HISTORY VS. ORIGINALISM: THE BILL COMES DUE

Memory and Authority: The Uses of History in Constitutional Interpretation. By Jack M. Balkin.* New Haven, CT: Yale University Press. 2024. Pp. viii + 370. $31.50 (softcover).

Against Constitutional Originalism: A Historical Critique. By Jonathan Gienapp.** New Haven, CT: Yale University Press. 2024. Pp. 368. $35.00 (hardcover).

Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War. By Mark A. Graber.† Lawrence, KS: University Press of Kansas. 2023. Pp. li + 361. $47.95 (hardcover).

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In the longstanding debate over the merits of judicial and academic originalism, the views of professional historians have played a secondary role at best.[2] The contentious exchanges over the Second Amendment that came to a head in Justice Scalia's

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2. For exchanges, compare Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011) with the limited response by William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1117 (2017). *See also* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015).

controversial opinion in *District of Columbia v. Heller*[3] perhaps convinced historians to assume a higher profile.[4] Nonetheless, the historians' critique has never come into focus on the bench or in the law schools. It has confused legal scholars in general and originalists themselves have found it elusive at best.

After reviewing these three books, I am convinced it will be far more difficult for both originalists and their opponents to ignore the substantial challenges posed by the historical critique. In particular, Jonathan Gienapp's book embodies the views of generations of historians who share his methodological approach to the study of the past.[5] For different reasons, the works by Jack Balkin and Mark Graber are of great significance to the debate over the role of history in constitutional argument as well. Thankfully from my point of view, historians are finally in the house. And as far as originalism is concerned, the bill they present is now due.

In considering the thrust of the critique by historians for a project on Reconstruction, I became convinced that part of the problem is the way the debate is structured.[6] It may be surprising, but at no point in either the debate in the 1980s centered on the "intent of the Framers" or in discussions of the new originalism based on the concept of original public meaning was proceeding in terms of the methodology typically employed by historians considered.[7] The distinction so carefully drawn and maintained by contemporary originalists between original meaning and original intent is in fact distinctly unhelpful in grasping the historical critique. This is no doubt part of the reason why the force of that critique has been overlooked.

The intervention by historians represented by these three books should lead to a long overdue overhaul of the terms of the

3. 554 U.S. 570 (2008).

4. Jonathan Gienapp credits *Heller* for making him realize that originalists were not doing history as he understood it. Zoom interview with Jonathan Gienapp, Associate Professor of Law and History, Stanford U. (June, 2023).

5. JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM (2024) (*Against Constitutional Originalism* was still unpublished at the time of writing; page references are to the book's page proofs.).

6. *See* Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TULANE L. REV. 281 (2021) [hereinafter Griffin, *Optimistic Originalism*].

7. To be sure, some historians proposed the term "original understanding" to capture what they were doing. *See*, *e.g.*, JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7–11 (1996). This term did not prove influential.

debate. To give an example, historical context, the situated perspective of past actors and complex interactions in the assemblies that enacted the U.S. Constitution and its amendments is not best approached as a matter of "expectations." Originalists have surely relied too much on this concept as a way of waving away otherwise relevant historical evidence.[8]

Let's be clear that although these books have substantial implications for the debate over originalism, their more subversive theme is that a proper attention to history poses difficulties for ordinary constitutional lawyering and thus the use of evidence from the past by all lawyerly advocates, whether originalist or not. Everyone should be on notice that historians have arrived.

The three books are helpfully interrelated. Each author finds inspiration from the other works, with Balkin's book serving as a natural meeting point. So I start with it in Part I. I move to Gienapp's book in Part II and Graber's in Part III. In Part IV I underline the points inspired by the sum of the books, especially with respect to the debate over originalism.

I. BALKIN ON CONSTITUTIONAL INTERPRETATION AND HISTORY

I like to amuse my friends with the notion that there is a distinct "Yale School" of constitutional interpretation. The foremost characteristic of the Yale School is locating jurisgenerative patterns in America's history that usefully address contemporary constitutional problems.[9] In carrying out this project the Yale School highlights the vital role political regime transitions and social movements play in the process of constitutional change, whether through formal amendment or otherwise, and how the Constitution should be interpreted in light of these transitions. In using history, the Yale School stresses change rather than continuity, although it always strives to maintain an essential link with a valued constitutional past. To my

8. I advanced this point in Griffin, *Optimistic Originalism*, *supra* note 6, at 297, 325–28.

9. "Jurisgenerative" is a reference to the work of Robert Cover, who also taught at Yale Law School. *See* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

mind, this well describes work by Bruce Ackerman, Reva Siegel, and Robert Post, although these themes resonate through Akhil Amar's books as well.[10]

This is by way of introducing Jack Balkin's new book *Memory and Authority*, a wonderful example of the Yale School. How history can contribute to constitutional interpretation is its central concern (Balkin, p. 3). Of course, this is not Balkin's first foray into the field. His 2011 book, *Living Originalism*,[11] remains controversial among legal scholars on both sides of the divide Balkin attempted to bridge. Roughly the first half of *Memory and Authority* is a reconsideration and update to *Living Originalism*, although the former can certainly be read productively without consulting the latter. The second half, concerned with the concept of "constitutional memory" and an attempt to mediate between historians and lawyers, strikes out in new directions.

Living Originalism is an unusual work that actually moved constitutional theory forward. Calling his approach to interpretation "text and principle,"[12] Balkin made a fundamental advance through several innovative arguments centered on the debate between originalism and living constitutionalism. One is the now more familiar distinction between original meaning (understood as semantic meaning) and original expected application. Balkin contends we are legally bound only to the former.[13] The second is to observe more clearly than prior scholarship that the concept of the "living Constitution" does not describe a distinct approach to judicial interpretation, but rather a theory of constitutional change.[14] Yet another example is the idea of employing history not as a precise command, but as a resource in the multigenerational project of American constitutionalism.[15]

10. *See*, *e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). With respect to Amar and Balkin, see, e.g., AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

11. JACK M. BALKIN, LIVING ORIGINALISM (2011) [hereinafter BALKIN, LIVING].

12. *Id*. at 3–6.

13. *Id*. at 100–08.

14. *Id*. at 277–82. This point is repeated in Balkin, p. 66.

