ORIGINALISM'S TWO TRACKS[†]

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ABSTRACT

Originalists constantly invoke history. But they are divided over how to approach the past. Some originalists—let's call them "track one" originalists—view the past in a backward-looking way, using modern criteria to identify earlier constitutional content. Other originalists—let's call them "track two" originalists—try to understand the past on its own terms, using historical criteria to identify earlier constitutional content. Although underappreciated, this division has significant implications for originalist theory and practice. It bears, for instance, on whether originalists should resuscitate long-forgotten features of our constitutional past, such as the embrace of general fundamental rights that were grounded in natural or customary law rather than in constitutional text. By exposing foundational paradigm shifts in American constitutionalism, Jonathan Gienapp's pathbreaking book, Against Constitutional Originalism*, underscores the importance of distinguishing between "track one" and "track two" originalism. And how originalists respond to Gienapp's challenge, this Essay argues, should largely depend on which of these two tracks they choose.*

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INTRODUCTION

Historical paradigm shifts are generally hard to detect. We inevitably view the world from our own perspectives, shaped by our own conceptual frameworks, and it is difficult for us to recognize and put aside those basic assumptions in order to think historically.[1] But that challenge is especially acute in law. Lawyers constantly claim authority in—and thus continuity with—the past.[2] Even innovative legal arguments are often backward-looking in appearance, with innovators coopting existing terminology and claiming fidelity to earlier ideas.[3] Legal discourse can thus maintain a veneer of consistency, despite fundamental changes in its underlying conceptual foundation. Without careful study, then, we can easily overlook profound differences between past and present understandings of law.

In his pathbreaking book, *Against Constitutional Originalism: A Historical Critique*, Jonathan Gienapp brings those differences into stark relief.[4] Although Gienapp has much to say about the original Constitution, his aim is not to recover the historical meaning of its particular terms or phrases. Rather, Gienapp's focus is on the predicate assumptions that the Founders brought to bear on the Constitution as a whole, such as how they envisioned the relationship between the written Constitution and other sources of fundamental law.[5] Building on his earlier work,[6] Gienapp insists that in order to recover a truly historical understanding of the Constitution, we cannot jump straight into a search for the original meaning of particular clauses. Instead, we first need to reconsider our foundational assumptions—axioms that we take for granted—about the nature of American constitutionalism.

This Essay discusses how originalists might account for these insights. All originalists make claims about history, but they are divided in how they

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[1] *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012) (tracing how scientific paradigms change over time).

[2] *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024) (tracing and evaluating lawyerly uses of history in constitutional argument).

[3] Moreover, even when innovators expressly disclaim earlier ideas, they often mischaracterize those ideas. *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 3-4 (1991) (arguing that critics of *Lochner* era decisions distorted those decisions).

[4] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

[5] *Id.* at 67 ("[The Founders] did not wield a clear distinction between written and unwritten constitutional meaning; nor did they draw sharp distinctions between written and unwritten sources of law.").

[6] *See generally, e.g.*, Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321 (2021) [hereinafter Gienapp, *Written Constitutionalism*].

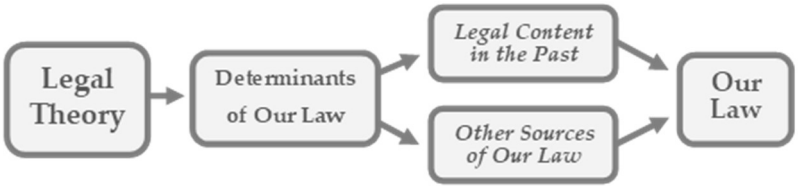
approach the past. Some originalists—labelled here as "track one" originalists—view the past in a backward-looking way, using modern criteria to identify earlier constitutional content. Other originalists—labelled here as "track two" originalists—try to understand the past on its own terms, using historical criteria to identify earlier constitutional content. By revealing paradigm shifts in American constitutionalism, Gienapp's book sharpens the distinction between "track one" and "track two" originalism. But the implications of his historical critique of originalism largely depend on which track originalists choose.

