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Method and Dialogue in History and Originalism

Logan E. Sawyer III

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There is a sharp separation between the scholarly literature of originalists and that of professional historians. Originalists cite one another, but regularly ignore recent work by historians, whom they accuse of misunderstanding their goals and methods.[1] Historians are generally happy to

1. Originalists often cite a handful of works of history, most importantly Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969). But *Creation* is 50 years old, and citations to recent work are scant. There are only a handful of citations to winners of the John Philip Reid Award, including Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005); Christopher Tomlins, *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2010); and Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783–1867* (Chicago: University of Chicago Press, 2014). Little-Griswold winners fare little better. Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004) has been cited less than a half dozen times in law review articles advancing originalist arguments. Mary Sarah Bilder's Beveridge Prize winning *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015) has been lauded as a work of history by originalists, but largely discounted

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return the favor.[2] Engagement between the two communities is too often limited to methodological disputes and amicus briefs.[3] As a result, historical inquiry offers less to constitutional law than it might, and constitutional lawyers offer less to history than they could. Some of this separation is due to unavoidable methodological tension: originalism seeks to use the past to resolve current legal disputes, while history's foundational commitment is to the difference between the past and the present.[4] But those methodological tensions—important as they are—have not always frustrated productive dialogue.

Originalism, in fact, emerged as an important theory of constitutional interpretation in the 1970s because of developments in professional historiography. New, post-revisionist approaches to the historiography of Reconstruction inspired and legitimated the book that set originalism on its current trajectory: Raoul Berger's *Government by Judiciary*.[5] The revolution in the historiography of the founding embodied in Gordon Wood's *Creation of the American Republic* offered originalists other opportunities.[6] It was not unbridgeable methodological disagreements, but technological, institutional, and disciplinary developments that separated history from originalism: the digitization of historical records, the growing influence social and cultural history, the shift to "original public meaning originalism," and, most importantly, the emergence of an influential network of originalist scholars, judges, and institutions. Those trends have only accelerated in the twenty-first century, which makes a return to the close but contentious relationship of the 1970s unlikely. Nevertheless, the role that historians played in creating originalism suggests that opportunities for productive dialogue still exist, even if that dialogue will look different than it did 40 years ago.

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as being of little relevance. Lawrence B. Solum, "Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record," *BYU Law Review* 2017 (2017): 1621–82, at 1656–57. Lawrence B. Solum, "Intellectual History as Constitutional Theory," *Virginia Law Review* 101 (2015): 1111–64, argues the methods of intellectual history are of limited use for originalists.

2. Saul Cornell, "Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism," *Fordham Law Review* 82 (2013): 721–56.

3. Joshua Stein, "Historians before the Bench: Friends of the Court, Foes of Originalism," *Yale Journal of Law and the Humanities* 25 (2013): 359–89.

4. Allan Megill, *Historical Knowledge, Historical Error: A Contemporary Guide to Practice* (Chicago: University of Chicago Press, 2007).

5. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 1st ed. (Cambridge, MA: Harvard University Press, 1977).

6. Wood, *Creation*.

I.

Government by Judiciary did not invent originalism.[7] Judges, academics, and politicians supported the theory before 1977.[8] But Berger's originalist criticism of the Warren Court's Fourteenth Amendment decisions produced a decisive shift among conservative intellectuals and academics toward the theory.[9] It made originalism what it is today: a heavily contested theory of unquestioned importance.

It succeeded for many reasons. It combined an ambitious defense of originalism and a sharp critique of the Warren Court's Fourteenth Amendment jurisprudence. The debates in the 39th Congress, Berger argued, conclusively demonstrated that the Fourteenth Amendment was intended to protect no more than the limited rights to property, contract, and court access that were identified in the 1866 Civil Rights Act. That limited intention, which Berger argued was legally binding, contradicted pivotal Warren Court precedents, including *Griswold v. Connecticut*'s identification of a right to privacy, *Baker v. Carr*'s protection of voting rights, and *Brown v. Board of Education*.[10] That critique of judicial activism resonated with conservative intellectuals and political actors.[11] In addition, Berger himself was a prestigious scholar with a reputation for scholarly independence and no associations with either the conservative movement or segregation.[12] And his arguments, although certainly not

7. Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore, MD: Johns Hopkins University Press, 2005).

