ORIGINALISM AS INTELLECTUAL HISTORY

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If the majority opinions in *Dobbs* and *Bruen*[1] taught us one thing it is that the Supreme Court's originalist jurists remain deeply committed to the practice of history. Throughout its last term, the Court often surveyed the literature and law of the past to address modern life's most pressing constitutional questions. So, if judges are to take on the mantle of history, what form should their historical inquiry take?

Just as different schools of jurisprudential thought produce and employ distinct methodological practices, so do the different historical camps. The Straussian, the Cambridge School adherent, and the New Left historian *sometimes* reach different historical conclusions, but they *often* utilize unique scholastic processes. These processes embody more than a myopic focus on the discrete actions and utterances of the past—they encompass the ideas, philosophies, and languages animating those events. Thus, if American jurists want to uncover rights "deeply rooted in the Nation's history"[2] or if they wish to determine which regulations are a part of our "historical tradition,"[3] then they must adopt a historical method that accounts for the totality of the historical experience. This approach, therefore, would mirror that of the intellectual historian.

However, intellectual history should not be understood as an "alternative to originalism."[4] In fact, the opposite is true: originalism should take the form of intellectual history. Infusing originalism with the methodological practices and aims of intellectual history will create an interpretive framework that is far more robust and intellectually honest.[5]

As he digs into the historical record, the originalist intellectual historian recognizes that the text can only be understood after first accounting for the different intellectual traditions underpinning each constitutional provision. Before attempting to ascertain the "communicative content of a legal text,"[6] he digs deeper, unearthing the intellectual heritages undergirding the

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235, 2242 (2022).; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[2] *Dobbs*, 142 S. Ct. at 2253; *see also* Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997).

[3] *Bruen*, 142 S. Ct. at 2126.

[4] *See generally* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism,* 82 FORDHAM L. REV. 721 (2013) (arguing for the abandonment of the originalist method in favor of intellectual history).

[5] Lawrence B. Solum has made a similar argument in *Intellectual History as Constitutional Theory,* 101 VA. L. REV. 1111 (2015). This analysis will subtly depart from that framework.

[6] *Id.* at 1117.

Constitution's framework and the era in which it was created. The balance of this essay will delineate this type of originalism, but before that exploration, we should survey the current originalist landscape.

BRUEN'S ORIGINALISM

The Court in *Bruen* seems to endorse a particular interpretive approach. Justice Thomas, responding to the dissent's critique of his "text-and-history test," favorably cites the scholarship of William Baude and Stephen Sachs.[7] Drawing upon their work, Justice Thomas understands the role of the judge as "resolv[ing] legal questions presented in particular cases or controversies," not "resolv[ing] historical questions in the abstract."[8]

Justice Thomas agrees with Baude and Sachs' suggestion that lawyers and judges should view "'legal inquiry [as] a refined subset' of a broader 'historical inquiry,'"[9] relying on "'various evidentiary principles and default rules' to resolve *uncertainties*."[10] Thomas only quotes a snippet of Baude and Sachs' article, but the portion included in his majority opinion emphasizes what even proponents of originalism view as its most glaring deficiency: historical and textual analyses almost always yield uncertain, murky, and disputed answers. In those cases, what should be done? Baude and Sachs provide one potential path forward.

ORIGINALISM AND THE LAW OF THE PAST?

Baude and Sachs first task lawyers with grounding their judgments in the "rules which were law at the Founding and everything that has been lawfully done under them since."[11] In this sense, they view law as an "accumulation of past law."[12] To best ascertain its meaning and applicability, one must simply trace law's steps backwards, charting its course from its genesis to the contemporary issue at hand. However, they recognize that their preferred method of historical inquiry can "[run] dry."[13] Sometimes answers are absent from the historical record, and, in other cases, too many answers arise, leaving us with several plausible solutions to constitutional dilemmas. It is in these instances that Baude and Sachs suggest jurists consider "doctrines of precedent"[14] and "default rules."[15] Similarly, at times when older provisions confront modern problems, jurists can simply "apply general legal concepts" and rely upon

[7] *Bruen*, 142 S. Ct. at 2130 n.6 (citing William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 37, 809, 809–20 (2019)).