15. BALKIN, LIVING, *supra* note 11, at 229–31.

The key distinction between original meaning and original expected application laid the foundation for an implicit deal Balkin offers to originalists and, by extension, to living constitutionalists. The deal rests on making a further sharp distinction between the tasks of constitutional "interpretation"—done with respect to the unambiguous clauses of the Constitution—and "construction," the process of determining the meaning of all the remaining reasonably contested clauses. The proposed deal is that both sides should accept that the results of "interpretation" are binding law, which cannot be changed except through the Article V amendment process. By contrast, constructions can legitimately change the meaning of the Constitution outside Article V through judicial decision, determinations by the branches of government within their sphere of competence and, more controversially, through democratic contestation amid party-political struggles and the insistent demands of social movements. Balkin describes his approach to original meaning as a "thin theory," in that most disputes over the meaning of the Constitution will be resolved not by original meaning, but in the "broad zone of constitutional construction" (Balkin, p. 135). As many commentators observe, Balkin's approach has the effect of collapsing the differences between originalism and its living constitutionalist (or "nonoriginalist") opponents.[16]

In *Memory and Authority*, Balkin takes the opportunity to improve his argument for why this deal should be attractive to both sides. Proceeding initially as a cultural critic, Balkin sees the originalism vs. living constitutionalism debate through the lens of the advent of constitutional modernity. This is the recognition, which probably began in earnest toward the end of the nineteenth century with the beginning of the modern state, that Americans had lost "crucial connections to the stabilizing and legitimating authority of the past and the institutions and tradition of the past" (Balkin, p. 68). Balkin describes two responses to this challenge—one in which we accept that we are now modern and different (that is, the "living Constitution"), the other in which we attempt to regain the past through pledges of fidelity (originalism) (Balkin, pp. 69–70). This is why Balkin ultimately describes originalism and living constitutionalism as "two sides of a single

16. *See*, *e.g.*, Griffin, *Optimistic Originalism*, *supra* note 6, at 318 n.224.

coin" (Balkin, p. 9), i.e., two different, yet related, responses to the same historical circumstances.

Balkin continues innovating in *Memory and Authority*. He introduces a new account of the methods or "modalities" of constitutional argument (Balkin, pp. 15–26). Philip Bobbitt made the most famous contribution here, distinguishing among the different methods of interpretation such as text, structure, precedent and so on.[17] But Bobbitt listed "history," that is, originalism, as a distinct mode of interpretation. Balkin first contends that there are many more forms of argument that Bobbitt and subsequent scholars (including myself) allowed.[18] Balkin's improved list of the modalities of interpretation (and construction) are arguments from text, structure, purpose, consequences, judicial precedent, political convention, customs, natural law or natural rights, national ethos, political tradition, and honored authority (Balkin, pp. 18–22).

Balkin's main point is the use of history or historical evidence is pervasive throughout the methods. On the one hand, each form of argument can be presented in a historical guise by using evidence from the past (supporting text, structure, purpose, and so on) that is suited to that form. On the other hand, the forms of argument most influential for a given interpreter of the Constitution guide the selection of the most relevant kind of historical evidence. As he says, "[i]n short, history supports the different forms of legal argument, and the different forms of legal argument provide or impose a perspective on history" (Balkin, p. 23).[19]

With these matters clarified, Balkin's proposed *rapprochement* between originalism and living constitutionalism (really, Balkin-style pluralism) becomes more plausible. Unfortunately, as far as theory is concerned, since the publication of *Living Originalism* academic originalists have been more interested in marking boundaries among themselves rather than confronting Balkin's position. It is startling to realize that no

17. PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (1982).

18. I commented on Bobbitt and the subsequent debate in Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).

19. Balkin then distinguishes between constructive and deconstructive uses of history to claim legal authority and obedient or critical uses of the past, creating a four-valued scheme of rhetorical ways to use history in legal argument (Balkin, pp. 24–26).

major response was made to Balkin's arguments.[20] As he describes it, originalism not only always had different variants (original intent, original understanding, and original public meaning), but the lead variant, original public meaning, itself split into multiple competing versions (Balkin, pp. 60–62). He further observes that the evidentiary basis of "public" meaning originalism is sometimes reduced to what the Constitution meant to eighteenth-century *lawyers*, not the public at large (Balkin, p. 60). There is also original law originalism, advocated by the especially productive duo of William Baude and Stephen Sachs (Balkin, pp. 61–62).

While originalist *theory* remains occupied with internal debates, Balkin views acceptance of originalist *arguments* by Americans as massively overdetermined (Balkin, pp. 77–93). From his perspective, we will always have originalism in the sense that we will always be turning to eighteenth-century and nineteenth-century evidence to resolve key constitutional questions. For Balkin, originalism is an artifact of "American political culture and American cultural memory" (Balkin, p. 77). This is a reference to his prominent theme that the way Americans make, remake, and choose to remember history is of great significance to how Americans argue with each other over the Constitution, a chief focus of our national identity (Balkin, pp. 6–8).

What, however, of originalist theory? Diplomatic relations between Balkin's "text and principle" approach and standard-form academic originalism can be described as tense. Despite the reputation *Living Originalism* had among liberals as an endorsement of originalism (albeit of a highly specific kind), it contained many telling criticisms of what might be termed legal-conservative originalism. So too with *Memory and Authority*. Balkin confirms the prior intuition many of us had that one way originalists go wrong is by asserting that originalism is *exclusive*—that it is the only legitimate method of constitutional interpretation (Balkin, p. 106).[21] Making originalism exclusive meant that it was necessarily tasked with generating specific

20. Balkin does discuss and criticize the theory put forth by McGinnis and Rappaport (Balkin, pp. 120–26).

21. On this point, see also Gienapp (p. 175); Stephen M. Griffin, *Rebooting Originalism*, 2008 ILL. L. REV. 1185, 1187, 1197; Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 10–12 (2009).

results across a vast range of contested cases. Balkin argues what I have long thought, which is the only way to accomplish this formidable task is by adopting what Balkin calls a "'thick' conception of original meaning" (Balkin, p. 106) that relies on the framers' "expected applications" and massaging the often scattered historical evidence until it yields determinate results. Balkin is an expert guide to the ins and outs of academic originalism and his criticisms here are again right on target (Balkin, pp. 106–17, 120–48).

It is at this point that we cross paths with historians—including Gienapp and Graber. Balkin summarizes the originalist approach to the use of historical evidence:

> The concept of original public meaning is fashioned in the present for present-day use. It selects certain features of the past as relevant to constitutional interpretation and renders other features of the past irrelevant. It then reconfigures those features of the past that it regards as relevant through the perspective of a particular view about law and legitimacy. It then dubs that reconfiguration 'the original public meaning of the text.' (Balkin, p. 121).

We can contrast Balkin's pointed summary with that provided by the late eminent historian Bernard Bailyn:

> [My insights concerning Revolutionary America] emerged from a deeply contextualist approach to history—an immersion in the detailed circumstances of a distant era and an effort to understand that world not as it anticipated the future but as it was experienced by those who lived in it.[22]

Historians often begin such discussions by saying the "past is a foreign country" (Gienapp, p. 39), and it is fair to say that most historians who have considered the question do not have a high opinion of originalist uses of history.[23] In two brilliant discussions in *Memory and Authority* Balkin attempts to mediate between the contending parties (Balkin, pp. 135–48, 231–68), but I am not sure he is successful.

Balkin argues that his "thin" theory of original meaning (we are obliged to follow the semantic meaning of the Constitution, but semantic meaning only) is better able to navigate the

22. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION: FIFTIETH ANNIVERSARY EDITION xxiii (2017).

23. *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 164–69 (1996).

challenging terrain created by historians' continual rethinking of the past, their respect for the "ambiguity, the complexity and multi-vocality of the past, and the inevitability of multiple interpretations" (Balkin, p. 232); the need to avoid historical anachronisms; the reality that the best evidence about constitutional meaning often comes from post-adoption history; and that some legal positions that were in the minority in the past should be recognized nonetheless as the right way to go in the present (Balkin, p. 135). By contrast, most originalists pursue a "thick" theory of interpretation (whether de jure or de facto) that ties clauses to a methodology that is invariably selective, partial, and prone to anachronism (Balkin, pp. 106–11). As we will see, Gienapp presents a more detailed indictment of contemporary originalism along similar lines.