8. Alfred Avins, "Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent," *Virginia Law Review* 52 (1966): 1224–55; Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1–35; Sam J. Ervin, "The Role of the Supreme Court as the Interpreter of the Constitution," *Alabama Lawyer* 26 (1965): 389–99; and William Rehnquist, "The Notion of a Living Constitution," *University of Texas Law Review* 54 (1976): 693–706.

9. Ken I. Kersh, "Ecumenicalism through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955–1980," *Studies in American Political Development* 25 (2011): 86–116; and O'Neill, *Originalism*, 111–32.

10. Berger, *Government by Judiciary*, 1st ed.

11. Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599; Kersh, "Ecumenicalism"; and O'Neill, *Originalism*, 111–32.

12. O'Neill, *Originalism*, 111–32. Compare with Sam Ervin Jr. and Alfred Avins who opposed *Brown* and the 1964 Civil Rights Act on originalist grounds. Alfred Avins, "Racial Segregation in Public Accommodation," *Case Western Reserve Law Review* 18 (1967): 1251–83; Alfred Avins, "De Facto and de Jure School Segregation," *Mississippi Law Journal* 32 (March 1967): 179–247; and Sam J. Ervin, "The United States Congress and Civil Rights Legislation," *North Carolina Law Review* 42 (1963): 3–15.

convincing to everyone, were clear, carefully documented, and exhaustively defended.[13]

But Berger also owed some of his success to a revolution in Reconstruction historiography that inspired his efforts and legitimated his conclusions. Earlier claims that the Warren Court's Fourteenth Amendment jurisprudence was inconsistent with the intentions of its drafters was written into the teeth of the historical revisionism of Kenneth Stamp, James McPherson, and others, who routed the overt racism of the Dunning School and recast the Radical Republicans in the 39th Congress as racial egalitarians who fought to establish a biracial democracy.[14] The Radicals, they argued, failed in the short term, but successfully constitutionalized their goals in the Fourteenth and Fifteenth Amendments.[15] Jacobus TenBroek and Howard Jay Graham applied that political history to the Fourteenth Amendment itself, which they saw as an expression of abolitionist-inspired racial egalitarianism.[16]

Berger's work, in contrast, extended the post-revisionism of David Donald, Michael Les Benedict, Harold Hyman, and others.[17] Those scholars also rejected the Dunning School, but emphasized the political power and limited aspirations of moderate Republicans. Racism and fears of centralized authority among moderates, post-revisionists argued, led the 39th Congress to preserve significant parts of the pre-Civil War federal system. *Government by Judiciary* explicitly built on that research, which Berger followed closely.[18]

13. Berger, *Government by Judiciary*, 2nd ed. (Indianapolis, IN: Liberty Fund, 1997), 485–91.

14. Avins, "De Facto and de Jure School Segregation"; Avins, "Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent"; and L. Brent Bozell, *The Warren Revolution: Reflections on the Consensus Society* (New Rochelle, NY: Arlington House, 1966).

15. Hans L. Trefousse, *The Radical Republicans; Lincoln's Vanguard for Racial Justice* (New York: Knopf, 1968); LaWanda and John H. Cox, "Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography," *Journal of Southern History* 33 (August 1967): 303–30; Willie Lee Rose, *Rehearsal for Reconstruction: The Port Royal Experiment* (Indianapolis, IN: Bobbs-Merrill, 1964); James M. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* (Princeton, NJ: Princeton University Press, 1964); and Kenneth M. Stampp, *The Era of Reconstruction, 1865–1877* (New York: Knopf, 1965).

16. Howard Jay Graham, *Everyman's Constitution* (Madison: State Historical Society of Wisconsin, 1968); and Jacobus TenBroek, *Equal under Law* (New York: Collier Books, 1965).

17. Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York: W.W. Norton, 1974); David Herbert Donald, *The Politics of Reconstruction, 1863–1867* (Baton Rouge: Louisiana State University Press, 1965); Harold Melvin Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Knopf, 1973); and Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975).