I. ORIGINALISM'S TWO TRACKS

A. *Theory*

Like other constitutional interpreters, originalists begin their interpretive project with a present-day goal: identifying the content of fundamental law today. That task is necessarily framed, even if only implicitly, by a theory of how our law is constituted.[7] Legal theorists have provided many models,[8] but for present purposes, we can elide the important differences among them. The key point here is that nearly any plausible theory of the Constitution—and certainly any theory embraced by originalists—often directs legal interpreters backward, requiring them to examine the law at the Founding.[9]

Figure 1. Identifying Law.



Explanation: This figure depicts the relationship between legal theory and resort to legal content in the past. In particular, an interpreter examines legal content in the past because her legal theory establishes that such content is part of our law.

[7] *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019) ("Whether and how past law matters today is a question of current law, not one of history."); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2042 (2021).

[8] *See generally, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014); H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012).

[9] Like Gienapp's book, this Essay focuses on the U.S. Constitution and on the Founding Era.

Identifying the content of the law of the past requires a method for identifying law. One needs to know how the law of the past was constituted. First and foremost, this task requires knowing the *metaphysical* determinants of earlier law—that is, what sorts of things constituted the law. These determinants might include the will of legislators, the public meaning of legal enactments, the customary law applied by courts, and perhaps even the law of nature. It also requires knowing how those sources of law were defined and how they related to each other. Additionally, one needs *epistemic* criteria for identifying the law—knowing which evidence to consult, what burdens of proof to use, and so on.[10]

In large part, these tasks are familiar to lawyers. After all, identifying *our* law often requires looking backward to the law of the past, just as choice-of-law analysis often directs us to examine another jurisdiction's law. Although such efforts can be painstaking and contentious, they are hardly unusual. As William Baude and Stephen Sachs write, "Tracing a chain of title or a chain of legal authority decades into the past is normal lawyers' work."[11] Therefore, they conclude, "originalism demands no more of the past than ordinary lawyering does."[12]

Perhaps so. But treating the recovery of earlier law as merely conventional lawyering elides an important question: Whose perspective should frame how we identify the law of the past? Should we use a present-day lens, based on our own assumptions about the determinants of law? That approach is "track one" originalism—using *modern* legal criteria to identify the fundamental law of the past. Or should we view the law of the past through a historical lens, based on the Founders' assumptions about the determinants of law? That approach is "track two" originalism—using *historical* criteria to identify the fundamental law of the past.

A similar conceptual distinction arises in choice-of-law analysis. Sometimes judges and lawyers identify another jurisdiction's law by employing their own jurisprudential assumptions rather than adopting the internal perspective of legal actors within the other jurisdiction. For example, even though jurists now widely reject the idea of "general law," instead treating the holdings of each state's courts

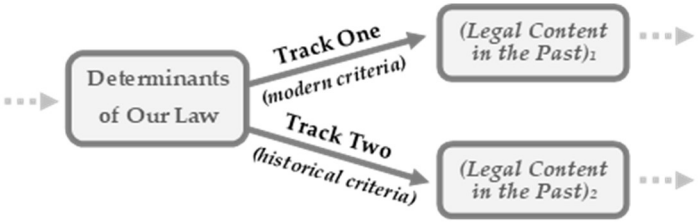
[10] On the distinction between metaphysical and epistemic determinants of law, see Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 129 (2020). Notably, some epistemic criteria might replicate or overlap with metaphysical criteria. For instance, the text of the written Constitution is a (metaphysical) source of law, and historical documents replicating that text serve as (epistemic) evidence of its language. However, it is easier to perceive the distinction between metaphysical and epistemic criteria when construing the text. Metaphysically, the meaning of the text might comprise, say, its ordinary meaning to the public at the time of ratification. But epistemically, we mostly identify that meaning by looking to other sources that demonstrate how Americans used language in the late eighteenth century.

[11] Baude & Sachs, *supra* note 7, at 809-10.

[12] *Id.* at 810.

as the final word on that state's common law,[13] Georgia's judges continue to use traditional common-law reasoning and do not give dispositive weight to the decisions of other states' courts.[14] This approach is akin to operating on track one. More commonly, however, courts try to put themselves in the shoes of another jurisdiction's courts when trying to identify that jurisdiction's law. This approach is akin to operating on track two.

Figure 2. The "Two Tracks" Revision.



