HISTORY, LAW, AND CONSTITUTIONAL RUPTURE[†]

JONATHAN GIENAPP[*]

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[*] Associate Professor of History and Law, Stanford University. He wishes to thank Jud Campbell and Mark Graber for helpful feedback.

I. THE PROBLEM OF CONSTITUTIONAL RUPTURE

The principal problem of U.S. constitutional interpretation centers on the passage of time. "Time bends everything," Lawrence Lessig tells us.[1] As time passes, things change. Not always in equal measure—much can persist, including over long stretches of time. But often, the passage of time does bend things in profound ways. That is especially true of constitutionalism and law, where older forms must be applied to novel and often unforeseen circumstances, something the American example amply demonstrates. The U.S. Constitution was made a long time ago and must govern a world markedly different from the one for which it was made. What we should do with older constitutional forms (in the case of the U.S., quite old) in a much-changed world poses a challenge that any theory of constitutional interpretation must address.[2] Call this the problem of social drift.

The problem of constitutional time runs deeper than just this, however. The problem as just stated—that society can transform while its constitution remains the same—is evident, even glaring, and therefore widely recognized. No one can doubt that the modern U.S. is vastly different than its eighteenth-century forebear—its society, economy, and system of governance transformed in ways nobody two centuries ago could have comprehended, much less anticipated. But a more fundamental, and often less perceptible, form of change can sever constitutional present from past. In the first instance, a gap widens between constitutional form and the social world that constitution is meant to regulate and channel; in the second instance, the change takes place within the domain of constitutionalism itself. As time passes, how people think about constitutionalism and its attendant subjects—law, government, power, liberty, rights—can also transform. While many recognize how the interpretation of a constitution might change as society itself changes, it is harder to see how the very idea of a constitution itself can also imperceptibly take on new shape and meaning through the changed habits, assumptions, and legal consciousness of those interpreting it.

This less recognized form of change, wrought by the passage of time, defines U.S. constitutionalism every bit as much as the first. Indeed, in crucial respects this kind of change is even more important because it impinges on the constitutive categories of constitutional law itself, and in so doing, captures a deeper difficulty defined not merely by the passage of constitutional time, but by rupture within it. The true problem of American constitutional time is the rupture in constitutional sensibilities and consciousness that differentiates how we approach constitutional interpretation today from how those who lived closer to the constitutional Founding once did. Time has carried us far from that earlier

[1] LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 445 (2019).

[2] For valuable meditations on the variable of time in U.S. constitutional interpretation, see *id.*; DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); and Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015).

constitutional world. Our society has changed in radical ways, but so too have our constitutional habits of mind. Earlier constitutionalists and lawyers operated within a conceptual paradigm quite unlike the one that their modern counterparts take for granted.[3] Call this the problem of historical rupture.

Despite its central importance, the challenge that historical rupture poses for modern constitutional interpretation is still far too neglected. Compared to the problem of social drift, the problem of historical rupture is all but ignored—downplayed and dismissed, if acknowledged at all.

Depending on one's attitude toward the legal past, this neglect might be understandable. For a good portion of the twentieth century, many legal actors in the U.S. consciously attempted to move forward—if not break—from the constitutional past, not return to it. Rallying under the broad slogan of "living constitutionalism," early Progressives, New Dealers, and eventually the Warren Court and its committed champions in the legal academy strove to rework the constitutional order so it might accommodate a changing society.[4] Because those dedicated to such change were not attempting to recapture something that once was, they did not need to worry about historical rupture, whether they recognized it or not. Their attitude toward this issue seemed simple: if there had been rupture in constitutional thinking, so be it. Society had evolved and so too should the Constitution. How the Constitution might have been understood prior to that evolution was of little more than antiquarian concern.

But there are, of course, many other legal interpreters who have betrayed a much different attitude toward the past—constitutional originalists chief among them. Unlike their interpretive opponents, originalists have always sought to bridge the gap between now and then to recapture what once was in the U.S. constitutional past.[5] Among them, this neglect is far less understandable, much

[3] *See* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 5 (2024) (laying out the case for rupture between early and modern U.S. constitutionalism); *see also* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 936 (2015) (arguing that originalism "proceeds from the faulty premise that the Founding generation and we today occupy more or less the same linguistic world").

[4] *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUDS. AM. POL. DEV. 191, 217 (1997) (detailing the ideas, proponents, and social conditions that gave rise to "living constitutional law"). *See generally* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); STRAUSS, *supra* note 2 (defending living constitutionalism today).

[5] *See* Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AM. HIST. (Mar. 20, 2017), https://www.processhistory.org/originalism-history/ [https://perma.cc/LEU2-JSZU] (discussing originalist belief that law is rooted in past); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013) ("At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.").

less justifiable. By staking constitutional interpretation to historical recovery, originalism directly implicates the problem of constitutional rupture. A theory guided by the premise that we ought to interpret the Constitution in accordance with its original meaning as first laid down proposes an especially vivid and strident strategy for coping with the passage of time: rather than continuing to drift from our constitutional past, we should remain obedient to it.[6] And yet, the idea of deep historical rupture rarely figures into originalist theory or interpretation. In fact, virtually all primers on originalist methods presuppose strong constitutional continuity over time. To be sure, originalism is essentially predicated on a particular form of discontinuity. There would be little point in insisting that we are bound today by original constitutional meaning rather than contemporary constitutional meaning unless the two sometimes diverged.[7] But this identifies a relatively slender form of discontinuity while otherwise presupposing a much broader form of continuity running beneath it. Perhaps the Constitution's narrow textual meaning has shifted over time as words have assumed new meanings, but how we think about constitutions and constitutional law has held more or less steady.[8] The Founding generation did not operate in a different intellectual universe than our own—they thought about constitutions, constitutionalism, and law much as we do today.[9] The conceptual scheme has remained constant over time, even if bits of data within it have shifted. Thus, despite focusing so intently on the past and its recovery, originalists by and large act as if modern legal interpreters don't have to worry about temporal rupture. They can interpret the Constitution without agonizing over whether interpreters two centuries ago were operating in the same constitutional paradigm as lawyers today. One can practice originalism and recover original meaning without worrying about that broader form of historical rupture.