[8] *Id.* at 2130 n.6.

[9] *Id.*

[10] *Id.* (emphasis added).

[11] Baude & Sachs, *supra* note 7, at 812.

[12] *Id.*

[13] *Id.* at 816.

[14] *Id.*

[15] *Id.*

"ordinary legal reasoning" to square old law with new facts.[16] How does this method fare in practice?

The majority's reasoning in *Heller* offers one example. Baude and Sachs view *Heller*'s discussion of the Second Amendment's prefatory clause, pre-existing rights, and the scope of those rights as "claims of legal interpretation"—not merely historical exegesis.[17] However, as they note, Justice Scalia's arguments have "generated a forest of historical criticism," as some legal academics have fervently sought to refute the historical assertions underlying the Court's reasoning.[18]

Baude and Sachs do not appear perturbed by these divergent and conflicting historical accounts. Ambiguity, as they see it, is an unavoidable byproduct of these types of inquiries. "Single obvious answers" to constitutional questions are often unattainable; in lieu of certainty, "today's lawyers are fully capable of rendering an opinion on which side of a Founding-era dispute had the better claim."[19]

Of course, unequivocal answers should not be the aim of any jurisprudence, but originalists should not sell their judicial philosophy short. While uncertainty is ineluctable, an originalism infused with intellectual history has the capacity to elucidate history's most opaque legal questions.

RECOGNIZING INTELLECTUAL PARADIGMS

Baude and Sachs' methodology offers a valuable framework for how this new form of originalism might look. Their contention that lawyers must trace law back to its origin is sound, but their methodology stops one step too early. Because the issue before us is not where our process should *start*, but rather where it should *end*. As lawyers and judges work backwards and identify each node of antecedent law, their terminal point cannot merely be the constitutional text. Their historical inquiry should progress one step further back in time. This final methodological move would seek to understand the political thought and intellectual traditions imbuing constitutional provisions.

Baude and Sachs are skeptical of this final interpretive leap. While they concede that queries into "intellectual and political culture" are *sometimes* valuable, they advise originalists to refrain from using intellectual history to create "broad[] reconstructions of the past."[20] It seems, however, that what Baude and Sachs reject is a particular strand of modern intellectual history that tries to examine '"the way ordinary Americans understood issues of law and constitutionalism' in order '"to complement the traditional top-down perspective."'[21] This type of intellectual history emphasizes the common and ordinary understanding of law at the time of enactment. In their

[16] *Id.* at 818.

[17] *Id.* at 819.

[18] *Id.*

[19] *Id.* at 818–19.

[20] *Id.* at 814.

[21] *Id.* (quoting Cornell, *supra* note 4, at 726).

rebuke of this form of intellectual history, Baude and Sachs are likely correct in arguing that "[w]hose perspectives matter is . . . a question for legal philosophy and substantive law."[22]

However, the form of intellectual history this essay endorses is crucially different from the version partially rejected by Baude and Sachs. This essay's intellectual history embraces a two-step interpretive process. First, it focuses on ascertaining the intellectual milieu that gave birth to constitutional text and influenced the speech acts of lawmakers. Only after doing so does it then concern itself with, among other exercises, uncovering the ordinary or common understanding of constitutional provisions. Perhaps, given their preference for relying upon "internal legal sources,"[23] Baude and Sachs might support this type of historical exercise that seeks to primarily contextualize the environments where law was debated, drafted, and enacted.