Despite Balkin's careful attention to the differences between lawyers and historians, his discussion of the methodology historians employ to study the past, "past," suggested by Bailyn's comment above, is underdeveloped. From my perspective, Balkin segues too quickly from methodological concerns to the question of what historians can do for lawyers, which seems to be making arguments relevant to specific questions of constitutional interpretation (Balkin, pp. 237–39). While nothing in Balkin's approach prevents historians from offering a more general critique of the use of history in legal argument, for the most part he concentrates on presenting an intriguing discussion of the role historians play as "memory entrepreneurs" (Balkin, pp. 186–87)—persuading Americans to remember the past differently.

As an example of a general historical critique relevant to legal argument, consider the question of Reconstruction. Balkin is, of course, aware of the cautionary tale of the Dunning School, a group of historians centered at Columbia University who published multiple works that influenced lawyers, Justices of the Supreme Court, and the general public to believe that Reconstruction was a social experiment gone terribly wrong (Balkin, p. 155).[24] No doubt the Dunning School itself was influenced by how white society viewed the post-Civil War experience by the end of the nineteenth century.[25] But other

24. For relevant commentary, see ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION xxi–xxiv (2019).

25. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 74–85 (1988).

historians, W.E.B. Dubois among them,[26] repeatedly challenged the premises and evidence of the Dunning School from an early stage and by the 1950s (if not much earlier), it was in eclipse.[27]

I recall the enormous impact on the legal academy of Eric Foner's magisterial book on Reconstruction, a work that not only encapsulated the refutation of the Dunning School by an army of historians over the preceding decades but helped establish new lines of inquiry on our constitutional past.[28] Yet Foner is not impressed with the unwillingness of the contemporary Supreme Court to benefit from what is now a generations-long reconsideration by the American historical profession not only of Reconstruction, but the entire nineteenth century.[29] We need to consider the possibility that this reluctance to benefit from the lessons of historical scholarship is part of a more general hesitation by the legal profession to take on board the critical role of history.

Foner's comments on the Court's lack of Reconstruction awareness support the idea that historians can meaningfully engage with legal problems, something Balkin thinks would be productive (Balkin, pp. 236–39). But surely one of the of the lessons of Reconstruction-era scholarship is that one of the most important tasks historians can perform is "myth-busting"—challenging what we think we know, generating new insights by excavating long-buried assumptions of entire bodies of constitutional doctrine and bringing into question common assumptions that undergird the legal profession's everyday work.[30] This is not inconsistent with what Balkin has in mind in describing "memory entrepreneurship," but it is different.

26. *See* DANIEL LEVERING LEWIS. W. E. B. DUBOIS: BIOGRAPHY OF A RACE 383–85 (1983); DANIEL LEVERING LEWIS, W. E. B. DUBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY 349–78 (2000).

27. *See* NOVICK, *supra* note 25, at 228–39; 348–60. It is arguable that the influence of the Dunning School lingered in legal scholarship for decades with respect to the specific topic of the legitimacy of President Andrew Johnson's impeachment. On this point see Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. 413, 426–31 (2019). *See generally* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973).

28. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988). My initial work in the 1990s was inspired by Foner's book. *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 68–87 (1996).

29. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 125–67 (2019).

30. Take the example of judicial review. Today, it is viewed as central to constitutional enforcement. This was not necessarily the founding generation's view (Gienapp, p. 151).

Despite these reservations, we should keep Balkin's theory close by. As I will discuss in Part IV, it may be best suited to cope with the challenges presented by historians like Gienapp and Graber.

II. GIENAPP AND THE PERSPECTIVE OF HISTORIANS

What is the role of history? Despite Balkin's book having "history" in the title, his discussion of this question is somewhat attenuated. Historians are trained differently from lawyers (although Balkin acknowledges there are plenty of academics with both degrees) and respect the ambiguity and complexity of the past (Balkin, p. 232). There is at least one key item missing from Balkin's discussion—historical context.[31] "Context" may be a contested concept within originalist theory,[32] but it is essential to understanding what historians do. In his account of the history profession in the twentieth century, for example, the late Peter Novick remarked that "my way of thinking about anything in the past is primarily shaped by my understanding of its role within a particular historical context, and in the stream of history."[33]

Jonathan Gienapp agrees (Gienapp, pp. 39–64). His first book, *The Second Creation*, did something unusual, at least from the perspective of constitutional lawyers—it placed in historical context the challenge of interpreting the U.S. Constitution in the early republic.[34] Gienapp refused to take the methods of constitutional interpretation as simply given. Rather, he expertly explored how they were invented and developed over time.[35] In this way Gienapp confounded a host of originalist shibboleths, including some about what historians do. As an example, originalists seem convinced historians are concerned primarily with the motives of historical actors and the causes of events.[36] But Gienapp explicitly eschewed any discussion of motives in favor of noticing first, which sorts of methods and arguments were

31. Suggested by the Bailyn quote, *supra* note 22 and accompanying text.

32. See my commentary in Griffin, *Optimistic Originalism*, *supra* note 6, at 293 n.65.

33. *See* NOVICK, *supra* note 25, at 7.

34. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) [hereinafter GIENAPP, SECOND CREATION].

35. *See*, *e.g.*, *id.* at 4–5, 116, 201, 264–71, 324.

36. *See* John O. McGinnis & Mike Rappaport, *The Finished Constitution*, LAW & LIBERTY (Sept. 28, 2023), https://lawliberty.org/book-review/the-finished-constitution.

available in the eighteenth century with respect to interpreting constitutions and second, describing the consequences of the choices the founding generation made with respect to those methods and arguments in key debates in the First Congress.[37]

Gienapp's argument in *The Second Creation* was not entirely out of the blue. Anyone who read Gordon Wood's magisterial *The Creation of the American Republic* would have been on notice that understanding eighteenth-century political and legal thought requires a conceptual shift.[38] Closer to the present, Larry Kramer's intervention into the debate on the legitimacy of judicial review provided evidence that demonstrated that the concept of a political constitution as a fundamental law was so new that lawyers had difficulty making sense of it.[39] In addition, I think it likely that some prior scholars who studied the debates in the First Congress noticed that the members appeared to be arguing about not simply the merits or constitutionality of the national bank or Jay Treaty,[40] but also what *counted* as a legitimate argument—in other words, *how* to argue about matters constitutional. For such matters were not settled when the Constitution was ratified.

Despite its obvious significance to the originalism debate, *The Second Creation* was not widely reviewed in law journals.[41] After *Against Constitutional Originalism*, ignoring Gienapp's arguments will be far more difficult. In a way, this book is not just Gienapp's creation. In an important sense he is providing a voice and intervention for generations of historians who have wondered: what is going on in the legal academy and the law courts? Why isn't the extensive scholarship accumulated in the past several decades on the eighteenth century making more of a difference?

Gienapp's new book is also unusual. In form it is a critique of academic originalism. What Gienapp may not have realized is that in taking on the use of history by a broad spectrum of originalists, his arguments have substantial implications for the use of history for lawyers and judges as well—for nonoriginalists as well as

37. GIENAPP, SECOND CREATION, *supra* note 34, at 17.

38. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969); *see* Gienapp (pp. 34–35).

39. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2005).

40. *See* GIENAPP, SECOND CREATION, *supra* note 34, at 202–86.

41. See the belated review by originalists John McGinnis and Mike Rappaport, *supra* note 36.

originalists, in other words.[42] Gienapp conducts what amounts to a professional audit of the legal academy's use of historical evidence, at least with respect to the eighteenth century, and the results should concern not only originalists, but everyone who uses such evidence to illuminate the Constitution.

The structure of Gienapp's argument against originalism is straightforward. Originalists have been engaging in an elaborate bracketing of otherwise relevant historical evidence (Gienapp, p. 48). Originalists refer to this bracketed evidence as "original intent, underlying purposes, or expectations" (Gienapp, p. 48) and assert that determining the original public meaning of the Constitution (the most popular form of originalism) is something different. It might indeed be something different, but as Gienapp argues, this is not the right path:

> The crucial consideration is not whether we follow meaning or intent but instead whether we treat historical meaning as relatively thick or thin. The key question is not, Does an author's intent or a ratifiers' expected application control the meaning of a text? But instead, How broadly and deeply must we contextualize a complex historical speech act (such as a constitutional provision) in order to decipher its original meaning? . . . Complex constitutional provisions necessarily presuppose a thick network of conceptual understandings. The meaning of those provisions was originally *embedded* in a mode of thought and the conceptual universe that structured it. . . . We can understand historical linguistic practice in the first place, then, only if we already understand how the people who engaged in that linguistic practice understood a broader cluster of complex interlocking concepts—if we absorb how they thought. Otherwise, we're just going to interpret their linguistic practice *as if they thought like us*—thinking *for* them and *through* them, fleshing out meaning by way of our intuitions rather than theirs—which is a recipe for misreading their practice rather than decoding its objective content. (Gienapp, pp. 47–48, emphasis in original)

Having made this crucial point, Gienapp implements his "thick" conception of historical meaning in five subsequent

42. As an example, it is unclear to me whether the sort of orthodox originalists associated with the University of San Diego Law School Center for the Study of Constitutional Originalism would regard "Yale School" scholar Akhil Amar as an originalist. But whether they would or not, Gienapp's arguments pose problems for at least Amar's general project, if not necessarily his arguments about the meaning of specific clauses (Gienapp, pp. 58–60).

chapters by marching through a wide range of otherwise relevant evidence that is ordinarily missing in legal analyses of the Constitution, whether originalist or not. Conveying the sense of Gienapp's complex and nuanced discussion is difficult in a brief space, so I devote myself here to what I see as the most prominent bottom-line examples.

Saying that the past is a foreign country can seem unhelpful. But over the past half-century or so historians have increasingly converged on several examples of what can be termed "global" differences between the world of the eighteenth century and our own. They are global differences in the sense that if they were better known, they would affect how we think how the Constitution works and how to determine its meaning across a wide range of clauses and cases.

First, Gienapp points to the much different conceptual treatment of rights (Gienapp, pp. 91–100). Gienapp invokes the recent work of Jud Campbell[43] to show that the founding generation's idea of the relationship of rights to government power was, roughly, much less "libertarian" than the post-World War II concepts with which we are familiar. On the eighteenth-century conception according to Campbell, rights were "regulable so long as those regulations were in pursuit of the public good and made by a representative legislature."[44] Further, discussion of rights did not necessarily assume that judicial review would be the enforcement mechanism for rights (although it was certainly mentioned). The upshot is that evidence from the eighteenth century that relates to the legal content of rights must be taken at a considerable discount, given the tendency to assume a contemporary framework of rights.

The different treatment of rights is related to another blockbuster legal reality of not only the eighteenth century, but at least part of the nineteenth century as well. Namely, both the founding generation and abolitionists whose writings presaged the Reconstruction amendments were not legal positivists (Gienapp, pp. 76–91). That is, they did not assume that valid law was based solely on enactment. They believed in a more fluid relationship between formally enacted rights and constitutional

43. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 268–80 (2017).

44. *Id.* at 276 (footnote omitted).

provisions in general and other kinds of law, including the law of nations and the common law. This aspect of the eighteenth-century point of view may be the one that is most difficult to recapture or understand today.

Gienapp devotes an entire chapter to yet another key development—the "legalization" of the Constitution (Gienapp, pp. 155–71). Legalization refers to the practice of treating the Constitution as if it were an ordinary law, such as a statute, and basing its treatment and interpretation on the assumed similarities. Gienapp makes clear that this was a process that extended into the time of the Marshall Court in the early nineteenth century. In other words, it was not an accepted reality when the Constitution was ratified. The generation that wrote the Constitution thought of it at least as much as a political document to be regarded and enforced by the people as a legal one to be enforced by the judiciary.[45]

Gienapp presents other examples of global differences,[46] but their importance is that they are highly relevant to evaluating originalist arguments. In bringing these examples to bear, Gienapp makes the same move as before—namely, saying originalists have missed the boat in terms of assuming that the evidence they are bracketing is best described as "intent" or "expectations." By this point, Gienapp can plausibly accuse originalists of asking the wrong question (Gienapp, pp. 181–84, 199–200). The evidence he reviews does not concern any of these things, but rather consists of "eighteenth-century understandings of what constitutionalism was and how it worked" (Gienapp, p. 200). Here Gienapp's description of his enterprise happens to dovetail with Graber's approach in *Punish Treason, Reward Loyalty*.[47]

With respect to the originalism debate, Gienapp's arguments should have two immediate effects. First, originalists such as Randy Barnett and Evan Bernick, who contend that "many historians who choose to engage in constitutional interpretation

45. I argued previously that doing this had a distinct cost, as the Constitution, in the end, is not strongly analogous to any other form of law. *See* GRIFFIN, AMERICAN CONSTITUTIONALISM, *supra* note 28, at 11–19.

46. He argues, for example, that the question of the nature of the federal union, which occupied so much attention in the early republic and after, could not be settled by the text (Gienapp, pp. 117–37).

47. Though Graber stresses showing how constitutions work rather than what they meant (Graber, p. xxx).

employ 'Framers' intent' proto-originalism despite its now well-recognized drawbacks among legal scholars,"[48] are simply wrong. They have made a category error (Gienapp, p. 200). This error is typical among originalists and a basic source of their misunderstanding of what their conflict with historians is about. The methodology common to historians that stresses understanding people's beliefs in a past context does not resemble and, in any case, is not limited to anyone's "intent." The issue, rather, is choosing between a thick or thin historical context as Gienapp contends.

The implications of this one error for the standard debate over originalism are staggering. Originalists have used the dichotomy between original intent and original meaning to structure the debate for decades. Yet it has no relationship to any sound historical methodology. Gienapp demonstrates more clearly than past commentators that it *never* captured the approach used by historians of the early republic or, for that matter, the Reconstruction era. The distinction is an arbitary, self-imposed barrier to the proper use of historical evidence by legal scholars.