After all these years of arguing over the appropriate use of history in constitutional interpretation, the most important problem raised by the endeavor continues to be downplayed and ignored. That neglect has become especially glaring of late, as the current Supreme Court has placed greater legal weight on

[6] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (1997) (arguing that the Constitution is "dead," not "living," and therefore interpreters should enforce what was originally laid down); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 4 (rev. ed. 2014) ("[O]riginal meaning must be respected so that those who are to govern by laws have little or no hand in making the laws by which they govern.").

[7] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 16-18, 23-25, 62-65 (2015) (describing how "linguistic drift" changes the meaning of words over time, opening gaps between the Constitution's contemporary and original meanings).

[8] *See* GIENAPP, *supra* note 3, at 8 (noting how originalists are often focused "squarely on the meanings of specific constitutional words and phrases").

[9] *See id.* at 12.

our constitutional past than arguably ever before.[10] It is high time to confront the problem of historical rupture in U.S. constitutional interpretation. Anyone who appeals to history in U.S. constitutional argument—most especially originalists, but not just them—must acknowledge and explain what is to be done about the gulf separating us from earlier forms of constitutional thinking. If we are to obey the past, then we need to surmount the chasm separating us from it. We need to recognize that our fundamental law was created by people equipped with a different legal consciousness. We need to do the work of historicizing earlier forms of constitutional thinking that do not map neatly onto our own. Modern originalists can neither ignore nor bracket this fact by insisting, as they often do, that they are engaged in an interpretive activity called "law" that is distinct from "history," which supposedly frees them from the need to take past differences seriously. In one way or another, the problem of historical rupture touches everyone who wields the constitutional past in our contested present.

II. CONSTITUTIONAL MODERNITY AND THE MODERN USES OF CONSTITUTIONAL HISTORY

For this reason, the arrival of Jack Balkin's important new book, *Memory and Authority: The Uses of History in Constitutional Interpretation*, is a welcome development.[11] Among its many virtues is how seriously it takes historical rupture in our constitutional order. Far from ignoring the problem of rupture, the book's arguments are often predicated on it. Lurking beneath Balkin's account of the uses of history in contemporary constitutional interpretation is a deep argument about constitutional time.

The account itself is wide-ranging and illuminating. With characteristic insight, the book provides an exceptionally useful primer on lawyers' myriad uses of history in legal argument and how these uses of the past compare to, and often differ from, the aims and work of professional historians.[12] Balkin rightfully recognizes that history matters to law because history provides distinctive legal authority: the authority to either justify or denounce a candidate for interpretation today.[13] Whereas historians turn to history to answer historical questions, lawyers turn to history for ammunition in modern legal disputes.[14] Balkin's book provides a rich and valuable taxonomy of the rhetorical modes—

[10] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); United States v. Rahimi, 144 S.Ct. 1889 (2024) (Gorsuch, J., concurring; Kavanaugh, J., concurring; Barrett, J., concurring; Thomas, J., dissenting).

[11] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

[12] *See generally id.*

[13] *Id.* at 3-5.

[14] *Id.* at 232 (arguing that historians "are interested in the past for many reasons other than present-day legal debates," while lawyers "use history in ways that reflect [the] adversarial culture of authority claiming" prevalent in the legal field).

or modalities—that structure the kinds of constitutional arguments lawyers make and the ways in which history is often deployed within each.[15] In so doing, the book explains why, even if lawyers use history differently than do historians, historians' work will remain forever relevant to law: because lawyers will never stop appealing to the past for authority, they will always have incentive to draw on historians' work and tout historians' expertise.[16]

Beyond the vagaries of professional training and practice, Balkin suggests that history has far-reaching authority in constitutional interpretation because of central features of U.S. civic and constitutional culture—that American national identity is bound up in a creedal tradition tethered to a founding national and constitutional moment.[17] History matters in constitutional interpretation, then, not because of the ever-expanding debate over originalism, but the other way around: the originalism debate caught fire because of the unique authority history has long enjoyed in national constitutional dispute.[18] That means that not all historical argument in constitutional law is properly classified as originalist argument (as it too often is),[19] that non-originalists have as much at stake in the use of history as their opponents,[20] and that originalists themselves often use history in more capacious and freewheeling ways than they are inclined to admit.[21]

All of this is because, Balkin provocatively suggests, most appeals to history in modern constitutional argument are in fact appeals to memory: "what people remember about the past and how they remember it."[22] Memory is different than an accurate account of the past.[23] Rooted in the present to serve the needs of the present, it is instead "a set of stories, icons, symbols, and events that help constitute members of a social group as a group and that help constitute the

[15] *Id.* at 15-53.

[16] *Id.* at 247-53.

[17] *Id.* at 9-10, 77-85.

[18] *Id.* at 9-10, 74 (arguing that "Americans are attracted to originalism" because it is "a feature of *national* constitutional culture" of "reverence for the views of the founders").

[19] *Id.* at 5-6, 20-26, 62-64 ("[A]lmost everybody makes arguments from original intention, original meaning, original purpose, or original understanding from time to time, whether they are devoted to originalism or fervently opposed to it.").

[20] *Id.* at 7, 13, 172-76, 193-96.

[21] *Id.* at 7, 12, 118, 159-68 (showing how originalists selectively invoke history by appealing to originalist arguments where they align with modern values and avoiding them where "the values of the framers and adopters appear too alien or irrelevant").

[22] *Id.* at 179 (referring to "collective memory" as distinctively shared cultural phenomenon). *See generally* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022) (delineating the concept of constitutional memory before applying it to the history of suffrage movements and arguments about voting rights).

