note 40, at 1430. The two claims are different, however. Fallon points to that subset of constitutional provisions whose meaning is uncontestable. As I use the idea of *intellectus*, however, it refers to a layer of significance present, though often trivially so, in every provision.

99. LEWIS, *supra* note 97, at 157.

100. Pronounced *rātīō*.

101. As C.S. Lewis explains in more detail,

We are enjoying *intellectus* when we “just see” a self-evident truth; we are exercising *ratio* when we proceed step by step to prove a truth which is not self-evident. A cognitive life in which all truth can be simply “seen” would be the life of . . . an angel. A life of unmitigated *ratio* where nothing was simply “seen” and all had to be proved, would presumably be impossible; for nothing can be proved if nothing is self-evident. Man’s mental life is spent in laboriously connecting those frequent, but momentary, flashes of *intelligentia* which constitute *intellectus*.

LEWIS, *supra* note 97, at 157. Josef Pieper further emphasizes that the faculty of mind, man’s knowledge, is, according to antiquity and the Middle Ages, simultaneously *ratio* and *intellectus*; and the process of knowing is the action of the two together. The mode of discursive thought is accompanied and impregnated by an effortless awareness, the contemplative vision of the *intellectus*, which is not active but passive, or rather receptive, the activity of the soul in which it conceives that which it sees. JOSEPH PIEPER, *LEISURE: THE BASIS OF CULTURE* 11–12 (1998).

102. An “argument,” as I understand the term for my purposes here, need not be thorough or airtight. It need not even be fully spelled out. All it needs to do is move beyond raw immediate cognition.

public meaning looks to the meaning ascribed to a text by a group of *readers*.¹⁰³ Readers just like us. Readers in the same position that we today—as readers—find ourselves. Readers facing the same challenge we face in making sense of the text.

IV. THE FABRIC UNRAVELS AND UNRAVELS SOME MORE

So what? Why should this little snag in the tapestry of original public meaning unravel the entire fabric? Why should one tiny spot of incoherence metastasize into something more consequential? My argument has two steps.

A. Mistaken Arguments

i. By Their Own Lights

The first step focuses on the possibility that the original public made a *mistake* in its own reasoning even according to its own lights. Whatever the views of the original public, there will be some potential for tension between the actual methods or approaches used by that original public and our better-considered analysis of where that method or approach should lead. Indeed, it is entirely possible that we might find the original public's reading of a text defective even by the original public's own lights.

Imagine, for example, that the original public were intentionalists. They based their reading on the best evidence they thought they had of the actual intent of authors of the text. But they might have misunderstood that evidence. Or they might not have realized that the evidence they consulted was unreliable. Or they might not have had access to some of the evidence available to us.¹⁰⁴ Should our reading of the text really defer to their obvious misreading?

Or imagine that the original public gave legal texts the best reading they could in the light of their background moral and political theory, as Dworkin or

103. The original authors' understanding of the text they are writing is a raw fact—their intent. The presence of that intent in their mind distinguishes them from all readers—both their own contemporaries and any other later readers. Or maybe even that is not so simple. The original authors are both writing a text *and* reading the text they are writing. Most of us, I think, have experienced reading a set of words we've just written or even as we are writing them and understanding something in those words that was not in our minds before we wrote them. To that extent, the original authors *are* also readers, in the same position as the rest of the "original public." Their "intent" is not just a raw fact but also the product of an interpretation. Moreover, it might be difficult or impossible, even for the authors themselves let alone for the rest of us, to disentangle the authors' intent for the words they are writing from their own contemporaneous reading of those same words. For present purposes, however, I will ignore these complications.

104. As noted *supra* in the text accompanying note 52–53, the possibility that later readers might have evidence of intent that was not available to the original public might be an argument against intentionalism. But I am imagining here a conversation among committed intentionalists.

some “public good” constitutionalists would. But we, reading the same texts today, might justifiably believe that *our* background moral and political theory makes more sense than theirs, as *readers*. Might it not then behoove us, out of respect for the original public’s own method of reading the text, to correct their failures?

In truth, as the debate over Washington’s declaration of neutrality attests, the original public—at least of the Constitution—were neither intentionalists nor Dworkinians. Their interpretive method was much more complex and eclectic. But that only amplifies the problem.

In defending their respective positions about whether Presidents can abrogate treaties without the consent of Congress,¹⁰⁵ Hamilton and Madison each articulates both a theory of executive authority and a theory of treaties. Hamilton sees the executive as the “organ of intercourse with foreign nations” and the management of treaties as integral to that foreign policy authority.¹⁰⁶ Madison, on the other hand, focuses on the President’s duty to execute the laws and emphasizes that treaties, much like statutes, are part of the supreme law of the land.¹⁰⁷ Hamilton and Madison also, however, articulate textual, structural, and quasi-syllogistic arguments that act as both ground and prooftext for their more theoretical generalizations.¹⁰⁸

A modern reader examining the Pacificus-Helvidius debates might easily find one or another (or both) of these positions unconvincing. The problem might be with the general theory. Or it might be with some of the more specific textual claims buttressing the theories. Or it might be with the connections that the two antagonists try to draw between their general theories and their more specific interpretive moves. The overall argument might not bear the weight claimed for it, or it might not cohere, or it might suffer from any variety of gaps or infelicities.

So could the modern reader, in trying to make sense of the same constitutional problems that Hamilton and Madison faced, simply ignore those lapses in reasoning? Would that even do justice to the sort of debate in which Hamilton and Madison claimed to be engaged? No.

Moreover, as I suggested earlier, the possibility that the original public erred is still in play even if the original public happened to have reached a consensus on this or any other question of interpretation. Whatever the original public thought, we—their modern interlocutors—might still conclude that the arguments that led them to that consensus were mistaken or incomplete even

105. *See supra* notes 77–95 and accompanying text.

106. HAMILTON & MADISON, *supra* note 79, at 56.

107. *Id.* at 61.

108. *See generally id.*

using the same method or mix of methods or approach to legal interpretation as the original public itself.

ii. Of Meanings and Results

Something like the instinct I have just outlined helps motivate the proposal of some original public theorists to look to generalized original meaning rather than original expected results as the ground for our own interpretive enterprise.¹⁰⁹ Notably, even this concession already produces a much less punchy version of the original public meaning approach, indeed one that begins to lose the sheen of disciplined fidelity that made originalism seem so attractive in the first place.¹¹⁰ But I actually have in mind a much more far-reaching argument.¹¹¹ A reader today might, applying the original public's own approach to interpretation, not only disagree with that original public's view of the expected results of specific constitutional disputes, it might also go much further back in the chain of reasoning, disagreeing also with the original public's conclusions about the underlying constitutional meanings that might motivate any given set of results. Moreover, to the extent that the original public was eclectic, subtle, and even entirely tacit in its choice of interpretive methods or approaches, a modern reader would have even greater latitude—in practice, sweeping latitude—to disagree with the original conclusions of the original public.

B Mistaken Approaches

But that is only the beginning of the story. A more interesting and severe challenge still lurks. As I have emphasized, when *we* are the original public trying to make sense of a contemporaneous legal provision, the one method of interpretation that we cannot use is the theory of original public meaning. That means that in interpreting those contemporaneous provisions, we must take on board and believe in some other approach. And that approach, whatever it is, will sit on our shoulder and nag in our ear even when we are trying to interpret

109. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 6–12 (2011).

110. See SEGALL, *supra* note 40, at 177–79 (2018); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 716 (2011).

111. My argument thus far might seem to come closer to the “original methods originalism” proposed in John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *N.W. U. L. REV.* 751 (2009). For another account along similar lines, see Stephen E. Sachs, *Originalism Without Text*, 127 *Yale L.J.* 156, 158 (2017). It differs from it in several respects, however. For one thing, McGinnis and Rappaport want to discover and apply original interpretive rules. I am more interested here in overall interpretive methods, so that it is entirely possible that we as modern readers might disagree with the original public even as to their derivation of those rules from their own methods.

a non-contemporaneous text. If we ourselves, as the original public for our own contemporaneous texts, have found a method for interpreting contemporaneous legal texts that we judge to be normatively compelling and suited to its purpose, what would require us to give up that method when we are interpreting an older text?

Consider, then, a present-day reader of legal texts.¹¹² That reader might be sympathetic to the theory of original public meaning for interpreting older legal texts. Or not. In either event, resort to original public meaning will not work for interpreting contemporaneous texts. So, to grapple with those contemporaneous texts, the reader will need to adopt and hold in reserve some *other* approach or method or set of approaches or methods. This choice might be explicit or tacit. It does not even have to be self-conscious. But if the choice of method or approach is to have any integrity, it cannot be random. It will entail some deeper view—express or implied—about the nature of constitutional or other legal texts or what it might mean to read and interpret such texts.

Imagine, then, a reader who is an intentionalist with respect to contemporaneous texts. That suggests some inclination to understand legal enactments as most akin to direct interpersonal communication, proxies in some sense for the underlying communicative intention of the author. Why would that same reader have a different understanding of the nature of legal enactments because the communication comes from an author who lived in the past?

Or imagine a reader who is a Dworkinian for contemporaneous legal texts. That suggests a deep view that legal texts need to be read in a way that best fits both the imperative of the words themselves and the background of moral and political principle that help give law its normative life. Why should such a reader abandon that view for a different method or approach just because the texts at issue are older?

A similar question can be asked about any other method or approach to which a present-day reader might be drawn for contemporaneous texts. And it could be asked as urgently even for more eclectic approaches—the bailiwick of ordinary traditional lawyers and judges—that might seem on the surface less jurisprudentially committed. For as Phillip Bobbitt and Dennis Patterson have pointed out,¹¹³ the deep philosophical claim at the heart of such ordinary traditional eclecticism is that legal meaning is less a matter of discerning a legal truth waiting to be discovered than of making legal arguments in a variety of modes as dictated and constrained by the lawyer's craft. In this view, legal

112. I refer to a single reader for the sake of convenience. I might as easily refer to an interpretive community.

113. See BOBBITT, *supra* note 30, at 6–7; PATTERSON, *supra* note 25, at 16–17.

meaning is *constituted* by legal argument. Therefore, the eclectic lawyer, as much as anybody else, would need to wonder why he or she should shift to a radically different way of doing law simply because the law in question is not contemporaneous.

The problem can be put more starkly. I have been speaking loosely of “contemporaneous” legal texts. Presumably, that term extends to legal texts enacted in the recent past.¹¹⁴ Intentionalists, for example, would apply their intentionalist methods to provisions enacted today. And they would apply those methods to legal texts enacted yesterday or a year ago. But what about five years ago? Ten years ago? A hundred years ago? At what point should they feel compelled to turn off the method they have adopted for contemporaneous texts, which by hypothesis make considerable sense to them, and switch to the theory of original public meaning? My point here is not that they could not draw a line in time. That claim would be too strong, succumbing to a common philosophical fallacy.¹¹⁵ The relevant question, rather, is why the reader would ever find a *reason* to switch.

So, if we (and not merely some hypothetical reader or readers) really believe that whatever method of interpretation we bring to contemporaneous texts is analytically sound, normatively compelling, practical, and well-suited to the special characteristics of legal texts, why should we ever abandon it? Why wouldn't we at least always be feeling a tug of war between the theory of original public meaning and that other method of interpretation that nags in our ear?

