

The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism

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The debate over constitutional Originalism continues to spark scholarly controversy.¹ The most recent development in this contested history is the emergence of so-called “New Originalism,” an approach that eschews the search for the subjective intent of either the Framers or Ratifiers and instead focuses on the public meaning of the text at the time of the Founding.² A somewhat under-theorized version of this theory even made

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1. On Originalism as a movement, see JONATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005). On methodological and interpretive issues, see JACK N. RAKOVE, *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (1990); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); and Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). For recent critiques of Originalism, see Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); and Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

2. On New Originalism, see Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). This interpretive theory goes under several different names: public meaning Originalism, original understanding Originalism, and semantic Originalism. For some proponents of this theory, the focus of interpretation is on fictive readers, the average rational man on the street or a hypothetical fully informed reader of the Constitution. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); and Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002). Another variant of this theory, semantic originalism focuses on linguistic meaning, sometimes described as sentence meaning, timeless meaning, or semantic meaning. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009) [hereinafter Solum, *District of Columbia*] and more fully Lawrence B. Solum, *Semantic Originalism* (Ill. Public Law Research Paper No. 07-24), available at <http://ssrn.com/abstract=1120244> [hereinafter Solum, *Semantic Originalism*]. One strand of New Originalism, called original methods Originalism, claims to employ the Founders' own interpretive methodology, but in application this

a cameo appearance in Justice Scalia's majority opinion in *District of Columbia v. Heller*.³

While champions of New Originalism claim to have solved the problems of traditional Originalism and identified a means of elucidating an objective meaning of the Constitution, this theory has not solved the basic problem with Originalism: the absence of a rigorous historical methodology.⁴ Any effort to explore the original meaning of the Constitution must deal with a range of methodological problems inherent in any work of intellectual history.⁵ Moreover, New Originalists have assumed the existence of an interpretive consensus when there was none at the Founding.⁶ Americans were just as deeply divided over questions of constitutional methodology then as they are now.⁷ Any choice we make about how to interpret the Constitution, including the emphasis on public meaning favored by New Originalists, invariably commits us to a position in the Founding Era's debates. There simply is no neutral Archimedean point from which any Originalist can begin discerning the true original meaning of the Constitution.⁸ The suggestion that constitutional meaning is derived by elaborating the public meaning of the Constitution's text and not by recourse to the intent of its Framers or Ratifiers is not a neutral philosophical or historical claim that stands above the political fray; rather, it is simply one of many possible interpretive stances in political

approach turns out to be virtually indistinguishable from other variants of New Originalism. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007) [hereinafter McGinnis & Rappaport, *Interpretive Principles*]; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods*].

3. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). For a thoughtful critique of Justice Scalia's originalist theory, see Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000).

4. For a forceful critique of New Originalism's pretensions of objectivity, see Richard R. Fallon, *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2011).

5. On the problematic relationship between intellectual history and Originalism, see David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137 (2011). On the shifting methods of intellectual history, see Anthony Grafton, *The History of Ideas: Precept and Practice, 1950-2000 and Beyond*, 67 J. HIST. IDEAS 1 (2006).

6. For a clear statement of this view, see Saikrishna B. Prakash, *UnOriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998) (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997)).

7. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 688 (2009); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

8. See the discussion of new originalism, *infra* pp. 298-306.

play at the time of the Founding.⁹

Ironically, the New Originalist emphasis on public meaning is hardly new at all, but rests on an approach to constitutional interpretation first advanced by Anti-Federalists more than two hundred years ago.¹⁰ In contrast to New Originalists, the original champions of a public meaning approach sought to empower the people and energize a form of living constitutionalism. Thus, New Originalists have turned history on its head, using a theory that was originally designed to restrain federal judges and employed it to empower the federal judiciary. The Founding generation's emphasis on public meaning was part of a tradition of popular constitutionalism which sought something similar in spirit to modern theories of a living constitution. In the hands of New Originalists, this dynamic vision of constitutionalism has been transformed into a theory designed to fix constitutional meaning at the Founding moment.¹¹ The supreme irony, however, is that rather than restore a lost Constitution, the application of New Originalist methods would create an essentially Anti-Federalist Constitution that never existed, a document that would have been opposed by the Federalists who wrote and ratified the real Constitution.¹²

If one were genuinely interested in understanding how the Constitution was read at the Founding moment one might expect New Originalists to reconstruct the full range of interpretive practices in place at the Founding Era.¹³ In reality, leading New Originalists have shown little interest in the task of recovering Founding-era practices. Instead, New Originalists have

9. Philosopher Paul Grice's work has been cited by some new originalists, see the discussion of semantic originalism, *supra* note 2. It is important to recognize the divisions among philosophers of language regarding Grice. Even among supporters of Grice there are serious disagreements over how to implement his ambitious philosophical project. On Grice, see H. P. GRICE, *STUDIES IN THE WAY OF WORDS* (1989). Although the field of philosophy of language may no longer be marked by a "Homeric opposition" between followers of Grice and his critics, there are significant divisions within the field: Simon Blackburn, *Communication and Intention*, in *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 458 (E. Craig ed., 1998), available at www.rep.routledge.com/article/U006SECT3. For overviews of criticism of Grice's program, see WILLIAM G. LYCAN, *PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION* 86-97 (2000); and MICHAEL MORRIS, *AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 248-70 (2007).

10. See Justice Scalia's use of the Pennsylvania Anti-Federalist Dissent of the Minority discussed below, *infra* pp. 303-04.

11. The obvious exception to this critique is the theory of living Originalism. See Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007). In Balkin's terms, New Originalists have taken a radical "protestant" theory of the Constitution and reinterpreted it for a conservative "catholic" end. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

12. See *infra* pp. 303-04.

13. See *supra* note 2.

turned to fictional constructs such as fully informed readers or modern theories of philosophy of language. Such approaches have created a constitutional shell game in which contemporary political preferences are shuffled around and made to appear to be part of an original meaning.¹⁴ Similar methodological problems mar other strains of New Originalism. Nothing better illustrates the simplistic view of history favored by New Originalists than their naïve reliance on old dictionaries. Thus, Lawrence Solum praises Justice Scalia's decision in *Heller* to use historical dictionaries to decode the meaning of the Constitution.¹⁵

Originalist faith in simply scouring the dictionary as a shortcut around the laborious process of doing genuine historical research rests on a serious misunderstanding of the history of dictionaries. The first American dictionaries were published after ratification. Early dictionaries, including the first American dictionaries, were not compiled according to the rules of modern lexicography.¹⁶ These texts were idiosyncratic products of their authors, who often had ideological and political agendas. As a general rule, such dictionaries were more prescriptive than descriptive. It is simply anachronistic to argue that one ought to consult historical dictionaries from the Founding-Era to elucidate a set of fixed linguistic facts that can be used to unravel the meaning of the text of the Constitution.

The notion of using original methods to reconstruct original meaning at first glance seems to gesture toward a genuinely historical method, but advocates of this approach show no greater familiarity with Founding Era practice than do other New Originalists. Indeed, John McGinnis and Mike Rappaport, the leading champions of "original methods Originalism" evince their own lack of familiarity with Founding-era history by simply parroting Justice Scalia's pseudo-Originalist method, an approach that invokes the authority of the Founders, while citing rules drawn from

14. In practice, the fictive readers conjured up by New Originalists are typically little more than empty vessels into which modern originalists pour their own ideological biases. See Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 *FORDHAM L. REV.* 545 (2006).

15. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); Barnett, *supra* note 2; Solum, *Dist. of Columbia*, *supra* note 2.

16. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 *BUFF. L. REV.* 227, 242-62 (1999). See generally ANTHONY PAUL COWIE, *THE OXFORD HISTORY OF LEXICOGRAPHY* (2009). America's first dictionaries post-date the Constitution. See RICHARD ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* (1980).

treatises written nearly a half century later.¹⁷

McGinnis and Rappaport share John Yoo's view that the common people's ignorance in the Founding rendered them effectively mute on constitutional questions.¹⁸ This theory is, literally, idiotic in the eighteenth-century sense; it treats ordinary Americans as if they had no public voice—in other words, as idiots. Ignoring the real voices of eighteenth century Americans is an important part of New Originalism's methodological obfuscations.¹⁹ McGinnis and Rappaport make the

17. McGinnis and Rappaport endorse Justice Scalia's erroneous characterization of the Founding Era's approach to preambles in *Heller*. McGinnis & Rappaport, *Original Methods*, *supra* note 2, at 767. Curiously, they do not provide a single Founding Era case to support this contention. Compare this historical discussion of this issue, which cites no Founding Era sources, with the careful explication of contemporary sources by historian David Thomas Konig. David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009). The proper interpretation of preambles was a central issue in *Lloyd v. Urison*, 2 N.J.L. 197, 200-01 (N.J. 1807). On the temporal oddities of Scalia's argument in *Heller*, see Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639 (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

18. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)). For a devastating critique of Yoo's "history lite approach," see Martin S. Flaherty, *Case Studies in Conservative and Progressive Legal Orders: The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (2004) [hereinafter Flaherty, *Case Studies*]; and Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999) [Flaherty, *History Right*]. Many of the problems Flaherty identifies with Yoo and other originalists stem from their simplistic approach to history. Yoo's approach to historical materials resembles the approach of bright undergraduates who have not yet made the transition to genuine historical thinking. Sam Wineburg, the leading authority on history and learning, notes that true historical thinking involves the interrogation of texts, including an appreciation that texts are complex historical constructions, not magic mirrors into the past. See SAM WINEBURG, *HISTORICAL THINKING AND OTHER UNNATURAL ACTS* (2001). Ahistorical thinking, Wineburg notes, typically assimilates historical evidence to preexisting frameworks rooted in presentist concerns and reads historical texts without properly contextualizing them. This one dimensional view of the past is typical of most textbooks, particularly those used in secondary schools. WINEBURG, *supra*, at 74-82. Yoo's reductive summary of GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) is a case in point. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933-4 (2003). Compare this one-dimensional account with the way historians have read Wood's important work. See *Forum: The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 WM. & MARY Q. 549 (1987).

19. In eighteenth-century English the term "idiot" not only referred to the legal concept of a person of diminished mental capacity, but it might have also signified an ordinary person without learning, or a private person without a public voice. OXFORD ENGLISH DICTIONARY (3d ed. 2010), available at <http://www.oed.com:80/Entry/91049>. In his early dictionary of "hard words," Edward Phillips notes that idiot "(in Greek) properly signifies a private Man, who has no publick Office; among the Latins it is also taken for an unlearned or unskillful Person." EDWARD PHILLIPS, *THE NEW WORLD OF WORDS* (London, 7th ed. 1720). For other contemporaneous usages to the Constitution, see JAMES FORDYCE, *SERMONS TO A YOUNG WOMAN* 178 (Philadelphia, M. Carey 1787); and

following extraordinary claim about the Founding Era:

[T]he people decided whether to ratify the Constitution based on an explanation of its meaning by those with legal knowledge. Pamphleteers of all kinds wrote lengthy explications of the Constitution precisely so that the people could be informed. It is not too much to say that they translated the condensed, sometimes technical language of the legal document into familiar language more easily accessible to the electorate as a whole. Moreover, the people did not vote directly on the Constitution, just as they did not vote directly on the passage of statutes. They instead relied on their representatives—who were more likely to be either schooled in legal understanding or able to consult more learned colleagues.²⁰

This notion of constitutional idiocy at the root of New Originalism is premised on a profound ignorance of Founding-Era history. The state ratification debates in Pennsylvania, New York, or Massachusetts, in particular, provide many examples of common folk who took an active part in ratification.²¹ There was no sharp line separating those with, from those without legal knowledge. In the era of the Constitution legal knowledge existed along a continuum. At one extreme were figures such as James Wilson who were steeped in the classic texts of Anglo-American law. The middle of this spectrum included men such as William Findley who had read Blackstone, but not internalized his method. At a more popular level, William Manning, a tavern keeper, gained his knowledge of the law from the popular press. Among members of the lesser gentry it was not uncommon to find individuals with some knowledge of the law. Thomas Bourn, a delegate from Cape Cod, was typical of many delegates to the state conventions in this regard. When the town of Sandwich proposed binding its delegates with specific voting instructions on

PELATIAH WEBSTER, *POLITICAL ESSAYS* 343 (Philadelphia, Joseph Cruikshank 1791). In Greek political philosophy the term *idiotes* described a person who took no part in the public life of the city. See HANNAH ARENDT, *THE HUMAN CONDITION* 35, 54 (1971); DAVID MILLER, *POLITICAL PHILOSOPHY: A VERY SHORT INTRODUCTION* (2003).