[23] BALKIN, *supra* note 11, at 180-81 ("Shared memory is less about historical accuracy and more about a common set of cultural resources for making claims in the present."); *id.* at 183 ("[M]emory does not merely recollect or describe. It also grounds practical judgment and imposes a normative order on the world.").

group's identity and its sense of shared values."[24] It shapes a group's "understanding of their past and how they reason about the present in light of the past."[25] When lawyers appeal to the past to make arguments about law in the present, they are therefore rarely *doing* history. They are instead invoking, and often constructing, constitutional memory. "Collective memory lies in the background of almost all constitutional interpretation,"[26] Balkin asserts, which means that most modern constitutional interpreters are more accurately understood as "memory entrepreneurs."[27] By remembering some things and forgetting others and assigning salience to certain aspects of the constitutional past over others, lawyers, judges, and citizens help determine which past voices and experiences count in constitutional interpretation, thereby channeling the past into the present and adapting an old constitution to an ever-changing world.[28] Fights over using history in constitutional interpretation are therefore often fights over constitutional memory. Which means that originalism is as much a theory of constitutional memory, Balkin argues, as it is a theory of constitutional interpretation.[29] The same is true of originalism's competitors. In treating appeals to history in constitutional argument as moves within contemporary cultural memory—which are the product of a distinct kind of civic culture—Balkin ultimately emphasizes the presentist nature of most modern constitutional argument. Even those legal arguments that turn to the past—in fact, especially those arguments that turn to the past—are rooted in the needs and logic of the present.[30]

Balkin stresses the presentist dimensions of modern legal argument in part because of his underlying sense of American constitutional time and the rupture within it—none more important than what he terms "constitutional modernity."[31] "The 1787 Constitution," Balkin contends, "was designed for a different world and a different country than the American democracy of the twentieth century."[32] This drift, he claims, "eventually . . . produced a crisis of

[24] *Id.* at 179.

[25] *Id.*

[26] *Id.* at 34.

[27] *Id.* at 186-88, 192 (explaining how memory can be used to manipulate groups and erase historical events).

[28] *Id.* at 6-8, 179-85, 192-209 (claiming that the ways constitutional memory is invoked in legal arguments also creates future constitutional memory). "Tradition and cultural memory are not fixed. They are shaped by how people choose to argue, articulate, persuade, and remember. They are shaped by how people actively invest in memory and encourage others to remember." *Id.* at 176.

[29] *Id.* at 200 ("It is naive, therefore, to think of originalism as merely a theory about the meaning of words. Originalism is also a construction of constitutional memory and of the constitutional tradition.").

[30] *Id.* at 185 ("The meaning of the past is the terrain on which battles over the present are fought.").

[31] *Id.* at 67-70.

[32] *Id.* at 69.

modernity," in which Americans recognized that they were "losing—or ha[d] already lost—crucial connections to the stabilizing and legitimating authority of the past and the institutions and traditions of the past."[33] In short, "[m]odernity is the sense of separation from the past,"[34] and in the twentieth century, it was something American constitutionalists were becoming "increasingly self-conscious about."[35] In the domain of constitutionalism, this "loss of organic connection to the past"[36] manifested as "the felt sense that the world of the framers had long since passed away, and that the problem for the present was how to be faithful to an ancient constitution in very different circumstances."[37] While social drift—the sense that the social world had outgrown an older constitutional form—provoked this crisis, Balkin stresses that it powered a transformation in consciousness itself. Modernity thus worked an internal revolution in constitutional and legal habits—one that left modern interpreters suspended in a conceptual scheme very different from the one that previous interpreters had known.[38]

As Balkin sees it, modern constitutionalism and the dominant forms of constitutional interpretation that have defined it—originalism and living constitutionalism—were borne of this "crisis of *constitutional modernity*."[39] Originalism and living constitutionalism were complementary ways for coping with the experience of being constitutional moderns. Living constitutionalism embodied one reaction: "The framers' world is not our world, and we cannot return to it."[40] Originalism embodied a rival reaction: "We have lost—or are in danger of losing—our connection to the Constitution that sustains us. Therefore,

[33] *Id.* at 68.

[34] *Id.* at 69.

[35] *Id.* at 87.

[36] *Id.* at 69.

[37] *Id.* at 10.

[38] *Id.* at 69. For others who have traced a similar historical arc in constitutional and legal thinking from the American Founding to the twentieth century, see KAMMEN, *supra* note 4; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992) (detailing shifts in American jurisprudence between nineteenth and twentieth centuries); KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM (2011) (delineating shifts in American jurisprudence and democracy between eighteenth and twentieth centuries); STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021) (exploring historical shift of judges as *finders* of law to *makers* of law in American jurisprudence); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1993) (exploring how modernism reshaped U.S. constitutional law); Gillman, *supra* note 4; and Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861 (2022) (exploring how dramatic changes in how people have thought about constitutional rights and jurisprudence altered understandings of the First Amendment over time).

[39] BALKIN, *supra* note 11, at 69.

[40] *Id.* at 70.

we must regain the past. . . . and restore the Constitution that has been lost."[41] Living constitutionalism and originalism are, thus, "twins separated at birth, mirror-image interpretive approaches designed to deal with modernity"[42] and "increasing separation from the past."[43]

This powerful insight leads Balkin to three important conclusions. First, while people throughout American history have appealed to the purposes and intentions of the Constitution's framers, originalism "as a self-conscious and general theory of legal interpretation . . . is a relatively recent invention," and one that arose in response to modernity.[44] Second, like other fundamentalist reactions to modernity, originalism is itself thoroughly modern in sensibility and orientation. Despite its "longing to regain the past and its authority," it is rooted in the present and sees the past from that present.[45] Often its conception of the past is "imagined" precisely because it is brought on by the anxiety of modernity and is a product of modern cultural memory.[46] Third, these opposing cultural tropes have been adopted by liberals as well as conservatives—the past has been called on as a way of dealing with the anxiety of modernity, not simply to forestall change but also to legitimate and consolidate it.[47] Thus, long before the conservative legal movement rallied under the banner of originalism and seemingly laid claim to the authority of the constitutional past, liberal constitutional reformers, first in defense of the New Deal, and then later on the Warren and early Burger Courts, frequently appealed to the wisdom of the Constitution's framers to justify their innovative interpretations.[48] Originalists themselves, in turn, have often appealed to history in order to justify significant legal change.[49]

The upshot is that originalists, every bit as much as living constitutionalists, are constitutional moderns through and through. They argue from the other side

[41] *Id.*

[42] *Id.* at 172.

[43] *Id.* at 10.

[44] *Id.* at 87.

[45] *Id.*

[46] *Id.* at 87, 90-92, 171.

[47] *Id.* at 70, 87-88, 92-93 (illustrating how Americans revert to originalism as a central means to justify modern political change).

[48] *Id.* at 88-90.