Explanation: This figure depicts my proposed "two tracks" revision to Figure 1. On track one, interpreters use *modern criteria* to identify legal content in the past. On track two, interpreters use *historical criteria* (*e.g.*, the criteria used at the Founding). Both tracks look to history, producing something that one can call "original meaning." Crucially, however, any differences between our criteria and historical criteria can lead to variation in results. That is, the *(Legal Content in the Past)*1 identified on track one might not be the same as the *(Legal Content in the Past)*2 identified on track two.

Several points of clarification are in order. First, the point of this Essay is not to identify which criteria apply on track one or track two. As a shorthand, readers may think of track one in terms of textualist versions of originalism—i.e., the written Constitution is the sole source of fundamental law, and the originalist task is to uncover the original public meaning of its text. And readers may think of track two in terms of original-law originalism—i.e., our fundamental law is constituted by the fundamental law of the past (including any unwritten fundamental law) unless that law is validly changed. But at its core, the distinction between track one and track two concerns the *method* used to identify the determinants of legal content in the past, not to the determinants themselves. Thus, although many track-one originalists are textualists, a track-one originalist might look to customary fundamental law if their legal theory recognizes customary law as a source of fundamental law. Likewise, although track-two

[13] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."). For a description of general law, see Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1260-69 (2017).

[14] *See* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1126-27, 1126 n.89 (2011).

originalists generally embrace an original-law approach, a track-two originalist might conclude, as a historical matter, that the text of the Constitution was the only source of fundamental law at the Founding and was understood according to its original public meaning.[15] In other words, track one and track two diverge over *how to determine* the sources and methods used to identify legal content in the past. Any variance in the sources and methods themselves is downstream of that initial divergence.

Second, track one and track two originalism focus on the *metaphysical* determinants of earlier legal content, not on the *epistemic* criteria used to identify that content.[16] From an epistemic standpoint, we are in a radically different position than the Founders. For instance, we lack direct access to their oral communication, and what little evidence we have regarding their oral statements must be handled with care.[17] On the other hand, we are in a far better epistemic position with respect to some types of written evidence and analytic techniques.[18] Consequently, our epistemic methods of identifying law in the past are not entirely the same as those that the Founders used to understand their own law. But so long as evidence is carefully matched to whatever metaphysical determinants an interpreter seeks to discover, using the best epistemic techniques available today makes sense, even if those techniques were unavailable at the Founding.[19] The key difference between track one and track

[15] Joel Alicea's criticism of prioritizing customary fundamental law over original meaning takes this form. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 44-52 (2022).

[16] Or, as others would put it, the distinction between "track one" and "track two" originalism focuses on the "standard" for correctness, not on the "procedure" used to identify correct answers. *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 777-81 (2022). Again, it is possible that metaphysical and epistemic sources and methods will sometimes overlap. *See supra* note 10 and accompanying text. If so, originalists should accept whatever metaphysical sources and methods constituted the law of the past.

[17] *See generally* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (exploring the creation and accuracy of James Madison's notes from the Philadelphia Convention); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986) (examining the reliability of various Founding-Era sources, such as the records of the state ratification conventions).

[18] This is true not only in terms of the range of available evidence but also in terms of the techniques one can use to process that data. *See* William Baude & Jud Campbell, Early American Constitutional History: A Source Guide (Mar. 11, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718777 (discussing sources); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1624 (defending a "Method of Triangulation" that includes using corpus linguistics techniques and data sets unavailable to the Founders).

[19] Notably, these points about evidence and methods apply not only to originalist inquiries but also to the work of intellectual historians, such as Gienapp, who seek to discover truths about the past. *See* sources cited *supra* note 6.

two, therefore, is how originalists *metaphysically* identify legal content in the past.

An example can help illustrate this point. Suppose a track-two originalist concludes, based on historical evidence, that the content of fundamental law in the past was *metaphysically* constituted by the ordinary meaning of the Constitution's words and phrases. Suppose further that the Founders, as native speakers of eighteenth-century English, *epistemically* identified that meaning using their own linguistic intuitions. Track-two originalists faced with this situation should not don wigs, assume Founding-Era personas, and then intuit the meaning of the Constitution's language. Rather, track-two originalists should approach the interpretive task scientifically, seeking to use whatever evidence and techniques are best suited to identifying how the Founders originally understood the Constitution's words and phrases.[20]

Third, although this Essay often refers to earlier views of "law" (and its cognates), it bears emphasis that "law" carries different meanings. By using the term "law," this Essay does not posit a lawyerly, judicially enforceable definition of law, in contrast to a popular approach.[21] Rather, my use of the term "law" should be read ecumenically, capturing whatever features of constitutionalism follow from one's theory of law, whether now or in the past.