V. OLD TEXTS IN NEW BOTTLES

A. Moving Along the Timeline

Employing the method of original public meaning to interpret older legal or constitutional enactment is not impossible. But to win the tug of war against whatever other method or approach to interpretation is our default for contemporaneous enactments, and to overcome the arguments outlined in Part III, a justification of original public meaning must do two things. First, it must not contradict the assumptions built into whatever method we use in reading contemporaneous legal texts. Second, it must precisely explain why the passage of time changes the equation: why we should give up that default method when dealing with older texts.

114. *Cf.* Primus, *supra* note 96.

115. *See* Dominic Hyde & Diana Raffman, *Sorites Paradox*, in STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta, ed., 2018), <https://plato.stanford.edu/archives/sum2018/entries/sorites-paradox> [<https://perma.cc/S9TP-E8X9>].

Consider, *only by way of analogy*, Professor Mark Graber's argument that constitutional texts should be read immediately after ratification—"on day one"—according to the intentions of their authors and the expectations of their original readers but that later generations—"at day ten"—applying the same texts should employ purposivist or doctrinalist methods of interpretation.¹¹⁶ Professor Graber's view is interesting and coherent, whether or not one agrees with it. It is not directly on point to my discussion here; as I said, I cite it here only by way of analogy. For one thing, Graber is not defending original public meaning theory. Quite the contrary. More important, he is hypothesizing a sequence of readers successively interpreting the same text at various times, while the argument I am looking for would imagine the same reader, situated right now in time, interpreting successively older texts. But Graber does illustrate the sheer conceptual possibility of methods of interpretation differing with the distance in time between text and reader.

The challenge, therefore, would be to devise a satisfying argument for why readers "at a day many tens of thousands of days later" (riffing on Graber's language) should abandon the method of interpretation they use for contemporaneous texts in trying to find meaning in older texts. It is worth repeating the two criteria that such an argument should satisfy: First, it must not deny or contradict the assumptions built into whatever otherwise-compelling method we use in reading contemporaneous legal texts. Second, it must precisely explain why the passage of time changes the equation: why we should give up that default method when dealing with older texts.

Some of the usual defenses of original public meaning do not pass these tests. It will not do, for example, to suggest that the meaning of a legal text simply *is* the original public meaning.¹¹⁷ Nor does it make sense to argue that the authority of original public meaning is built into the very idea of law or of written law.¹¹⁸ In fact, this point suggests a third, latent but important, criterion for a suitable defense of original public meaning: It must not resort to question-begging; to repeat: it must not reduce to the claim that the meaning of a legal text just *is* its original public meaning.

It also will not work to claim that the original public (whether all of them or a subset) are in some sense the unchallengeable adjudicators of the meaning of legal text. That is not how we think of ourselves (or our judges) with respect to contemporaneous texts. Nor does it explain why we should displace the default method of interpretation that is sitting on our shoulder and continues to whisper or even nag insistently in our ear.

116. See Graber, *supra* note 96, at 1581, 1590, 1591.

117. Solum, *supra* note 34, at 1957.

118. See generally WURMAN, *supra* note 11.

With all that said, though, some arguments might still be on offer. Consider two.

B. Of Readers, Authors, and Contracts

i. Constitution as Contract

One strategy might be to try to sidestep my claim that the original public were “readers just like us.”¹¹⁹ Consider the possibility that the original public were not merely readers, but in a sense also *authors*. The best way to operationalize this idea would be to posit that legal texts are in some sense the products of a contract or covenant to which not only legislators or ratifiers were parties, but the broader public as well.

As a general matter, this account would seem to fail at least one of the criteria I just set out: it is not consistent how we read contemporaneous legal texts. Generally, we think of contemporaneous laws as just that—laws—not as contracts.¹²⁰

Maybe, though, this would be a place to distinguish more precisely between ordinary laws and constitutional provisions. Ordinary laws emerge from the ordinary work of legislatures. But Constitutions—by virtue of being constitutions—might be the product of a “high politics” in which the entire polity is engaged.¹²¹ And that might suggest reading constitutional texts as grand contracts to which the entire public are signatories of a sort.¹²²

119. *See supra* p. 26.

120. The exceptions that prove the rule are so-called “legislative contracts” whose abrogation might be unconstitutional under the Contracts Clause of the Constitution, U.S. Const. art. I, § 10, cl. 1. *See* *Am. Smelting & Refining Co. v. Colorado*, 204 U.S. 103, 104 (1907); Perry Dane, Allan R. Stein & Robert F. Williams, *Saving Rutgers-Camden*, 44 RUTGERS L. J. 337, 382–89 (2014); *cf.* *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (holding that challenged statute was not a legislative contract). But these sorts of statutes are rare. *Id.* (“[T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.”) (emphasis added). More important, legislative contracts are pacts that the legislature enters into with specific rights-holders, not with the “original public” at large.

121. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 230 (1991); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1070 (1984). This notion of high politics is central to Professor Ackerman’s arguments about “dualist democracy” and the Constitution. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461 (1989).

122. For an important, qualified defense of this analogy, see BARNETT, *supra* note 41, at 100. *Cf.* Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional*

This chain of arguments is frail. As others have pointed out, to think of the Constitution as a “social contract” in a broad political sense does not mean that its specific provisions should be interpreted as if they constituted actual contractual language.¹²³ Indeed, there is arguably a certain tension between understanding the nation as grounded in a “social contract” and imagining that the Constitution itself is a sort of contract.¹²⁴ But it might still be worth taking the constitution-as-contract analogy seriously, for the sake of argument, and seeing whether it gets us far.

I propose that it does not. Consider this peroration from the landmark joint opinion in *Planned Parenthood v. Casey*,¹²⁵ upholding in its time the continued vitality of *Roe v. Wade*:¹²⁶

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. . . . Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.¹²⁷

Interpretation, 58 S. CAL. L. REV. 551, 583–87 (1985) (discussing but refuting the “argument from contract”). Whether Bruce Ackerman’s ideas about “high politics” and “dualist democracy,” see ACKERMAN *supra* note 121, translate easily into the Constitution-as-contract analogy is an interesting question. Michael Greve has argued that Ackerman’s argument reflects “our contractarian constitutional tradition,” Michael S. Greve, *The Originalism That Was, and the One That Will Be*, 25 YALE J.L. & HUMAN. 101, 103–04 (2013), but “contractarian” does not necessarily mean “contract-like,” *cf. infra* text accompanying note 123. In any event, Greve argues that “conventional originalism does not want to defend the contractarian tradition (let alone respond to those who attack it), for fear that the enterprise might pull judges away from a readable text into natural law abstractions and aspirations.” Greve, *supra* at 104.

123. See Paul Lermack, *The Constitution Is the Social Contract So It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1405 (2007).

124. *Cf.* Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2317–19 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (1993)) (collecting cases invoking social contract theory; noting the nineteenth century Supreme Court most often called on social contract theory to strike down legislation when no constitutional language clearly controlled). The most famous instance of reading social contract principles into the Constitution (as distinguished from understanding the Constitution as a contract) might be *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (explaining that a statute that violates “the great first principles of the social compact[] cannot be considered a rightful exercise of legislative authority”).

125. 505 U.S. 833 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

126. *Id.* at 846.

127. *Id.* at 901.

The remarkable thing about this passage for our purposes is that it employs the idea of the constitution-as-contract, not to buttress anything like a reading based on “original public meaning,” but to support a different, evolutionary, view of constitutional interpretation. The opinion might have been using the contract idea metaphorically. That might have been one reason for speaking of the Constitution as a “covenant” and not just a “contract.”¹²⁸ Nevertheless, this example points to deeper conundrums.

Comparing constitutions to contracts might shift the frame of arguments about methods of interpretation and their implications. But it does not resolve those arguments and might even complicate them.

ii. The Real Original Public

Traditionally, approaches to contract interpretation have been described as either “subjective” or “objective,” or some combination.¹²⁹ The subjective approach looks to the actual intent of the parties. The objective view tries to discern the meaning of the contract apart from what the parties might have thought about it. Recall, though, that the point of this exercise is to get some purchase on the idea that the “original public” for the Constitution were authors and not just readers. For that purpose, the objective view just kicks us back to the question that got us on this road in the first place: how do we read the “objective” meaning of the Constitution? We therefore need to imagine ourselves, even against our better inclinations, as taking a “subjective” view of contract interpretation, which is to say being contract intentionalists. Only from that perspective would the views of the original public, not as readers but as authors, have a special hold on us.

I have, please note, already built in so many more working assumptions that the whole exercise might be tottering on the point of collapse. But let us continue. There are more serious problems.

128. The idea of “covenant” also has deeper political and theological resonances that might be especially relevant to the sort of contract that the Constitution is supposed to be. *See generally* DANIEL J. ELAZAR, COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY (1998); Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 PUBLIUS 101, 107–09 (1980); Neil Riemer, *Covenant and the Federal Constitution*, 69 PUBLIUS 135 (1980); John Witte, Jr., *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579 (1987). For some helpful discussions of the Jewish idea of a covenanted community, see, e.g., DAVID HARTMAN, A LIVING COVENANT (1985); DAVID NOVAK, THE JEWISH SOCIAL CONTRACT: AN ESSAY IN POLITICAL THEOLOGY (2006).

129. *See* JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 4.12 (2020); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000). The details of this debate and of critiques of the distinction itself are outside the scope of this Article. Most courts, though, purport to follow the “objective” approach.

We could define the original partners to the constitutional contract to include all Americans living at the time. Or we could define them more narrowly to include, say, only persons entitled to vote. Even if, for the sake of argument and ignoring the corrosive moral implications,¹³⁰ we were to adopt the narrower definition, that set of persons would be large and amorphous. And most of what they thought about the meaning of the Constitution would likely have been sketchy at best. Indeed, it is hard even to imagine that the broad original public had any view at all of, say, the technical provisions of Article III of the Constitution or the details of the Presentment Clause or even the meaning of “Privileges and Immunities.” Thus, with respect to major pieces of the Constitution, it is wrong, except in a fictional sense, to imagine that the broadly defined original public did or could have had any genuine *authorial* intent.¹³¹

More starkly, if the original public did have any views at all on certain provisions of the Constitution or its amendments, they might have had views radically at odds with the reigning legal tradition, then or now. Consider, for example, that repeated public opinion polls suggest that today’s public evinces

130. It would be factually wrong and philosophically scandalous, for example, to assume that women, persons of color, and others excluded from the franchise had no views worth noticing about the meaning of the Constitution. Imagine, for example, if slaves or free Blacks at the time of the drafting of the Constitution had been allowed to articulate the view, later developed by the ex-slave Frederick Douglass, influenced by the abolitionist Lysander Spooner, that the original Constitution was at its heart an “anti-slavery” document. *See* Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Speech before the Scottish Anti-Slavery Society, Glasgow, Scotland (March 26, 1860), *reprinted in* Frederick Douglass, *The American Constitution and the Slave*, *in* THE SPEECHES OF FREDERICK DOUGLASS: A CRITICAL EDITION 151 (John R. McKivigan, Julie Husband & Heather L. Kaufman eds., 2018); LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1860). *See generally* JAMES OAKES, *THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION* (2021). Similarly, imagine if we were to consult the views of women in the early Republic, with their newly engaged political consciousness, on the meaning of the constitutional text. *Cf.* LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT & IDEOLOGY IN REVOLUTIONARY AMERICA* (1986).