[49] *Id.* at 92-93, 170-72 (explaining how conservative originalism is a form of living constitutionalism that "keeps the Constitution in line with the changing views of conservatives confronting a changing society"); *see also* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 568-74 (2006) (arguing that originalism bridges constitutional law with dynamic political culture by offering narratives to pursue legal and political changes); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1130 (2023) (analyzing how, in the context of recent abortion decisions, the Supreme Court has harnessed originalism to create constitutional memories that can justify "doctrinal innovations").

of a decisive rupture in constitutional time that has produced a shared consciousness and competing reactions to it. They live in a modern legal world and turn to history, not for its own sake, but to find resources to help shape and redirect the present in which they do battle.[50] Originalism is several things at once: a cultural attitude, a form of constitutional memory, a mode of political rhetoric, a judicial approach to interpreting the Constitution, and an academic theory that comes in several varieties.[51] Nonetheless, while popular, judicial, and academic originalism are importantly different, they share a modernist sensibility. They are all shaped by and help construct cultural memory.[52] In appealing to the past, they each fundamentally view it from the present, refracting what they find through a modern lens.[53] They also tend to downplay distance from the past to which they appeal.[54] They each enlist history, above all the Founding, to participate in modern constitutional debate.[55]

Balkin's account of the practices of modern constitutional argument and originalism's place within it—how American lawyers use history, why they use history, how they conceive of the past, how they relate that past to the present, and how they approach the work of professional historians—is, thus, ultimately informed by his particular account of constitutional time and the rupture that defines it. It's an argument as edifying as it is refreshingly honest. It fully accepts that "the basic orientation of legal argument," even when drawing on the authority of the past and claiming to recapture the past, "is presentist."[56]

I recently completed my own book on the relationship between history and modern constitutional interpretation, *Against Constitutional Originalism: A Historical Critique*,[57] and I'm struck by how it and Balkin's book can be seen as two sides of a single coin. Both are interested in discontinuity across American constitutional time and how that shapes modern constitutional argument. My book critiques originalism from the perspective of history, exposing the ways in which originalists impose a brand of modern constitutionalism onto an eighteenth-century past that did not share it.[58] Balkin's book, meanwhile, explores the various ways in which modern constitutional interpreters, both originalists and non-originalists alike, pull the past into the

[50] BALKIN, *supra* note 11, at 67-70, 170-72 (illustrating how originalism and living constitutionalism "are both methods of creative adaptation to modernity using history").

[51] *Id.* at 58-65, 90-93.

[52] *Id.* at 59, 90-93.

[53] *Id.* at 121.

[54] *Id.* at 138 ("Most lawyers and judges deal with the problem of anachronism by simply ignoring it . . . .").

[55] *Id.* at 121.

[56] *Id.* at 138 (elaborating on why legal practitioners downplay the possibility of anachronism in their constitutional arguments); *id.* at 52-53 (explaining how historical arguments about law and tradition are based on current public consensus and values).

[57] GIENAPP, *supra* note 3.

[58] *Id.* at 195-225.

present to make it usable for the needs of that present.[59] Both of our books stress rupture in American constitutional thinking, and both see originalism as the product of a distinctively modern legal consciousness—mine based on looking at modern practice from the perspective of eighteenth-century constitutionalism,[60] and Balkin's based on looking at history from the perspective of modern constitutionalism.[61] But whereas my book stresses the unacknowledged problems raised by constitutional rupture, Balkin's shows how modern legal argument works because of that rupture.[62] Whereas mine attempts to explain how interpreters might overcome that rupture and the anachronism it invites to recover the historical Founding as it once was, Balkin's considers how modern legal argument inherently remakes the past in accordance with present needs by sifting, amplifying, remembering, forgetting, compiling, and narrating the raw materials of that past in ways that resonate in a post-rupture world.[63] Accepting my argument about the problem of historical rupture perhaps leaves us to conclude that Balkin is right about what modern constitutional interpreters are actually doing when they use history: They aren't recovering the past as it once was, but rather, they are isolating parts of that past and refracting them through the forms and terms of modern constitutional disputation and the normative imperatives of cultural memory that hover above them.[64] Legal interpreters, as Balkin tells us, "select from, filter, and reconfigure the past so that law can use it for legal purposes."[65] So much wrenching and filtering creates something new, justified not by the norms of historical retrieval but the modalities of constitutional argument to the case at hand.

Balkin often celebrates this rhetorical practice, reveling in how history is deployed in the modern language game of law to achieve various purposes and

[59] BALKIN, *supra* note 11, at 67-70.

[60] GIENAPP, *supra* note 3, at 1.

[61] BALKIN, *supra* note 11, at 67.

[62] *Compare* GIENAPP, *supra* note 3, at 19-28, 226-50 (arguing that originalists make assumptions about the Constitution's nature and how to interpret it that are predicated on modern legal thinking), *with* BALKIN, *supra* note 11, at 69-70 (elaborating on how a "sense of modernity and loss of organic connection to the past" has created fault lines of modern debate over constitutional interpretation).

[63] *Compare* GIENAPP, *supra* note 3, at 65-192 (detailing the distinctive logic and features of Founding-era constitutionalism and how to recover it), *with* BALKIN, *supra* note 11, at 138-39 (explaining how "some degree of anachronism is unavoidable in legal argument").

[64] *See, e.g.*, BALKIN, *supra* note 11, at 51-52 (describing how lawyers produce "stylized accounts of history" in order "to generate clear normative lessons for law"); *id.* at 139 ("Legal argument . . . demands that we use old texts and concepts across time, and it approaches these texts and concepts in terms of their potential relevance to the present."); *id.* at 143 ("[W]e cannot draw lessons from the past without bringing our own present-day perspective to it . . . ."); *id.* at 237 ("The modalities [of constitutional argument] mediate and filter the past through rhetorical forms, and they are also the lenses through which lawyers see and discover history.").

[65] *Id.* at 243.

spur on further creativity and democratic claims-making.[66] But he also fully accepts this memory entrepreneurship for what it is—a decidedly presentist practice. He understands the difference between a creatively successful legal argument that draws on the purposes of the Constitution's framing, the honored authority of its leading framers, or the purported ethos of an earlier time, and a historical argument rooted in historical context. Modern legal rhetoric as Balkin describes it might be justified if that justification does not hinge on fidelity to the past as it once was. As he puts it, "lawyers' uses of history" entail "the construction of constitutional norms in the present rather than a humble surrender to the past."[67] He might well be right, moreover, that lawyers and historians can coexist in peace without forcing the other to conform to their norms. But not everyone and everything can continue untroubled.