18. Berger, *Government by Judiciary*, 1st ed., 5.

Berger wrote to Michael Les Benedict to praise him for demonstrating that it was the "the conservatives and centrists, not the radicals, [who] wrote the [Fourteenth Amendment's] script,"[19] and he wrote Harold Hyman to request comments on his draft. "My study," Berger explained, "confirmed the revisionist historians, including your own work."[20] The problem, he continued, was that "lawyers have not come to grips with the impact of revisionist studies on construction of the 14th."[21] Section one made historical arguments that were a springboard for his legal analysis in part two, but, he told Hyman, it "can stand alone, and perhaps it should, uncontaminated by the controversy about the techniques of the Warren court."[22]

Berger's engagement with post-revisionism did not immunize him from sharp criticism from historians both in public and in private.[23] It nevertheless helped legitimate his claims. "I was seduced," wrote Hyman in response to the draft. "[Y]ou have written an immensely important reconsideration. It will reopen argument and on a higher level than ever. Therefore historians will thank you."[24] Willard Hurst wrote to tell Berger that he was a reader for the press. He had some stylistic and organizational complaints, but found no "major disagreements of substance."[25] Later, he wrote Berger about the ferocious debate that *Government by Judiciary* had spawned in the law reviews: "you confirm again that critics of your historical analysis are not critics of your history—certainly they don't succeed where they try—but are in pursuit of certain substantive public policy goals which they like."[26] Post-revisionists may not have intended it, but they helped spark a revolution in constitutional interpretation.

A new interpretation of the founding, grounded in intellectual history and epitomized by Gordon Wood's *Creation of the American Republic*,

19. Berger to Michael Les Benedict," September 21, 1975, Box 1, Folder 5, Raoul Berger Papers, Harvard Law School Special Collections [hereafter Berger Papers].

20. Berger to Harold Hyman, February 2, 1976, Box 1, Folder 20, Berger Papers.

21. Ibid.

22. Ibid.

23. Stanley I. Kutler, "Raoul Berger's Fourteenth Amendment: A History or Ahistorical?" *Hastings Constitutional Law Quarterly* 6 (1979): 511–26; and Avaim Soifer, "Protecting Civil Rights: A Critique of Berger's History," *New York University Law Review* 54 (1979): 651–706. In his notes on the manuscript of *Government by Judiciary*, Hyman told Berger that, "I want my JD students, who are working for history MAs and PhD's, to grapple with far more kinds of evidence than" you have examined. Hyman to Berger, March 3, 1976, Box 1, Folder 20, Berger Papers.

24. Hyman to Berger, March 3, 1976, Box 1, Folder 20, Berger Papers.

25. Willard Hurst to Berger, December 21, 1976, Box 1, Folder 19, Berger Papers.

26. Hurst to Berger, October 5, 1981, Box 1, Folder 19, Berger Papers.

also made originalism more attractive.[27] Wood's argument that the fight over the Constitution replaced the classical politics of virtue with a recognizably modern system of political thought was deeply historicist. It was thus in tension with aspects of consensus and progressive historiography, and directly at odds with anti-historicist perspectives like those of Straussian political philosophers.[28] But Wood's argument could be interpreted to associate the Constitution's ultimate form with a broadly shared, coherent, and recognizably modern political theory.[29] When that interpretation was combined with his emphasis on the causal power of ideas—"Ideology creates behavior," he later wrote—his work could be understood, or perhaps caricatured, to establish that the Constitution was the product of a limited set of consensus political principles that continued to have relevance in contemporary political debates. That understanding made originalism more attractive in multiple ways.[30]

Wood's emphasis on the causal power of broadly shared ideas made research easier, by suggesting that the Constitution's meaning could be captured by attention to public debates.[31] Law professors largely lacked the support, training, and interest to do the archival research needed to ferret out how economic interests shaped the response of various factions to the Constitution. They were, however, accustomed to searching legislative history for indications of a statute's meaning, and were happy to apply that approach to the Constitution. Hyman, for example, complained that *Government by Judiciary* relied too much on public justifications for the Fourteenth Amendment. You should, he wrote to Berger, "grapple with far more kinds of evidence than the pari materia rule. The *politics* of the DC bill and the 14th am[endment] bill were *not* the same."[32] Berger was unmoved: "there is a large body of law about interpretation. For 40 years this was my bread and meat. What I say will carry weight with courts, not the items you mentioned."[33] "Of course we must read the

27. Wood, *Creation*. Wood's approach, of course, was not unique. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); and J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975).