Accordingly, originalism injected with intellectual history would mirror, in some respects, the historical method outlined by renowned intellectual historian J.G.A. Pocock.[24] Originalists need to take seriously the act of "discover[ing] the language or languages in which the text [they] may be studying was written, and the parameters of discourse which these tended to impose upon its utterance."[25] These "parameters," for Pocock and his acolytes, are known as "paradigms."[26] Recognizing the existence of historical and intellectual paradigms "encourages the presumption that [historical actors were] situated in a certain reality," and thus were "called on to act, speak, or think in certain ways, and not in others."[27] To put it more simply, intellectual history appreciates that historical actors speak and exist within particular historical moments. Accordingly, their speech acts and the texts they create must be understood as creations and utterances formulated in a specific intellectual environment. These environments restrict and influence the ways in which historical actors think about and discuss politics and the law. As Jonathan Gienapp argues, "[T]here is no separating the original Constitution from the constitutive assumptions that initially breathed life into it, that determined the kind of thing it was, the kind of content it possessed, where its boundaries lay, and its relationship to law."[28] Any proper understanding of history and historical acts must then account for the intellectual paradigms in which these acts were performed.

Plainly, the Constitution was not framed in a vacuum. The individuals who constructed and codified the text existed in a specific intellectual milieu. Their speech acts and the constitutional text must be read with an eye towards the paradigmatic ideas, constraints, and theories that imbued their era of American history.

In this crucial respect, this form of intellectual history differs from the type implicitly embraced by Lawrence Solum.[29] Broadly, Solum views intellectual history as a "contextualist

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[22] *Id.* at 814.

[23] *Id.*

[24] J. G. A. Pocock, *The Reconstruction of Discourse: Towards the Historiography of Political Thought*, 96 MLN 959, 959–80 (1981).

[25] *Id.* at 974.

[26] *Id.* at 964–75.

[27] *Id.* at 964–65.

[28] Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, at 360 (2021).

[29] Solum, *supra* note 5.

methodology . . . [that] identif[ies] the relevant context of constitutional communication."[30] Yet, Solum is primarily concerned with the "communicative content of a legal text"—that is the "meaning that the text communicated (or perhaps was intended to communicate) to its anticipated readers."[31] This methodological desire to recover "communicative intentions"[32] and his approving references to intellectual historian Quentin Skinner,[33] however, place Solum in a "conventionalist," not "contextualist—interpretive," camp.[34] Conventionalists are concerned with "authorial intentions."[35] For a conventionalist, "[t]o understand an utterance we have to grasp both its meaning and its illocutionary force . . . [which] comes from the conventions that determine what the author was doing in making it."[36] Contextualists, like Pocock, on the other hand, assert that "the meanings available to the authors depend on the ways of thinking, writing, or speaking that exist in their communities."[37] Intellectual paradigms, for a contextualist, "fix the ideas or meanings we express as well as the words we use to do so."[38]

Solum appears to embrace a conventionalist conceptualization of intellectual history, placing a high emphasis on how ideas contextualize communicative intent. The form of intellectual history this essay endorses, however, employs a Pocockian contextualist approach. As previously stated, that approach would entail a two-step process. It begins by (1) trying to ascertain the prevailing paradigms that imposed restrictions on utterances in the first place. With that vital information in mind, it then proceeds to (2) investigate things like authorial intent and ordinary meaning. In other words, this exercise first understands utterances in relations to the environments in which they were uttered, rather than in respect to the intentions of the utterer.

In this way, an originalism that accounts for intellectual history is, in fact, *more* originalist. It recognizes that law is not created *de novo.* It ventures beyond the text itself and seeks to ascertain the original intellectual ideas and traditions imbuing the historical periods—like the Founding or Reconstruction—during which constitutional provisions were discussed and ratified. Although cognizant of the history of ideas, this form of originalism does not seek to answer *philosophical* questions; instead, it simply serves to contextualize legal phraseology—the written word—by consulting the intellectual landscape of the period.

As such, this type of originalism should not be understood as venturing away from the legal and into that which is political or philosophical. It remains, as Baude and Sachs might say, a

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[30] *Id.* at 1128.

[31] *Id.* at 1117.

[32] *Id.* at 1158.

[33] *See generally id.*

[34] Mark Bevir, *The Role of Contexts in Understanding and Explanation*, 23 HUMAN STUDIES 395, 395–411 (2000).

[35] *Id.* at 396.

[36] *Id.* at 397.

[37] *Id.* at 396.