20. McGinnis & Rappaport, *Original Methods*, *supra* 2, at 771 (citing John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997)). Beginning with Jackson Turner Main's pioneering study, *The Antifederalists: Critics of the Constitution, 1781-1788* (1961), there have been three generations of historians who have documented the vitality of the popular debate over the Constitution. For the most recent study to validate this conclusion, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* (2011).

21. All of these sources are now available in authoritative modern editions. The state ratification debates of Pennsylvania, Massachusetts, and New York are available in 2, 4-7, 19-23 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (John. P. Kaminsky et al. eds., 1976) [hereinafter DHRC].

ratification, Bourn threatened to resign, reminding his fellow townsmen that to deprive delegates of their voice would be to literally render them idiots. "Under the restrictions with which your delegates are fettered," he wrote "the greatest idiot [sic] might answer your purpose as well, as the greatest man."²²

The notion of constitutional idiocy is central to virtually every brand of Originalism, new and old. The idiotic theory also enables some New Originalists to side step dealing with the actual beliefs of Americans and substitute the beliefs of a fictive reader, effectively turning constitutional interpretation into an act of historical ventriloquism.²³

When combined with the false Originalist assumption that a consensus existed on matters of constitutional interpretation and belief, the idea of constitutional idiocy allows Originalists to cherry-pick their quotes from a narrow range of sources, and then pronounce those views typical of the Founding Era. Indeed, in *Heller*, Justice Scalia used an Anti-Federalist text written by the "Dissent of the Pennsylvania Minority" as one of the keys to unlocking the meaning of the Second Amendment. His methodology makes it easy for him to take a text articulating the beliefs of the dissent of the minority of a single state ratification convention and transform it into a proxy for public meaning. In the wacky world of New Originalism, dissent becomes assent, minorities become majorities, and the interpretive method of the Anti-Federalist losers supplants the methods of the Federalist winners. Such creative rewriting of the past makes for interesting alternate histories, but it is not a serious scholarly methodology for understanding the historical meaning of the Constitution. It is an exercise in law office history cloaked in Originalist garb.²⁴

22. 5 *id.* at 1020.

23. On the importance of fictive readers to new originalist practice, see the work of Lawson and Barnett, *supra* note 2.

24. Cornell, *supra* note 17. Originalist scholarship is a paradigmatic example of "law office history." In contrast to scholarly history, law office history is characterized by several recurring problems: it is typically result-oriented, it shows an appalling lack of familiarity with Founding Era history and historiography, and it approaches historical texts in an anachronistic manner. For critiques of various aspects of law office history, see EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523-29 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); and Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003). Originalism often reads as if it were a science fiction alternate history, a world in which the Anti-Federalists, not the Federalists wrote the Constitution. On this genre, see Gavriel Rosenfield, *Why Do We Ask "What If?" Reflections on the Function of Alternate History*, 4 HISTORY & THEORY 90 (2002).

Solum's theory of semantic Originalism invokes the authority of philosopher Paul Grice. Yet, even if Grice provided the best model for Originalists, one would still need the methods of intellectual history to do a rigorous survey of actual Founding Era linguistic behaviors. Moreover, it would make more sense to begin with post-Gricean scholarship and one of the major revisions of Grice's theory. John Searle's notion that we must look at intention plus convention provides one model. Another promising model is provided by Scott Soames and his theory of the "pragmatic enrichment" of meaning. Soames highlights the philosophical problems with textualism and semantic theories of legal meaning. In either case, one would still need to pay attention to issues of intent. The notion that the meaning of a legal text can be determined without reference to intent seems at odds with the views of leading philosophers of language working on legal questions.²⁵

Moving beyond Originalism's idiotic theory of the Constitution and its false notion of interpretive consensus necessarily leads to questions about popular constitutionalism in the Founding Era. Although interest in popular constitutionalism has blossomed among legal scholars, the subject of popular modes of constitutional interpretation during the Founding Era has not drawn much scholarly notice.²⁶ Understanding how the Constitution was read by different groups in the Founding Era, including ordinary Americans, is the essential starting point for any serious historical inquiry into original meaning.²⁷

25. Although a full examination of the problems with Solum's theory of semantic originalism, *supra* note 2, are beyond the scope of this essay a few observations are worth making. Grice's entire project was to link sentence meaning with his intentionalist model of speaker meaning, so any historical application of Grice would require an ambitious scholarly inquiry: a survey of old dictionaries would hardly begin to meet this requirement. Applying Grice leads to something akin to Geertzian thick description. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE* (1973). On recent historians' debt to Geertz, see William H. Sewell Jr., *Geertz, Cultural Systems, and History: From Synchrony to Transformation*, 59 REPRESENTATIONS 35 (1997). If one were looking to raid philosophy for a model, Searle's notion of intention plus convention seems a far better fit for the project of constitutional interpretation. SEARLE, *supra* note 9. Alternatively recent work in pragmatics offers another model for originalism. For a sketch of how a neo-Gricean approach informed by "pragmatic enrichment" could bring some rigor to legal interpretation, see the introduction to PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN LAW (Andrei Marmor & Scott Soames eds., 2011).

26. For a general discussion of the idea of popular constitutionalism, see LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); and Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI. KENT L. REV. 809 (2006).

27. Most forms of New Originalism are clumsy and unreflective exercises in reader-response criticism aimed at uncovering how the Constitution would have been read. For an overview of the evolution of reader-response methodology and a brief discussion of the problems of using fictive readers in place of actual ones, see Philip Goldstein, *Reader-Response Theory and Criticism*, in *THE*

It is easy to understand why popular modes of interpretation would be almost invisible to modern constitutional scholarship.²⁸ Recovering how the Constitution might have been read by ordinary Americans requires moving beyond the familiar canonical texts consulted by Originalist scholarship. In essence, one must write a constitutional history from the bottom up to complement the more traditional top-down court-centered narratives of this period.²⁹ Exploring constitutional history from the bottom up means expanding the range of sources consulted for establishing constitutional meaning. Looking at constitutional history through this lens, one might learn as much from a popular play, a short newspaper squib, or tavern keeper's musings, as one might learn from an elite text such as *The Federalist* or the decisions of the Marshall Court.³⁰ When one moves beyond the debate between elite Federalists and Anti-Federalists, or Jefferson and Hamilton's arguments over strict and loose construction, a much more fundamental division within the Founding generation becomes visible: a conflict between elite and popular approaches to constitutional interpretation. Only when this aspect of the

JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM (Michael Groden, Martin Kreiswirth, & Imre Szeman eds., 2d ed. 2005). On the relevance of this method to history, see J.G.A. Pocock, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY (1985); and Martyn P. Thompson, *Reception Theory and the Interpretation of Historical Meaning*, 32 HIST. & THEORY 248 (1993). For a concise overview of the empirical problems of applying these insights to actual historical texts in eighteenth-century Britain, see Ian Jackson, *Approaches to the History of Readers and Reading in Eighteenth-Century Britain*, 47 HIST. JOURNAL 1041 (2004). A reader response model does make sense as an alternative to Originalism. The goal would be to determine how the Constitution was read by different groups in American society during the Founding Era and decide which of these diverse readings ought to have the greatest legal weight in modern constitutional interpretation. Recovering past reading practice is, however, among the most notoriously difficult historical problems faced by intellectual historians. For an effort to chart what such a reader-response model might look like, see SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999) [hereinafter CORNELL, *OTHER FOUNDERS*].

28. For two views of the Founders' views of interpretive method which focus largely on Madison, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1988); and Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMM. 159 (1996). The important pathbreaking essay on Originalism, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), explores Anti-Federalist and Federalist interpretive practice, but treats each group as essentially monolithic and draws no distinctions between popular and elite thought. Scholarship since Powell's pioneering work has stressed the diversity of Anti-Federalist thought. See CORNELL, *OTHER FOUNDERS*, *supra* note 27.

29. On the notion of social history and history from the bottom up, see Jesse Lemisch, *The American Revolution Seen from the Bottom Up*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 29 (Barton J. Bernstein ed., 1967). Although constitutional historians have not yet embraced history from the bottom up in a systematic fashion, legal historians have been engaged in exploring legal history from the bottom up for more than a generation. See, e.g., William Forbath, Hendrik Hartog & Martha Minow, *Introduction Legal Histories from Below*, 1985 WIS. L. REV. 759.

30. Grafton, *supra* note 5.

Founding debate is restored to its prominence can we begin to understand the dynamics of the original debate over Originalism.

POPULAR CONSTITUTIONALISM IN THE FOUNDING ERA: THE PEOPLE'S
CONSTITUTION V. THE LAWYER'S CONSTITUTION

One of the most fundamental divisions in Founding-Era interpretive practice has been effectively invisible to modern scholars. Proponents of a lawyer's constitution clashed with champions of a people's constitution. Spokesmen for the former believed that constitutions ought to be interpreted according to the rules laid down by Anglo-American jurists such as Blackstone. Advocates for the people's constitution argued that legal texts should be interpreted according to the ordinary rules of the English language. This latter theory was also distinctly hostile to judicial review, placing its faith in the people themselves, acting through popular institutions such as the legislature, jury, and for the most radical champions of this theory, the militia and crowd. This basic tension between the lawyer's constitution and the people's constitution has gone unnoticed by most legal scholars because modern constitutional law focuses so heavily on federal case law, giving little attention to state cases, and even less attention to popular writing from the Founding Era. When one looks at these neglected sources the vibrancy of popular constitutionalism in the Founding Era comes into sharp focus.

As the tempest over ratification was raging, playwright Samuel Low completed his political farce, *The Politician Outwitted*.³¹ Staged in 1789, the play is set amidst the larger political tumult generated by the lively debate in New York over the Constitution. The play explores a number of themes relevant to understanding constitutional and political conflict in the new nation.³² At one point a Federalist character named "Trueman" expresses joy over the news that Massachusetts had become the latest "federal pillar," a reference to a common architectural metaphor for ratification.³³ Barely able to contain his joy, he declares that ratification of the Constitution was "the grand *desideratum* of my wishes."³⁴ The somewhat pretentious turn of phrase prompts an angry response from his Anti-Federalist opponent, "Loveyet," who protests that he does not care

31. SAMUEL LOW, *THE POLITICIAN OUTWITTED* (New York, J. Lawson 1790).

32. See Maxwell Bloomfield, *Constitutional Values and the Literature of the Early Republic*, 11 J. AM. CULTURE 53 (2004).

33. LOW, *supra* note 31, at 43

34. *Id.*

“a fig for your latin and literature!”³⁵ With political tempers still smarting from another Federalist victory, the Anti-Federalist character launches into a diatribe against the underlying legal and constitutional vision of his Federalist opponents. Accusing Federalists of lawyerly cunning and craft, he complains that they have over-awed and taken “advantage of our weak side.”³⁶ Echoing a common Anti-Federalist complaint, he charged the Federalists with trying to “cram this unconstitutional bolus down our throats, with Latin.”³⁷ Federalists were a “vile junto of perfidious politicians” whose goal is “to *latin* us out of our liberties.”³⁸ Low’s play chronicled a growing tension in American culture between two opposing legal cultures a conflict between the elite discourse of judges and lawyers, inflected by Latin and shaped by the traditions of Anglo-American jurisprudence, and a more popular constitutional discourse hostile to that tradition.