28. Gordon S. Wood, "The Fundamentalists and the Constitution," *The New York Review of Books* 35 (1988): 33–40.

29. Edward Countryman, "Of Republicanism, Capitalism, and the 'American Mind,'" *The William and Mary Quarterly* 44 (1987): 556–62.

30. "Ideology," he wrote later, "creates behavior." Gordon S. Wood, "Ideology and the Origins of Liberal America," *The William and Mary Quarterly* 44 (July 1987): 628–40, at 631.

31. Countryman, "Of Republicanism, Capitalism, and the 'American Mind.'"

32. Hyman to Berger, March 3, 1976, Box 1, Folder 20, Berger Papers.

33. Berger to Hyman, April 6, 1976, Box 1, Folder 20, Berger Papers.

[members of the 39th Congress] in *their* frame of reference," he wrote later. "But . . . for courts it is what is said *on the floor* during the debates that is controlling."[34]

The ideological interpretation's emphasis on the emergence of recognizably modern political principles during the debate over the Constitution thus simplified the application of Founding Era debates to contemporary constitutional issues. To view the Constitution as the product of recognizably modern ideas of liberty, democracy, and republicanism could ease, even if unintentionally, an ascent to levels of abstraction that avoided the deeply contextual and sometimes unappealing role of the practical politics, economic interest, and sectional advantage.[35] It allowed the Constitution to be seen as the product of timeless political principles identified and applied by a remarkably wise group of dedicated public servants. From that perspective, the Founders were asking much the same constitutional questions as contemporary Americans, and answering them with remarkable wisdom.

Exemplary of how originalists embraced this perspective is Michael McConnell's 1987 review of Raoul Berger's next book, *Federalism: the Founders Design*. The review, which cited *Creation* twice, criticized Berger's failure to recognize that the Constitution "inspires reverence not just because it was drafted and ratified by our forefathers, who were an uncommonly clever lot, but because it is the most successful attempt in history to construct a polity consistent with both the baser passions and higher aspirations of its citizens."[36] More concretely, McConnell argued that Berger failed to recognize that the Founders had designed an effective federal system by anticipating the insights of contemporary public choice theorists such as James Buchanan.[37] Berger's book thus failed in what McConnell saw as its chief task: to offer to contemporary proponents of national power the same arguments for federalism that had won the day at the founding.[38]

Like post-revisionism, the ideological interpretation of the founding was not intended as a support for originalism. Indeed, some of its leading advocates are also some of originalism's most effective critics, and even Wood

34. Ibid.

35. Jack N. Rakove, "Gordon S. Wood, the 'Republican Synthesis,' and the Path Not Taken," *The William and Mary Quarterly* 44 (1987): 617–22. Michael J. Klarman, *The Framer's Coup: The Making of the United States Constitution* (Oxford: Oxford University Press, 2016), has recently re-emphasized those themes.

36. Michael W. McConnell, "Federalism: Evaluating the Founders' Design (reviewing *Federalism: The Founders' Design* by Raoul Berger)," *University of Chicago Law Review* 54 (1987): 1486.

37. Ibid., 1491–93, 1508, 1510.

38. Ibid., 1491–93, 1511.

himself has rejected the theory.[39] And like post-revisionism, it was certainly not the only trend that helped legitimate originalism.[40] But together with post-revisionism, it made originalism more attractive to originalist scholars such as Raoul Berger and Michael McConnell, whose careers demonstrate a simultaneous commitment to shaping the application of judicial review and participating in scholarly debate at the highest level.

II.

When Gordon Wood complained in 2006 that, "[i]f it weren't for the law professors who teach and write constitutional history we wouldn't have much constitutional history being written or taught in the academy these days,"[41] and then blamed that problem on history faculties who "prefer popular cultural history to what some dead white males in the past did with the Constitution," he undoubtedly surprised some historians, particularly those who believed that cultural history could enrich our understanding of the Constitution.[42] But his criticism suggests an important reason that the relationship between history and originalism deteriorated: originalists, who were shifting their attention from original intentions to original public meaning, found little value in the products of social and cultural history.