The second effect of Gienapp's analysis is to raise serious questions about the viability of the Baude and Sachs project of "original law" originalism. Indeed, Gienapp devotes an entire chapter to criticizing their work (Gienapp, pp. 226–50). The problem here is clear enough: Baude and Sachs create a kind of fantasy world in which the assumptions and tools of modern twentieth and twenty-first century lawyering are simply stipulated as existing in the eighteenth century. Nothing in Gienapp's able review of the extensive literature on the eighteenth century supports their claims.

It is worth asking: Does Gienapp leave lawyers nowhere to go? His historical critique of originalism is not easy to answer—but it is not easy to take his complex treatment of the eighteenth century on board either. Consider Balkin's point that the use of history is pervasive in the methods of constitutional argument. Does this mean that the way we do constitutional argument must be fundamentally rethought? Gienapp's book is an overdue challenge not simply to originalists but to the standard approach of the community of constitutional scholars, judges, and lawyers.

48. RANDY E. BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 4 (2021).

III. GRABER ON RECONSTRUCTION AND THE FOURTEENTH AMENDMENT

Gienapp critiques originalism from the standpoint of eighteenth-century historical research. With Mark Graber, we move to the nineteenth century—specifically, the Civil War and Reconstruction. With *Punish Treason, Reward Loyalty*, Graber launches a remarkable scholarly project aimed at decisively shifting our understanding of the Fourteenth Amendment and the Reconstruction Amendments generally. This multi-volume effort is called "The Forgotten Fourteenth Amendment," which refers to Graber's principal objective of demonstrating that the history of the Reconstruction amendments, especially those current in legal scholarship, is substantially incomplete. At the same time, Graber's approach to historical evidence poses at least a contrast and, more likely, a distinct challenge for originalist accounts of Reconstruction. He highlights the difference between determining legal meaning in a narrow sense and understanding a deliberate constitutional design (Graber, p. xxvii). Like Gienapp, Graber is implicitly challenging whether the commonplace distinction between semantic meaning and the framers' expected applications is a good way to approach the task of establishing an accurate historical context for determining the law of the Constitution.

Graber's project controversially decenters (without *necessarily* deemphasizing) section 1 of the Fourteenth Amendment, the fount of an enormous river of judicial doctrine (Graber, p. 130). Why? Graber foregrounds the political and constitutional objectives of the Republican Party in the immediate aftermath of the Civil War. In effect, he treats the Party as an institution co-equal to the branches of government. Situating the Republican Party in those fraught circumstances in turn highlights a key issue well known to historians, but not much featured in contemporary law school casebooks—what conditions Republicans should impose on the former rebel states before readmitting them to Congress and thus to national politics itself. Emphasizing the readmission issue has the initial and somewhat startling effect of making us realize that Republicans had to be up to more than advancing the cause of human rights in formulating the Fourteenth Amendment.

Graber advances his claims confidently because he found that a substantial trove of congressional evidence has been

overlooked. It appears that legal scholars, concentrating on the discussions of section 1 in the 39th Congress as recorded and labeled as such in the *Congressional Globe*, are using only a fraction of the relevant evidence concerning the background of the Fourteenth Amendment. Graber describes how there were many exchanges and debates directly relevant to the *entire* Fourteenth Amendment that were not explicitly labeled in the *Globe* as such (Graber, pp. 1–11). Discussions revolving around the readmission of the former rebel states were extensive and shed considerable light on the objectives of Republicans in formulating all aspects of the Reconstruction Amendments (Graber, pp. 16–17).

Graber's analysis and conclusions are thus based on a far wider array of historical evidence than any previous discussion of the Fourteenth Amendment, at least by legal academics. What does his analysis show? Republicans realized they were confronting an intransigent South whose elites had no intention of changing their ways. If anything, they sought to continue slavery after the War, even if it had to assume another form (Graber, pp. 52–54, 59). Further, Republicans had reason to think that once back in Congress, Southern Democrats would demand the payment of Confederate war debts and continuation of de facto rebel rule. To respond to this looming challenge, Graber describes how Republicans wanted to create a situation in which the former rebel states would have to provide various guarantees of good conduct. Guarantees of rights were certainly part of the Republican plan, but they were not the principal objective. Graber's key thesis can be described briefly as placing structure before rights. As he puts it: "The Republicans who framed the Fourteenth Amendment thought constitutions work by configuring politics. They regarded constitutions as mechanisms that privilege coalitions with particular interests and values. . . . The point of constitutional reform was to configure politics in such a way that would enable the people who remained loyal to the Union to control how the Thirteenth Amendment was interpreted and implemented in the foreseeable future" (Graber, pp. xxxi–xxxii).

The book is the beginning of a multivolume project and, as such, does not provide all the evidence for Graber's thesis. It consists of a lengthy preface, which serves as an overview of the entire series, followed by an introduction, five chapters and a conclusion. By

setting out his argument so expansively in the preface, Graber risks getting ahead of the evidence he presents in this first volume. Not all elements of Graber's argument emerge clearly as he walks up to the formation of the Reconstruction amendments without considering their content in detail. Scholars who see section 1 as central to Reconstruction might wonder what happened to the Civil Rights Act of 1866. Graber's objective in this volume is thus limited. He uses it to establish the viewpoint through which the Republican Party viewed the essential tasks of Reconstruction.

Not taking on the details of the Fourteenth Amendment, however, leaves the argument in this volume hanging. Scholars who nonetheless are interested in the legal content of section 1 and whether, if implemented properly, it could have avoided the signal failure Reconstruction became for the dream of achieving racial equality might wonder why they should pay attention as Graber spins out his project through the remaining volumes (which might take some time!). I believe there are several good reasons.

Let me preface those reasons with an observation. I began serious study of American constitutionalism a few years prior to the bicentennial of the Constitution in 1987. So I was a witness to a distinct shift in scholarly attitudes toward the Constitution, although this shift was certainly not universal. At the time of the bicentennial, scholars saw the Constitution as more virtuous than flawed—judged over the long run it served its country well as a guarantor of democracy and stable government despite the significant compromises, practical and moral, that were necessary for its ratification.[49] Those compromises, including the protection of slavery, were relegated to the background of accounts of what happened at the Federal Convention, although certainly not forgotten.[50] Since the bicentennial legal scholars have migrated to a more critical view of the original founding bargains.[51] The compromises with slavery are foregrounded in recent accounts and regarded as an essential element of a deeply flawed and morally unacceptable republic.[52]

49. *See*, *e.g.*, Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TULANE L. REV. 2121 (1996).

50. Thurgood Marshall's criticisms of the bicentennial, for example, were regarded as an outlier. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

51. This judgment is reflected in mainstream works such as MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

52. Despite the lack of attention in The New York Times' 1619 Project to

At the same time, most constitutional scholars see the eighteenth-century Constitution as redeemable. Where an earlier generation valorized the Founders and their eighteenth-century Enlightenment achievement, more recent generations valorize abolitionists, Abraham Lincoln, and the Republican reconstructors as the true founders of today's multiracial democracy.[53] The Reconstruction Amendments are seen as directly addressing and solving many (although certainly not all) of the problems and compromises in the 1787 Constitution. There is an ironic parallelism at work here that nonetheless has had an enormous influence—that is, the original Constitution was terribly flawed despite being understood for most of American history as near-perfect, but Reconstruction, at least properly understood, is nearly without flaw. Indeed, an array of legal scholars, interest groups, and starry-eyed litigation shops converge on representing Reconstruction as when America finally got it right.[54]

This is precisely where Graber's project poses a deeply unsettling challenge to what has become conventional wisdom. Suppose that Reconstruction was a product of nineteenth-century values, just as the original Constitution was a product of eighteenth-century values. And suppose those values are not fully consonant with our own. The example of the treatment of women by the Republican reconstructors in Congress is a familiar one. This point can be extended. Graber's work, along with that by other insightful historians,[55] suggests that the Reconstruction Amendments themselves, in fact the entire project of Reconstruction, was both the product of political compromise and was inextricably linked with nineteenth-century values that differ from our own. Which should raise the question: Have contemporary lawyers invested too much hope in Reconstruction?

constitutional matters, this is its real significance as its popularity marks a shift in the cultural understanding of the Constitution. *See* THE 1619 PROJECT (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman, & Jake Silverstein eds., WH Allen, 2021).