131. *Cf.* Fallon, *supra* note 40, at 1429 (“I know of no originalist who has worked out a methodology for calculating how many citizens of the past qualified as sufficiently informed to judge the meanings of particular constitutional provisions competently, for identifying how many had one understanding of a disputed provision in comparison with another, and for resolving disagreements by one or another numerically-based protocol.”); *id.* at 1445 (stating that public meaning originalism’s “practitioners characteristically if not invariably reach their conclusions about particular provisions’ original meanings without pausing to tally the number of those actual historical people who held alternative views and without furnishing a method for determining how many actual people would have had to converge on an interpretation for it to count as the historically correct one”).

a crabbed or just misdirected understanding of much of the Bill of Rights.¹³² It is likely that a similar poll taken among the members of the actual original public at the time of the enactment and ratification of the Bill of Rights would not have yielded entirely different results.

Many original public meaning theorists argue that the original meanings they have in mind are the views of real or hypothetical reasonable, well-informed, or legally astute members of the original public.¹³³ More empirically-grounded original public meaning theorists might focus on written sources such as dictionaries or newspapers or the *corpus linguistics*.¹³⁴ Neither of these approaches, however, can claim to capture the true understandings, let alone the *zeitgeist* of the broader original public.¹³⁵

If we treat the original public as *readers*, it might seem right to demand that they be reasonable, competent readers. That is, after all, what we would demand of ourselves as readers of contemporaneous texts. It might even make sense to focus on only a tiny subset of readers. But if we want to understand the original public to have been in some sense the *authors* of the constitutional text, and if we want to be intentionalists in our reading of the constitution-as-contract, then we would need to have the courage of our convictions and try to unearth, reconstruct, or guess the real views of the actual public. We cannot have it both ways.

iii. Contracts and Their Landscapes

There is one last problem with the constitution-as-contract hypothesis. Contracts, whether read “objectively” or “subjectively,” are not creations *ex nihilo*. Parties enter contracts against a legal background that fills in the terms

132. See, e.g., Marvin Ammori, *Public Opinion and Freedom of Speech* (John S. and James L. Knight Found. Info. Soc’y Project at Yale L. Sch. White Paper), https://law.yale.edu/sites/default/files/documents/pdf/Public_Affairs/ISP_PublicOpinion_fos.pdf [<https://perma.cc/BH3B-D7TS>]. The Freedom Forum has for years conducted periodic surveys on American beliefs about First Amendment rights, some of which are dramatically mistaken. See, e.g., FREEDOM FORUM, THE FIRST AMENDMENT, WHERE AMERICA STANDS 10 (2020), <https://survey.freedomforum.org/content/uploads/2021/09/Freedom-Forum-Downloadable-Report.pdf> (72% of respondents would ban political ads with falsehoods); *id.* at 13 (74% of respondents “incorrectly said that private workplaces are held to the First Amendment”); *id.* at 14 (“[56%] say students can be required to recite the pledge of allegiance at school.”); 2022 Update: *First Amendment Sparks — And Could Bridge — Divides*, FREEDOM F., <https://survey.freedomforum.org/2022-update/> [<https://perma.cc/KRE8-72SS>] (last visited March 17, 2023) (March 2022 update found that, for example, that nearly two-thirds of the sample “say that the First Amendment does not protect the false claims of politicians.”).

133. See *supra* note 69 and accompanying text.

134. See *supra* note 62 and accompanying text.

135. For a similar argument, see John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N. U. L. REV. 773 (2013). See also Fallon, *supra* note 40, at 1475.

that they do not explicitly record. We might imagine that the Constitution is different. But that would be implausible on its own terms and would in any event weaken the force of the analogy. In fact, it makes sense to think that a good deal of what we call constitutional interpretation—even if we reject the constitution-as-contract metaphor—is an effort to make sense of the legal landscape in the background of the constitutional edifice.¹³⁶

We therefore return once more to same problem with which we began. Original public meaning theorists might argue that the background legal landscape needs to be understood in terms of original public meaning. But, again, that begs the question. Any consideration of the backdrop to constitutional meaning will include some attention to history. But not necessarily in the way that original public meaning theorists would look to history.¹³⁷ And not necessarily to the exclusion of other considerations.

C. Stability and Its Uncertainties

Thinking of constitutions as contracts led down some interesting paths, but none that should convince readers today to give up their preferred method of legal interpretation of contemporaneous texts in favor of the method of original public meaning for older constitutional texts. But there might be a more basic argument.

Maybe the key is to focus directly on the problem of the passage of time, and posit, as some advocates for original public meaning have, that the point of the method is to *fix* or hold steady the meaning of a legal text and insulate it

136. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012). I have pointed out elsewhere that to imagine otherwise is to succumb to “constitutional glare,” the temptation to treat the Constitution as a self-sufficient fount of all legal values rather than as one piece of a larger legal and normative landscape. See Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 86–87 (2016); Perry Dane, *Judaism, Pluralism, and Constitutional Glare*, 16 RUTGERS J. LAW & RELIG. 282, 289–90 (2015).

137. See *supra* note 24 and accompanying text.

from change by later generations.¹³⁸ This account comes closer to being plausible, but not close enough.¹³⁹

i. Ontological Stability

Notice first that there is a difference between what I will call “ontological” stability of meaning and a more practical or expressed stability of meaning. By “ontological,” I mean real or essential. For example—and without endorsing a straightforward analogy between natural phenomena and legal texts—many philosophers would argue that the “meaning” of “water” included “H₂O” even before anyone had discovered the chemical composition of water.¹⁴⁰ If we have in mind this sort of pure ontological stability of meaning, then most object-ists might endorse the idea that the meaning of the Constitution does not change as long as we are willing to concede both that the original public might have been wrong about that meaning and that the true meaning of some constitutional provisions might be (a) open-textured, (b) tied in complex ways to ongoing larger webs of meaning, (c) invite further development in the light of experience and the demands of the day, or (d) refer to moral or other truths akin in this sense to physical “natural kinds” such as water.¹⁴¹

This is plain even in the thought of our most prominent exponents of evolving constitutional meaning. Justice William J. Brennan, Jr., for example, in his famous lecture on the “contemporary ratification” of the United States Constitution, emphasized that the “encounter with the Constitutional text has been, in many senses, my life’s work.”¹⁴² He insisted that he was engaged in the public act of interpreting the text and not merely engaged in moral

138. WURMAN, *supra* note 11, at 61; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015); Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. L. Rsch. Paper No. 07-24), <https://ssrn.com/abstract=1120244> [<https://perma.cc/M573-H77L>]. There are some additional arguments for all forms of originalism that, although related to the fixity thesis, are distinct from it and for that matter from each other. These include claims that originalism tempers “judicial activism” (however defined) or that it constrains judicial discretion. The obvious problem with such arguments is that if curbing judicial activism or judicial discretion are understood as ends *in their own right*, there might be far more effective ways for achieving one or both of those ends, including limiting judicial review, applying a strong presumption of constitutionality, enshrining determinate canons of construction, or adhering more strictly to the norm of *stare decisis*.

139. For an argument similar in some respects to mine here, see Ash McMurray, *Semantic Originalism, Moral Kinds, and the Meaning of the Constitution*, 2018 B.Y.U. L. REV. 695 (2018).

140. See SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980).

141. See Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2441–42 (1992).

142. Brennan, *supra* note 27, at 1. I should add, in the interest of full disclosure, that I clerked for Justice Brennan. See generally Perry Dane, *Law Clerks: A Jurisprudential Lens*, 88 G.W. L. REV. ARGUENDO 54 (2020).

introspection.¹⁴³ He affirmed that the Constitution as written “embodies substantive value choices.”¹⁴⁴ But he also argued that to “remain faithful to the content of the Constitution, . . . an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances.”¹⁴⁵ And he concluded that the “genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”¹⁴⁶

Put another way, most legal interpreters of any persuasion, even if they reject the lure of a “static meaning,” are still looking for the “original” meaning in an ideal ontological sense. They only disagree about how to discover that ideal meaning.¹⁴⁷ Therefore, with respect to *ontological* stability of meaning, resorting to the theory of original public meaning is, again, question-begging.

ii. Practical Stability

That does leave the second possibility—a more practical or expressed view of stability of meaning. From this perspective, the point is not that the essential ontological meaning of the Constitution or another legal text should be “fixed” but that its *interpretation* should be “fixed” or at least not change wildly over time. If stability is not understood in ontological terms, however, then there is little reason to think that only the views of the original public can legitimately or successfully anchor that stable interpretation. In fact, some originalists argue that in some instances later “discussions and adjudications” could establish or

143. Brennan, *supra* note 27, at 1–2.

144. *Id.* at 6.

145. *Id.* at 6.

146. *Id.* at 7. Another variation on ontological stability is suggested by the “living tree” principle in Canadian constitutional law and the “always speaking” doctrine in United Kingdom statutory interpretation. See *supra* note 28 and accompanying text. These metaphors compellingly suggest that a legal text can, in some sense, exist in an eternal present such that succeeding generation of interpreters can understand themselves as among the members of the “original public.” Cf. Frederick Marc Gedicks, *The “Fixation Thesis” and Other Falsehoods*, 72 FLA. L. REV. 219, 219 (2020) (“Philosophical hermeneutics maintains that the meaning of any text is constituted by the present as well as the past. If this claim is true, then the fixation thesis must be false because the original public meaning of the Constitution could not exist in the past as a fact unaffected by the present.”)

147. One exception would be certain purely unqualifiedly pragmatic and consequentialist approaches such as RICHARD POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* (2017); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006). I am not suggesting that all pragmatic or consequentialist approaches to legal interpretation are inconsistent with ontological originalism.

“liquidate” the settled meaning of constitutional provisions.¹⁴⁸ The deeper point, though, is that stability in this sense is a necessarily complex and dynamic idea. Rightly understood, it should consider not only temporal priority but also other considerations, including the degree of official authority supporting an interpretation and the degree to which an interpretation has made its way into the broad brushstrokes of our legal landscape. Thus, for example, if we really want to stabilize constitutional or other legal meaning—without assuming that the only way to do so is to look to original public meaning—then we might want to look to a long-settled judicial doctrine in preference to the earlier scattered and unimplemented views of assorted members of the “original public.”

Supporters of theories of original public meaning have struggled with the relevance of nonoriginalist judicial precedents to their account of constitutional and legal meaning.¹⁴⁹ The point I am making here, though, is that the idea of

148. WURMAN, *supra* note 11, at 95. The term “liquidation” is taken from James Madison’s account in the *Federalist Papers* and elsewhere about how constitutional interpretation was to proceed. *Id.* See also William Baude, *Constitutional Liquidation*, 71 STANFORD L. REV. 1, 4 (2019). In Professor Baude’s reading of the idea, genuine “liquidation” in the Madisonian sense required three key elements: an initial indeterminacy in the constitutional language, a course of deliberate practice, and general acceptance of the meaning as “liquidated.” *Id.* It is easy to imagine, though, a less constrained version of the principle.

149. See, e.g., SCALIA, *supra* note 47, at 140 (“[S]tare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.”); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (arguing that, although it “is not incompatible with original public meaning originalism to adhere to precedent,” in certain specifically defined classes of cases, including non-constitutional cases and cases involving “detrimental reliance by identifiable individuals,” it is, and that apart from those exceptions, where “a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place”); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 N.W. U. L. REV. 803, 836–38 (2009) (originalists should not overrule conflicting precedents when doing so would yield especially disruptive results or when the precedents uphold principles that would likely be supported by constitutional amendments if those precedents did not exist); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (deference to erroneous precedents “undermines—even refutes—the premises that are supposed to justify originalism”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 N.W. U. L. REV. 923, 963 (2009) (“[I]f originalism is limited to these rare cases of unconstrained inscription, then originalist constitutional interpretation is likely to have very little to say about the most important constitutional controversies of our age.”). For a brief survey of the range of views held by supporters of original public meaning theory, see Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147 (2012) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); JACK M. BALKIN, *LIVING ORIGINALISM* (2011)). For a sympathetic but critical effort to tease apart the various considerations that might be relevant to whether historical evidence should override precedent or settled practice, see Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1827–31 (2015).

stability of interpretation and the doctrine of precedent are *both* part of a larger value of legal stability deeply embedded in the Anglo-American concept of the rule of law.¹⁵⁰ And that should in turn remind us that, as we know from our constant debates about *stare decisis* in specific contexts, the principle of legal stability, however important, is not absolute; it necessarily competes with other values that are equally vital to the rule of law and our understanding of the legal imagination.