Finally, it is worth commenting on what Lawrence Lessig calls "translation."[22] Some interpreters think that determining law *translationally* is simply a fact of life in a jurisprudential world that was fundamentally reshaped a century ago.[23] Translation of this sort could occur on track one, filtering historical evidence through a modern interpretive framework. But Lessig identifies the law of the past on track two—using the Founders' own criteria—and then credits certain parts of that law through a process of translation, accounting for the jurisprudential gulfs that separate our constitutional past and present.[24] Put more broadly, identifying the law of the past need not be the final step in considering how the law of the past contributes to our law.[25]

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[20] This Essay has nothing to say about which methods are most appropriate to this task.

[21] *See, e.g.*, Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMANS. 295 (2011) (discussing debates at the Founding about whether lawyers are uniquely suited to interpreting the Constitution); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (same).

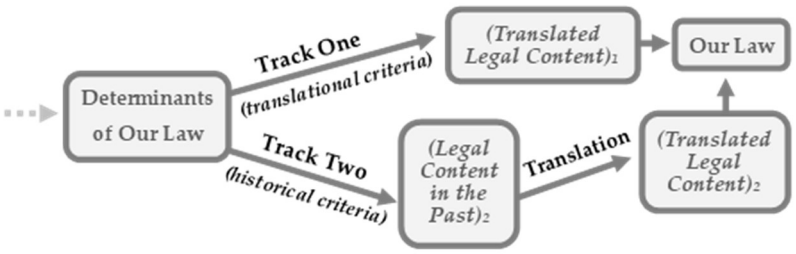
[22] *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing fidelity in law and translation as means of statutory interpretation).

[23] *See* Jack M. Balkin, *Rabbi Akiva and the Crowns: A Parable of Constitutional Fidelity*, 104 B.U. L. REV. 1321 (2024).

[24] *See* Lawrence Lessig, *The Brilliance in* Slaughterhouse*: A Judicially Restrained and Original Understanding of "Privileges or Immunities*,*"* 26 U. PA. J. CONST. L. 1, 14, 36-42 (2024) (defending "two-step" originalism and applying that approach to the Privileges or Immunities Clause).

[25] *See id.* at 14-15 (criticizing "one-step" originalism and preferring a "two-step" version).

Figure 3. Modes of Translation.



Explanation: This figure depicts two versions of how one might think about translating legal content in the past into current law. One version is simply track one, using modern criteria to identify legal content that applies today. But another version of translation seeks to identify legal content in the past on track two and then translate that content into a form that is useable today, consistent with modern precepts about the nature of law.

B. *Originalism Today*

Although originalists are not always clear about which track they use, some have signaled that they are operating on one track or the other. Originalists on track one include Jack Balkin and Larry Solum. "[A]rticulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time," Balkin writes.[26] "It is a theoretical and selective reconstruction of elements of the past, brought forward to the present and employed for present-day purposes."[27] Although Solum defends a contextually richer account of original meaning, he agrees that it must be ascertained using modern criteria, which he draws from linguistic philosophy.[28]

Other originalists operate on track two. William Baude and Stephen Sachs argue that identifying the law of the past requires accounting for how earlier

Other interpreters use "construction" to inform how the law of the past contributes to our law. In doing so, originalists generally treat any legally determinant constitutional content at the Founding as firmly constraining "construction." *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 293 (2017) ("Constitutional doctrines . . . must be consistent with . . . . the set of doctrines that themselves directly translate the communicative content of the text into doctrine and the set of doctrines that are the logical implications of that set."). Lessig, by contrast, is open to departing from specific features of the law of the past through translation. *See* Lessig, *supra* note 22, at 1205-06 (asserting that translators must capture authorial intentions, even if doing so means moving away from the exact meaning of the authors' words).

[26] BALKIN, *supra* note 2, at 121.