It is not difficult to find examples of popular spokesmen voicing complaints very similar to the characters in Low’s political farce. When Amos Singletary, an Anti-Federalist farmer from a strongly Shaysite region of western Massachusetts, rose in the Massachusetts ratification convention, he denounced the Constitution in a language that closely tracked the metaphor chosen by Low.

These lawyers, and men of learning, and monied men, that talk so finely and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this Constitution and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great *Leviathan*, Mr. President, yes, just as the whale swallowed up *Jonah*.³⁹

In contrast to the Latinate discourse of the law, Singletary’s language was inflected by a Protestant plain style. He drew on the Biblical story of Jonah to frame his critique of the Constitution. Singletary was hardly alone in fulminating against the new Constitution. Further west in Great

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. 6 DHRC, *supra* note 21, at 1346-47. Illiteracy in this context connotes the absence of learning (i.e., not an inability to read or write). For a discussion of Singletary’s speech in this context, see MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* (1992).

Barrington, Massachusetts, Anti-Federalist John Bacon, a state representative and a candidate for the Massachusetts state ratification convention, charged that the Constitution was “a government for great men & law[y]ers.”⁴⁰ The contrast between the Latinate culture of the law and the popular Protestant plain style of Singletary and other Anti-Federalists struck a resonant chord in Massachusetts.⁴¹

Criticism of lawyers in Massachusetts was not new. At roughly the same time that Shays’s Rebellion rocked western Massachusetts, Benjamin Austin published a scathing attack on lawyers in a pamphlet entitled “The Pernicious Practice of the Law.”⁴² Writing as “Honestus,” Austin compared the chicanery of lawyers with the practices of “Romish priests in matters of religion.”⁴³ In the strongly Protestant culture of eighteenth-century Massachusetts, such a comparison was hardly flattering. Champions of popular constitutionalism shared a common belief that citizens need not have much, if any, formal training in law to understand the meaning of constitutional and legal texts, which ought to be interpreted according to their plain meaning. An important consequence of this belief was the view that judges and courts should not be the final arbiters of constitutional meaning. Rather than adopt a court-centric approach, popular constitutionalism was deeply suspicious of ceding so much authority to lawyers and judges. For some, the legislature, not the judiciary, was the proper arbiter of constitutional meaning. For the most radical champions of this theory, plebeian populists, only truly local institutions such as the jury, the militia, and even, when necessary, the crowd, retained the authority to decide what the Constitution meant.⁴⁴

40. Letter from Theodore Sedgwick to Henry Van Schaack (Nov. 28, 1787), in 6 DHRC, *supra* note 21, at 1035; see also *A Countryman*, AM. HERALD (Boston), January 21, 1788; *From the Independent Chronicle*, AM. HERALD (Boston), Jan. 7, 1788; *Peregrine*, MASS. CENTINEL, Apr. 19, 1788. In New York, the Anti-Federalist author Brutus, Jr., used a similar language. 6 THE COMPLETE ANTI-FEDERALIST 39 (Herbert J. Storing ed., 2007).

41. As a general rule, Federalists were much more likely to cite classical authorities than Anti-Federalists. Opponents of the Constitution were also more likely to cite the Bible than Federalists. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 184 (1984). For other examples of the Protestant “plain style” in Anti-Federalist writing, see the New York *Essays of A Plebeian*, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 40, at 128; and *A Countryman*, in 6 THE COMPLETE ANTI-FEDERALIST 128, *supra* note 40, at 69.

42. HONESTUS, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW (Boston, Thomas Adams & John Nourse 1786).

43. *Id.*

44. Saul Cornell, *Mobs, Militias, and Magistrates Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006). For a sweeping discussion of popular political thought in early American history, see RONALD FORMISANO, FOR THE PEOPLE: AMERICAN POPULIST

William Manning, a tavern keeper from Billerica, Massachusetts, echoed this popular critique of the law.⁴⁵ He chose a different metaphor to capture his own suspicions about the new Constitution. Manning's fears about the new frame of government stemmed as much from the methods of constitutional interpretation associated with the lawyer's constitution as from the actual text of the document. Manning compared the Constitution to "a Fiddle, with but few Strings." The language of the Constitution would allow the better sort to "play any tune upon it they pleased."⁴⁶ These ambiguities would be exploited by those trained in the methods of the lawyer's constitution. The starting point for any understanding of Manning's constitutional vision, and other popular voices, was an inchoate conception of class struggle. Manning saw the new nation divided into two classes: the few and the many. In his writings, Manning repeatedly employed a language very similar to Singletary and other supporters of popular constitutionalism, lashing out at the danger posed by the "craft and cunning arts" of those in power, and singled lawyers for particularly harsh criticism for their obfuscations.⁴⁷

Elite legal culture in the Founding Era, particularly among Federalists, was designed to shore up a basic distinction between law and politics, to isolate a range of issues, particularly economic ones, from the vicissitudes of popular politics.⁴⁸ Proponents of popular constitutionalism generally sought to eliminate this distinction, expanding the scope of the political, exposing more economic activity to political control.⁴⁹

Elite defenses of the law resisted such efforts and sought to separate law and politics and provide greater security for economic activity. Stability and predictability were especially important to a commercial economy. One can see the outlines of the ideology of legal elites in the responses written to challenge the anti-lawyer rhetoric of Honestus. A

MOVEMENTS FROM THE REVOLUTION TO THE 1850S (2008). For an interesting but somewhat episodic effort to look at aspects of popular constitutionalism in the period between the American Revolution and the Civil War, see CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008).

45. WILLIAM MANNING, *THE KEY OF LIBERTY: SHOWING THE CAUSES WHY A FREE GOVERNMENT HAS ALWAYS FAILED AND A REMEDY AGAINST IT* 148, 180 (Sean Wilentz ed., Harvard Univ. Press 1993) (1799).

46. *Id.* at 148.

47. *Id.* at 146.

48. On the importance of this distinction to elite legal thought in this period, see WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000).

49. On popular constitutional thought, particularly its alternative vision of the relationship between politics, property, and the economy, see TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* (2007).

writer calling himself “Zenas” defended traditional legal culture against the populist tirades of “scribblers” or “Gazetteer politicians,” slurs that expressly linked the combative world of the popular press with anti-lawyer ideology.⁵⁰ The contrast between the lawyer’s constitution, which was shaped by leather-bound treatises, and the people’s constitution, a world of anonymous newspaper essays and tavern conversations, could hardly be starker. Zenas defended the elite tradition of law, reminding his readers that men learned in the law were essential in any free government, and particularly necessary in America’s new constitutional order. Champions of popular constitutionalism, he argued, defended a misguided ideal of constitutional simplicity. Zenas disputed this naïve view, arguing that the reverse was true. “Systems of government become complex and increase in their complexity in an exact proportion to the quantity of freedom enjoyed by the subject.”⁵¹ Moreover, the creation of clear forms, definitions, and rules of legal construction—the primary goal of legal education—was itself designed to reduce the arbitrariness and capriciousness of the application of the law to specific cases. If true liberty was the absence of arbitrary authority, the lawyer’s constitution served the interests of liberty far better than the mutable democratic vision of law associated with the people’s constitution defended by Honestus.

One of the most spirited defenses of the “lawyer’s constitution” came from Samuel Willard Bridgham in *An Oration on the Propriety of Introducing the Science of Jurisprudence into a Course of Classical Education*, which was written at roughly the same time as Manning was writing *The Key of Liberty*. A lawyer and politician who eventually became the mayor of Providence, Rhode Island, Bridgham defended a distinctly Federalist vision of law that was the mirror image of the class-conscious rhetoric used by Manning and Singletary. Bridgham sought to strengthen and defend the lawyer’s constitution against the attacks of Manning and others like him.⁵²

Bridgham made a plea for broadening classical higher education to include a course on jurisprudence. The *Oration* was designed to buttress existing class distinctions, not level them. Firming up the link between classical education and legal education would solidify the rule of a

50. Zenas, *INDEPENDENT CHRONICLE* (Boston), April 27, 1786.

51. *Id.*

52. SAMUEL WILLARD BRIDGHAM, *AN ORATION ON THE PROPRIETY OF INTRODUCING THE SCIENCE OF JURISPRUDENCE INTO A COURSE OF CLASSICAL EDUCATION* 4, 5 (Providence, R.I., Carter and Wilkinson 1797).

virtuous elite.⁵³ Bridgham naturally began his *Oration* with an epithet from Blackstone. No legal thinker was more important for supporters of the lawyer's constitution than Blackstone, whose magisterial *Commentaries* became a standard reference work for both the meaning of the common law and the methods of legal analysis.⁵⁴

Bridgham was certainly among those who put his faith in the wisdom of Blackstone and the lawyerly tradition of Anglo-American law. In his oration he invoked the "wisdom of ages, improved and collected in those many volumes of English jurisprudence."⁵⁵ A command of this material, he noted, "requires a laborious investigation." Moreover, he suggested to his audience that it was "preposterous in the extreme" to believe that a "man can explain statutes he knows nothing about, can comment upon texts of which he is totally ignorant, or can remedy defects in laws of which he has no knowledge." Sounding a familiar Federalist theme, Bridgham warned against the danger of "political jealousy," particularly the type sown in the people by "ignorant Americans."⁵⁶ No group had done more harm in this regard than the original Anti-Federalist opponents of the Constitution. In short, Bridgham viewed the beliefs of men like Manning and Singletary as precisely the type of ideas that had nearly plunged the nation into "agitation and civil commotion."⁵⁷

It is tempting to see this divide as a simple dichotomy separating elites from the people, but the historical reality is even more complex. It would be far more accurate to view the conflict over legal interpretation as existing along a spectrum in which elite culture shaded gradually into a more popular plebeian culture. At one extreme stood men such as Samuel

53. On the role of Greek and Roman culture in early American legal culture, see CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE, 1780-1910* (2002).

54. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); see also Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 184 (1984).

55. Prior to the American Revolution, there were at least one thousand copies of Blackstone in American libraries. The first American edition of Blackstone, published by Robert Bell in Philadelphia in 1771-1772, had a list of subscribers that included such leading figures as John Adams, John Jay, James Wilson, and St. George Tucker. Along with Montesquieu, Blackstone was one of the most frequently cited authorities during Ratification. While the importance of Blackstone to the constitutional thought of the Founding Era is reasonably well established, what has not attracted as much notice is the role of different readings of Blackstone in the struggle to define early American constitutionalism. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976). For the persistence of Blackstone's influence, see M. H. HOEFELICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* (2010).

56. BRIDGHAM, *supra* note 52.

57. *Id.*

Willard Bridgham who were firmly committed to the methods of the lawyer's constitution. In the middle stood many self-made lawyers who had some familiarity with Blackstone's writings. Further along this continuum were moderates who believed that the law required no special knowledge, and at the extreme were plebeian populists who believed the voice of the people could be spontaneously gathered by juries or even mobs.