Of course, the most consistent and uncompromising supporters of theories of original public meaning are *not* concerned about legal stability in this broad practical sense.¹⁵¹ They really *are* committed to what I called ontological fixity. As often as not, in fact, their goal is to upset settled precedents and long-held stable assumptions in favor of what they consider to be a purer original understanding. Hence the title of Randy Barnett's book, *Restoring the Lost Constitution*.¹⁵² And hence Justice Clarence Thomas's bracing, intellectually provocative, and self-consciously radical efforts to convince the Supreme Court to revise its long-held views of a variety of foundational constitutional doctrines.¹⁵³ But, as I have emphasized, commitment to ontological stability

150. The principle of legal stability in constitutional interpretation, correctly understood, is not only a prudential virtue, but itself a constitutional responsibility basic to the role of courts in the separation of powers. *Cf.* Philip James Sales, Lord Sales, Presentation at Public Law Conference in Dublin, Ireland (July 8, 2022), <https://www.supremecourt.uk/docs/lord-sales-long-waves-of-constitutional-principle-lecture.pdf> [<https://perma.cc/MZY6-RQMR>] (discussing constitutional change and stability in the British context). Thus, contrary to the views of some judges and commentators, the conflict in many cases is not between fidelity to the Constitution, on the one hand, and adherence to prior court decisions, on the other. Rather, the tension is between fidelity to two different constitutional provisions – the provision being interpreted and the requirement embedded in Article III to maintain a pace of change consistent with the proper role of a judge.

151. *See, e.g.*, Barnett, *supra* note 149, at 269; Paulsen, *supra* note 149, at 289; *cf.* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 363 (2013) (“[F]ar from constraining judges, a turn to new originalism could liberate judges from the shackles of current constitutional doctrine. . . . Accordingly, a shift to the new originalism, away from common-law interpretive practices, would yield great legal uncertainty, as it would reopen long-accepted precedents for reexamination on the grounds that those precedents are inconsistent with original public meaning.”); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 516 (1996) (“Originalism . . . entails the potential for radical discontinuities in interpretation—and hence unequal treatment and unpredictability.”); Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y 159, 173 (2009) (“[O]riginalism [can be] a source of instability and not of discretion-confining rules.”).

152. BARNETT, *supra* note 41; *see also, e.g.*, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 334–36 (2004); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1687–88 (2017).

153. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due

does not—contrary to the polemics of Barnett, Thomas, and others—require belief in the method of original public meaning.

iii. The Bind

To sum up, the problem is this: The most insistent and interesting supporters of the theory of original public meaning are seeking what I have called ontological stability. But they wrongly assume that ontological stability requires adherence to original public meaning. Original public meaning *might* be more obviously relevant to what I have called practical or expressed stability. But practical or expressed stability, rightly understood, also depends on considerations other than original public meaning. And—as the defenders of the method of original public meaning are often the first to insist¹⁵⁴—the value of practical stability itself is in both practice and theory defeasible in a system of law that is interested in correct results and not merely consistency of results.

VI. THE GERM OF TRUTH

A. Intellectus

The search for original public meaning cannot be the method that an original public uses to interpret contemporaneous legal enactments. Nor should

process decision is ‘demonstrably erroneous,’ we have a duty to correct the error established in those precedents.”) (internal citations omitted); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211–12 (2020) (Thomas, J., concurring in part and dissenting in part) (urging the Court to overrule its landmark separation of powers decision in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1423 (2020) (Thomas, J., concurring in the judgment) (rejecting the Supreme Court’s longstanding practice of incorporating individual rights against the States by way of the Due Process Clause of the Fourteenth Amendment and arguing that the proper vehicle for incorporation is the Fourteenth Amendment’s Privileges or Immunities Clause); *Town of Greece v. Galloway*, 572 U.S. 565, 604–07 (2014) (Thomas, J., concurring) (restating his long-held view that the Establishment Clause is a federalism provision that should probably never have been “incorporated” under the Fourteenth Amendment to apply against the States); *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (arguing that the Commerce Clause’s “text, structure, and history all indicate that, at the time of the founding, the term ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes”) (internal citations omitted); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (arguing that the “‘substantially effects’ test under the Commerce Clause is ‘inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases’”). See generally *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (“In my view, the Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. . . . We should restore our *stare decisis* jurisprudence to ensure that we exercise ‘mere judgment,’ which can be achieved through adherence to the correct, original meaning of the laws we are charged with applying.”).

154. See sources cited in *supra* note 151.

it be, for the reasons I have discussed, the method we use to interpret older enactments. But, like most mistaken theories, it has a germ of truth. A wee germ of truth. One specific dimension of original meaning, narrowly defined, needs to play some extremely limited role in legal interpretation. That limited role concerns those aspects of the meaning of specific words that in their original understanding were held as matters of immediate, self-evident, cognition—in the medieval terminology, *intellectus*.¹⁵⁵ I am talking, in other words, not of the “original public meaning” of ideas or clauses or doctrines or even reasoned definitions, or anything that required argument, but of that layer of meaning that just popped into the head. Such immediately cognizable meanings are relevant because *any* theory of interpretation must at some point recognize the role of the pre-interpretive, if contextual, range of possible meaning of the words that it is looking to interpret.¹⁵⁶

B. The French Connection

Consider the problem this way: Imagine you are a judge, scholar, or citizen looking to interpret, not the United States Constitution, but the French Constitution.¹⁵⁷ And imagine that you do not know French. The first thing you should do is learn French well enough to appreciate the possible range of meanings in relevant contexts of the various words used in the French constitution.¹⁵⁸ It would also help to get a French legal education. But at a minimum you would have to learn French.

This is true regardless of your interpretive method because (virtually) any interpretive method or approach must at some point consider words. Thus, for

155. See *supra* notes 97–99 and accompanying text.

156. By specifying the “contextually sensitive” range of possible meanings, I am acknowledging that, even at the level of pre-interpretive *intellectus*, words do not necessarily exist in isolation from the context in which we find them. The range of possible meanings that might pop into our head without reasoning or argument will sometimes depend on the context in which those words appear.

157. LA CONST. Although the current French Constitution is a relatively contemporaneous document, some of its language dates to earlier versions. For purposes of my argument here, however, I will just ignore the potential confounding variable of time.

158. Notice that it would not be sufficient just to obtain a translation of the French text into English. It is a truism that also happens to be true that every translation, however faithful and well-crafted, is already an interpretation. See, e.g., KARL POPPER, UNENDED QUEST: AN INTELLECTUAL AUTOBIOGRAPHY 21 (2005); LAWRENCE VENUTI, CONTRA INSTRUMENTALISM: A TRANSLATION POLEMIC (2019). The classic broader philosophical argument emphasizing the “indeterminacy of translation” is W.V.O. QUINE, WORD AND OBJECT 23–71 (1960). Moreover, even if we could magically ignore the element of interpretive choice in every translation, the fact remains that those intentions are not just thoughts in the air—they must be *about* the words that the author used. Similarly, an object-ist, though rarely ending the analysis with many for words and phrases, even the best translation would have a different range of possible meanings than the words or phrases in the original French text.

example, though an intentionalist cares about the subjective intentions of the authors of a legal provision, those intentions are not just thoughts in the air – they must be *about* the words that the author used.¹⁵⁹ Similarly, an object-ist, though rarely ending the analysis with the words of a legal provision, cannot ignore those words. Indeed, even to argue, as a certain sort of object-ist might, that particular terms are “majestic” or open-textured enough to invite or demand the reader’s further hermeneutical reasoning¹⁶⁰ requires enough knowledge of the language to appreciate that those terms *could* be open-textured majestic generalities.

The point of the analogy to the French Constitution, of course, is that the English of some 230 years ago, or some 150 years ago, is also to some extent a foreign language. It is much less foreign than French, and that matters a lot. But sometimes its foreignness can be obscured precisely because the words *seem* the same.¹⁶¹ Moreover, it is hard to imagine a twenty-first-century reader becoming entirely “fluent” in eighteenth-century English.¹⁶² Indeed, total fluency might be difficult given that eighteenth-century English is, to the extent (*though only to the extent*) of its foreignness, no longer a living language. We cannot learn it the way we learn other foreign languages, by interacting with native speakers and internalizing the “dynamic theories that are modified on the fly by speakers and interpreters.”¹⁶³ We thus face, even under the best of circumstances, an unavoidable “epistemological underdetermination.”¹⁶⁴ But despite these difficulties, we should still make some effort to learn the English used in our earlier legal texts.

Nevertheless, even if appreciating as much as we can of the original, pre-interpretive, immediate, self-evident meaning of the words of older legal texts is desirable, it cannot by itself be a method of interpretation. Knowing French is necessary to interpreting the French Constitution. But that is little solace even to readers fluent in French. Knowing French, which is to say knowing at the level of *intellectus* the linguistic possibilities of certain words

159. I try to work out some implications of this observation at *infra* Section VI.F.

160. *See supra* note 27 and accompanying text.

161. *Cf.* Donald Davidson, *Radical Interpretation*, 27 *DIALECTICA* 313 (1973) (discussing the complexities of “interpretation in one idiom of talk in another”).

162. For some of the difficulties that anthropologists face in trying to understand the details of foreign cultures in the absence of complete fluency in the language, see Robert Gibb & Julien Danero Iglesias, *Breaking the Silence (Again): On Language Learning and Levels of Fluency in Ethnographic Research*, 65 *SOCIOLOGICAL REV.* 134 (2016).

163. *See* Robert J. Eiben, *Understanding Dead Languages*, at 39 (May 12, 2005) (Master’s Thesis, Virginia Tech), <https://vtechworks.lib.vt.edu/bitstream/handle/10919/32798/Thesis.pdf>. [<https://perma.cc/7W9T-RKLS>] This observation is crucial to understanding the limits to the entire originalist enterprise.

164. *Id.* at 40.

and phrases, still leaves virtually every interesting question of interpretation unresolved. Linguistic possibility—the fruit of *intellectus*—tells us what it is we need we need to be arguing about, but it takes the next step—*ratio*—to conduct the argument itself.¹⁶⁵

This is true for three interconnected and overlapping reasons. First, the meaning of legal provisions, legal rules, and legal principles might be built on

165. I do not want to discount here the possible ultimate philosophical significance of *intellectus* on its own terms. The distinction between *intellectus* (as unmediated meaning) and *ratio* (as the product of analysis) bears a family resemblance, if a mild one, to Martin Buber’s distinction between the I-Thou and I-It modes of encountering persons and objects. See MARTIN BUBER, I AND THOU 1–5 (trans. Walter Kaufmann) (Free Press, 1958) (100th Anniversary ed., 2023). Buber understood that all of us must adopt the I-It mode, with its habits of dissection, to function and fully understand the world in which we live. But he still powerfully insisted on the indispensability of the I-Thou modality to our complete lives as human beings. See Perry Dane, *When Secular Laws and Religious Convictions Collide*, MARGINALIA (March 12, 2021), <https://themarginaliareview.com/when-secular-laws-and-religious-convictions-collide/> [<https://perma.cc/42GJ-D25C>].