III. ORIGINALISM AND HISTORICAL RUPTURE

The rupture in constitutional time that Balkin calls attention to raises urgent questions for originalism. It undercuts how originalists leverage historical authority to legitimate their theory. Whatever else might be true of their theory, originalists are assured that they are recovering something firmly rooted in the past. They might not be doing history, but they are retrieving something thoroughly historical—something that was *there*. It isn't something they've created or contrived; it isn't something they've made by filtering the past through their modernist lens. What they recover from the past is authentic. It *has* to be. Nothing else could justify the pointed accusations of infidelity they level against competing interpretations that aren't equivalently rooted in the past, or how they aggressively wield historical evidence like a sword to cut down various laws, actions, and constitutional rights that don't square with it. It matters, then, if the past that originalists' brandish against their opponents is truly historical in nature or, in fact, a form of memory—something rooted more in the present than the past.

Even more specifically, Balkin's account of historical rupture challenges the increasingly standard way that many originalists deflect historical critique: by claiming they are doing law rather than history (a subject that Balkin probes in depth in his closing chapters).[68] As originalists tell it, they are justified in taking a narrower view of the past, zeroing in on legal doctrine and other technical aspects of law at the expense of wider historical contexts, because that is how

[66] *Id.* at 131-34 (describing how historical constructions of the Constitution can serve to improve its democratic legitimacy); *id.* at 172-76 (providing different ways originalists and non-originalists can "marshal the resources of history"); *id.* at 210-27 (describing how constitutional memory can be expanded to include all forms of history, including that of groups excluded from constitution-making); *id.* at 267-68 (explaining how lawyers can use broader sets of historical resources to construct or deconstruct legal authority).

[67] *Id.* at 142.

[68] *Id.* at 231-68.

legal analysis works.[69] "The past offers a wild cacophony of information about law and legal practice, but not all of it will feature in a modern legal inquiry," explain William Baude and Stephen Sachs.[70] "Present law typically gives force to past *doctrine*, not to that doctrine's role in past society."[71] To identify that doctrine in the past, a legal interpreter is likely to "focus on operative legal texts and on 'internal' accounts of legal doctrine" from the applicable historical period.[72] Because the "relevant legal doctrines," they explain, "represent an extraordinarily narrow slice of any society's intellectual life," it is not only perfectly fine but indeed necessary for lawyers to privilege "restrictive accounts" of past law over "broader reconstructions of the past" more familiar to intellectual history.[73] What is important for history is not the same as what matters for law. Historians complain about originalists' use of history only because they are confused about the object of legal interpretation and because they lack the specialized training lawyers possess that enables them to isolate and analyze those technical features of the legal past germane to that particular interpretive inquiry. That might be because the Constitution is written in the "language of the law,"[74] or because recovering its original meaning is a distinctively "legal enterprise,"[75] or because originalist theory creates defined interpretive targets (such as original public meaning).[76] Whatever the case, historians err in confusing a legal exercise suited for special lawyerly techniques with a historical one that calls for historians' expertise. Historians' critiques of what lawyers are up to when they interpret the past are thus little more than an index of historians' own misunderstanding.[77]

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[69] *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813-17 (2019); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 51-70 (2006).

[70] Baude & Sachs, *supra* note 69, at 813.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 813-14.

[74] *See generally* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018).

[75] *See* Lawson & Seidman, *supra* note 69, at 50.

[76] *See* Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1114-15 (2015); BARNETT, *supra* note 6, at 389-93.

[77] *See generally* Solum, *supra* note 76, at 1163-64; Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 539-40 (1998) (distinguishing "the time-honored tradition of the historian less concerned about the meaning of legal text and more concerned with ideas"); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1559 (2012) (asserting that lawyers have special claim to expertise in constitutional interpretation); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1654 (claiming that historians' "primary concern is with motivations, ideology, and ideas, and not with the semantics or pragmatics of

It might seem at first glance that Balkin's account of how lawyers use history could bolster originalists' claims that they are doing something distinct from historical analysis that historians fail to understand. After all, Balkin stresses how lawyerly uses of history are often distinct from the approaches common to professional historians.[78] As he elucidates, lawyers interpret the past through the common modalities of legal argument, which is not the typical lens employed by historians. Yet, Balkin's arguments do not ultimately support originalists in their struggle to free themselves from historians' objections. In fact, they undercut originalists' rhetorical posture.

Balkin offers his own important reasons for why originalist lawyers will never be able to keep historians out of the debate. First, the topics of constitutional law are not restricted to lawyers and those supposedly trained in legal science—a major part of Balkin's argument is how these "are common topics for all" that "facilitate a common conversation" across professional disciplines and among the citizenry as a whole.[79] Second, lawyers disagree deeply among themselves, not only about historical findings, but also about which underlying interpretive theory is needed to make sense of those findings.[80] These disagreements *among* lawyers are fueled by the adversarial nature of legal argument itself: one set of