[27] *Id.*

[28] Solum, *supra* note 7, at 1967-75. Because Solum's approach to interpretation incorporates far more contextual enrichment, it bears a much closer resemblance to track-two originalism than Balkin's approach.

generations viewed the determinants of law.[29] As Sachs explains, "To find out the law that the Constitution made, the relevant way to read the document's text [is] according to the rules of the time, legal and otherwise, for turning enacted text into law."[30] Along similar lines, John McGinnis and Michael Rappaport argue that constitutional content should be identified using the Founders' criteria, which they call "original methods."[31] In the same vein, Bernie Meyler's "common law originalism" posits that we should read constitutional references to the common law using an eighteenth-century approach to common law.[32]

II. GIENAPP'S CRITIQUE

In *Against Constitutional Originalism*, Gienapp deftly guides readers through ways that modern assumptions about the Constitution depart from those that prevailed at the Founding. As the title suggests, he focuses particularly on originalism—a family of interpretive theories that prioritize the Founders' understanding of the Constitution.[33] At core, Gienapp claims that however one uses original meaning today, we go *historically* off course if we bring our constitutional assumptions to bear on eighteenth-century sources.[34] In other words, for a claim about the Constitution's original meaning to be genuinely "original" (i.e., historical), we must first recover the conceptual predicates of eighteenth-century constitutionalism.[35] Limiting ourselves to Founding-Era evidence is not enough. We distort earlier understandings if we view that evidence through a modern lens.

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[29] *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358 (2015) (asking whether rules about determining legal content "have a legal pedigree to the Founding"); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082-83 (2017) (arguing that the interpretation of legal texts is governed by a "law of interpretation").

[30] *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 821 (2015).

[31] 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, 752 (2009).

[32] *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556-57 (2006) (criticizing some versions of originalism for attempting to identify the content of common-law terms while "ignoring the larger framework within which the particular doctrines of the common law functioned").

[33] Of course, originalists nearly always make room for other "modalities" of constitutional argument. But at least as a matter of degree, if not lexical ordering, originalists give greater interpretive weight to the original meaning of the written Constitution. Moreover, it is worth noting that Gienapp's historical critique also applies to constitutional pluralists who incorporate the original meaning of the Constitution's text into a broader interpretive framework.

[34] GIENAPP, *supra* note 4, at 13.

[35] *Id.* at 51.

To see the *original* Constitution—the system of fundamental law that the Founders actually embraced—we thus have to learn how to think historically about their constitutionalism.[36] As Gienapp demonstrates, for example, the Founders did not think of themselves as drafting a system of fundamental law from scratch—encapsulating all of its content in textual form. Rather, American elites widely accepted the existence of *general fundamental law*—a set of legal norms drawn from custom and reason whose existence and fundamentality did not depend on their enactment in constitutional text.[37] *Against Constitutional Originalism* challenges many other ingrained assumptions, such as the notion that the Constitution has always been a distinctively legal object.

Gienapp's historical work carries many present-day implications. Perhaps the most important is how much it underscores the difference between track-one and track-two originalism. Like others, originalists tend to instinctively assume continuity between past and present ways of thinking about the Constitution.[38] Viewing the Constitution as a text, for instance, is now second nature—the Constitution *just is* a text, the thinking goes—and therefore we casually overlook older approaches.[39] Or consider rights. Constitutional rights *just are* textually derived, judicially enforceable "trumps" that bind legislative power, and therefore originalists instinctively assume that the Bill of Rights has always reflected those assumptions.[40] Over and over, Gienapp picks apart these essentialist ways of thinking about American constitutionalism, revealing large

[36] *See id.* at 220 ("[D]ecoding the Constitution's original meaning requires coming to terms with the constitutionalism in which that meaning was embedded.").

[37] This way of thinking did not necessarily depend on the non-positivist notion that natural law has legal force *as such*. Rather, Founding-Era elites generally treated certain rules and principles as being part of a polity's imagined "social compact," thus entering the polity's fundamental law and being implicitly recognized in its constitution. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 88-89 (2017).

[38] *See* GIENAPP, *supra* note 4, at 49. As Gienapp explains:

> If the only way available for thinking about law, constitutionalism, and its related concepts is the one you know, you won't be able to make sense of eighteenth-century linguistic practice except from the lone perspective you've internalized—even though that perspective and the myriad assumptions woven into it will distort the very linguistic practice you're trying to comprehend.