Arguably more germane, but less compromising, is Susan Sontag’s famous essay, “Against Interpretation.” Susan Sontag, *Against Interpretation*, in AGAINST INTERPRETATION AND OTHER ESSAYS 3 (Farrar, Straus and Giroux 1966) (2001). Sontag’s argument is that, with respect to literary and artistic works, “interpretation” disastrously shifts our attention from the work itself to a theoretical construct outside the work. *Id.* at 6, 8, 12–13. With respect to all the usual theories of legal interpretation, this insight is acutely on point. Each of these theories turns our attention from the text as we face it head on to something else, whether the author’s intentions, the original readers’ reactions, other texts, intertextual and intratextual inferences, doctrinal structures, the larger legal landscape, moral truths, political theory, tradition, history, or whatever. See *supra* notes 5–38 and accompanying text. In each case, we avoid simply confronting the text itself. It might seem that textualism or literalism would solve the problem, but it doesn’t, in that it too shifts our attention – from a holistic understanding to the dictionary. “‘Against Interpretation’ . . . is neither a plea for literal meaning nor a rejection of it; for either would be pointless. When Sontag says that ‘interpretation is the revenge of the intellect upon art,’ she simply wants us to renew our basic experience of the texts themselves; she would no doubt regard the insistence that texts be read ‘literally’ as a stifling form of ‘interpretation.’” Ronald Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 84 (1985) (footnote omitted).

What is a lawyer supposed to make of this? I am not sure, except to admit that our modes of reading, whatever our respective claims to get the text “right,” are in *all* cases both vital to our vocation as legal readers *and* inauthentic. They are tainted from the start – if inevitably and justifiably so – by our practical and professional commitment to analysis. That requires, not the abandonment of interpretive strategies and legal rigor, but the willingness (turning back to Buber) to let our readings be “fed by the roots of the I-You relationship . . . [that], though fleeting, transforms the I-It relation,” realizing that the “I-You and the I-It forms of relation are not simplistically opposed to each other. One illuminates and even enables the other.” Dane, *supra*. (This is not what I originally meant by *intellectus*, but so be it.) So, what might it mean, in terms that we as lawyers could cash out, to take on board Sontag’s and Buber’s insights and try to confront a legal text holistically, diving into its existential heart, if only as a first step? I am even less sure, and I suspect that anyone with legal training would be similarly perplexed. But with respect to some of the “majestic generalities” in the Constitution, I suspect that the answer might ironically more resemble Justice Brennan’s approach, *supra* notes 27, 142–46 and accompanying text, than any other on offer.

the raw material of words, but it is much more than those raw materials. Nor is it reducible to those raw materials. Pure textualism, if such a thing even exists, does not work. Second, even considering only the words themselves, knowing the *range* of potential meanings does not, without further argument, decide which specific meaning is at play in a specific context. Third, and crucially, further argument and analysis can bring to the fore meanings that might not even have been included even in our contextually sensitive pre-interpretive cognition of certain words. Language is a complex tool. Words can have connotations and implications that surprise even native speakers.

Similarly, with respect to English legal texts of a hundred or two hundred years ago, knowing the original, pre-interpretive, self-evident range of meaning of words or phrases is important.¹⁶⁶ It would be nice, for example, to get a good handle on the original range of meaning for the word “emolument” used in the Emolument Clauses¹⁶⁷ and elsewhere¹⁶⁸ in the Constitution.¹⁶⁹ But unless that range of possibilities does not overlap at all with the current pre-interpretive, immediate, self-evident, range of contextually-sensitive, meanings we attach to those words and phrases, and *even if* it does *not* overlap, it will rarely be dispositive.

It is possible to hypothesize cases in which a shift in the range of meaning is so dramatic and precise that it would radically change the game. But those cases are hard to find. At the end of the day, with respect to most questions of real interest, the dynamics of reasoning through the variety of possible interpretations will swamp whatever insights might be gained by discovering certain pre-interpretive, once self-evident but now archaic, original meanings. Trying to recover those meanings is worthwhile. It can be salient. And if the Constitution had been written in an even older form of English, it would be indispensable. But it is not a theory of interpretation.

166. See Solum, *supra* note 62. I discuss some of the differences between Solum’s account and mine *infra* at notes 172–84 and accompanying text.

167. See U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* at art. II, § 1, cl. 7 (“The President shall . . . not receive . . . any other Emolument from the United States, or any of them.”).

168. See U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been increased during such time . . .”).

169. Cf. Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1 (2017). Note, though, that for my purposes, I am referring here to the original, context-sensitive range of meanings of “emolument,” not the “original public meaning” of the Emoluments Clauses in the sense that modern-day originalists might be seeking.

C. Ratio

Interpretation can only rarely rest on the immediately cognizable meaning—*intellectus*—of the English language, either in our time or of an earlier time. It requires a large dose of reasoning—what medieval thinkers called “ratio.”¹⁷⁰ It will be best to illustrate this point by way of some examples.¹⁷¹ First, though, I need to distinguish the argument here from a superficially similar claim found in some of the more recent iterations of the theory of original public meaning.

D. Lines in the Sand

As noted, some supporters of the method of original public meaning posit that it is only the first step in a more complex inquiry. One common claim is that the analysis of original public meaning should exclude the original public’s views of the “expected application” of legal provisions, leaving that task of application to later readers.¹⁷²

Another favorite distinction is between “interpretation” and “construction.” Various theorists have understood the interpretation/construction distinction in different ways. Professor Keith Whittington, for example, has argued that “interpretation” is a legal task while “construction” is a “political” and even non-judicial enterprise.¹⁷³ Professor Jack Balkin, a “living originalist,” posits “that the object of constitutional interpretation . . . is the Constitution’s basic framework”¹⁷⁴ while “construction builds on and implements the basic

170. See *supra* note 101 and accompanying text.

171. See *infra* notes 187–238 and accompanying text.

172. See, e.g., BALKIN, *supra* note 109; Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1397 (2012); cf. Sunstein, *supra* note 26, at 313–15 (discussing “soft originalism”). For criticism of this distinction from supporters of original public meaning originalism, see, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15 (2012); Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, L. & LIBERTY (Dec. 2, 2014), <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track/> [<https://perma.cc/C3QW-MKZN>]. For criticism from opponents or skeptics of original public meaning originalism, see, e.g., Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2031–34 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011)); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1166–67 (2012).

173. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5–11 (1999).

174. Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 147 (2018). He explains that

[t]he basic framework consists of the Constitution’s original public meaning plus the text’s choice of rules, standards, and principles. The original public meaning consists of the original semantic meaning of the text, plus any generally

framework” so that “[m]ost disputed questions of constitutional law involve construction.”¹⁷⁵ Professor Larry Solum similarly suggests that “interpretation yields semantic content” of a text “whereas construction determines [its] legal content or legal effect”¹⁷⁶ by translating that semantic meaning “into constitutional doctrines that are sufficiently determinate to resolve particular cases.”¹⁷⁷

I do not find the interpretation/construction distinction compelling,¹⁷⁸ though it does have a certain pedigree.¹⁷⁹ I have not distinguished between the two terms here. But regardless, the distinction between *intellectus* and *ratio* is different from the one supposed between interpretation and construction, for two reasons.

First, I am drawing a different line at a different place. Whatever the scope of the zone of “interpretation,” the zone defined by the stratum of *intellectus* is much smaller.¹⁸⁰ That is why I can argue that recovering the layer of immediately cognizable meaning (*intellectus*) in 18th century English, though desirable, ends up being profoundly less helpful than one might suppose. “Interpretation,” even if distinguished from “construction,” tries to find some definite meaning in legal provisions or principles, though it might concede that some are just too vague for that purpose. The recovery of an older *intellectus*, however, does not require finding a definite meaning, but only getting a sense

recognized legal terms of art, and any inferences from background context necessary to understand the text.

Id.

175. *Id.*

176. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010).

177. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. L. ISSUES 409, 421 (2008).

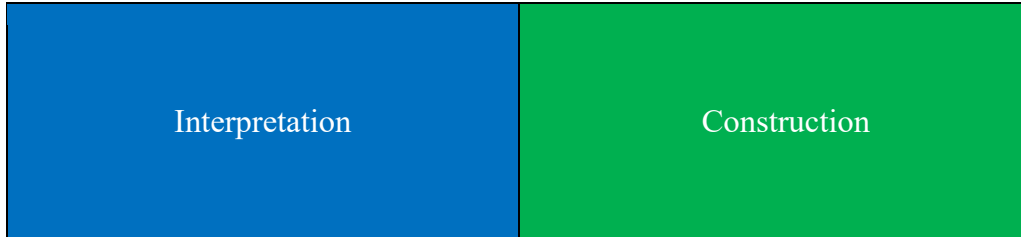
178. To be sure, legal analysis has different strata. I have in this Article emphasized the difference between *intellectus* and *ratio*. I have elsewhere discussed the difference between abstract legal principles and their doctrinal development. *See, e.g.,* Perry Dane, *Two Clauses: Privacy, Religion, and Constitutional Reason*, 26 WILLIAM & MARY BILL RTS. J. 939, 986 (2018) (“[T]he last stage in legal analysis necessarily differs from the steps before it.”). There is also both practical and theoretical utility in the traditional if blurry distinction between legal rules or principles and their application to specific facts. But the interpretation/construction distinction imagines that there is one dimension of legal meaning that authentically inheres in the legal text and another that does not, and I find that idea misguided.

179. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 38 (1871).

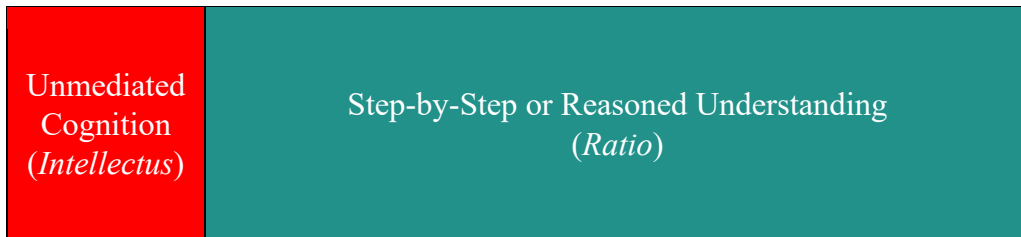
180. *Cf.* Fallon, *supra* note 40, at 1431 (“Rather than defining the original public meaning as limited to minimally necessary . . . or historically noncontroversial meaning, mainstream public meaning originalists posit that constitutional provisions’ original public meanings consist of minimal meanings *plus* some further content that, they maintain, can also be discovered as a matter of historical and linguistic fact.”).

of the range of possibilities found in the raw materials that make up those provisions.¹⁸¹

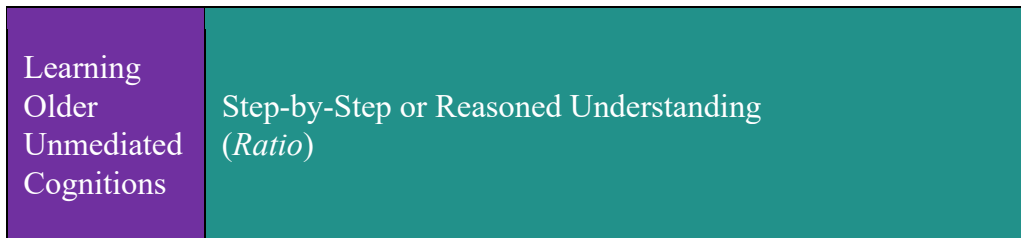
Thus, if the division between interpretation and construction looks like this:



then the line I have had in mind would look like this for understanding contemporaneous texts:



and would look like this for understanding older texts:



181. Larry Solum has suggested that the “interpretation” of legal texts does need to include not only close attention to the meanings that the drafters’ generation would have attached to specific words but also immersion in the original form of the language. Solum, *supra* note 62, at 1649. This might look a tad like a focus on *intellectus*. But Solum takes this to be only one part of a larger web of inquiry into the original communicative meaning of entire provisions. *Id.* at 1624. Where he does refer to the “pre-reflective beliefs about the meaning of the words and phrases that make up the text,” he does so only to warn against relying on the “pre-reflective” intuitions of the later reader trying to make sense of an earlier text. *Id.* at 1638–39.