the Constitution"); Randy Barnett, *Can Lawyers Ascertain the Original Meaning of the Constitution?*, VOLOKH CONSPIRACY (Aug. 19, 2013, 4:22 PM), http://volokh.com/2013/08/19/can-lawyers-ascertain-the-original-meaning-of-the-constitution/ [https://perma.cc/LT27-X96H]; Randy E. Barnett, *Challenging the Priesthood of Professional Historians*, VOLOKH CONSPIRACY (Mar. 28, 2017, 12:51 PM) [hereinafter Barnett, *Challenging the Priesthood*], https://reason.com/volokh/2017/03/28/challenging-the-priesthood-of/ [https://perma.cc/8W23-LS4Q]; Mike Rappaport, *Historians and Originalists*, ORIGINALISM BLOG (Aug. 21, 2013), https://originalismblog.typepad.com/the-originalism-blog/2013/08/historians-and-originalistsmike-rappaport.html; Mike Rappaport, *Historians and Originalists Part I: The Context of the Debate*, LAW & LIBERTY (Apr. 11, 2017), https://lawliberty.org/historians-and-originalists-part-i-the-context-of-the-debate/ [https://perma.cc/TUP4-DGJN]; Mike Rappaport, *Historians and Originalists Part II: The Adequacy of Originalist Scholarship*, LAW & LIBERTY (Apr. 22, 2017), https://lawliberty.org/historians-and-originalists-part-ii-the-adequacy-of-originalist-scholarship/ [https://perma.cc/Y5R9-9SXQ]; Mike Rappaport, *An Important Difference Between Historians and Originalist Law Professors*, LAW & LIBERTY (Oct. 11, 2018), https://lawliberty.org/an-important-difference-between-historians-and-originalist-law-professors/ [https://perma.cc/QL28-MQTF]; John O. McGinnis, *Why Mary Sarah Bilder Gets Originalism Wrong*, LAW & LIBERTY (Feb. 11, 2021), https://lawliberty.org/why-mary-bilder-gets-originalism-wrong/ [https://perma.cc/3563-Q7TD]; John O. McGinnis & Mike Rappaport, *The Finished Constitution*, LAW & LIBERTY (Sept. 28, 2023), https://lawliberty.org/book-review/the-finished-constitution/ [https://perma.cc/5S2L-XKQS].

[78] BALKIN, *supra* note 11, at 232.

[79] *Id.* at 239; *see also id.* at 237-39 (explaining how historians' expertise enables them to use constitutional modalities in arguments as well as lawyers can, and perhaps better than lawyers can with respect to arguments leveraging custom or tradition, for example).

[80] *Id.* at 238, 241-45.

lawyers will always be looking for new arguments and evidence to undercut the authority of the lawyers aligned on the opposite side of an issue.[81] If one group uses history to establish authority, the other group will use history to rebut that authority.[82] One group of lawyers might wish to keep historians at bay, but their legal adversaries will have a strong incentive to empower historians to provide evidence that undermines the first group's claims.[83] Balkin is surely right about all of this. Historians are capable of working within the modalities of legal argument to provide accounts of the past that either construct certain kinds of legal authority or, more often, deconstruct those forms of authority.[84] That's especially so when considering all the modalities on offer. Originalists who present law as a technical science accessed through a special kind of lawyerly reasoning often restrict their vision to a handful of legal modalities (such as precedent and doctrine) at the expense of many others (custom, tradition, ethos, honored authority, and consequences) that Balkin shows play as significant a role in constitutional argument.[85] Furthermore, given that lawyers are constantly searching for sources of authority to undercut other legal arguments, it is inevitable that historians' knowledge of the past will continue to play a major role in constitutional dispute. Balkin insists efforts to keep out historians by creating "a Maginot line that hopes to let in only a controlled dose of history"[86] will never work because those originalists who seek to do so misunderstand how the nature and dynamic of legal argument in our society works.[87] "Law" will remain forever permeable to "history."[88]

These insights are all immensely valuable, but I would like to push Balkin's analysis in a different direction. Balkin's account of rupture, modernism, and the inherent distorting effects of modern legal argument undercuts originalists' rhetorical posture toward history and historians in an even more fundamental way.

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[81] *Id.* at 250-53.

[82] *Id.* at 250.

[83] *Id.* at 251.

> Attempts to fence out historians . . . are often intradisciplinary rather than cross-disciplinary: lawyers who hope to fence out historians may also object to lawyers who would disagree with them about how to use history, or who would use history in different ways to rebut their claims to legal authority. *Id.*

[84] *Id.* at 237-39, 248. Balkin is right that historians are better suited to deconstruct lawyers' uses of the past, given historians' adeptness at undermining strong claims of legal certainty by noting disagreement, complexity, ambiguity, and indeterminacy in the historical record or by calling attention to how the past is less familiar than those appealing to it assume.

[85] *Id.* at 247-48 ("[L]awyers use many different modalities of argument, far more than [some originalists] let on. These modalities of argument use history in ways that make it far more difficult to ignore historians' work and historians' objections.").

[86] *Id.* at 253.

[87] *Id.* ("The relevance of history—and therefore historical dispute—is baked into the modalities of argument that lawyers unselfconsciously employ.").

[88] *Id.* at 247.

That is because originalists cannot easily accept Balkin's account of what they are doing. Originalists are willing to accept that they are lawyers doing law when they venture into the past, but they do not accept that they are moderns engaged in historical distortion and anachronism on account of their presentism. Following the imperatives of legal analysis, they might train their attention on narrow slices of the legal past, but they insist that narrowness does not make their work historically inauthentic. They must believe, as noted above, that they are recovering something genuinely rooted in the past. Balkin's portrayal of modern legal argument points in a very different direction, however. In unmasking originalism as a modernist brand of legal interpretation by suggesting that originalists are constitutional memory entrepreneurs, Balkin gives us reason to believe that originalists are not quite as in touch with the past as they would like to believe. Taking rupture in American constitutional history seriously recasts both originalists' familiar rejoinders to historians and their attempts to justify their narrow approach to the constitutional past.

If lawyers use history differently than historians, it is not because they are doing something called "law" as opposed to something called "history," but instead because of how they think about law itself and whether it's been marked by rupture in the history of the United States. Put another way, originalists are not choosing law over history; they're choosing modern law over past law. Seen in these terms, the problems become more evident. Originalists' law-as-specialized-knowledge argument does a lot less work when modern law is set against past law. It changes the question at the heart of the debate from, "who is best equipped to study law?" to, "is past law comparable to modern law, and *if it isn't*, who is best equipped to understand it?" Modern lawyers might be better equipped to understand modern law, but that does not mean they are better at evaluating the conceptual premises of eighteenth-century thought. It's only *if* our constitutional paradigms and the Founders' constitutional paradigms align that lawyers could claim any special skillset over historians. But that assumption is the very issue in question: Has U.S. constitutional history been marked by rupture? Was the Founders' legal world fundamentally different from our own?