53. *See*, *e.g.,* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006).

54. As an example, consider the Constitutional Accountability Center, https://www.theusconstitution.org/.

55. *See*, *e.g.,* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015); FONER, THE SECOND FOUNDING, *supra* note 28; MARK WAHLGREN SUMMERS, THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION (2014).

Moving back to constitutional doctrine, why should we take notice of Graber's work in light of the undoubted centrality of section 1 to contemporary constitutional law? In addition to the undoubted benefits of historical accuracy and potential insight from a broader view, I believe there are several reasons worth considering.

First, Graber's project highlights the key and often overlooked issue of how the Constitution can be enforced. What guarantees that the text will be respected by the people, especially people formerly in rebellion? This was a genuine question in the Reconstruction era. In the debates in the 39th Congress, for example, Graber shows how Republicans worried about new amendments becoming "parchment barriers." (Graber, pp. 44–45, 60). One response was to give Congress concrete new powers to enforce the amendments, borrowing the "appropriate" language from Chief Justice Marshall's epochal opinion in *McCulloch v. Maryland*.[56] The question of enforcement, of course, is highly pertinent today considering Supreme Court decisions creating the "congruence and proportionality" standard,[57] along with concerns about voting rights in the wake of the invalidation of a key section of the Voting Rights Act of 1965 in *Shelby County v. Holder*.[58]

Second, a historical lesson about the wages of compromise may be useful. Although it is usually not put this way, I suggest legal scholars today see section 1 as fully adequate to solve the problems of racial equality. But not all the Republican reconstructors agreed. They knew the Reconstruction amendments were the product of compromise and contained provisions that perhaps hampered their ability to achieve their goals. To be sure, some contemporary scholars have acknowledged, for example, problems with the limited reach of the Fifteenth Amendment. As Graber suggests, however (although not fully in this volume), all of the amendments show the hampering effects of legislative compromise. This point is surely critical to understanding the fate of Reconstruction.

Third, Graber's project helps us better understand and make progress on what many scholars consider a critically important issue, indeed a mystery: why did Reconstruction fail, and could it

56. 17 U.S. 316 (1819).
57. City of Boerne v. Flores, 521 U.S. 507 (1997).
58. 570 U.S. 529 (2013).

have succeeded? Graber makes the point repeatedly that today we are used to the judiciary enforcing the Constitution, whereas nineteenth-century Republicans, imbued with the spirit of partisan supremacy deriving from Jacksonian America, preferred a legislative model (Graber, p. xxxiii). A *political party*, not the judiciary or a New Deal-style independent agency, was *collectively* in charge of Reconstruction. Would you rely on one political party to defend your rights? Likely not, but Republicans didn't see the problem with their party-based approach until perhaps it was too late. Graber poses the issue of the success of Reconstruction in a useful way—if we want section 1 to succeed, whether in the past or present, how is that possible without a strategy for building long-term political and legislative support?

Fourth, this suggests the usefulness of a "state-building" perspective on the quest for racial equality and a multiracial democracy. Political parties and social movements can initiate constitutional change, but to maintain that change, government institutions must be provided with the legitimacy to enforce constitutional values over the long term. Only in the twentieth century did Americans learn that to advance voting rights, for example, the tendency to turn to the judiciary to enforce rights simply would not work. Only the administrative state could provide the necessary enforcement to make the Voting Rights Act operational. And this lesson was learned well only after the Great Depression and the New Deal. Effective enforcement of civil rights and the achievement of something close to a level playing field for those "loyal" to the Union (to use the terms of Republican reconstructors) would happen only in the twentieth century. Legal scholars should therefore be cautious about attributing all the necessary changes with respect to racial equality to the First Reconstruction. The Second is equally relevant to understanding how racial equality can best be achieved and maintained.

These last two points illustrate how Graber can be understood as commenting on Balkin's position that there needs to be a way of mediating among lawyers, legal scholars and historians. One version is the idea of a "usable past," but here arguably legal scholars fell into error. They adopted an overly rosy or "optimistic" account of Reconstruction that makes it difficult to understand why Reconstruction failed. Graber invokes

Mark Wahlgren Summer's recent work[59] to remind us that from the perspective of some Republicans in Congress, Reconstruction in fact was an on-balance success. This is partly because they were perhaps overly concerned about the South returning to secession and war, something they prevented. These Republicans celebrated the return of peacetime and prewar ideas of Union, as well as the fact that they had placed civil rights for all on the law books (Graber, pp. 215–17).

I am suggesting that scholars reconsider the relationship of history as historians practice it not only to originalism but to lawyering and legal scholarship, no matter from what theoretical or political perspective. What if legal scholarship took its cues *from* history rather than attempting to shape history to its ends?

IV. THE BILL FROM HISTORY

When you enter the original Disneyland in Anaheim or the "Magic Kingdom" at Walt Disney World in Orlando, you find yourself on "Main Street, U.S.A." Main Street's late nineteenth-century feel has a real-life basis. It is a recreation of Marceline, Missouri—Walt Disney's hometown.[60] Marceline appears to be a very small town, but if its Victorian architecture is reproduced accurately on Main Street, it is no doubt like many such towns in the Midwest. There are expansive porches, gables, and turrets. Of course, Main Street is a "false front," a Potemkin village. No one lives there.

Main Street is entertainment, an idealized history inspired by a personal memory. There are clear differences between Disney's affectionate use of memory and the kind of critical contextual history historians are trained to produce. Unfortunately, it has sometimes been hard to perceive the same degree of difference between Disney and the use of the Constitution's history by public officials, lawyers and judges. There is a decided preference among lawyers and even legal scholars for narratives of continuity, stories that stress the similarities between past and present.[61] As historians like to emphasize change and discontinuity ("it's a foreign country"), this creates the potential not only for a

59. *See* SUMMERS, *supra* note 55.

60. *See* NEAL GABLER, WALT DISNEY: THE TRIUMPH OF THE AMERICAN IMAGINATION 485, 499 (2008).

61. *See* Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115 (1999).

divergence of views between lawyers and historians, but for significant bias in lawyerly assessments of historical evidence.