Id.; GIENAPP, *supra* note 6, at 6 ("[W]hile there is a mountain of scholarship dedicated to the early decades of the Constitution's existence, almost all of it explores how a Constitution we would readily recognize was debated . . . rather than explaining how such a recognizable Constitution emerged in the first place.").

[39] *See* GIENAPP, *supra* note 6, at 7-8 (arguing that at the time of ratification, Americans did not assume that the Constitution was merely a text).

[40] For my own efforts to dislodge this essentialist way of thinking, see, for example, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017); Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861 (2022) [hereinafter Campbell, *The Emergence of Neutrality*]; Jud Campbell, *Tradition, Originalism, and General Fundamental Law*, 47 HARV. J.L. & PUB. POL'Y (forthcoming 2024); and Jud Campbell, *Determining Rights*, HARV. L. REV. (forthcoming 2025).

gulfs between our views about the Constitution and those that prevailed at the Founding. In sum, the choice between track one and track two really matters.[41]

But does Gienapp's provocatively titled book, *Against Constitutional Originalism*, actually undermine originalism? To approach that issue, it seems to me, we must consider whether originalists are operating on track one or on track two.

For originalists operating on track one, historical scholarship is often informative, but it is unlikely to affect their methods. In terms of its facilitating role, intellectual histories offer track-one originalists plenty of useful information, such as context regarding the Constitution's words and phrases.[42] But in terms of its jurisprudential upshot, Gienapp's work has less traction. Track-one originalists approach the past through a modern lens.[43] "Inquiry into the founding generation's beliefs about the nature of law is interesting and valuable," Larry Solum acknowledges.[44] "But it is simply a fallacy," he continues, "to equate their beliefs about the nature of law with the actual nature of law in 1787."[45]

To the extent that track-one originalists purport to identify constitutional meaning that *actually existed in the past*, however, Gienapp offers a powerful critique. He writes:

> *If* we are bound by the Constitution's original meaning, then we are bound by whatever defined and determined that meaning. It's a package deal. You cannot simply attend to *what* the Founding generation laid down or *what* they ratified or what the Constitution *communicated* while ignoring how eighteenth-century people understood constitutionalism and fundamental law to work. *What* they laid down and what the Constitution *communicated* was a function of how constitutionalism and fundamental law were assumed to work. The two were inseparable.[46]

Gienapp is spot-on. Again, track-one originalists may have compelling reasons to look at the past through a modern lens. Law often works that way. As Thomas Reed Powell reportedly quipped, "If you think you can think about something which is attached to something else without thinking about what it is attached

[41] My point is not that it *always* matters. In many situations, the choice presents a false conflict where both tracks lead to the same result. But the more that our jurisprudential assumptions depart from those at the Founding, the more likely it is that the legal content discovered on track one and on track two will diverge.

[42] Depending on how originalists define the relevant inquiry on track one, such context can play a greater or lesser interpretive role. *See* BALKIN, *supra* note 2, at 105-11 (discussing "thick" and "thin" versions of original-public-meaning originalism).

[43] Jack Balkin employs a mixed approach. At the point of interpretation, Balkin's approach is decidedly on track one, looking only to a "thin" semantic account of original meaning. *See id.* But Balkin is open to using more deeply contextual histories when engaging in construction. *See id.* at 135-43.

[44] Solum, *supra* note 7, at 2042.

[45] *Id.*

[46] GIENAPP, *supra* note 4, at 214.

to, then you have what is called a legal mind."[47] But as Gienapp says, the "original meaning" recovered on track one is often a projection—a constructed form of meaning that an interpreter creates for present-day reasons.[48] An upshot of his work, then, is that originalists on track one must acknowledge that their efforts to locate "original meaning" are acts of twenty-first-century reconstruction, not recoveries of meaning that existed in the past. Locating "original meaning" in a truly historical sense requires operating on track two.

The implications of Gienapp's work for track-two originalism are different. Describing William Baude and Stephen Sachs's original-law originalism as "a superior approach to Founding-era constitutionalism," Gienapp praises the pair for recognizing that "we can bring the original Constitution into focus only if we first embed it in eighteenth-century constitutionalism and the myriad interconnected assumptions that were central to that constitutionalism."[49] Indeed, the essence of original-law originalism is to proceed on track two, recovering the law of the past on its own terms, using historical criteria.