In rebutting historians, originalists, in essence, deny the idea of historical rupture in our constitutional tradition. They are not ultimately obeying law over history, heeding their specialized training, or drawing on technical legal knowledge. Fundamentally, they are treating past law as alike in kind to present law. They can approach the past in the narrow ways they do because there is little historical difference to bridge, little about the past that is daunting or unfamiliar. They take comfort in the belief that, whatever particulars might have changed, Americans' essential way of doing and thinking about constitutionalism and law has remained constant over time. They believe that modern lawyers can use past law to resolve present law without much difficulty because there are not any sharp discontinuities to negotiate, alternative paradigms to translate, or unusual worldviews to decode. The Founders' constitutionalism was ours, and ours is theirs. When originalists recover law in

the past, therefore, they flatten historical time. This is what originalists' law-as-specialized-knowledge rebuttal of historians in fact amounts to.

But contrary to what these originalists assume, rupture is arguably the defining feature of U.S. constitutional history. If anything is clear about this nation's constitutional past, it is that Americans before the twentieth century thought very differently about law than they do now, especially constitutionalism, and especially the closer we get to the Founding itself.[89] We today stand, as Jud Campbell has put it, "in the aftermath of seismic shifts in legal culture," marked by "the demise" of once foundational forms of legal and constitutional thinking.[90] Lawrence Lessig is thus quite right to stress that "19th-century jurists lived in a different conceptual universe" than we do now.[91] My aforementioned book endeavors to bring these differences in conceptual

[89] The literature testifying to this fact is extensive. *See generally* BANNER, *supra* note 38; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (50th anniversary ed. 2017); GIENAPP, *supra* note 3; JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023); HORWITZ, *supra* note 38; LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS (2024); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996); PARKER, *supra* note 38; GEORGE THOMAS, THE (UN)WRITTEN CONSTITUTION (2021); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1998); Mary Sarah Bilder, *The* Ordeal *and the Constitution*, 91 NEW ENG. Q. 129, 136 (2018) (describing the manner in which the American Revolutionaries conceived of constitutionalism compared to how it is understood today); Pamela Brandwein, *The* Slaughter-House *Dissents and the Reconstruction of American Liberalism*, 118 AM. POL. SCI. REV. 1005 (2024); Jud Campbell, *Determining Rights*, HARV. L. REV. (forthcoming 2025) [hereinafter Campbell, *Determining Rights*]; Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611 (2023) [hereinafter Campbell, *General Citizenship Rights*]; 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); Jonathan Gienapp, *Written Constitutionalism, Pasts and Present*, 39 LAW & HIST. REV. 321 (2021); David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1595 (2018) (noting that the eighteenth-century conception of law of nations seems foreign today); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 82 (1987) (arguing that the emotional background of early U.S. constitutional thought is largely unknown to us); Horwitz, *supra* note 38; Lawrence Lessig, *The Brilliance in* Slaughterhouse*: A Judicially Restrained and Original Understanding of "Privileges or Immunities*,*"* 26 U. PA. J. CONST. L. 1, 14-17, 35-42 (2023); John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 LAW & HIST. REV. 361 (2021); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020); Suzanna Sherry, *Natural Law in the States*, 61 CIN. L. REV. 171 (1992).

[90] Campbell, *Determining Rights*, *supra* note 89 (manuscript at 55).

[91] Lessig, *supra* note 89, at 36.

thinking between then and now into focus.[92] It attempts to recapture the once dominant, now defunct, and often counterintuitive forms of constitutional consciousness that pervaded at the time of the Founding—a way of understanding and doing law that endured in essential ways across much of the nineteenth century. It traces constitutional interpretation up to the rupture that Balkin rightly identifies and emphasizes.

To highlight just some of the essential ways in which earlier constitutional and legal thinking radically diverged from what came later: at the Founding and for decades to come, people thought that law was found rather than made, and that accessing law was a matter of knowing how to reason about it. The substance of law and legal enactments, and the content of fundamental law and constitutions, was inextricably intertwined with a way of reasoning about law.[93] This form of legal reasoning betrayed a broader and more integrated view of law than we would find intuitive today.

To their minds, law was far more capacious. As a category, "law" encompassed a much wider range of activities and modes of thought than we are accustomed to. In the early United States, the study of law was seamlessly entwined with the study of philosophy, psychology, morality, history, sociology, and political theory.[94] These were not treated as distinct subjects and analytical approaches. Where we split, they merged without any sense that it should be otherwise. This capacious approach to law comes across clearly in early U.S. legal treatises, which often began with disquisitions on human nature and treated legal subjects as extensions of what we would term moral and political philosophy, sociology, or psychology.[95] The job of the legal theorist was to understand how these various aspects of human behavior and experience fit together into a unified thing called law.

Not only did law implicate a broad swath of human thinking, law itself formed a unified whole. Unlike their counterparts today, early U.S. legal thinkers did not draw sharp distinctions between positive and non-positive law—law posited by human beings and thus grounded in contingent social facts and law that was established by universal standards of reason and justice.[96] They did not neatly distinguish municipal or civil law (the law emanating from a particular society's legislatures or courts) from natural law (the law of human nature that held across

[92] GIENAPP, *supra* note 3.

[93] *Id.* at 79.

[94] *Id.* at 78.

[95] *See, e.g.*, 1-2 JAMES WILSON, *Lectures on Law*, *in* COLLECTED WORKS OF JAMES WILSON 323 (Kermit L. Hall & Mark David Hall eds., 2007); NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (Rutland, J. Lyon 1793); ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS (Windham, John Byrne 1795), JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS FROM JULY, A.D. 1789, TO JUNE, A.D. 1793 (N.Y., Banks L. Pub. Co. 1899); JAMES KENT, COMMENTARIES ON AMERICAN LAW (N.Y., O. Halsted 1826-1830).