Like Disney's choice to use his memory to entertain, how we use history matters. How we use historical evidence matters. We should not be emulating Disney's uncritical use of the past. But once we grasp Gienapp's central claim that the new originalism brackets the most relevant historical evidence, shouldn't we consider a warning label? Perhaps one similar to Hollywood movies: "Based on a true story;" "Inspired by real events;" or "Some of this really happened." When originalists underwrite an interpretation or construction of the Constitution based on historical evidence, presumably this involves a truth claim, as well as a claim that they have made a good faith effort to examine all relevant evidence. Yet repeatedly attaching such warning labels would likely undermine originalism's legal authority.

The bill from history is now due. It is based on the reality that originalism and historians' history indubitably rest on a common foundation—the use of evidence from the past produced by sound research practices. That bill indicates a deficit—that is, originalism's legal claims must be taken at a considerable discount *if* originalists follow their own rules. This discount on the credibility of originalist claims applies if the evidence is filtered (as Balkin says, "structured") by insisting that it must be "objective" evidence of "public meaning" (or "original law") rather than being grounded in the kind of rich historical context sought by historians. But why would anyone, least of all lawyers and judges, accept what amounts to a drastic discount on historical credibility?

Where does this leave originalism? It is entirely possible that originalists have advanced interpretations of the Constitution that are regarded as plausible by historians. It is well known that not only do originalists disagree about its precepts but that not all originalists follow them in a strict sense. I suggest close inspection makes it apparent that some originalists use historical evidence in an ecumenical way resembling the practice of historians.[62] Further, it is certainly not unknown for originalists to consider a diversity of sources so great that they inevitably reflect historical

62. Based on my work in the war powers arena, my chief candidate is Michael Ramsey. *See*, *e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007).

context. Indeed, historians treat some originalist analyses with respect. It is the rigid *methodology* of originalism to which historians uniformly take strong exception, not every interpretation originalists advance.

When we turn, however, to originalist interpretations of the Constitution strongly influenced by the highly questionable way originalism treats historical evidence, we are more in Disney's world than any past reality. At the least, for serious attempts to apply the methodology of original public meaning, substantial riders or qualifiers must be applied before the legal claims can be regarded as credible by lawyers and judges. If not, we are in a Hollywood production and disabling warning labels are mandatory.

As far as riders or qualifiers, what do I have in mind? As historians like Jack Rakove have noticed, aggressive use of objective public meaning leads away from the "subjective" views of actual people.[63] This suggests the utility of a matching rider—any proposed interpretation of the Constitution must have been articulated by at least one person when the clause in question was adopted. Why do this? Consider the implications of offering an interpretation that appears plausible to us in the present but has the support only of scattered word usage unconnected to past constitutional discussions in context. Without this rider, we would be casting ourselves loose from the past—which is strangely the opposite of what originalism promises.[64]

The qualifiers are Gienapp's missing global contexts. To rearrange his order of discussion slightly, these are the missing contexts of legal positivism, the legalization of the Constitution, and the much different eighteenth-century conception of rights. Any analysis of eighteenth-century constitutional meaning that does not consider the relevance and impact of these contexts must be heavily qualified. In fact, these contexts are so pervasive that we must presume that unless they are considered with the appropriate qualifiers, we can't be sure that any originalist legal claims would be of practical value in the twenty-first century. This is a signal example of the heavy discount on credibility imposed by the bill from history.

63. *See* Rakove, *supra* note 2.

64. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 96–97 (2022).

Gienapp's elaboration of these contexts also allows us to be more precise in assessing the familiar charge that lawyers in general as well as originalists use historical evidence selectively. We can now see clearly that the charge of selectivity goes beyond cherry-picking the evidence in your favor. It includes also the issue of relying persistently on certain understandings of the course of history over others. Notably, these involve a presumptive bias embracing continuity over change and over-optimistic readings of evidence that almost always find ways for the past to solve quite contemporary legal problems. At the same time, the reality of dramatic shifts in historical context is continually underestimated. There is also the issue I call the "missing third alternative,"[65] namely the relative absence in originalist analyses of findings that the evidence available is simply too sparse or ambiguous to constitute the basis for a legal claim.[66]

In light of these formidable historical challenges, why might one persist in using originalist methods? I can think of several possibilities. Gienapp observes that the tenor of contemporary constitutional argument is "hyper-textualist" (Gienapp, p. 115) in the sense of determinedly ignoring other methods of interpretation—the methods Balkin discusses in some detail. It strikes me that an emphasis on the text above all is likely to downplay the well-known historical reality that many clauses in the Constitution are the result of political compromise. Originalists might be interested in doing this because it is not at all clear how compromise should be factored into the task of constitutional interpretation. Second, a hyper-textualist approach tends to diminish the possibility that we might have to acknowledge the "third alternative"—a null set or realizing that there simply isn't enough evidence on the matter in question. Third, and perhaps most important, hyper-textualism leads us away from the possibility that the framers *deliberately* enacted an ambiguous text in order, for example, to better their chances in the ratification process. As Graber notes, it so happens there is

65. GRIFFIN, AMERICAN CONSTITUTIONALISM, *supra* note 28.

66. In building out his arguments, Gienapp's critique is hindered by the lack of what I will call exemplars. An exemplar is an application of originalism to a significant problem of constitutional interpretation that is widely regarded among originalists as a sound application of the theory. Such exemplars could then be examined critically according to the historical methodology that Gienapp defends. The fuzziness of what the theory of, say, original public meaning involves in detail is suggested by the paucity of exemplars.

substantial evidence that the language in section 1 of the Fourteenth Amendment (other than birthright citizenship) was kept ambiguous so as to better satisfy the diverse constituencies that made up the Republican Party (Graber, p. xxxiii).

Thanks to the efforts of Balkin, Gienapp, and Graber, we can now see more clearly the costs the new originalism imposes on historical credibility. As Balkin and Gienapp detail, faced with challenges from historians and their use of the pejorative concept of "law-office history," originalists set about distinguishing their enterprise from that of historians. Originalists are convinced historians are interested in causes of events and the motives of historical actors rather than anything resembling original meaning.[67] As Gienapp argues correctly, this is far from a complete picture of what historians do. And Graber adds the suggestion that we should be as interested in how the Framers designed the Constitution to *work* as we are in determining what it *meant* (Graber, p. xxx).

In any case, isn't there a more straightforward path to finding out what historians are interested in when it comes to the Constitution? Originalists rarely refer to the contributions of *legal* historians to our understanding of the constitutional past. It is difficult to argue that these historians are not interested in the meaning of constitutional provisions (as well as how they work). The career of the distinguished legal historian Edward Purcell helps refute originalist claims about historians. Purcell uses the standard methodology of being interested in how historical actors think in context to explore, among other topics, the meaning of Article III, the evolution of the doctrine of federalism, and the jurisprudence of Justice Scalia.[68] When originalists generalize

67. McGinnis and Rappaport, *supra* note 36.

68. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007); EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON (2020). For other works by legal historians that illuminate our constitutional history, see VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (2008); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998). Of course, these are only a few examples. Then there is the Holmes Devise History of the Supreme Court. The latest and distinguished contribution to that series is ROBERT C. POST, THE

about what historians do, they should be more cautious and at least start with relevant work done in law schools.