But Gienapp also criticizes track-two originalists. For one thing, he argues that working on track two requires sensitivity to historical paradigm shifts that originalists usually overlook.[50] Being trained as a lawyer can, no doubt, sometimes help in recovering the law of the past, as originalists often insist.[51] But while lawyers constantly draw on history, they conventionally do so in presentist ways.[52] Legal training can thus exacerbate, rather than ameliorate, the natural tendency to approach the past on track one, even if an interpreter wants to use track two. Indeed, Gienapp criticizes Baude and Sachs for sometimes falling into this trap, viewing the law of the past through a modern lens rather

[47] Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (quoting unpublished manuscript).

[48] *See* Gienapp, *Written Constitutionalism*, *supra* note 6, at 358-59 (noting that separating the original text of the Constitution from original attitudes surrounding it creates new meanings). For further discussion of the present-day construction of original meaning, see BALKIN, *supra* note 2, at 121–22; Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 81-83 (2016); and Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1467-71 (2021). The qualifier, "often," is needed because depending on how one defines the relevant criteria on track one, the track-one conception of legal content in the past can sometimes align with the track-two conception of legal content in the past.

[49] *See* GIENAPP, *supra* note 4, at 232.

[50] *See id.* at 232-33 (arguing that historical disagreement and conflict surrounding the Constitution must be understood as "internal to Founding-era law").

[51] *See* BALKIN, *supra* note 2, at 140 ("[L]awyers tend to think that because these materials are legal, lawyers are better equipped and trained to understand and use these materials than anyone else—including, in particular, historians.").

[52] *See* Campbell, *The Emergence of Neutrality*, *supra* note 40, at 873 ("Most doctrinal histories retell the 'official story' in *our terms*—explicitly focusing on Supreme Court opinions and implicitly adopting modern attitudes about the nature of constitutional rights.").

than using historical criteria to determine earlier legal content.[53] Yet it bears noting that this problem is correctable—and, in fact, Gienapp's book provides a tremendously useful resource for originalists who want to get it right on track two.[54]

Perhaps more concerning for track-two originalists is Gienapp's argument that the Founders were often so divided about the determinants of fundamental law that modern interpreters cannot identify that law using descriptive analysis.[55] The point here is not that originalists have overlooked historical criteria for identifying the law of the past.[56] It is, rather, that the historical criteria themselves were historically contested. Consequently, identifying legal content on track two requires not only knowing the historical sources and methods used to identify legal content in the past but also being able to resolve disagreements among the Founders about those sources and methods.

Once again, this critique is spot-on.[57] This is not to say track-two originalists should raise a white flag. But Gienapp has described a conceptual problem on track two that deserves serious attention. The remainder of this Essay begins to sketch how originalists might respond.

One possibility is to use modern criteria to resolve historical conflicts about the determinants of law. For example, consider the Founders' disagreements about the nature of the Union. Some posited that the United States was a nation created in 1776, others asserted that nationhood began with the adoption of the

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[53] GIENAPP, *supra* note 4, at 232-33. As Gienapp explains:

> Originalists need concern themselves, Baude and Sachs argue, only with those facts and developments that happened to be internal to the law. Everything else can be brushed to the side. What they fail to recognize, however, is that so many of the early constitutional struggles they are quick to bracket or minimize . . . *were* internal to Founding-era law.

Id. In my view, Baude and Sachs's essay, *Originalism and the Law of the Past*, deserves this criticism. *See* Campbell, *The Emergence of Neutrality*, *supra* note 40, at 874 n.42; Baude & Sachs, *supra* note 7, at 810 (asserting that broad intellectual histories are irrelevant to legal inquiries). But as Gienapp also notes, Baude and Sachs have helped recover earlier ways of thinking about law. *See generally, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024); Sachs, *supra* note 13.

[54] The usefulness of Gienapp's work in this respect relates not only to efforts to identify the criteria to use on track two. It also can help originalists better comprehend and synthesize historical evidence that might otherwise appear confusing or irreconcilable. *See, e.g.*, Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 32, 48-51 (2020) (discussing how recognizing internal features of earlier law can render historical evidence more comprehensible and cohesive).