By the late 1980s, most historians had concluded that Wood's approach had underestimated the complexity, conflict, and contingency present in the Founding Era. A colloquium on *Creation* testified to the book's enduring importance, but also demonstrated historians' growing emphasis on a

39. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: A.A. Knopf, 1996); Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (2015): 935–56. "We do not, and cannot, base our constitutional jurisprudence on the historical reality of the Founding," said Wood in Gordon S. Wood and Scott D. Gerber, "The Supreme Court and the Uses of History," *Ohio Northern Law Review* 39 (2013): 448.

40. Other important developments are examined in Whittington, "The New Originalism," and G. Edward White, "The Arrival of History in Constitutional Law Scholarship," *Virginia Law Review* 86 (2002): 485–633.

41. Gordon Wood, "How Democratic is the Constitution?" *New York Review of Books* 53 (2006): 25–27. Work published within 5 years of Wood's comment include Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003); John Ferling, *A Leap in the Dark: The Struggle to Create the American Republic* (New York: Oxford University Press, 2003); and Woody Holton, "Did Democracy Cause the Recession That Led to the Constitution?" *Journal of American History* 92 (2005): 442–69.

42. Ruth H. Bloch, "The Constitution and Culture," *The William and Mary Quarterly* 44 (1987): 550–55.

kaleidoscopic variety of ideologies and interests that clearly differed from those of modern America. There was broad agreement that Wood had overemphasized the causal role of Republicanism.[43] He was criticized for ignoring other Founding Era ideologies,[44] underestimating the role of religion, political economy, and economic interest,[45] and ignoring the contributions of women, African Americans, and non-elites.[46] Elsewhere, neo-Progressive scholars re-emphasized the importance of class conflict,[47] Peter Onuf recaptured the role of sectional self-interest,[48] and Saul Cornell demonstrated that the anti-Federalists were much more than the representatives of ideas that lost.[49] The politics and economics of slavery had become more important, too.[50] Wood had addressed some of these themes, and supported exploration of others,[51] but the new emphasis on complexity, conflict, and social and economic interest was clear, and, as Jack Rakove's *Original Meanings* noted, it made recovery of a binding original intention difficult.[52]

A similar shift to contingency, conflict, and complexity in the historiography of Reconstruction further divided originalists and historians. Eric Foner's *Reconstruction: America's Unfinished Revolution*, still the standard work, moved past the post-revisionist concern with politics and the limits of reconstruction to integrate social and economic history. It re-established the importance of class conflict and the agency of the new freedmen and emphasized that Radical Republicans only abandoned their

43. Jackson Turner Main, "An Agenda for Research on the Origins and Nature of the Constitution of 1787–1788," *The William and Mary Quarterly* 44 (1987): 591–96; and Rakove, "Gordon S. Wood, the 'Republican Synthesis,' and the Path Not Taken."

44. Bloch, "The Constitution and Culture"; Countryman, "Of Republicanism, Capitalism, and the 'American Mind'"; and John Patrick Diggins, "Between Bailyn and Beard: The Perspectives of Gordon S. Wood," *The William and Mary Quarterly* 44 (1987): 563–68.

45. John Howe, "Gordon S. Wood and the Analysis of Political Culture in the American Revolutionary Era," *The William and Mary Quarterly* 44 (1987): 569–75.

46. Gary B. Nash, "Also there at the Creation: Going beyond Gordon S. Wood," *The William and Mary Quarterly* 44 (1987): 602–11.

47. Ferling, *A Leap in the Dark*; and Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007).

48. Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* (Philadelphia: University of Pennsylvania Press, 1983).

49. Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1999).

50. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 1996); Carroll Smith-Rosenberg, "Dis-Covering the Subject of the 'Great Constitutional Discussion,' 1786–1789," *The Journal of American History* 79 (1992): 841–73; and Gary B. Nash, *Race and Revolution* (Madison: Madison House, 1990).