The spectrum running from elite supporters of the lawyer's constitution to popular champions of the people's constitution included a broad constitutional middle ground, one populated by a host of new types of legal actors who emerged after the American Revolution. This legal middle ground included men such as the weaver-turned-politician William Findley and pseudonymous authors such as New York's Brutus.⁵⁸ In this constitutional middle ground, men with some exposure to the writings of Blackstone, such as Findley and Brutus, championed a constitutional theory of public meaning that sought to level the constitutional playing field by depriving lawyers of an undue advantage. Champions of this public meaning/ordinary language vision of popular constitutionalism also hoped to liberate American law from the last vestiges of the monarchism and aristocratic corruption of the English common law.⁵⁹ In their view, the protection of popular liberty required no Latin, not much Blackstone, and no recourse to the established conventions of Anglo-American law. Proponents of this view generally opposed the notion that the courts were the final arbiters of meaning, preferring to look to the jury or the legislature as the ultimate authority on constitutional meaning. Pursuing the logic of this democratic theory to its most radical conclusion, some advocates of popular constitutionalism dispensed with the notion that written constitutional texts were sacrosanct. In their view, constitutions were not substitutes for the direct action of the people themselves. Rather than trust in their state legislatures or even their state constitutions, these plebeian populists preferred to trust the people themselves acting directly as the jury, the militia, or, even if necessary, the mob.⁶⁰

58. See *infra* pp. 313-14.

59. See CORNELL, OTHER FOUNDERS, *supra* note 27.

60. *Id.* at ch. 3.

PUBLIUS AND BRUTUS DEBATE THE LAWYER'S CONSTITUTION

Although a sea of ink was spilled in the spirited debate over the Constitution, relatively little attention was devoted to the issue of how the proposed Constitution ought to be interpreted if it were adopted. Anti-Federalists devoted most of their energy to attacking the Constitution, and showed little interest in exploring what might happen if the Constitution were ratified. Similarly, Federalists spent most of their time rebutting specific Anti-Federalist criticisms and defending the Constitution, and hence they did not devote much attention to articulating a systematic theory of constitutional interpretation. Even the most far-sighted and theoretically sophisticated authors, including Publius and Brutus, paid little heed to this issue, one that would become a major point of contention in the decade after ratification. Still, Brutus and Publius did touch briefly on this issue within the context of their debate over the powers of the judiciary.⁶¹

The identity of the Anti-Federalist author Brutus remains a mystery. Recent scholarship favors the New York merchant Melancton Smith.⁶² New York's Anti-Federalists, including Smith, were more provincial than their Federalist opponents, and they lacked the same level of education, family connections, and wealth. Not surprisingly, when they approached the law, they did so from a more populist perspective. Rather than seek to expand the power of judges, Anti-Federalists such as Smith sought to limit judicial authority and enhance the power of the jury.

Brutus clearly had a basic grasp of texts such as Blackstone's *Commentaries*. Indeed, Brutus was eager to show off his knowledge of the great English jurist. Yet, a few quotations from the learned English jurist did not make Brutus a doctrinaire Blackstonian in matters of constitutional interpretation. Brutus may have had a passing familiarity

61. This important discussion has not merited the careful attention it deserves. In his important article on Originalism, H. Jefferson Powell discusses the disagreement between Publius and Brutus. I think Powell overstates the degree to which Publius adopted a strictly textualist approach to constitutional interpretation. Publius adopted an orthodox Blackstonian view that was strongly, but not exclusively, textualist. Another discussion of this debate mistakenly characterizes Brutus as a supporter of Blackstonian orthodoxy. Robert G. Natelson, for example, attributes beliefs to Brutus that the author was actually attacking. Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007). The most historically accurate treatment of this debate is DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* (2005).

62. For a useful overview of the debate over the identity of Brutus, see *Editor's Note*, in 19 DHRC, *supra* note 21, at 103-4. On the differences between the Federalist and Anti-Federalist elite in New York, see HULSEBOSCH, *supra* note 61, at 218.

with Blackstone, but he was not steeped in the *Commentaries* and certainly did not defer to its wisdom in all matters. Rather than embark on a detailed course of legal study, Brutus and others like him believed that a general acquaintance with a few widely reprinted law texts was all that any citizen needed. Accordingly, Brutus confessed his own “want of capacity to give that full and minute explanation of all of the legal terminology used in the Constitution.”⁶³ Indeed, as was true for many Anti-Federalists, Brutus’ vision of the law was as profoundly shaped by popular religious ideas, as it was by Anglo-American jurisprudence.⁶⁴

In his assault on the judiciary, Brutus sounded many familiar Anti-Federalist themes, including the dangers of consolidation and the absence of a bill of rights.⁶⁵ Brutus also worried that the federal judiciary would become an engine of despotism by aiding the process of consolidation. Brutus feared the type of men who would populate the judiciary and the methods they would use to interpret the new Constitution. Judges following the precepts of Blackstone would, Brutus argued, gradually expand the powers of the central government and would support the interests of the few, at the expense of the many.

The Federalist response to the types of fears raised by Brutus is instructive. In *Federalist* No. 83, Publius dismissed Anti-Federalist fears, noting that “the rules of legal interpretation are rules of COMMONSENSE, adopted by the courts in the construction of the laws.”⁶⁶ Taken in isolation, this comment might seem to suggest that

63. Brutus cites Grotius’ *De Jure Belli ac Pacis* [*On the Law of War and Peace*], a standard text for understanding international law, particularly the law of treaties, and Blackstone’s *Commentaries*, a standard guide for understanding the common law and interpreting statutes. XI BRUTUS, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 419, 420, 422 (Herbert J. Storing ed., 1981).

64. *Id.* at 386-87. See also Donald S. Lutz, *European Works Read and Cited by the American Founding Generation*, in A PREFACE TO AMERICAN POLITICAL THEORY 159-64 (1992). On popular Anti-Federalist debt to religious discourse, see Stephan Marini, *Religious Tests, Constitutions, and “Christian Nation”*, in RONALD HOFFMAN & PETER J. ALBERT, *RELIGION IN A REVOLUTIONARY AGE* (1994).

65. *The Federalist* was clearly the most nuanced and theoretically rigorous defense of the Constitution. Assessing its immediate impact has been more difficult. For an excellent overview of these issues and exploration of the rhetorical strategies of *The Federalist*, see Todd Estes, *The Voices of Publius and the Strategies of Persuasion in THE FEDERALIST*, 28 J. OF THE EARLY REPUBLIC 523-58 (2008). See also ALBERT FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984); MICHAEL I. MEYERSON, *LIBERTY’S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD* (2008). On Anti-Federalism, see CORNELL, *OTHER FOUNDERS*, *supra* note 27 at chs. 2-3.

66. THE FEDERALIST NO. 83 (Alexander Hamilton); see also Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), in CHARLES W. UPHAM, 2 LIFE OF TIMOTHY PICKERING 359-60, 366-67 (Boston, Little, Brown, & Co. 1873).

Publius was advocating something like a public meaning approach, a view that should have pleased critics such as Brutus, who favored this method. One must recall that documents such as *The Federalist* were political texts and must be read in context. Indeed, the problem of interpreting this particular passage illustrates many of the methodological flaws of the New Originalism. One must consider both Publius' intention, and the variety of possible audience responses, to arrive at an adequate understanding of this passage.⁶⁷

Indeed, there is good reason to conclude that this rejoinder and its glib dismissal of the problem of interpretation was disingenuous at best, and perhaps deliberately deceptive.⁶⁸ If one looks at all of Hamilton's contributions to *The Federalist*, and contemporary responses to Publius, a more accurate understanding of his argument with Brutus emerges. In contrast to the notion of constitutional idiocy embraced by modern Originalists, the historical evidence suggests that contemporary readers were quite astute and savvy, at least about discerning the ideological leanings of authors, including Publius. One Anti-Federalist author who was not taken in by such rhetoric, "[a] Countryman from Dutchess County," warned his readers that "[t]he Federalist, as he terms himself, or Publius, puts me in mind of some of the gentlemen of the long robe" who used the language of the law to befuddle and distract common folk.⁶⁹

As far as constitutional interpretation was concerned, the following passage is more typical of Publius:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still

67. On the methods of reader-response criticism, see *supra* note 28.

68. WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 50 (1999).

69. *A Countryman from Dutchess County*, in 6 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 63, at 66.

smaller of those who unite the requisite integrity with the requisite knowledge.⁷⁰

A learned judicial elite, well trained in Anglo-American jurisprudence, was not a threat to liberty but rather one of its essentials bulwarks.⁷¹

Brutus did not share Publius' faith in a learned judiciary. He saw himself as a spokesman for a rising middling class. He not only rejected the elitism of New York Federalists such as Hamilton, but he self-consciously distanced himself from the more radical democratic elements among the Anti-Federalists, the type of men who had rallied to Daniel Shays or poured into the streets of Carlisle Pennsylvania to mete out punishment to their Federalists opponents during ratification.⁷² Brutus occupied a sort of constitutional middle ground between these two extremes.

In his discussion of the problem of constitutional interpretation, Brutus provided a fairly lucid summary of the starting point of orthodox Blackstonian method. Brutus had clearly schooled himself well enough in Blackstone to summarize the first step of this method. Constitutional texts ought to be interpreted according to the plain public meaning of the text. The first of Blackstone's rules would have pleased Brutus: "words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use."⁷³ Brutus and Publius both accepted the first of Blackstone's rules, which enjoined judges to read legal texts in light of the common use of words. But this type of inquiry, which was the end goal for Brutus, was simply the starting point for Blackstone, Publius, and other champions of the lawyer's constitution.⁷⁴

Brutus rejected several core features of orthodox Blackstonian method—including its emphasis on discovering legislative intent. The search for an original intent was especially dangerous because it opened up all of the evils of the lawyer's constitution. Legislative intent, of course, was not simply the subjective meaning of laws as they were understood by the particular legislator who crafted a specific law. The

70. THE FEDERALIST NO. 78 (Alexander Hamilton); 1 WILLIAM BLACKSTONE, COMMENTARIES *59-61.

71. To be sure, it was not just elite Federalists who supported this vision of law. Many leading Anti-Federalists, such as Elbridge Gerry, supported orthodox Blackstonian method. On this point, see 2 ANNALS OF CONG. 1946-54 (statement of Rep. Elbridge Gerry).

72. CORNELL, OTHER FOUNDERS, *supra* note 27, at ch. 3.

73. 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

74. *Id.*

concept of legislative intent in Blackstone was a complex legal construct that was deduced from the application of a clear set of legal rules of construction. Blackstonian method recognized that memories faded and motives could lead individuals to misstate their own intent.⁷⁵ To avoid these problems, Anglo-American law had developed a clear set of procedures to ascertain the meaning of legal texts. These rules were summarized early in Blackstone's *Commentaries*. Thus, Blackstone offered this general advice to judges:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.⁷⁶

These general rules were followed by a series of specific interpretive principles. It was these standard techniques of the lawyer's constitution that worried Brutus, who feared that "the judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner."⁷⁷ Precisely because matters of constitutional interpretation were among the subtlest means of expanding the scope of federal power, judicial power was all the more insidious and potentially dangerous.

It is easy to understand why Blackstone's method worried Brutus. A paramount interpretive principle relied on preambles as a means of decoding legislative intent.

If words happen to be still dubious, we may establish their

75. For a useful discussion about the difference between subjective intent and legislative intent, see Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1502 (2006); and Powell, *supra* note 28. Contrary to the claims of New Originalists and Justice Scalia, the orthodox judicial model of interpreting statutes and constitutional provisions in the Founding Era was intentionalist. This concept of intent was not a subjective psychological or mentalist notion, but was a rule-based concept. Although the plain meaning of the text was the starting point for recovering intent, judges also employed a contextualist mode of analysis designed to identify the spirit of the law, including the specific evil that the legislation had sought to remedy. For a good illustration of how this was applied in the early republic, see *Martin v. Commonwealth*, 1 Mass. 347 (1805). In that case, the Court stated the rule in this way: "[i]n construing statutes, the great object is to discover from the words, the subject matter, the mischiefs contemplated, and the remedies proposed, what was the true meaning and design of the legislature." *Id.* at 391. The judges in this case turned to the preamble as a guide. See *id.* at 362-63, 391-393. Needless to say Justice Scalia provides no examples of Founding judges following his bizarre rule about preambles. Scalia obviously did not even read the full text of the Pennsylvania Constitution very carefully, since it enjoins legislators to use the preamble to articulate the reasons for enacting a law. PA. CONST. of 1776, § 15 (enjoining that "the reasons and motives for making such laws shall be fully and clearly expressed in the preambles").