In fact, it would make no sense for the line between “interpretation” and “construction” to collapse into the line between *intellectus* and *ratio*. Recall the reference point of my argument: modern readers trying to understand contemporaneous enactments. With respect to such enactments, *intellectus* comes naturally. It does not need to be recovered. If the interpretation/construction line were identical to the *intellectus/ratio* line, that would suggest that, for contemporaneous enactments, “interpretation” is a given and there is nothing left to do but “construction.” But that cannot be. We, the original public, interpret hard legal texts all the time. We do not merely “construe” them. And those interpretations do not always come naturally.

Second, theorists who emphasize a distinction between “interpretation” and “construction” typically assume that “interpretation” constrains “construction.”¹⁸² In contrast, *ratio* might build on *intellectus*, but it is not constrained by it. Legal meaning at the end of the day can overflow our intuitions about specific expressions in the language.¹⁸³ *Intellectus* undergirds legal analysis. But it does not control legal analysis. Except in trivial cases,

182. See, e.g., Barnett, *supra* note 48, at 645–47 (construction is limited to the “the bounds established by original meaning”); Solum, *supra* note 62, at 1626 (“*The Constraint Principle*: Constitutional practice, including the decision of constitutional cases and the judicial articulation of constitutional doctrines, should be constrained by the original meaning of the constitutional text.”); Larry Solum, *Segall on “Who Is Originalism For,”* LEGAL THEORY BLOG (Nov. 16, 2016), <https://lsolum.typepad.com/legaltheory/2016/11/segall-on-who-is-originalism-for.html> [<https://perma.cc/D3FG-4D58>] (“[E]ven with respect to those [constitutional] provisions that are underdeterminate, the text rules out some of the possible answers as inconsistent with the original meaning . . .”).

183. See *supra* at note 45; see *infra* at notes 222–24 and accompanying text. I borrow the image of truth “overflowing” the prior meaning of words and concepts from JAMES ROSS, *THOUGHT AND WORLD: THE HIDDEN NECESSITIES* 14–15, 26–27 (2008). I am, however, using the idea to make a different point than Ross is. Even—especially—devoted textualists recognize that legal meaning can overflow pre-reflective instincts. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). The situation might be less clear for legal provisions whose content is arguably exhausted by the layer of *intellectus*. These are the sorts of provisions that Richard Fallon suggests are fixed by their “minimal original meaning.” See *supra* note 98. Fallon posits, for example, that “when Article I, Section 3, Clause 1 provides that ‘[t]he Senate of the United States shall be composed of two Senators from each State,’ its meaning or communicative content is unmistakable. ‘Two’ means two.” Fallon, *supra* note 40, at 1430. I agree that, under our Constitution, each State is almost certainly entitled to two Senators, no more and no less. Plain meaning, not to mention consistent practice, count mightily here. Realistically, they might even count for everything. But I also wonder whether even this simple claim is in principle contingent, subject to potentially overriding arguments. Notably, some legal systems, including famously Jewish law, routinely override even the plainest and most “minimal” of original meanings in legal texts. See also *infra* note 184.

intellectus must not only be supplemented by *ratio*, it is subject to being overridden by it.¹⁸⁴

This is not to say that the search for legal meaning is unconstrained. It is constrained by the norms of legal argument themselves. Those norms can vary. We might disagree about them.¹⁸⁵ It is even worth repeating that sound constitutional discourse might move us to attend to history, including the views of at least some members of the original public.¹⁸⁶ But the point is that even such arguments about methods of constitutional interpretation are legal arguments. They are not automatic, but are part of the legal culture's necessary ongoing effort to make sense of itself, of its subject matter, and of the legal imagination.

E. Examples

I have argued that, in all but the most trivial cases, the crude core of unmediated meaning—*intellectus*—is insufficient to silence the voice of whatever method of interpretation that continues to nag in our ear whenever we confront a constitutional or other legal text. Here, as promised, are examples that help flesh out that argument.¹⁸⁷ The treatment here is sparse. A more complete account would merit a separate article. But this should be enough to illustrate the argument and make the point.

i. Madison and Hamilton Redux

Consider that some questions of constitutional meaning have little to do with the range of meaning of specific words. Recall the debate between Madison and Hamilton about whether President Washington could abrogate the treaty with France without congressional approval.¹⁸⁸ That debate, insofar as it involved the Constitution, required some reference to words such as “President”

184. The possibility that at least some possible meanings of a text will overflow the bounds of *intellectus* is even more apparent in the case of many esoteric or cryptic philosophical and literary texts and of religious texts embedded in traditions that look to mystical, allegorical, or other non-literal layers of significance. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1982); MELZER, *supra* note 66; IAN CHRISTOPHER LEVY, *INTRODUCING MEDIEVAL BIBLICAL INTERPRETATION: THE SENSES OF SCRIPTURE IN PREMODERN EXEGESIS* (2018); Emmanuel Levinas, *The Jewish Understanding of Scripture*, 44 *CROSSCURRENTS* 488 (1995). It is especially pronounced in some legal traditions, as any reader of the Talmud can testify. See CHAIM SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* (2020).

185. See *supra* notes 3–32 and accompanying text.

186. See *supra* note 24.

187. For the sake of convenience, my discussion here assumes a generally object-ist approach to interpretation. For a brief discussion of how the relationship of *intellectus* and *ratio* might also be of use to intentionalists, see *infra* Section VI.F.

188. See *supra* notes 77–95 and accompanying text.

and “treaty.” But those words were merely the launching points to Madison and Hamilton’s actual arguments. As emphasized above, the two men proposed different theories of executive authority, the role of the President, and the status of treaties as “laws,” different accounts of the constitutional relationship between war making and the prerogative to avoid war, different syllogisms, different structural visions, and different solutions to the puzzle of how to infer meaning from the silences of the text against the background of its explicit provisions.

The original public might have had views on all these matters. But, as I have been emphasizing all along, those views would have necessarily depended on *arguments*, spelled out or not. Those arguments might have been historical as well as theoretical and syllogistic. But in any event, readers of the Constitution today, for the reasons I have discussed, are entitled to find those arguments lacking.

ii. “It is a Constitution We Are Expounding.”

Sometimes, constitutional and other legal arguments do appear to focus more crisply on the interpretation of a single word or two. A classic example appears in Chief Justice Marshall’s holding in *McCulloch v. Maryland*¹⁸⁹ that the word “necessary” in the Necessary and Proper Clause of the Constitution¹⁹⁰ did not require “absolute” or “indispensable” necessity, but merely that “that one thing is convenient, or useful, or essential to another.”¹⁹¹ The Chief Justice then built on this definition to set out his classic test for whether Congress was lawfully exercising its power under the clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁹²

189. 17 U.S. 316 (1819).

190. U.S. CONST. art. I, § 8, cl. 18 (including among the enumerated powers of Congress the authority to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

191. *McCulloch*, 17 U.S. at 413–14.

192. *Id.* at 421.

The word “necessary,” around the time that the Constitution was drafted,¹⁹³ as well as around Marshall’s time,¹⁹⁴ and in ours,¹⁹⁵ had a range of meanings that, if truth be told, did and does focus on something like absolute necessity. Marshall did try to support his definition by citing “the common affairs of the world,” “approved authors,” and “common usage.”¹⁹⁶ But the real ground of the Court’s holding was a broader argument about how to read the grant of Congressional authority in a Constitution meant to last for the ages. Hence Marshall’s famous insistence that “it is a [C]onstitution we are expounding.”¹⁹⁷

193. The definition of “necessary” in the 1792 edition of Samuel Johnson’s dictionary read:

1. Needful, indispensably requisite
2. Not free; fatal; impelled by fate
3. Conclusive; decisive by an inevitable consequence.

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1792) (references and etymologies omitted). This definition does reveal one usage that has changed dramatically between then and now—not for the word “necessary” but the word “fatal,” which according to Johnson’s dictionary could mean either deadly or “proceeding by destiny; inevitable; necessary.” *Id.*

194. Noah Webster’s 1828 dictionary defined the adjective “necessary” to mean:

1. That must be; that cannot be otherwise; indispensably requisite. It is necessary that every effect should have a cause.
2. Indispensable; requisite; essential; that cannot be otherwise without preventing the purpose intended. Air is necessary to support animal life; food is necessary to nourish the body; holiness is a necessary qualification for happiness; health is necessary to the enjoyment of pleasure; subjection to law is necessary to the safety of persons and property.
3. Unavoidable; as a necessary inference or consequence from facts or arguments.
4. Acting from necessity or compulsion; opposed to free. Whether man is a necessary or a free agent is a question much discussed.

NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (etymologies omitted).

195. Here is the definition from a modern on-line dictionary:

- 1: absolutely needed : required
2. a: of an inevitable nature : inescapable
 - b: (1): logically unavoidable
 - (2): that cannot be denied without contradiction
- c: determined or produced by the previous condition of things
- d: compulsory

Necessary, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/necessary>. [https://perma.cc/35MZ-6NDB] (examples and hyperlinks omitted).

196. *McCulloch*, 17 U.S. at 413–14 (“If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”)

197. *Id.* at 407. It is worth quoting at greater length the passage to which this line is the conclusion:

A [C]onstitution, to contain an accurate detail of all the subdivisions of which its

The Chief Justice also relied on other arguments, including an explicit prudential concern for the consequences of a narrower definition of the word necessary.¹⁹⁸ And implicit in Marshall's opinion is arguably a view of judicial deference to the constitutional judgment of Congress partially at odds with his simpler declaration in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."¹⁹⁹ Moreover, in reading necessity as he did, Marshall was engaged in a common, specifically legal, approach to the meaning of the word.²⁰⁰ And he was capturing, consciously or not, a nuance in the use of the word "necessary" both at the time of the Constitution and today: The word tends to have a more relaxed meaning in those contexts in which one entity such as a court is considering the decisions of another.²⁰¹ This is apparent, for example, in the rule respecting whether

great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American [C]onstitution, is not only to be inferred from the nature of the instrument, but from the language.... It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a [C]onstitution we are expounding.

Id. at 406–07. Marshall returned to this concern later in the opinion:

This provision is made in a [C]onstitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which [G]overnment should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.

Id. at 415.

198. *Id.* at 415–18.

199. 5 U.S. 137, 177 (1803). *But see infra* note 201 and accompanying text.

200. *See* *Ingram v. Hall*, 2 N.C. 193, 206 (1795).