51. Wood, "Ideology and the Origins of Liberal America."

52. Rakove, *Original Meanings*.

efforts to establish a biracial democracy as Reconstruction proceeded.[53] Amy Dru Stanley's tracing of the contingencies, contradictions, and conflict in the meaning of liberty that unfolded throughout Reconstruction suggest how hard it is to identify a shared understanding of the liberty that the Fourteenth Amendment was intended to protect.[54]

As the work of Foner, Stanley, and others indicate, historians of Reconstruction and the founding increasingly doubted that words and the ideas they expressed were neutral mediums for the transmission of coherent and static concepts. Many concluded that words were not just the tools through which problems were identified and resolved. Instead, their meaning changed in response to intentional manipulation by political actors. Words were therefore not just tools to identify and resolve political conflicts, they were also in large measure defined by the outcome of political conflict. This understanding was not new in the 1980s. Indeed, it was at the core of Wood's *Creation*.[55] But it was becoming important among historians just as originalists made an opposite turn in their understanding of language.[56]

The largest change in originalism since the 1970s was a shift in emphasis from the original intentions of the Constitution's drafters to the original public meaning of the Constitution's text.[57] Most advocates of this "New Originalism" concluded that because the American people ratified only the public meaning of the Constitution, it was only that meaning that had enough democratic legitimacy to justify judicial enforcement.[58] That new focus directed originalist research away from issues to which historians' expertise was most clearly applicable—the actual motivations and expectations of the Constitution's drafters—to the broadly accepted meaning of

53. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988).

54. Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998).

55. Wood, *Creation*; and Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," *Political Theory* 2 (1974): 277–303.

56. Terence Ball and J.G.A. Pocock, eds., *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1988); Gienapp, "Historicism and Holism"; and John E. Toews, "Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience," *American Historical Review* 92 (1987): 879–907.

57. Lawrence B. Solum, "Originalism and Constitutional Construction," *Fordham Law Review* 82 (2013): 453–538; Keith Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 2001); and Randy Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2003).

58. Whittington, "The New Originalism."

constitutional provisions.[59] The need to justify this shift to originalism's critics as well as "original intent originalists" led "New Originalists" further away from historians, as they increasingly sought support for their claims in the philosophy of language.[60] Thus Randy Barnett's claim that New Originalism "can be very disappointing for critics of originalism—and especially for historians [who] expect to see a richly detailed legislative history only to find references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text."[61] It also helps explain the collective originalist shrug that greeted Mary Bilder's Bankcroft Prize-winning investigation of what was once a primary source for the Constitution's meaning: James Madison's notes from the Constitutional Convention.[62]

Technological and institutional changes have bolstered the effect of these intradisciplinary developments. The publication of primary documents made historical research much easier, but the digitization of sources of computer analysis has given originalists the ability to bypass historians in their search for original meaning.[63] Visits to dusty archives are now unnecessary to find colonial newspapers or private correspondence; a mouse click will do.[64] And "big data" offers originalists new ways to construct original public meaning.[65] BYU Law School has produced a full text searchable "Corpus of Founding Era American English" that, as of this writing, contained just under 120,000 texts written between 1760 and 1799.[66]

Perhaps most importantly, however, originalists can now legitimate their interpretations of the past even in the face of opposition from historians. A conservative legal network only in its infancy when Berger wrote *Government by Judiciary* is now a staunch advocate of originalism and a powerful force in American law, politics, and academic life.[67] Originalist

59. Gienapp, "Historicism and Holism."

60. Lawrence B. Solum, "Originalist Methodology," *University of Chicago Law Review* 84 (2017): 269–95.

61. Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45 (1999): 621–54.

62. Bilder, *Madison's Hand*; and Solum, "Triangulating Public Meaning," 1656.

63. Herbert J. Storing, ed., *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981).

64. National Historical Publications & Records Commission, Founders Online. https://founders.archives.gov/ (May 9, 2019).

65. James C. Phillips, Daniel M. Ortner, and Thomas R. Lee, "Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical," *Yale Law Journal Forum* 126 (2016).

66. BYU Law, Law and Corpus Linguistics. https://lawcorpus.byu.edu/ (May 9, 2019).

67. Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008).

arguments are produced at some of academia's most prestigious institutions and supported by a network of think tanks and other institutions. Georgetown Law School's Center for the Constitution offers a summer "Boot Camp" on originalism for interested law students, which includes a $2,000 stipend.[68] The University of San Diego's Center for the Study of Constitutional Originalism hosts an annual conference on originalism.[69] Stanford's Center for Constitutional Law is training a new generation of talented originalists such as Will Baude, Nathan Chapman, and Ilan Wurman. Public interest law firms channel originalist arguments to courts staffed with originalist law clerks and judges.[70] The Supreme Court may have a durable originalist majority. These networks provide more than enough indicia of intellectual respectability to overcome the opposition of historians, who can be dismissed as pursuing a different project.[71]

III.