If the critiques offered by Gienapp and Graber are correct, is originalism refuted? Only the most popular versions! These critiques in effect place Balkin's theory in the driver's seat as the only plausible form of originalism. Balkin's unique theory of American constitutionalism and constitutional interpretation, with its sharp distinction between interpretation and construction, is well suited to cope with an environment in which historical context is taken seriously. But if we make a "historical turn" in constitutional theory as we should, we must also consider that the structure of Balkin's theory illustrates why some might still feel a sense of disquiet.

Any sound legal history concerned with the eighteenth and nineteenth centuries will inevitably remind us that the law of the past was constituted by ideas and doctrines that were eventually abandoned. It is somewhat amazing that after decades of continuous development of the new originalism, it is still impossible to tell whether standard-form "original public meaning" originalists are in fact committed to reviving any of these ideas and doctrines.

Consider the common distinction made by lawyers and judges during Reconstruction and through the end of the nineteenth century between civil, political, and social rights. The distinction enabled proponents of the Fourteenth Amendment and judges later to argue that the equality guarantees of the Fourteenth Amendment applied only to the specialized category of civil rights. The pervasive nature of this mediating principle provides an excellent example of the difference between Balkin's theory and that of standard-form originalism.[69] Despite the fact that this distinction is obsolete, it also serves as a danger signal about what Balkin's "thin" approach to interpretation really involves.

Why is this distinction a problem for standard-form originalism? Because it was either part of the law of the Constitution in the nineteenth century or it was not. Of course,

TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930 (2024). Are these contributions by legal historians really irrelevant to the meaning of the Constitution as originalists define it? We are entitled to be skeptical of such an assertion.

69. *See* Griffin, *Optimistic Originalism*, supra note 6, at 316.

the evidence strongly supports that it was.[70] In other words, for decades it had the same status as the text of the Constitution—the law of the land. Any form of originalism that cannot reproduce this legal fact is suspect because it is not rendering an accurate report of the constitutional law, circa 1860s and after. I put it like this because different forms of originalism use historical evidence in different ways. But all of them without exception edit out this key nineteenth century legal reality. The problem is that on their own terms, they have no justification for doing so. They say they faithfully reproduce the law of the past, not avoid it.

But this is not true for Balkin. One of the key moves of *Living Originalism* was to stipulate that most of what we normally term constitutional "interpretation" actually occurs in the realm of construction. This is a consequence of the "thin" theory of meaning. In the realm of construction, we are under no obligation to respect past doctrines that are not a literal part of the Constitution. We can jettison them as obsolete mediating principles.[71] Balkin's theory of "text and principle" not only allows for this, it says that it is legitimate.

As Balkin describes in *Memory and Authority*, this move is rejected by mainstream originalists, but seemingly for ideological reasons rather than as a result of a theoretically sound argument (Balkin, pp. 111–15). Mainstream originalists both want the unadorned past and are seemingly unprepared to cope with what that would imply for the contemporary legal world. The obvious point bears emphasis—we cannot revive obsolete constitutional doctrines any more than we can revive a past world—other, at least, than in the manner of Disney. Or, rather, we can imaginatively reconstruct past worlds through sound historical inquiry, but we cannot recreate the American society of the past in any literal sense.

I said there is a danger signal here for Balkin. Because his theory allows us to jettison any past doctrine when it doesn't fit normatively with contemporary constitutionalism, it risks diluting constitutional law of the authority and perhaps the inspiration that the law of the past provides. Authority is really being provided by arguing with our contemporaries, not those who enacted the Constitution and its amendments. This indeed

70. *Id*.
71. *Id*. at 318 n.224.

resembles how conservatives imagine in their nightmares the constantly shifting and arbitrary world of "living constitutionalism."

As I read *Memory and Authority*, Balkin cabins this result by placing lawyers in charge. History cannot lead us just anywhere; its use is channeled through the forms of legal argument (Balkin, pp. 240–68). His understanding of how this process works is quite charitable toward the legal profession. I take a more skeptical view. I think when performing the ordinary tasks of constitutional interpretation and adjudication, we need to maintain an awareness of what we might be losing by bypassing a more robust version of the role of historians' history.

In my estimation, without placing *historians* in charge of how history is used, so to speak, we create unfortunate biases in constitutional analysis. We tend to lose sight of those parts of the Constitution not subject to continuous judicial interpretation—the "Constitution outside the courts." We also lose sight of the historical importance of structural doctrines like federalism and separation of powers. Doing ordinary lawyering in the past few decades has diminished our sensitivity to noticing that the Constitution may stand in need of reform. Although lawyers may now be catching up to this reality, in my experience historians have been more sensitive to these possibilities.

History done well is an intellectually exciting, normatively stimulating, and highly useful reality-based way of understanding the (past) world. Ordinary lawyering has nothing similar and goes badly astray when it tries. Consider the related ideas of the "canon" and decisions designated right or wrong "the day they were decided." Contemporary constitutional law has invested an enormous amount of intellectual energy into, in effect, privileging some past cases over others as part of the "canon" of constitutional law, as well as describing its evil twin, the "anti-canon." Along this same line, some eras of American legal history like Reconstruction are well celebrated and therefore "canon," while others, such as the segue to the progressive era in the late nineteenth century are criticized and regarded as somehow deviant.

Whatever may be said for this popular legal project, I see nothing to recommend it from the perspective of sound historical inquiry. The canonical case approach where we build theories around cases that are held to be utterly "wrong on the day [they

were] decided" or ineluctably correct from the moment of decision, has notably warped our understanding of constitutional history, the process of constitutional change, and thus our ability to see our own times clearly. Similarly, we should not privilege certain eras of constitutional history and pit them against others—we should at least begin with an assumption that all eras have their share of wisdom about how to regard the Constitution.

Taken together, these books open the door to a different understanding of the relationship between lawyering and history as practiced by historians. Balkin ably describes how constitutional lawyers need history to assist them in their ordinary practice. Historians have been more willing to help in recent years by filing briefs, forging a strong connection between the disciplines that is likely to expand (Balkin, pp. 231–53). My remarks in the last several paragraphs are not meant to dispute the desirability of this connection. I simply want to highlight the possibility that sometimes, what lawyers and legal academics need is not help from history in answering the questions they are most likely to ask but the sudden realization that they have been asking the wrong questions. As an eminent historian once emphasized to me, thinking of new questions to ask is one of the most valuable contributions the profession of history can make.

CONCLUSION

Today's audience demands efficiency in comprehension and "takeaways." Starting with the former and at the risk of alienating the three authors, I'll pose the question: Which of these books should you read if you don't have the time to read all three? My advice is to read Balkin's book, the last two (critical) chapters of Gienapp's book and Graber's highly informative preface, which serves as a comprehensive introduction to his entire project. When you have the time, circle back to the rest of Gienapp's book. With respect to Graber, I would wait for his second volume and compare it with the first to see where future research on the Fourteenth Amendment is going.

Takeaways? The usefulness of the longstanding distinction between original public meaning and original intent or expectations is at an end. This is a direct consequence of Gienapp's argument that originalists are deliberately bracketing

historical context—the most relevant evidence for constitutional law. Pluralism in constitutional interpretation is notably revived by Balkin's injection of historical argument. Finally, Graber reminds us that if you want liberty, equality, and enforceable constitutional rights, you need a political strategy as well as a legal strategy. Although Graber focuses on Reconstruction exclusively, this is undoubtedly a worthy lesson for our own times.