[38] *Id.* at 397.

method of "legal interpretation."[39] Just as "[h]istory is inextricably connected to law,"[40] intellectual traditions and political ideas deeply influence the law-making process; they become intertwined and entangled with law itself. As such, exploring the history of ideas behind the Constitution cannot be outsourced to historians or political theorists; it must be of concern to lawyers and judges. Proper legal interpretation, therefore, requires an accounting of intellectual history. They are inextricable—rather than distinct—disciplines.

INTELLECTUAL HISTORY AND GENERALITY

Such an approach does not fall victim to problems of generality. Viewing constitutional text at the level of generality called upon by intellectual history is certainly *helpful* in all cases, but it is only *necessary* in some. As he uses intellectual history to "mov[e] from the immediate meaning of the adopted text to the background purposes that explain it,"[41] the intellectual historian originalist recognizes that "the Constitution is framed at many different levels of generality."[42] Appreciating that historical reality, he enlists the discipline of intellectual history to "respect (rather than shift) the agreed-upon level of generality" embedded within the Constitution.[43] Accordingly, the act of consulting the intellectual traditions undergirding the text is both warranted and useful when confronted with what are often broad, elusive, and general constitutional components.

PUTTING THEORY INTO PRACTICE

How might employing this methodology work in practice? Take the Second Amendment. Ascertaining the outer contours of the right to bear arms is, as we have seen in *Heller*[44] and *Bruen*, a historical enterprise. However, originalist inquiries could be complemented by the work of intellectual historians. For instance, properly understanding the Framers' desire for an armed citizen militia would require an exploration into the classical republican tradition's intellectual grip on Founding-era discourse. This canon of political thought loomed large in the American consciousness,[45] and impacted the ways in which citizens and statesmen discussed and debated politics and the laws. A robust—and wholly originalist—interpretation of the Second Amendment's would call for an examination of how the classical republican canon dealt with armed citizens. It would then survey the ways in which the Framers and ratifiers were informed, impacted, and conceptually constrained by those classical ideas.

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[39] Baude & Sachs, *supra* note 7, at 819.

[40] William Baude, *Of Course the Supreme Court Needs to Use History. The Question Is How*, WASH. POST (Aug. 8, 2022, 9:27 AM), https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen [https://perma.cc/TQX9-WKLC].

[41] John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2017 (2009).

[42] *Id.* at 2040.

[43] *Id.* at 2052.

[44] 554 U.S. 570.

[45] *See generally* JOHN G. A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

In other words, this type of inquiry would not merely seek to understand what the Second Amendment means; it would first ask a more foundational question: what impelled the Framers to include this amendment at all? What schools of political thought and intellectual traditions led their generation to value, appreciate, and, ultimately, protect the right to bear arms? This sort of historical analysis uncovers the original intellectual impetuses behind constitutional ratification. In that way, we learn to understand not only the meaning of the text but also the philosophical driving force behind its existence.

In fact, such explorations have already been undertaken.[46] These studies, and ones like them, succeed in elucidating the potential meaning of often nebulous and frustratingly concise constitutional provisions. Injecting intellectual history into originalist interpretation brings greater context and clarity to these opaque constitutional provisions.

AN ORIGINALISM THAT ACCOUNTS FOR THE COMMON GOOD?

As it aids in our understanding of the Constitution, this form of originalism would also serve to bridge the divide within the conservative legal movement. Today, an internecine interpretive war between originalists and common good constitutionalists rages,[47] but an originalism that acknowledges intellectual history could bring this jurisprudential battle to an effective ceasefire.

Why? Because it would foreground the classical tradition's intellectual saliency in the Founding-era. The original constitutional text was constructed in a paradigmatic intellectual milieu that was concerned with the classical republican conception of the common good.[48]

The classical republican tradition, however, is not identical to the "classical legal tradition" identified by Adrian Vermeule.[49] While Vermeule has noted the existence of a particular strand of classical thought in the Founding-era, the dictates of intellectual history suggest that any conscription of the classical legal tradition at the Founding can only be understood after accounting for the larger intellectual paradigm in which it was enlisted.