76. 1 WILLIAM BLACKSTONE, COMMENTARIES *59-61.

77. *Brutus XII*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 63, at 420.

meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.⁷⁸

Blackstone's second rule was particularly troubling for Brutus because of the great weight it placed upon preambles. According to Blackstone, the preamble or *proeme* described the purpose of an enactment or constitutional provision.⁷⁹ Brutus recognized that the new Constitution's preamble could easily be converted by judges into a virtual blank check for the expansion of federal power if one used orthodox Blackstonian rules of construction. "If the end of the government is to be learned from these words," Brutus warned, "it is obvious it has in view every object which is embraced by any government."⁸⁰ Given Blackstonian methods, it was inevitable that "the courts, therefore, will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter."⁸¹

The final rule in Blackstone's method was equally troubling to Brutus who saw it as yet another example of the dangers of the lawyer's constitution: "Lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."⁸²

Blackstone's suggestion to look into the reason and the spirit of the law could provide judges with a means of expanding their power and reading new meanings into the law. Brutus noted the grave danger that would flow from court's interpreting the Constitution in terms of its reason and spirit:

This court will be authorized to decide upon the meaning of the constitution, and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and

78. 1 WILLIAM BLACKSTONE, COMMENTARIES *59-61.

79. *Brutus XII*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 63, at 421.

80. *Id.* at 424.

81. *Id.*

82. 1 WILLIAM BLACKSTONE, COMMENTARIES *59-61.

intention of it. In the exercise of this power they will not be subordinate to, but above the legislature.⁸³

Brutus also feared the Constitution's grant of equity jurisdiction, believing that equitable jurisprudence was especially open-ended and, thus, dangerous. Following Blackstonian rules of equity would authorize the federal courts to read the Constitution in a way that went beyond the plain meaning of the words. Irritated by Anti-Federalist attacks on orthodox Blackstonian method, Publius responded with a forceful attack.

In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State.⁸⁴

Hamilton's response to Brutus was lawyerly in the extreme. The Constitution was silent on the question of how it ought to be interpreted. There was nothing in its text that spoke to this issue directly. Hamilton was also correct, at least in theory, that there was no aspect of this critique of interpretation that could not be leveled "against the local judicatures in general."⁸⁵ Courts in every state commonly employed Blackstone's rules. The first point, though certainly technically correct, evaded the core critique of Brutus. While nothing in the text of the Constitution mandated that it be interpreted according to the precepts of the lawyer's constitution, which included orthodox Blackstonian rules, this was the approach Hamilton believed judges should use to interpret the Constitution.⁸⁶

Hamilton's response to Brutus raises a separate, but no less interesting question: would the culture of the new federal courts be different than the state judiciaries? Specifically, would the new federal courts, including the Supreme Court, approach constitutional interpretation differently than state courts? On this issue Publius and Brutus each had some evidence upon which to base their very different assessments of this question. Some state courts, most notably Virginia, were dominated by eminent jurists, men such as St. George Tucker, who were deeply committed to the traditional rules of Anglo-American jurisprudence. In Pennsylvania and New York, by contrast, the state's highest court included self-made men

83. BRUTUS XV, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 63, at 419.

84. THE FEDERALIST NO. 84 (Alexander Hamilton).

85. THE FEDERALIST NO. 81 (Alexander Hamilton).

86. *Id.*

drawn from the ranks of the middling sort, men like George Bryan and Robert Yates, whose approach to law reflected the ideas of the constitutional middle ground.⁸⁷ Brutus clearly believed that the state courts would act differently than the federal courts. Dominated by men of the middling sort whose interpretive methods would focus on public meaning, not an orthodox Blackstonian search for intent, state courts would better protect the people from the depredations they were likely to suffer at the hands of an elitist judiciary. Thus, Brutus not only opposed the elitism of Publius, but also the radicalism of plebeian constitutionalism. His vision of the state judiciaries envisioned something between the lawyer's constitution and the most populist vision of the people's constitution. He wrote approvingly of the recent history of the state judiciaries, which he believed had shown considerable restraint, opposing the paper money laws, tender acts, and other pro-debtor actions. Indeed, even Rhode Island: "The judges there gave a decision, in opposition to the words of the Statute, on this principle, that a construction according to the words of it, would contradict the fundamental maxims of their laws."⁸⁸ Brutus did not favor state courts because they would be pro-debtor, or less sympathetic to the rights of property, he favored them because he thought them more likely to be stocked with judges like himself: men who had demonstrated their commitment to the rule of law, but were not overly legalistic in their cast of mind. These types of judges would be more sympathetic to the concerns and ideals of the middling sort, the broad yeomanry and industrious artisans whom he believed were the most likely groups to be disadvantaged by the triumph of the lawyer's Constitution.⁸⁹

Controversy over the danger posed by the lawyer's constitution became an issue during the contest over the election of delegates to the New York state ratification convention. The issue was particularly heated in New York City where Federalists put forward a slate of candidates dominated by lawyers and judges. In the campaign to elect delegates to the convention, Federalists proudly asserted that knowledge of the law made their slate superior.⁹⁰ One writer lavished praise on the Federalists, noting

87. See CHARLES T. CULLEN, *ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804* (1987); JOSEPH S. FOSTER, *IN PURSUIT OF EQUAL LIBERTY: GEORGE BRYAN AND THE REVOLUTION IN PENNSYLVANIA* (1994).

88. *Brutus XIV*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 63, at 436.

89. On the ideology of middling Anti-Federalists, see CORNELL, OTHER FOUNDERS, *supra* note 27 at ch. 3.

90. On the controversy over the Federalist slate from New York City, see the documents gathered

that Chancellor Robert Livingstone and Robert Morris were men who were “the most proper and competent judges of judicial subjects.”⁹¹ Another, describing himself as “A Citizen and Real Friend to Order and good Government,” echoed this sentiment, adding that John Jay’s “legal knowledge is incontrovertible.”⁹² This writer also praised James Duane’s skill and Alexander Hamilton’s talents, noting that both candidates were respected and skilled lawyers.⁹³ Local Federalists not only echoed these sentiments in private, but they gave them a decidedly class-conscious spin. Samuel Blachley Webb, boasted privately that “the Antis cannot boast of a single great Character on their side.”⁹⁴ By contrast, Federalists could count on a ticket composed of men of substance.⁹⁵

Anti-Federalists did not dispute these Federalists claims but turned these virtues into vices. One anonymous author, assuming the name Honestus, recounted a lively chat in a local tavern that mocked the elitism of Federalists. According to the report published by Honestus, it was beyond dispute that inferior tradesmen and mechanics were less qualified to judge the merits of the Constitution than skilled lawyers. In a passage dripping with sarcasm he advised the people to defer to their wealthier and better educated superiors, noting that the study of government was “far beyond the reach of common capacities.”⁹⁶ Only those “who have had a liberal education, and have time to study, can possibly be competent to undertake such an important matter, as framing a government for such an extensive country.”⁹⁷ Despite attacks on their slate, Federalists won in New York City. The underlying conflict between two opposing visions of the constitutionalism was far from resolved. The same tension emerged in the New York ratification convention. Each side found a formidable champion: Alexander Hamilton defended the Federalist vision of the

in the Documentary History of the Ratification of the Constitution. 21 DHRC, *supra* note 21, at 1483-1510.

91. “Montgomery,” N.Y. DAILY ADVERTISER, Feb. 20, 1788, *reprinted in* 21 DHRC, *supra* note 21, at 1483.

92. “A Citizen, and Real Friend to Order and good Government,” N.Y. DAILY ADVERTISER, Mar. 21, 1788, *reprinted in* 21 DHRC, *supra* note 21, at 1489-91.

93. *Id.*

94. Letter from Samuel Blachley Webb to Joseph Barell (April 27 1788), *reprinted in* 21 DHRC, *supra* note 21, at 1509-10.

95. *Id.*; Letter from Samuel Blachley Webb to Catherine Hogeboom (April 27, 1788), *reprinted in* 21 DHRC, *supra* note 21, at 1509-10.

96. Honestus, N.Y. J., Apr. 26, 1788, *reprinted in* 21 DHRC, *supra* note 21, at 1507. Although this essay was *reprinted in* Massachusetts, there is no evidence to link it with Benjamin Austin’s Honestus essays. *See* HONESTUS, *supra* note 42.

97. Honestus, *supra* note 96, at 1507.

lawyer's constitution and Melancton Smith championed the people's constitution. The debate within the convention echoed many of the arguments that had been aired in the press in the lively debate between Publius and Brutus.⁹⁸

THE CLASH OF CONSTITUTIONAL CULTURES IN THE PENNSYLVANIA RATIFICATION CONVENTION

The same dynamic that would shape the struggle over constitutional interpretation in Massachusetts and New York had also been evident in Pennsylvania. The perspective of the lawyer's constitution was ably and forcefully defended by two of the state's leading Federalists: Chief Justice Thomas McKean, and James Wilson, arguably the nation's most respected legal thinker and forward-looking legal theorist. On the other side, a trio of Anti-Federalists leaders from western Pennsylvania championed the people's constitution: Robert Whitehill, John Smilie, and William Findley. All three men were classic examples of the type of mediating figures who defined the constitutional middle ground, men who may have read authors such as Blackstone, but were not wed to the lawyer's constitution. More important than any rules of legal construction was a recognition that "the natural course of power is to make the many slaves to the few."⁹⁹

The debates within the Pennsylvania Ratification Convention were wide-ranging, touching on virtually every point of disagreement between Federalists and Anti-Federalists. The conflict between the lawyer's constitution and the people's constitution inflected this discussion at many points. Two particular flash points in the Convention's proceedings, however, brought these two legal cultures to a head. The first conflict involved Chief Justice McKean and John Smilie. In a manner reminiscent of Zenas' attack on Honestus in Massachusetts, McKean dismissed Smilie's convention speeches for simply rehashing the same type of arguments being made in the popular press.¹⁰⁰ Once again, the world of the lawyer's constitution, a world of leather-bound legal treatises collided with the world of the popular press with its "scribblers," including Anti-Federalist essayists such as Brutus.¹⁰¹ Smilie resented McKean's haughty

98. MAIER, *supra* note 20.

99. William Findley, *Pennsylvania Ratification Convention Speech*, in 2 DHRC, *supra* note 21, at 439.

100. Zenas, *supra* note 50.

101. The substance of McKean's comments was recorded by Jasper Yates and James Wilson in

behavior. The resulting exchange highlighted the clash of two distinct legal cultures, one rooted in the treatises and traditions of Anglo-American law, and the other a more populist variant of this tradition filtered through the prism of the popular press. The second incident involved James Wilson and William Findley and centered on a dispute over the history of trial by jury that provided further evidence of the deep gulf separating the lawyer's constitution from the people's constitution. In the latter argument, Blackstone's *Commentaries* literally became a prop in a complex legal drama acted out on the floor of the Convention.