[55] *See, e.g.*, GIENAPP, *supra* note 4, at 183-84.

[56] That was Gienapp's first critique, as described above. *See supra* text accompanying notes 50-54.

[57] Indeed, as Gienapp generously acknowledges, GIENAPP, *supra* note 4, at 92, my own work has regularly emphasized this problem. *See, e.g.*, Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 691-99 (2023) (discussing the importance of historical disagreements regarding the nature of the Constitution).

Constitution in 1787, and still more claimed that the Constitution was merely a treaty-like instrument under which states remained fully sovereign.[58] One way to resolve this debate would be to use *modern* criteria to settle the Founders' disagreement.[59] There may be sound jurisprudential reasons for taking this approach. But using modern criteria to evaluate the law of the past would divert the track-two train onto track one.

Another option is to resolve historical disputes about the determinants of law by using *historical* criteria for settling such disagreements. In theory, such techniques could include measuring the prevalence of the view among the Founders, or looking to post-ratification "liquidation."[60] In order to stay on track two, however, originalists would need to show that a second-order rule of this sort actually existed at the Founding. In my view, the most plausible candidate for such a rule is the common good. That is, when choosing between contending interpretive theories, the Founders would have used whatever approach they thought best promoted the good of the political society and its members.[61] But if that view is correct, it hardly offers a neutral means of resolving disputes among the Founders about the determinants of their law. Perhaps at the end of the day, then, the content of fundamental law in the past is simply underdeterminate.

To be sure, this is not to say that the law of the past was radically indeterminate. On lots of issues, an overlapping consensus existed regarding Founding-Era fundamental law. Regardless of how one viewed the nature of the Union, for example, everybody agreed that each state gets two senators. So, we should not overstate the extent of dissensus on track two. But many times, the internal disagreements that Gienapp describes are disputes that matter.[62] And so, without a historical way of resolving those disagreements, originalists on track two may need to acknowledge that Founding-Era fundamental law sometimes runs out.

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[58] *See, e.g.*, Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 16-33 (2024).

[59] For instance, a positivist might rely on how legal elites today understand the nature of the Union. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803 (1995) (noting that the Constitution, in contrast to the Articles of Confederation, created a national system, featuring "a direct link between the National Government and the people of the United States").

[60] For discussions of liquidation, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); and Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1767 (2015). Notably, my use of the term "liquidation" departs from the notion that "liquidation" is a mechanism for resolving *textual* underdeterminacy, which is how the term is usually employed by originalists. *See* Baude, *supra*, at 1 (identifying textual indeterminacy as the prerequisite for constitutional liquidation).

[61] *Cf.* Campbell, *supra* note 37, at 110-11 (discussing the primacy of the common good in Founding-Era constitutionalism).

[62] *See, e.g.*, Campbell, *supra* note 57, at 691-99 (discussing how disagreements about the nature of the Union had profound implications for constitutional debates about national power to regulate voting rights).

In my view, recognizing this feature of track-two originalism is hardly fatal. Rather, it simply means that the law of the past does not always tell modern interpreters all that they need to know. But if they want to stay on track two, originalists should resist assuming that all constitutional problems have Founding-Era answers. That would be a recipe for constructing a presentist view of the past, diverting the track-two train onto track one. Instead, track-two originalists should frankly acknowledge the dilemma and then use *other* legal sources and presumptions to fill the historical gaps, without claiming that the result is the Constitution's original meaning. Indeed, this seems to be exactly what Baude and Sachs propose.[63]

III. CONCLUSION

Originalists all claim authority in history, but they approach the past in very different ways. Some use track one, identifying earlier constitutional content using modern criteria, while others use track two, identifying that content using historical criteria. By revealing paradigm shifts in American constitutionalism, Jonathan Gienapp's work has sharpened the distinction between these approaches and shown that originalists who claim to be operating on track two—recovering constitutional meaning as it existed at the Founding—are often unwittingly operating on track one—projecting modern ways of thinking onto the past. How originalists respond remains to be seen, but Gienapp has dramatically altered the terms of the debate.

[63] Baude & Sachs, *supra* note 7, at 816.