In fact, understanding the contours of that paradigm and its conceptualization of the common good is a vital originalist task. For instance, take the Preamble. The plain text of the Constitution's Preamble contains vague calls to "form a more perfect Union" and to "promote the general Welfare."[50] Given that the Preamble is regarded as an important interpretive tool that aids in

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[46] David T. Hardy, *The Janus-Faced Second Amendment:* Looking Backward to the Renaissance, Forward to the Enlightenment, 18 GEO. J. L.& PUB. POL'Y 421, 425–26 (2020) ; Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 71 (1984); *The Fear of Standing Armies is the Root of the Second Amendment*, LIBERTARIANISM.ORG, https://www.libertarianism.org/columns/fear-standing-armies-root-second-amendment [https://perma.cc/H5VH-DP4B]; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L. J. 551 (1991).

[47] *See* Randy Barnett, *Deep-State Constitutionalism*, CLAREMONT REV. OF BOOKS, Spring 2022, at 33–40 (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

[48] Pocock, *supra* note 45.

[49] *See generally* Vermeule, *supra* note 47.

[50] U.S. CONST. pmbl.

elucidating vague provisions in the Constitution's body,[51] it is incumbent on textual interpreters to ascertain the original meaning behind these broad directives.

Yet figuring out what exactly the Framers were referring to in the Preamble requires a thorough understanding of the intellectual traditions that dominated their discourse. In fact, identifying the paradigmatic constraints on their utterances is the first step in decoding "obvious semantic ambiguity."[52] Intellectual history, therefore, can help elucidate the Preamble's "broad and sweeping" [53] teleological goals,[54] and, as the meaning of the Preamble crystalizes, we will be better poised to understand the nebulous components of the Constitution's body.

To put it simply, when the Framers wrote *general* constitutional provisions and accompanied the text with similarly *general* prefatory material, they invited interpreters to seek out other sources to ascertain the text's meaning. Consulting the prevalent *intellectual* traditions of the period, therefore, is a wholly originalist exercise. It respects the written word and the interpretive preferences of the Framers.[55]

Accordingly, accounting for intellectual history retains aspects of originalism's positivism, while still recognizing a "substantive" element embedded within the methodology.[56] Concerned with some notion of the public good—however protean—the Framers, in ratifying the Constitution, instantiated a particular substantive vision. The document, therefore, was originally intended to pursue that vision. Some may dismiss their original substantive aims as atavistic or obsolete. Yet, framed at a high level of generality, the vision of the Framers is one that was deliberately left to be "more susceptible to adaptation."[57] Thus, it can be easily fashioned to meet modern exigences and address contemporary questions.

CONCLUDING THOUGHTS

Originalism finds itself at a crossroads. Close textual analyses and studies into original public meaning were supposed to mollify originalism's critics, but its dissenters are louder, more zealous, and more ideologically diverse than ever before. Originalism now finds itself under fire at precisely the moment when the Supreme Court appears eager to adopt its dictates.

Thus, as the Court and public embrace originalism's emphasis on historical inquiry, they must not ignore intellectual history. The Constitution and its amendments were created in particular intellectual environments—environments that influenced its drafting and ratification. Appreciating, understanding, and identifying the history of ideas that gave life to the text will

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[51] Michael Rappaport, *The Relevance of the Preamble to Constitutional Interpretation*, LAW AND LIBERTY (Mar. 1, 2019), https://lawliberty.org/the-relevance-of-the-preamble-to-constitutional-interpretation/ [https://perma.cc/N49N-SGSB]; *See also* Vermeule, *supra* note 47, at 39.

[52] Vermeule, *supra* note 47, at 39.

[53] Manning, *supra* note 41, at 2045.

[54] Vermeule, *supra* note 47, at 39–43.

[55] *See generally* Manning, *supra* note 41.

[56] For a critique of originalism on the grounds that it lacks a substantive vision, see Adrian Vermeule, *Beyond Originalism*, THE ATL. (Mar. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/Q4JF-4EZ6].

[57] Manning, *supra* note 41, at 2045.

help bring greater clarity and focus to our constitutional debates. Injecting originalism with intellectual history has the potential to create an originalism that is not only more durable, but also far richer, more historically accurate, and more intellectually honest.