The lengthy and sometimes rambling speeches of Anti-Federalists within the Pennsylvania Convention left some Federalists exasperated. Chief Justice McKean finally exploded, charging that his opponents had wasted the Convention's valuable time in "trifling and unnecessary debate."¹⁰² He dismissed the arguments of his Anti-Federalist opponents as long-winded. Revealing his own bias against the popular press, he condemned his opponents for simply rehashing ideas drawn from the newspaper essayists of the day. Smilie shot back, attacking McKean for his contempt for the people. In Smilie's view, Justice McKean had arrogantly dismissed the concerns of Anti-Federalists as "contemptible." One of McKean's supporters took particular offense at Smilie's attack, which not only maligned McKean, but also implied a general critique of the judiciary itself.¹⁰³ William Findley jumped to Smilie's defense, and after some additional heated exchanges between Federalist supporters of McKean and Anti-Federalist defenders of Smilie and Findley, the Convention adjourned for the day.¹⁰⁴

When the Convention resumed its business, Findley rose to address the delegates on the history of trial by jury. In the course of his discussion of this right, Findley suggested that Sweden had once enjoyed this venerable right but had lost it. McKean and Wilson immediately rose to challenge Findley's assertion that trial by jury existed anywhere outside of Britain. Following closely on the heated exchange with McKean the day before, Findley decided to produce two books, a volume of the *Universal History* and a volume of Blackstone's *Commentaries*, citing them as authorities to support his claims about the history of trial by jury. Findley's dramatic gesture, literally rising with the two volumes in hand, was intended as a

their notes of the debates. See 2 DHRC, *supra* note 21, at 527-8.

102. For a newspaper account, see *A Warm Altercation*, PENN. HERALD, Dec. 12, 1787.

103. *Id.*

104. *Id.*

rebuke to McKean and Wilson, who had scoffed at Findley's suggestion that the right of trial by jury had existed at some point in Swedish history. Findley took full advantage of this opportunity to berate his opponents, whose skepticism of his earlier claim he believed evidenced either a "want of veracity or ignorance."¹⁰⁵ Indeed, Findley went further, chiding both men by noting that if his own "son had been at the study of law for six months and was not acquainted with the passage in Blackstone, I should be justified in whipping him."¹⁰⁶ Brandishing the two books like weapons, he aimed to prove to the Convention and the hostile Federalist onlookers in the gallery that he was not some backcountry bumpkin. Findley did not believe that texts such as Blackstone were the sole province of judges or lawyers.

Rather than accept Findley's historical clarification graciously and shrug off his rebuke, Wilson used the occasion to heap scorn on his less well-educated opponent. Wilson confessed that, "I do not pretend to remember everything I read."¹⁰⁷ His opponent, by contrast, Wilson snidely observed, was clearly a person "whose stock of knowledge" was "limited to a few items" which meant he could "easily remember and refer to them."¹⁰⁸ Not content to belittle Findley's lack of education, Wilson compared Findley's efforts to those of an upstart law student trying to embarrass his teacher by pointing out a minor error. Wilson cited the example of the great English lawyer Sir John Maynard who had chastised a "petulant student" by reminding the student that "I have forgotten more law than you ever learned."¹⁰⁹

Although the gallery, packed with Federalist supporters, appreciated Wilson's wit, the remarks did not play so well outside of the Convention's halls. Indeed, Wilson's use of Maynard's memorable jibe was richly ironic. The remark was not, as Wilson had remembered it, delivered as a put-down to an upstart student, but rather was issued as a rebuke by one of England's most eminent lawyers to the tyrannical hanging Judge Jefferies, one of the most infamous figures in English legal history. The irony was especially rich given that Chief Justice McKean was often

105. Findley, *supra* note 99, at 532.

106. *Id.*

107. The exchanges may be found at 2 DHRC, *supra* note 21, at 532, 551.

108. *Id.*

109. See 2 *id.* at 532, 551 (transcribing an exchange in the Pennsylvania Ratification Convention between Findley, McKean, and Wilson). The two texts introduced by Findley were GEORGE SALE, ET AL., *THE MODERN PART OF AN UNIVERSAL HISTORY: FROM THE EARLIEST ACCOUNT OF TIME* (London, S. Richardson 1759); and WILLIAM BLACKSTONE, *COMMENTARIES*.

called “Jefferies” by his enemies, including the Anti-Federalist publisher Eleazer Oswald, who seized on the fracas in the state Ratification Convention as an occasion to remind Pennsylvanians of the similarities between the two jurists. Shortly after the heated exchange in the Ratification Convention, Oswald’s *Independent Gazetteer* carried a harsh denunciation of Justice McKean’s behavior, expressly comparing him to the notorious Jefferies. The author of that essay, “A By-Stander,” celebrated the fact that “three Pennsylvania farmers, all from the back country,” had humbled the Chief Justice, a professor, and so many lawyers.¹¹⁰ Dr. William Shippen, Jr., a Philadelphia Anti-Federalist, endorsed this judgment, writing to his son that Findley had “triumphed over McKean and Wilson to their infinite mortification.”¹¹¹ Shippen contrasted Wilson’s “dictatorial manner” with Findley’s “modesty.”¹¹² The embarrassment of McKean and Wilson was, he believed, a “stroke to the pride of two men who think themselves the greatest in the United States!”¹¹³ Writing as “Hampden,” Findley later condemned the work of the Pennsylvania Convention, noting that “they were all, or nearly all, eminent lawyers,” a fact which did not lead Findley to place much trust in their “political virtue.”¹¹⁴

Findley and other spokesmen for popular constitutionalism approached texts such as Blackstone differently than did lawyers and judges schooled in the way of the lawyer’s constitution. As Robert Darnton notes, historians of reading have identified an important distinction between patterns of “intensive reading,” in which a few texts are read over and over, such as the Bible, and a more cosmopolitan mode of “extensive reading” in which a broad range of texts are read. In the case of the Founding Era’s legal culture, one can discern an analogous, but different sort of tension. Findley’s mode of reading was extractive.¹¹⁵ For men such

110. *A Bystander*, INDEP. GAZETTEER (PHILA.), December 12, 1787. On Maynard’s exchange with Jefferies, see SAMUEL ARTHUR BRENT, *SHORT SAYINGS OF GREAT MEN: WITH HISTORICAL AND EXPLANATORY NOTES* 379 (1882); and EDWARD FOSS, *BIOGRAPHICA JURIDICA: A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND, FROM THE CONQUEST TO THE PRESENT TIME, 1066-1870*, at 441 (Lawbook Exchange 2000) (1870).

111. Letter from William Shippen Jr. to Thomas Lee Shippen (Dec. 18, 1787), *reprinted in* 2 DHRC, *supra* note 21, at 549-50.

112. *Id.*

113. *Id.*

114. William Findley, *Hampden*, PITTSBURGH GAZETTE, Feb. 16, 1788, *reprinted in* 2 DHRC, *supra* note 21, at 669.

115. On the history of reading, and the distinction between intensive and extensive reading, see Robert Darnton, *What is the History of Books?* 65 DAEDALUS 111 (1982). See also AN EXTENSIVE REPUBLIC: PRINT, CULTURE, AND SOCIETY IN THE NEW NATION, 1790-1840 (Robert A. Gross &

as Findley and Smilie, the world of the popular press was at least as important, if not more important, than the world of legal treatises. Legal texts, including Blackstone's *Commentaries*, were less relevant as a model of judicial reasoning than as a compendium of useful facts to be consulted in much the same way one might use a farmer's almanac. McKean and Wilson's approach to Blackstone was emulative. The learned judge's writings were not simply a useful compendium of facts about English law, Blackstone provided a model of legal reasoning that had to be internalized and applied to the new context of American law. In his law lectures, James Wilson explained this approach as one which sought a scientific method in the law: "The most proper way to teach and to study the common law is to teach and to study it as a historical science."¹¹⁶ The point was not simply extracting facts about the law, but the goal was to internalize a particular legal method, what Wilson described, in an Enlightenment idiom, as a science of the law.¹¹⁷

McKean and Wilson's behavior in the Convention was not well received in the backcountry and anger against them continued to simmer even after ratification. Frustration led backcountry Anti-Federalists to look askance at Federalist plans to stage a parade to mark their recent victory in the state ratification convention. When Federalists turned out to celebrate, Anti-Federalists responded with violence.¹¹⁸ The two sides clashed in the streets of Carlisle and the victorious Anti-Federalists meted out symbolic punishment to McKean and Wilson. Drawing on the rich traditions of plebeian culture, the crowd in Carlisle, Pennsylvania, subjected the two Federalists to ritual humiliation before executing and burning effigies of both men. It was an ignominious treatment for two of the state's most respected legal figures and prominent supporters of the Constitution. The protests of the Carlisle rioters dripped with hostility to the elite conception of law implicit in the Federalist's defense of the new Constitution.¹¹⁹

The battle between Federalists and Anti-Federalists in the streets of the town spilled over into the local newspaper, the *Carlisle Gazette*. An

Mary Kelly eds., 2010); David Hall, *The Uses of Literacy in New England, 1600-1850*, in *CULTURES OF PRINT: ESSAYS IN THE HISTORY OF THE BOOK* 36-78 (1996).

116. James Wilson, *Law Lectures*, in 2 *COLLECTED WORKS OF JAMES WILSON* 20, 25 (Kermit L. Hall ed., 2007).

117. *Id.*

118. On the Carlisle Riot and its significance in ratification, see CORNELL, *OTHER FOUNDERS*, *supra* note 27.

119. For a discussion of this incident, see *id.* at 109-114.

author claiming to be “One of the People” dismissed the notion that Federalists were entitled to assemble and speak in favor of ratification. Such a view clearly reflected the legalistic viewpoint of some local Federalist “attorney” and did not reflect the sentiments of most local residents. Local Anti-Federalists took the democratic ideal to its logical extreme, arguing that Federalist actions were an insult to the local Anti-Federalist majority. Indeed, Anti-Federalists believed that Federalists should have put their decision to celebrate to a vote. The actions of the Carlisle rioters showed little regard for freedom of expression or association, a point not lost on local Federalists, who wondered why it was necessary to call such a meeting to exercise one’s “liberty” to assemble.¹²⁰ Federalist supporters expressed their disdain for the ignorance of the Carlisle rabble; such condescension only fueled the ire of local Anti-Federalists, who lashed out at their opponents. In Carlisle, the struggle over the Constitution was tinged with class resentments and antagonisms. In contrast to the more measured rhetoric and egalitarianism evidenced in the writings of Brutus or the ratification speeches of William Findley, this plebeian populist vision of law was closer in spirit to the radicalism of Daniel Shays.

The violence in Carlisle’s streets led to the prosecution of the mob’s leaders. The ensuing legal controversy further illustrates the deep cleavage between the world of the lawyer’s constitution and the people’s constitution. When the leaders of the riot were incarcerated, Anti-Federalists turned to direct political action for relief. Rather than seek formal legal redress and use constitutional means to free the prisoners, local Anti-Federalists sought to mobilize the people themselves to act extra-legally to resolve the crisis. The rioters rallied the countryside, organizing themselves as militia units outside of state control and prepared to free the prisoners by force. A compromise between members of the local Federalist and Anti-Federalist elites avoided further violence and bloodshed. The state’s Attorney General entered a *nolle prosequi* and the self-styled militia units were allowed to march to the jail and secure the release of the rioters.¹²¹

The conflict in the streets of Carlisle provides one of the clearest examples of the profound disjuncture between the ideology of the lawyers’ constitution and the most radical version of the people’s

120. *Another of the People*, CG; 2 DHRC, *supra* note 21, at 679-84.

121. For an analysis of the Carlisle Riot, see CORNELL, OTHER FOUNDERS, *supra* note 27, at pp. 109-114.

constitution. For the Carlisle rioters, constitutional interpretation did not require any Blackstone. Indeed, it is not even clear that written constitutions or courts mattered very much to these champions of an extreme form of localist democracy. According to this radical theory, popular local bodies such as the militia or the jury could spontaneously collect the will of the people and, if necessary, bypass the courts and free prisoners from jail. The Carlisle Rioters' views not only set them apart from the Federalist elite, but also drove a wedge between them and spokesmen for middling Anti-Federalists such as Brutus or William Findley.