Historians and originalists are much more divided than in the late 1970s, when Raoul Berger could describe *Government by Judiciary* as an effort to help lawyers "come to grips with the impact of [historians'] revisionist studies."[72] And there are grounds for pessimism—even despair—about whether that can change. Neither the technological nor the disciplinary trends that contributed to this division are subsiding: big data, digitization of sources, social history, and original meaning originalism will not depart anytime soon. And the institutional reasons for the ongoing division may be both more important and more durable. The success of the informal network of originalists centered on, but not restricted to, the Federalist Society, means that today's originalists—unlike Raoul Berger—need neither inspiration nor legitimation from historians. They provide it for themselves through a community of dedicated, talented, and influential originalist scholars, judges, and think tanks that did not exist in the 1970s.

Nevertheless, there are some signs that an interdisciplinary dialogue might move beyond methodological disputes and amicus briefs. The

68. Georgetown Law, Georgetown Center for the Constitution, Originalism Summer Seminar, 2019. https://www.law.georgetown.edu/constitution-center/originalism-summer-seminar/originalism-summer-seminar/ (May 9, 2019).

69. University of San Diego, School of Law, Center for the Study of Constitutional Originalism, 2019. https://www.sandiego.edu/law/centers/csco/ (May 9, 2019).

70. Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015).

71. Solum, "Intellectual History as Constitutional Theory."

72. Berger to Hyman, February, 1976, Box 1, Folder 20, Berger Papers.

increasingly sophisticated methodological debates between historians and originalists have produced formidable arguments that even the search for original public meaning can benefit from the insights of historians, who have immersed themselves in the broader culture that gives constitutional language its meaning.[73] Scholars and judges outside of the networks associated with the Federalist Society have begun to embrace forms of originalism, some tentatively, some enthusiastically.[74] A growing number of talented scholars with both JDs and PhDs are well positioned to participate in interdisciplinary debates, and have increasingly done so.[75] And a JD is certainly not a prerequisite.[76]

Yet because today's institutional context is so different from that of the late 1970s, when Berger found inspiration and legitimation from post-revisionist historians, any meaningful substantive dialogue will have to be nurtured, by both historians and originalists, in volumes such as this one, in joint conferences, in readers' reports, and in the kind of informal interactions that Berger and Harold Hyman shared. And it should be. Limiting engagement between history and originalism to theoretical disagreements and litigation will not resolve the contest between originalism and other theories of constitutional interpretation. Originalism has been subjected to decades of methodological criticism, yet there are more originalists than ever in important academic positions, think tanks, and courts. If historians avoid substantive engagement with originalism, it will not change the theory's role in American law and politics. And if historians are excluded from originalist debates, it will not improve our constitutional law. It will only deprive an important theory of constitutional interpretation of the insights of a historical profession whose remarkable expertise and relevance to the originalist enterprise are clearly demonstrated in this

73. Gienapp, "Historicism and Holism"; G. Edward White, "Intellectual History and Constitutional Decision Making," *Virginia Law Review* 101 (2015): 1165–78.

74. Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2014); and Bernadette Meyler, "Towards a Common Law Originalism," *Stanford Law Review* 59 (2006): 551–600. At her confirmation hearing, Elena Kagan said that "sometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists." *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, Part 1, 111th Cong. 62 (2010).

75. Two examples are Gregory Ablavsky, "'With the Indian Tribes': Race, Citizenship, and Original Constitutional Meanings," *Stanford Law Review* 70 (2018): 1025–76; and Alison L. LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," *Stanford Law Review* 67 (2015): 397–446.

76. Saul Cornell "Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller," *Ohio State Law Journal* 69 (2008): 625–40.

volume and elsewhere. The chances for a productive and substantive dialogue may appear limited today, but that dialogue is worth pursuing. And we can pursue it with more hope when we recognize that the separation between originalism and history has not always been so stark.

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