201. *See* Perry Dane, *Province and Duty: The Double-Coding of Judicial Review and Legislative Lawfinding* (unpublished draft) (on file with author). Chief Justice Marshall, interestingly, in an anonymously published defense of his *McCulloch* decision, did reject a reading of the case that would rest its holding on a supposed view that "Congress has judged of the necessity and propriety of this measure, and having exercised their undoubted functions in so deciding, it is not consistent with judicial modesty to say there is no such necessity, and thus to arrogate to ourselves the right of putting our veto upon a law." John Marshall, *A Friend of the Union*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 105 (Gerald Gunther, ed., 1969). The last part of this sentence, regarding "judicial modesty," might *by itself* cut against my argument about deference, though I also suspect that the Chief Justice did protest too much. In rejecting, however, the supposed underlying premise to deference that Congress was exercising its "undoubted functions" in judging the "necessity

ship's captains should be reimbursed for certain expenses they thought "necessary"²⁰² or, traditionally, the standard applied to police officers who claim to have used "necessary force."²⁰³ It also resonates with constitutional provisions that authorize the President or Congress to act in a given context in a manner that *they* consider "necessary."²⁰⁴

Again, it is worth emphasizing that the original public could have—hypothetically—reasoned its way to a different conclusion. But if so, it would not have been because they knew something about the English language in 1787 that Marshall did not appreciate in 1818, or that we, acquainted as we are with the English language of our time, are incapable of evaluating on its own merits.

and property of this measure, Marshall is putting up a straw man subtly but importantly different from the view I am willing to ascribe to the decision in *McCulloch*. My point is not the Court was simply being "modest" in navigating its relationship to Congress but that the word "necessary" might, in legal contemplation, mean something else when used in the context of a court assessing the reasonableness of another responsible actor's decisions.

202. In *The Fortitude*, 9 F. Cas. 479, 489 (1838), Justice Story, acting as Circuit Justice parsed the meaning of the word "necessary" in the rule that a master can mortgage his ship to pay for repairs in a foreign port, but only if the repairs are "necessary." Story rejected the argument that "necessary" meant "absolutely necessary," holding instead that "all that the maritime law requires [of] . . . the master [is that he] should exercise reasonable diligence in ascertaining what repairs and supplies are necessary." *Id.* The resonance with *McCulloch* is obvious.

203. See, e.g., *Hall v. Township of Mt. Morris*, 198 F. Supp. 2d 906, 920 (E.D. Mich. 2002); *Brewer v. Perrin*, 349 N.W.2d 198, 202 (Mich. Ct. App. 1984). Some courts have even gone to the point of speaking of "reasonable and necessary force," see, e.g., *Schroeder v. Mabellos*, 823 F. Supp. 806, 811 (D. Haw. 1993); *State v. Davis*, 261 Conn. 553, 572 (2002), or "reasonably necessary force," see, e.g., *Jackson v. Allen*, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974); *State v. Clothier*, 753 P.2d 1267, 1269 (Kan. 1988).

204. See U.S. CONST. art II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . ."); U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . ."). Even more striking is how the Georgia Constitution, with which Marshall was familiar, see *Fletcher v. Peck*, 10 U.S. 87, 125, 127 (1810), has since 1789 authorized the state legislature to make whatever laws, not repugnant to the Constitution, it "shall deem necessary and proper" for the good of the state. See GA. CONST. art. 3, § 6, ¶ 1; *id.* art. 1, § 16 (1789). Georgia courts have read this provision to confirm that the General Assembly's power to legislate, subject only to other constitutional constraints, is "absolutely unrestricted." See, e.g., *Parrish v. Emps.' Ret. Sys.*, 398 S.E.2d 353, 357 (Ga. 1990); *Plumb v. Christie*, 30 S.E. 759, 762 (Ga. 1898). To be sure, the federal Necessary and Proper Clause does not use the phrase "they shall deem." More important, the two provisions play distinct roles. While the federal language supplements a list of limited and enumerated powers, the Georgia provision sums up the description of legislative powers of a State, exercising all residual sovereignty in the federal system. But that might only suggest that Congress's interpretive authority, though broad, is still confined.

iii. “Commerce is Intercourse”²⁰⁵

What about words whose meaning might have changed? Professor Randy Barnett has argued that the original meaning of the word “commerce” as used in the Commerce Clauses of the Constitution²⁰⁶ was at its core limited to the “trade and exchange” of goods.²⁰⁷ He also agrees, though, with Chief Justice Marshall’s decision in *Gibbons v. Ogden*²⁰⁸ that the regulation of “commerce” also extended to navigation and would extend that holding to other forms of transportation.²⁰⁹ But he suggests that Marshall’s more general argument that “commerce” extended to “intercourse” created the potential for later mischief. And Barnett argues that the Supreme Court’s modern jurisprudence, which extends “commerce” to include manufacturing, agriculture, banking, insurance, and a legion of other economic and non-economic activities, is unfaithful to the original meaning of the Constitution.

Other scholars have disagreed with Barnett’s reading of the evidence of original public meaning.²¹⁰ I do not want to play on that field. I do, though, want to make three points.

First, Barnett canvasses a large array of materials to buttress his conclusions, including views of the Common Clauses specifically and hints about the meaning of “commerce” in dictionaries, newspapers, and other sources. He is especially focused, though, on the records of the discussions of the drafters and ratifiers of the Constitution. Strands of that discussion verge on old-fashioned intentionalism. As I argue at the start of this Article, simple intentionalism is not vulnerable to the same critique as the one I aimed at the theory of original public meaning.²¹¹ But intentionalism might have its own problems.²¹² In any event, Barnett claims to support original public meaning theory rather than intentionalism.²¹³ If so, though, the views of the original

205. *Brown v. Maryland*, 25 U.S. 419, 446 (1827).

206. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

207. See Barnett, *supra* note 61, at 146 (2001). See also Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623, 623 (2012).

208. 22 U.S. 1 (1824).

209. See Barnett, *supra* note 61, at 116–30.

210. See, e.g., BALKIN, *supra* note 109, at 376–77; Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 N.W. U. L. REV. 695, 696–97, 699, 713 (2002). See generally Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996) (challenging Justice Thomas’s narrow interpretation of the original meaning of the Commerce Clause).

211. See *supra* p. 20.

212. See *supra* notes 44–55 and accompanying text.

213. See Barnett & Bernick, *supra* note 58, at 46.

drafters would be, at best, evidence of original public meaning, and not necessarily the most compelling evidence.²¹⁴ And thus granting the drafters' debates an especially privileged place in the analysis risks muddling the important distinction between the two.

Second, and more important, recall my own goal in this discussion. Barnett wants to discover the distinct "original public meaning" of the Commerce Clauses,²¹⁵ which is to say to uncover their *one most authoritative* original public meaning. My aim, however, is only to learn some late eighteenth-century English with respect to the range of immediate meanings in context of the *word* "commerce," and *then* to ask how that knowledge might be relevant to reasoned arguments—grounded in one interpretive method or approach or another—about the possible meaning of the Commerce *Clauses*.

In this light, the evidence that Barnett discusses paints a more complex picture. To be sure, taking his arguments at face value, the core meaning of "commerce" had a lot to do with trade and exchange. But as with many words of that sort, its borders were rough and fractal. It could be used figuratively, which sets the stage for a more multivalent definition. More important, the word "commerce" often seems to have been used as a conceptual placeholder in the rhetoric of the time, often in combination with other words. In addition to its more precise uses, it could be included as part of what we might today call a "word salad." That rhetorical usage also suggests both complexity and caution. Barnett makes a good deal, for example, of the fact that "commerce" was often included in lists along with other activities such as "manufacture" or "agriculture."²¹⁶ He argues that if commerce included manufacture or agriculture, each term would not need to be enumerated separately.²¹⁷ But it turns out that "commerce" also often appeared in lists along with "trade" and that the phrase "trade and commerce" was especially popular. Barnett describes the pairing of "trade" and "commerce" as a "couplet," suggesting that it was akin to familiar doublets such as "cease and desist" or "null and void."²¹⁸ But can we be so sure that one rhetorical trope (manufacture and commerce) proves

214. See Solum, *supra* note 62, at 1656 ("[D]rafting history can provide evidence of conventional semantic meaning, but this role is evidential."). *But cf.* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 464 (2013) (arguing that original public meaning is likely to converge with the views of both the drafters and the ratifiers).

215. *Cf.* Fallon, *supra* note 40, at 1446 (criticizing public meaning originalism's "underlying premises, including its Interpretive Methodology Assumption and its Conceptual Assumption that uniquely correct original meanings exist even in historically disputed cases").

216. Randy E. Barnett, *The Original Public Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 102 (2001).

217. *Id.* at 112–13.

218. See Barnett, *supra* note 61, at 124; *cf.* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 *U. PA. L. REV.* 261, 306 (2019).

a distinction between the two words while the other (trade and commerce) suggests synonymity?²¹⁹ And how should we read the evidence when for example, “trade,” “commerce,” and “manufacture” get joined together as a single triplet, as in an 1809 case that referred to “trade, manufacture, or commerce”?²²⁰ My point in citing these examples is *not* to argue for a different account of original public meaning. As noted, I am willing to concede Barnett’s findings for the sake of argument. I am merely suggesting that there was more potential meaning in the word “commerce” than its putative core meaning could adequately capture.

Moreover, I am not sure what single word *would* have been used to describe the entirety of activities including trade, manufacture, agriculture, banking, and the rest. “Business” comes to mind. But “business” might have been too broad, especially given its own wide range of meanings, including metaphorical and incidental usages. Indeed, Noah Webster’s dictionary of 1828 described “business” as “a word of extensive use and indefinite signification.”²²¹ So might the word “commerce” be broad enough, in late eighteenth-century English, to support, on its own, a principled argument for a more expansive account of the reach of the Commerce Clause? I would not exclude the possibility, especially because my goal is not to uncover the most prevalent understanding of the word “commerce,” let alone the Commerce Clause. It is instead, as I have been emphasizing, only to decide whether somewhere in the rudimentary and possibly confused *intellectus* of the word “commerce” the seed exists for an argument—*ratio*—that the Commerce Clause might encompass more than trade and exchange. Indeed, as I emphasized in my discussion of the French Constitution, the process of argument might even end up finding dimensions of the word that were not present in the range of pre-interpretive understandings of the word.

To reiterate: My goal here is not to rediscover the century meaning of the Commerce Clauses. Nor is it even to conclude how most eighteenth-century readers would have understood the word “commerce.” It is instead to learn some eighteenth-century English with respect to the word “commerce.” But as we know from our more intimate acquaintance with our own form of English, simply knowing the language rarely produces definitive answers to any halfway

219. *Cf.* *Miller v. The Ship Resolution*, 2 U.S. 1 (Fed. Ct. App. 1781) (using the phrase “trade and commerce,” but also referring to “trade” and “commerce” separately).

220. *See Stewart v. Foster*, 2 Binn. 110, 112–13 (Pa. 1809) (“It is true that foreigners may become members of certain [in]corporations established in *England*, as well as in this country, for the purposes of carrying on trade, manufactures, or commerce; and may possibly be admitted, in some instances, to enjoy like privileges, in such private communities, with other members who are citizens.”).

221. Webster, *supra* note 194 (definition of “business”).

interesting legal or other interpretive questions. Otherwise, we would have no arguments about the meaning of legal provisions enacted in our own time in our own English. That is where our interpretive method or approach, whatever it is, comes into play, imposing the discipline of *ratio* on the rawest of raw materials provided to us by our endowment of *intellectus*.