RESPUBLICA V. OSWALD: POPULAR CONSTITUTIONALISM ON TRIAL

Although the backcountry continued to simmer for some time, Pennsylvania Anti-Federalists continued to oppose the Federalist agenda. An interesting coda to the struggle over ratification occurred when the printer Eleazer Oswald published a blistering attack on Federalists in his paper, *The Independent Gazetteer*. The object of Oswald's scorn, the Federalist editor Andrew Brown, sued Oswald for libel and the case eventually came before Thomas McKean, the man Oswald had labeled a latter-day Judge Jefferies during the bitter struggles over ratification.

Oswald ridiculed Brown by calling him a "hand-maid of some of my federalist enemies," which led Brown to follow through on his threat to bring a charge of libel against the Anti-Federalist editor.¹²² Five years earlier, in 1782, Oswald had stood before judge McKean on a libel charge, but mounted a classic Zengarian defense, effectively using jury nullification to thwart the prosecution.¹²³ This time, however, Oswald over-played his hand when he attacked McKean in print. McKean struck back, slapping Oswald with a contempt citation, a move that prevented Oswald from coming before a jury. Typically, the doctrine of contempt required that one's actions occur in court. McKean used the English legal doctrine of constructive contempt, which allowed judges to construe statements outside of the courtroom as instances of contempt if they

122. The most important documents pertaining to the case were published in pamphlet form. See, e.g., *A Gentlemen of the Law, in THE CASE OF THE COMMONWEALTH AGAINST ELEAZER OSWALD* (Philadelphia, William Spotswood 1788).

123. In essence, Oswald relied on jury nullification to block his prosecution for libel. On the legal significance of the Zenger trial, see Paul Finkelman, *Zenger's Case: Prototype of a Political Trial*, in *AMERICAN POLITICAL TRIALS* 21-42 (Michal Belknap ed., 1994).

interfered with court proceedings.¹²⁴

The relationship between the press and the jury was complex. At one level Oswald clearly believed it was appropriate to try to sway public opinion by challenging the neutrality of the court. A sympathetic writer in the *New York Journal* noted that “it is not only the privilege, but the duty of every citizen of this state to write and publish his sentiments upon the proceedings of any branch of government.”¹²⁵ The author of this essay, “An Observer,” further noted that “the judicial power is one branch of government, and therefore its proceedings are the objects of public discussions, as much as the proceedings of the legislative and executive powers.”¹²⁶ Thus, Oswald confidently asserted:

Enemies I have had in the legal profession and it may perhaps add to the hopes of malignity that this action is instituted in the Supreme Court of Pennsylvania. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empanelled, a jury of freeman and independent citizens, I must rest the fruit. I have escaped the jaws of persecution through this channel on certain memorable occasions.¹²⁷

At the same time, Oswald was unwilling to take this idea to its ultimate logical conclusion and claim that it was legally proper to influence a trial, once proceedings had begun. Oswald was a vigorous supporter of the people’s constitution and clearly had little confidence in, or esteem for, the lawyer’s constitution. In his earlier prosecution he had taken full advantage of the power of popular constitutionalism, using the jury to nullify the prosecution against him. Juries, not judges, were the guardians of liberty in this view. Critics accused him of trying to use the press to interfere with the administration of justice, Oswald appeared to fall back on an argument worthy of any lawyer. His statements about McKean, he argued, had been made before the trial commenced and so was a legitimate exercise of freedom of the press, not an example of tampering

124. See CORNELL, OTHER FOUNDERS, *supra* note 27, at ch. 3. Anti-Federalists believed that Pennsylvania law had not absorbed this English doctrine and that Pennsylvania law had decisively broken with practices inconsistent with America’s new republican legal system.

125. *An Observer*, N.Y. J., Aug. 14, 1788.

126. *Id.*

127. *The Case of the Commonwealth Against Oswald*, *supra* note 122, at 3. For an overview of his earlier libel trial, see NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1990).

with a jury.¹²⁸

McKean's use of a constructive contempt citation only exacerbated popular animosity toward him. He believed that constructive contempt was a legitimate tool of courts necessary to preserve the power and dignity of his judicial office. The fact that Oswald had not made his statements directly before the court was irrelevant, as his comments had been intended to undermine the authority of the court. "Judges," McKean wrote, "discharge their functions under the solemn obligations of an oath; and, if their virtue entitles them to their station, they can neither be corrupted by favor to swerve from, nor influenced by fear to desert their duty."¹²⁹ Oswald's actions merited a contempt citation because they were an attempt at "prejudicing the public" regarding "the merits of a case" and hence interfered with the "administration of justice."¹³⁰ When Oswald demanded that the contempt charge be brought before a jury, McKean replied that "whether the publication amounts to a contempt, or not, is a point of law, which, after all, is the province of the judges, and not the jury to determine."¹³¹

Oswald's attorney suggested that McKean's application of English precedents on the law of libel and contempt were inappropriate because Pennsylvania's Constitution rejected these doctrines. McKean, in contrast, asserted that there was a strong continuity between the ideals of Pennsylvania's Constitution and traditional English law, not a sharp disjuncture.¹³² Following an essentially Blackstonian mode of construction, he asserted that there was nothing in the "language of the Constitution (much less in its spirit and intention)" which authorized Oswald's actions.¹³³

Oswald and his supporters argued that McKean's actions violated the express provisions of the Pennsylvania Constitution, which not only protected freedom of the press, but expressly required a jury trial for criminal matters. Once again, the two sides approached the law in radically different ways. McKean used methods of construction and interpretation that defined the essence of the lawyer's constitution: the canonical rules of construction of English common law which focused on

128. *To the Public*, INDEP. GAZETTEER, July 26, 1788.

129. *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 319, 326 (Pa. 1788).

130. *Id.*

131. *Id.*

132. *Id.* at 319, 326

133. *Id.* at 325.

the “spirit” of the law and the “intention” of its framers. By contrast, Oswald’s supporters offered up the plain meaning of the text, interpreted without any recourse, to the traditions of Anglo-American law.

Oswald supporters saw McKean’s actions as a manifestation of the essentially anti-democratic spirit of elite legal culture. “X.Z.” attacked the use of “implied power” and was irate that “the party pretending to be offended, is to decide on the offense.”¹³⁴ Such actions were typical of those members of the legal elite who favored the lawyer’s constitution over the people’s constitution. X.Z., wrote that “gentlemen of the robe have too generally lofty ideas.” His views mirrored those of William Manning and Amos Singletary.¹³⁵ “Amongst the *great*,” X.Z. wrote, “the inferior class of mankind are viewed as a lower order of beings.”¹³⁶ “Gentlemen of the bar,” he warned, “are very ingenious in producing cases and opinions in court, to support particular points.”¹³⁷ Legalisms and latitudinarian constructions were a threat to popular liberty and had to be combated. “No opinion,” he declared, “must ever be permitted to overrule the fundamental liberties of our country, or to destroy the express words of our Constitution.”¹³⁸ The methods of legal interpretation used by judges were insidious. X.Z. asserted that by “this sort of logic, the whole constitution may be converted to a very ductile code.”¹³⁹ In contrast to McKean’s reliance on the methods of the lawyer’s constitution, X.Z. took the plain meaning approach of the people’s constitution a step further. In his view constitutional texts were to be interpreted in an almost literal fashion. Judges were not entitled to exercise any interpretive latitude and were prohibited from discovering any implied power or authority beyond the express grants made by the text of the Constitution. If Pennsylvanians wished to endow their courts with the power of constructive contempt they were free to do so by statute. If judges needed legal guidance, he advised, they ought to look at the acts of the legislature, not the cases and rules laid down by English judges and compiled by authors such as Blackstone. Oswald clearly valued the scathing critique of X.Z., since he decided to reprint it a month later, a fact that underscored the importance of the essay’s arguments.

134. X.Z., INDEP. GAZETTEER, July 28, 1788, *reprinted in* INDEP. GAZETTEER, Sept. 22, 1788.

135. *See supra* pp. 309-10.

136. X.Z., INDEP. GAZETTEER, *supra* note 144.

137. *Id.*

138. *Id.*

139. *Id.*

Another pro-Oswald writer, "One of the People" reminded readers that "it is the fashionable opinion of" those in power "that the common people cannot understand and ought not to inquire into the proceedings of those in power."¹⁴⁰ He dismissed the argument that the common people were "not sufficiently acquainted with the law" to understand their own constitution and rights.¹⁴¹ "The advocates of oppression," he warned, would have the people believe that "because you are not lawyers you do not understand commonsense."¹⁴² Finally, reiterating a central tenet of popular constitutionalism, he asserted that constitutional interpretation was not some mysterious science of the law, but a matter of sorting out the plain meaning of every day English.

One writer, calling himself "Public Justice," reminded readers not to be over-awed by the "learned Chief Justice."¹⁴³ Judges were well known to use "constructive" means to pervert and twist the plain meaning of the constitution's text. Simple common sense would ultimately prevail over such "strained interpretations." McKean, he reminded his audience, had been wrong before and had been humiliated by a "plain countryman," William Findley, in the Pennsylvania Ratification Convention.¹⁴⁴

Rather than accept his contempt citation, Oswald decided to appeal directly to the Pennsylvania Assembly.¹⁴⁵ The 1776 Constitution gave the legislature exceptionally broad powers of impeachment. Section 9 also provided "[t]he general assembly of the representatives of the freemen of Pennsylvania, and shall have power to . . . redress grievances."¹⁴⁶ For champions of popular constitutionalism, including Oswald, this power was not restricted to enacting legislation, but also included a general appellate authority to review the decisions of the Courts. Thus, Oswald reminded readers that "the constitution of this state has left a mode of redress," a direct appeal "to the fathers and protectors of the people," the assembly.¹⁴⁷ Oswald expressly described the legislature as a "court"

140. *One of the Common People*, INDEP. GAZETTEER, Aug. 7, 1788.

141. *Id.*

142. *Id.*

143. *Public Justice*, INDEP. GAZETTEER, July 30, 1788.

144. *Id.*

145. During the colonial period the legislature had often exercised judicial-like powers over financial matters. The Pennsylvania Constitution went well beyond colonial precedents in endowing the legislature with broad authority to address constitutional questions. See Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1383 (1998).

146. PA. CONST. of 1776, §9.

147. [Eleazer Oswald] *To the Public*, THE PENNSYLVANIA MERCURY AND UNIVERSAL

which could hold a judge of the Supreme Court “answerable.”¹⁴⁸ He shared a belief, common among supporters of popular constitutionalism, that the legislature was superior to the judiciary and had the power to make the “bench tremble for their outrages.”¹⁴⁹ Oswald clearly hoped the Assembly would not only vindicate him of all wrong-doing, but also that they would impeach McKean.

The Assembly took the case and resolved itself into a committee of the whole to consider the issue of impeachment and the substance of Oswald’s claims against McKean. The Chief Justice found an able spokesman in the assembly in William Lewis, a respected Philadelphia attorney.¹⁵⁰ Oswald’s champion was William Findley.

Peppering his speech with references to Blackstone’s *Commentaries*, Lewis rejected the argument that the learned judge’s venerable rules could be glibly dismissed because of their author’s Tory leanings. When he turned his attention to Oswald’s reading of the Pennsylvania Constitution’s provisions on jury trials and freedom of the press, Lewis subjected them to a systematic critique, employing Blackstonian method and a detailed knowledge of the relevant English precedents on both libel and contempt.

Lewis began by reminding the Assembly of the difference between true liberty and licentiousness. Freedom from “arbitrary and despotic rule” was the true signification of liberty and was not to be confused with “uncontroled [sic] power of doing whatever the will might prompt,”¹⁵¹ which was antithetical to true liberty. Liberty properly understood was only possible in a society in which individuals were well “regulated by the laws and constitution of the state.”¹⁵² In light of this overarching principle, Lewis reasserted the orthodox Blackstonian view that freedom of the press consisted of the absence of prior restraint, and did not shield individuals from prosecution for publishing libels or items inconsistent with ordered liberty.

Here, then, is to be discerned the genuine meaning of this section in the bill of rights, which an opposite construction would

ADVERTISER, July 31, 1788.

148. *Id.*

149. *Id.*

150. Lewis eventually went on to a distinguished career as a federal attorney and judge. See BIOGRAPHICAL DICTIONARY OF FEDERAL JUDGES, available at <http://www.fjc.gov/servlet/nGetInfo?jid=1395&cid=999&ctype=na&instate=na>.

151. *Republica v. Oswald*, 1 U.S. (1 Dall.) 319, 329 (Pa. 1788).

152. *Id.*

prostitute to the most ignoble purposes. Every man may publish what he pleases; but, it is at his peril, if he publishes any thing which violates the rights of another, or interrupts the peace and order of society.¹⁵³

Disrupting the orderly processes of the court clearly fell outside the scope of freedom of the press. Taking his case directly to the people did not promote liberty, it undermined the rule of law.

It has been asserted, however, that Mr. Oswald's address was of a harmless texture; that it was no abuse of the right of publication, to which, as a citizen, he was entitled; and, in short, that in considering it as a contempt of the court, the judges have acted tyrannically, illegally, and unconstitutionally. But let us divest the subject of these high-sounding epithets, and the reverse of this assertion will be evident to every candid and unprejudiced mind: For, such publications are certainly calculated to draw the administration of justice from the proper tribunals; and in their place to substitute newspaper altercations, in which the most skilful writer will generally prevail against all the merits of the case.¹⁵⁴

Oswald's actions obstructed justice and poisoned the well of public opinion, effectively tampering with the jury. With a lawyerly flourish, Lewis pointed out that such practices effectively replaced trial with rhetoric battle. To depart from the established rules of construction would ensnare the law in a "labyrinth of error, and eventually endanger that liberty."¹⁵⁵ In short, by preventing the law from becoming arbitrary, the methods of the lawyer's constitution enhanced liberty, not undermined it.

William Findley rose to defend Oswald and in the process provided one of the most eloquent critiques of the lawyer's constitution.¹⁵⁶ First, Findley argued that the American Revolution and the adoption of Pennsylvania's radical democratic Constitution represented a clear break with English law and many of Blackstone's ideas, which reflected "the dark and distant periods of juridical history."¹⁵⁷ As far as methods of legal interpretation were concerned, Findley defended the people's constitution in forceful terms. Legal ideas required no recourse to formal legal training. A strong proponent of popular constitutionalism, Findley averred

153. *Id.* at 319.

154. *Id.* at 326, 331.

155. *Id.* at 335-6.

156. *Id.*

157. *Id.* at 334.

that every citizen “who possessed a competent share of common sense, and understood the rules of grammar” could determine the meaning of the Constitution. He attacked “the sophistry of the schools and the jargon of the law” and warned that many legal techniques were designed to “pervert or corrupt the explicit language of the text.”¹⁵⁸ Regarding freedom of the press, he intoned, “there was nothing ambiguous or uncertain” about the rights guaranteed by the Pennsylvania Constitution. “It would be fatal to the cause of liberty” he asserted “if it was once established, that the technical learning of a lawyer is necessary to comprehend the principles laid down in this great compact between the people and their rulers.”¹⁵⁹

Findley not only questioned the relevance of the lawyer’s constitution, but he also challenged its court-centered vision of constitutional interpretation. In contrast to Lewis, Findley was not a strong supporter of the idea of judicial review; he did not believe that courts were the final arbiters of constitutional meaning. Indeed, he claimed that “the law of the land was not, in fact, contra-distinguished from the judgment of his peers, but merely a diversity in the mode of expressing the same thing.”¹⁶⁰ Findley was defending an expansive role for the jury to decide both the facts of the case and the law. In essence, Findley was arguing that the meaning of both the Constitution and the law was what the jury decided using common sense.¹⁶¹ Popular constitutionalism held that the plain meaning of the text was something that the people themselves, acting through popular bodies such as the jury, would decide. Findley’s variant of popular constitutionalism closely resembled modern theories of a living constitution, with one important difference. The agents of constitutional change would not be the judiciary, but the people themselves, acting through their legislatures.

Oswald’s supporters were unable to persuade the Assembly that an impeachable offense had been committed. Findley then proposed the following two resolutions:

‘Resolved, That the proceedings of the supreme court against Mr. Eleazer Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the court, nor against any officer, or order thereof, but for writing and publishing improperly, or

158. *Id.* at 335.

159. *Id.* at 335.

160. *Id.* at 335.

161. CORNELL, OTHER FOUNDERS, *supra* note 27, at 128-34.

indecently, respecting a cause depending before the supreme court, and respecting some of the judges of said court, was an unconstitutional exercise of judicial power, and sets an alarming precedent, of the most dangerous consequence, to the citizens of this commonwealth.'

'Resolved, That it be specially recommended to the ensuing General Assembly, to define the nature and extent of contempts, and direct their punishment.'¹⁶²

The resolutions prompted another round of lively debate but were eventually defeated. Once again, Lewis rose to challenge Findley and the people's constitution. Findley's resolutions, he believed, were not only wrong on the facts before the Assembly, but represented a dangerous precedent that threatened the independence of the judiciary, the doctrine of judicial review, and undermined the very idea of a written constitution. Lewis provided an excellent summary of several features of the lawyer's constitution

1st. That the legislative power is confined to making the law, and cannot interfere in the interpretation: which is the natural and exclusive province of the judicial branch of the government: and 2ndly, That the recommendation to the succeeding assembly would be nugatory: for the courts of justice derive their powers from the constitution, a source paramount to the legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter.¹⁶³

The battle between the lawyer's constitution and the people's constitution did not end with *Respublica v. Oswald*. This tension would reemerge periodically during the ensuing decade as Americans struggled to define the contours of their new Constitution and grappled with how the Constitution would be interpreted and who would speak for the people and be the final arbiter of meaning —legislatures, courts, or local institutions such as the jury, the militia, or even the crowd.¹⁶⁴

HISTORY, IDEOLOGY, AND ORIGINALISM

The rise of New Originalism marks a serious step backward in the evolution of American constitutional theory. Supporters of New

162. Findley, *supra* note 99, at 337.

163. Oswald, 1 U.S. (1 Dall.) at 337.

164. Kramer, *supra* note 26.

Originalism have not solved the problems of traditional Originalism, but have offered a theory even more prone to abuse and manipulation. In contrast to intentionalist models of Originalism which focus on the meanings of identifiable groups within the Founding Era, either Framers or Ratifiers, New Originalism's focus on public meaning provides an invitation to cherry-pick quotes and manipulate evidence: it is an open invitation to writing law-office history on a grand scale.¹⁶⁵ The essential problem that plagued traditional Originalism continues to plague New Originalism: neither method has developed a rigorous historical methodology. Champions of Originalism, old and new, have embraced a theory rooted in history, while remaining resolutely anti-historical in their thinking.¹⁶⁶ Until Originalists recognize that they must master the basic techniques of intellectual history and understand the major modern historical debates about eighteenth-century political and constitutional history, and gain something more than a passing knowledge of Founding-era sources, their claims will continue to generate ideological manifestos masquerading as serious scholarship.

Ironically, one of the main insights of the so-called New Originalism, its emphasis on interpreting the Constitution according to public meaning, turns out not to be new at all, but is virtually identical to an approach to constitutional interpretation that was first championed more than two hundred years ago by Anti-Federalists such as Brutus. The periodic revival of an Anti-Federalist constitutionalism is in some sense hard wired into the structure of American constitutionalism. While such a process has often been self-conscious, at other times Americans have unknowingly reinvented an essentially Anti-Federalist critique of the Constitution.¹⁶⁷ Given the structures created by the Federalist Constitution, a revival of Anti-Federalist criticism, seems inevitable. In this sense, New Originalism is unremarkable; New Originalists are merely the latest in a long line of dissenters to revive an Anti-Federalist critique of the Constitution. What is a bit embarrassing about New Originalism is that its authors do not seem to be aware of the Anti-Federalist origins of their theory, or appreciate the irony that their version of Originalism would not restore the

165. For a thoughtful critique of New Originalism's potential for abuse, see Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

166. See discussion, *supra* pp. 295-307.

167. See, e.g., Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 59-60 (1990); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 223 (2004).

Constitution's original meaning, but would turn history upside down, effectively replacing our Federalist Constitution, with an Anti-Federalist one.

There are further ironies arising from the emergence of the New Originalism. A careful historical exploration of Founding-era practice conclusively demonstrates that the textualist theories of Justice Scalia, grounded in a public meaning approach, are themselves entirely at odds with the dominant modes of interpretive practice in place in the Founding Era. The Blackstonian search for Framers' intent, the Madisonian focus on Ratifiers' intent, and the living Originalist search for the public meaning advanced by some Anti-Federalists all have solid precedents in Founding-era practice. The one theory without a firm foundation in the Founders' world is New Originalism, including Justice Scalia's textualism.

Better history will not eliminate future controversies, but it will provide an intellectual and methodological rigor currently lacking in Originalist jurisprudence and scholarship. An honest theory of Originalism must begin with the recognition that there is no neutral or principled way to choose among the competing interpretive practices at play in the Founding Era.¹⁶⁸ Originalism is not and can never be the neutral method it professes to be; at best, Originalism requires that we take sides in the Founding Era's own interpretive battles. Forcing Originalists to be more transparent about their method will not put an end to law-office history or judicial activism, but it will make certain types of interpretive sleights of hand more difficult and more intellectually embarrassing. Consider the two recent gun cases decided by the Court, *Heller* and *McDonald*. In *Heller*, Scalia rejected the intentionalist model of Originalism found in Justice Stevens's dissent. Yet, in *McDonald*, Scalia happily signed on to Justice Alito's opinion, which included a lengthy discussion of the original intent of the Congress responsible for framing the Fourteenth Amendment. The Court majority simply switched Originalist method to arrive at a politically congenial result. Forcing greater historical rigor on Originalists would not prevent such intellectual inconsistency, but it would make it easier to spot efforts to rig the methodology to produce the desired result.¹⁶⁹

168. Kramer, *supra* note 26. Indeed, to be genuinely historical one would need to account not only for the interpretive pluralism in place during the Founding Era, but also deal with the way interpretive practices shifted as the Founders struggled to make sense of the new Constitution.

169. Compare the originalist method of Justice Scalia in *Heller*, which dismisses the relevance of

Rather than retreat from history, the only intellectually plausible strategy for Originalism is to embrace it. Originalist scholars and judges have not only shown a shocking lack of knowledge of Founding-Era interpretive practices, but they have also been ignorant of important recent developments in the humanities, including history, literature, and philosophy. If Originalism is to become a serious intellectual enterprise, and not simply remain an ideological tool, it must cease to be a conversation among a narrow group of true believers and must become truly inter-disciplinary.¹⁷⁰

the thought of the First Congress that drafted the Second Amendment, with the authority accorded to the Reconstruction Era Congress that drafted the 14th Amendment in Justice Alito's *McDonald* majority. *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

170. Originalists continue to publish primarily in law reviews and host conference dominated by law professors (primarily adherents of Originalism), which has lent the theory a very parochial character. The historical and philosophical flaws in the theory are simply recycled by this system. See *Originalism 2.0: The Twenty-Ninth Annual Federalist Society National Student Symposium on Law and Public Policy*, 34 HARV. J.L. & PUB. POL'Y 5 (2011); *Symposium: Original Ideas on Originalism*, 103 NW. U. L. Rev. 751 (2009).