The third point, though, is the most important: Assume that eighteenth-century English did *not* admit a broader reading of the word “commerce.” Nevertheless, whatever the nuances of eighteenth-century English, the legal meaning of an enactment, including a constitutional provision, can—as noted—overflow the bare meanings of the words used to write that enactment.²²²

Barnett almost concedes that much in his discussion of “navigation.” As noted, Barnett believes that Chief Justice Marshall correctly held in that the Commerce Clauses extended to the regulation of navigation. But he is not certain how to justify that belief:

The . . . sources . . . make clear the intention to subject shipping and navigation to the regulation of Congress. The interpretive challenge is in determining exactly how, if at all, navigation is included in the original meaning of the text While the sources I have examined do not provide indisputable answers to these questions, on balance, I think navigation appears to be included within the meaning of the term “commerce” because of its intimate connection to the activity of trading.²²³

Barnett’s argument is sensible. But it is grounded in the typical tools of legal and practical reasoning, including implication, analogy, synecdoche, and necessity rather than immediate cognition. And if I am right about the difficulties with the theory of original public meaning, then other readers, including readers today, are entitled to draw their own conclusions, using their own reasoning, about the potentially overflowing meaning of the Commerce Clause.²²⁴

iv. Speech and Press; Speaking and Printing

Sometimes, the fruits of research into the original meaning of words or phrases is eye-opening. But those meanings might still be overwhelmed by the challenge of explication.

222. *Supra* note 183 and accompanying text.

223. Barnett, *supra* note 61, at 125.

224. See, e.g., Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison*, 11 WM. & MARY BILL OF RTS. J. 403 (2002); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994).

Consider the First Amendment's guarantee of freedom of speech and of the press.²²⁵ Our contemporary understanding of "the press" in this constitutional context generally identifies it with the activity of journalism or the "Fourth Estate," understood broadly.²²⁶ "Freedom of speech," on the other hand, covers the more general set of rights of expression—oral and written²²⁷ and even non-verbal²²⁸—available to all. Some scholars, however, suggest that in the founding generation, the "press" did not refer to an occupation or industry, to wit journalism, but to the "technology" of the printing press. Conversely, "speech" referred to oral expression.²²⁹

This is a fascinating, even gobsmacking, historical insight.²³⁰ But it is not clear if that lesson about eighteenth-century English can definitively advance an understanding of the entire system of freedom of expression under the First Amendment. Treating "the press" in the First Amendment as a distinct occupation admittedly makes it easier to advance an argument of the sort that Justice Potter Stewart notably made that the press is entitled to a special set of protections under the First Amendment.²³¹ But the Supreme Court has regularly insisted that journalists do not have more enhanced expressive rights than other persons.²³² Conversely, even if we were to take on board the earlier

225. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

226. *See, e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring) ("That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."); *see also* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 81 (1975) ("The role of the 'autonomous' press is institutional in the sense that the press enjoys a separate constitutional status in the American society, a status quite apart from individual rights of free expression."). *See generally* LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* (1991).

227. *See* *Holzemer v. City of Memphis*, 621 F.3d 512, 527–28 (6th Cir. 2010) ("[T]he Constitution prohibits retaliation for a citizen's exercise of his First Amendment right to Free Speech, whether that speech takes written, oral, or another form.").

228. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (protecting expressive flag-burning under the Free Speech Clause).

229. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today*, 160 U. PA. L. REV. 459, 474–77 (2012).

230. Note, though, that our own language, outside of specifically constitutional conversations, has kept *both* senses of "press," along with many others, though the technological sense might be secondary in ordinary conversation. *Press*, MERRIAN-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/press>. [<https://perma.cc/8T2E-Q9SV>].

231. *See generally* Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975).

232. *Herbert v. Lando*, 441 U.S. 153, 165 (1979) (rejecting special protection against inquiry into the editorial processes of the press in defamation suits); *Cohen v. Cowles Media Co.*, 501 U.S.

understanding of “speech” and “press” as referring to technologies rather than occupations, a complete account of the First Amendment—in the context of normative theory, structural concerns, traditional legal reasoning, and even historical narrative—might still recognize a special set of rights for the institutional press.²³³

v. Natural-Born History

Finally, consider a concededly technical and historically freighted provision such as the requirement in Article II of the Constitution that the President be a “natural born citizen.”²³⁴ The question has come up whether a child born abroad to United States citizens is a “natural born citizen.” The answer seems to be yes, though doubts remain.²³⁵ The reason, though, has little to do with the unmediated meaning of the term, whether in eighteenth-century English or twenty-first-century English. Rather, the term has a legal pedigree in English law, common law, and political history that lends it a determinacy that it might not otherwise have.²³⁶

This view might be consistent with the “original public meaning” of the natural-born citizen clause. But that would be because the legally literate members of the original public would have understood the technical meaning of the term. A modern reader could reach the same conclusion, not out of deference to that specialized original public, but because the same legal

663, 665 (1991) (holding that the First Amendment does not provide the press any special immunity from suits alleging breach of a confidentiality agreement); *Branzburg v. Hayes*, 408 U.S. 665, 692–93 (1972) (holding that the press has no special immunity from grand jury subpoenas).

233. See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 144–73 (2013) (discussing press freedom as a structural value); *id.* at 161 (“Although the press is imperfect, diverse in its values and approaches, and subject to ongoing debates about ethics and techniques, it is still essentially a professional enterprise. . . . Through its expertise, the press makes significant contributions to the infrastructure of public discourse. It ought to have a greater role in shaping its own destiny under the Press Clause.”); Stewart, *supra* note 231, at 631–33; David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 198 (“[R]egulation of the press presents preeminently structural, not rights-based issues.”); Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 53 (2016) (shifting the inquiry from trying to discover the original understanding of the difference between “speech” and “press” to asking why the founding generation considered press freedoms to be so important, and concluding that one reason was to further “an informational structural defense against the failings of government”). See generally Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

234. U.S. CONST., art. II, § 1, cl. 5.

235. See generally Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349 (2001).

236. See generally Michael D. Ramsey, *The Original Meaning of “Natural Born,”* 20 J. CONST. L. 199 (2017).

arguments and legal history²³⁷ remain relevant.²³⁸ Or if, perchance, the original public had misconstrued the legally enshrined meaning of the term, they would be wrong, and we would be right.

F. A Note on Intentionalism

I said at the start of this Article that I tend to be an object-ist.²³⁹ Actually, I am, as most commentators used to be for generations, an eclectic object-ist who might sometimes also be willing to throw a dash of originalism (in various of its forms) into the mix. But I have also insisted that the goal of this essay is not to critique intentionalism, which might still be the most defensible unitary alternative to the many varieties of object-ism. In that spirit, it might be worth very briefly suggesting how intentionalists might make use of some of the ideas worked out here.

Intentionalists, by definition, are interested in mental states, or more precisely evidence of mental states. Words in legal enactments and other texts are from the intentionalist perspective only the imperfect efforts to express those mental states. Nevertheless, words are important. Otherwise, even the effort to express and memorialize intentions through words would be pointless. That is the paradox of intentionalism and the source of worries about “secret intentions” and the like.²⁴⁰

The obvious solution is to require that authors exercise good faith in their effort to reduce their intentions to words.²⁴¹ The obligation of good faith might mean different things in different contexts. Some philosophical, literary, and religious texts, including religious legal texts, for example, might admit of a

237. For a short outline of how history might be relevant to an object-ist approach to legal interpretation, see *supra* note 24.

238. In his article, Michael Ramsey surveys the legal pedigree of the term “natural born” and the contours of English law on the subject. Near the end of the article, he then argues that this English practice was known to the Framers (at minimum, through Blackstone’s description). And absent any other conclusive definition of the phrase, it seems conclusive in itself. “The Framers knew [the core meaning of ‘natural born’] in English law The best reading of the clause is that this is the constitutional meaning as well.” Ramsey, *supra* note 236, at 243. My claim here is that this last passage about what the Framers would have known might be relevant to an intentionalist but is otherwise unnecessary to a sound legal argument. *Cf.* Sachs, *Original Law*, *supra* note 24 (emphasizing the difference between trying to recover the original public meaning of a term and reaching a conclusion about its original legal scope).

239. See *supra* text accompanying note 32.

240. See *supra* note 48 and accompanying text.

241. This is a more forgiving standard than Larry Solum’s suggestion that the authorial intentions that count are those that effectively communicate public meaning. See Solum, *supra* note 34, at 1953. Solum, however, is an original public meaning theorist trying to pay some due respect to authorial intentions, while my goal is to speak in defense of a more die-hard intentionalist who needs to pay some due respect to the plausible understandings of reasonable readers.

wide range of meanings (and even underlying intentions) at some distance from the apparent meanings of the words on the page.²⁴² But for the sort of secular legal texts we have in mind here, the obligation of good faith might if nothing else constrain an author from using words whose even very broad range of unmediated plausible meanings, as discernible by *intellectus*, is inconsistent with the intention that the author had in mind. An author who fails to meet even that low bar might simply be thought, in that instance, as disqualified from imposing his intended meanings on the text.²⁴³ That would eliminate the problem of “secret intentions,” though it would still leave the intentionalist with the challenge of what to do with the words produced through such bad faith.

In real life, though, such instances are likely to be vanishingly rare in constitutional and other secular legal texts. In that sense, intentionalists and object-ists might reach a similar conclusion for cognate reasons: the original, unmediated range of meaning of words and phrases is theoretically relevant to their projects, but not likely to be very important in practice.

Of course, constraining the problem of “secret intentions” does not vindicate intentionalism. It might still suffer from other serious theoretical difficulties and from the sheer paucity of evidence about the actual mental states of authors.

VII. CONCLUSION

That said, it seems time to put my own cards back on the table. If my critique here has anything to it, what explains the attraction of original public meaning? I have argued elsewhere that contemporary legal culture has suffered a severe, neurotic loss of faith in the legal imagination and the power of legal reasoning.²⁴⁴ Modern doctrinaire intentionalism hoped to reduce the arduous work of trying to make sense of complex texts into a straightforward empirical inquiry. The method of original public meaning sought to achieve those same ends while avoiding some of the defects in intentionalism.

But trying to escape the imperative of genuine legal inquiry is doomed to fail.²⁴⁵ Discerning legal meaning requires judgment and the use of the tools of legal craft. It is a discursive, hermeneutical, and often unavoidably normative

242. For a parallel discussion in the context of how object-ist interpretation might overflow the *intellectus* of certain sorts of texts, see *supra* note 183–82 and accompanying text.

243. For a similar argument with respect to a recipe for enchiladas, see *supra* note 11.

244. See, e.g., Dane, *Two Clauses*, *supra* note 178, at 980–93; Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 121–35 (1994).

245. See Dane, *supra* note 178, at 982–83, 988–89.

enterprise.²⁴⁶ Some originalists have recognized this by articulating the distinction (which, as noted, I do not find helpful) between “interpretation” and “construction.” But my critique has been more sweeping. It has been grounded in a simple question: How do we try to understand contemporaneous legal enactments? And it has posited that the answer to that question will have repercussions beyond contemporaneous enactments.

Whatever method we find compelling for contemporaneous enactments will continue to sit on our shoulder even when we contemplate earlier texts, even texts written more than two hundred years ago. It will nag. It will whisper in our ear. It will nag. It might even shout. It demands to be heard.

246. *Cf.* SEGALL, *supra* note 40, at 192–94. Segall criticizes originalism for having too much misplaced faith in its own claims. I criticize it for having too little faith in the legal imagination. We are both right, I think. But we might have different notions of “faith.” *Cf.* MELVIN KONNER, BELIEVERS: FAITH IN HUMAN NATURE (2019).