[96] GIENAPP, *supra* note 3, at 79.

all societies).[97] Instead, they assumed that fundamental sources of law naturally harmonized, and that the task of legal interpretation was to synthesize what we would consider competing and distinct kinds of law.[98]

This integrated view of law, which assumed that positive and non-positive law bled into one another to form a seamless whole, is most clearly illustrated by how they imagined the common law. Back then, the common law enjoyed a multifaceted character. Unlike today, where it is typically understood on positivist and realist terms, in the eighteenth and nineteenth centuries, common law blended positive law (the customary practices of a particular political community, and the legal treatises and judicial opinions that sought to identify and entrench them) with non-positive law (the general legal principles, or law of reason, that the study of history and experience revealed).[99] The common law was at once evidence of a contingent community's law and evidence of universal natural law that transcended that community. It was dynamic yet fixed, democratic yet timeless. That was because the common law was as much a way of thinking about law as it was a body of law—the substantive features of law followed from the capacity to reason about law through the common-law method.[100]

This integrated view of law, captured so neatly in the capacious and multifaceted way in which the common law was understood, saturated how early U.S. legal thinkers thought about fundamental law, and thus, constitutional law. What can be called general fundamental law fused enacted written constitutional provisions with the preexisting legal principles found in common law, natural law, and British constitutionalism.[101] U.S. written constitutions were constructed and interpreted against the background of general fundamental law, which was, in turn, part of those constitutions, inextricably entangled with their content and legal effect.[102]

This distinctive understanding of fundamental law was interconnected with the paradigm of social compact theory, which similarly saturated early U.S. constitutionalism. Social compact theory (often called social contract theory) was a thought experiment that helped people establish the basis of legitimate constitutional governance.[103] Hardly anyone who reasoned about constitutions in the early U.S. did so without appealing to it. The theory assumed a two-step process by which people made government: Through the first step, individuals left the state of nature to form a social compact or body politic; having done so,

[97] *See id.* at 80.

[98] *Id.* at 78.

[99] *Id.* at 80-81.

[100] *Id.* at 80-85.

[101] *Id.*

[102] *Id.* at 76-91.

[103] Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1788-92 (2021); GIENAPP, *supra* note 3, at 93-95, 124-27; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87-90 (2017).

that political community then took a second step and agreed to a constitution of government.[104] The "constitution," in the fullest sense of the term, was the entwined agreements made at each step (both the constitution of government and its underlying social compact). Much of fundamental law, including most rights protections, were secured not through the constitution (as we understand it) but through the social compact that preceded it.[105] The powers delegated to the government, meanwhile, were not simply a function of what had been enumerated in the constitution of government but also the nature of the social compact underpinning it.[106]

Composed against the backdrop of general fundamental law and social compact theory, U.S. written constitutions were embedded in a wider field of unwritten law. To properly interpret these constitutions, one needed to know how fundamental law operated and the content of the social compact that underlay it. The written constitution, as we understand it, did not stand alone. Its contents were enmeshed with a broader body of law that itself presupposed a broader conception of law.[107]

On account of this form of written constitutionalism, constitutional fixation worked much differently than most today assume.[108] Some constitutional content was fixed through textual enactment. Most of what was called the constitution of government (the traditional items that fell under the heading "constitution") were fixed in this way.[109] The U.S. had one national executive rather than three, elected by a system of state electors and subject to removal by impeachment because the text of the Constitution said so. And these specifications and rules could not be altered by the ordinary government. But other parts of the constitution were fixed outside of the text, and thus fixed in a wholly different fashion. Fundamental rights were mostly fixed by the social compact, for instance.[110] Some of these rights were later textually declared, most famously when the Federal Constitution was amended in 1791, though that declaration for the most part did not alter their constitutional status or preclude the people themselves through their representative institutions from making ongoing determinations of their legal scope.[111] The scope of national power under the Constitution, meanwhile, was fixed by the nature of the union—by the

[104] GIENAPP, *supra* note 3, at 93-95,; Campbell, *supra* note 103, at 87-90.

[105] GIENAPP, *supra* note 3, at 93-100, 107-08, 111-15; Jud Campbell, *Fundamental Rights at the American Founding*, 4 CAMBRIDGE HIST. RTS. (forthcoming 2025) (manuscript at 3) (on file with author) ("Americans naturally viewed fundamental rights as being recognized *before* constitutional ratification.").

[106] GIENAPP, *supra* note 3, at 124-37, 185-89; Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 20 (2024).

[107] GIENAPP, *supra* note 3, at 65-116.

[108] *Id.* at 138-54.

[109] *Id.* at 89-90.

[110] *Id.* at 91-94; *see also* Campbell, *Determining Rights*, *supra* note 89.

[111] *Id.* at 97-99, 145-46; *see also* Campbell, *Determining Rights*, *supra* note 89.

kind of polity the United States happened to be.[112] Thus, neither fundamental rights nor the scope of national power were fixed through constitutional text, nor did the fact that they were fixed mean their content could not evolve.

This is a form of legal thinking largely foreign to us. On the other side of realist and positivist revolutions that rendered natural law, general common law, general fundamental law, and social compact theory obsolete—a shift embodied in the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[113]—we don't easily detect, much less decode, these earlier forms of legal thinking.[114] To us, they're largely invisible.[115] That is what conceptual rupture begets. Yet those conceptual ingredients were not only part of the U.S. constitutional past—they were essential frameworks through which knowledgeable legal thinkers made sense of law and constitutions.[116] There was no separating their written constitutions from those legal paradigms and the premises that structured them.[117] The original Constitution was very much written in the language of general fundamental law and social compact theory. For decades to come, legal interpreters instinctively knew this and interpreted the Constitution accordingly.

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[112] GIENAPP, *supra* note 3, at 124-37, 184-89; *see also* Campbell, *supra* note 106, at 24-25.

[113] 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts."). This ruling entrenched the conception of law famously articulated by Justice Oliver Wendell Holmes Jr. two decades earlier. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .").

[114] *See* GIENAPP, *supra* note 3, at 40-44, 65-171, 234-36; Campbell, *Determining Rights*, *supra* note 89 (manuscript at 55) (noting that the first half of the twentieth century witnessed "seismic shifts in legal culture, including the demise of social-contract theory, natural law, and customary constitutionalism"); Campbell, *supra* note 103, at 87 ("The Founders spoke about their 'natural rights' with a familiarity that Americans have long since lost."); Campbell, *supra* note 38, at 868 ("[O]ur interpretive assumptions about rights are so radically different from those of the past."); Lessig, *supra* note 89, at 36 ("[T]he 19th-century jurists lived in a different conceptual universe.").

[115] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 49-50 (1980) ("[F]or early American lawyers, references to natural law and natural rights functioned as little more than signals for one's sense that the law was not as one felt it should be."). Such observations betray modern legal consciousness by showing limited imagination to understand an earlier legal capacity, which assumed that natural law and natural rights picked out real and usable concepts.

[116] GIENAPP, *supra* note 3, at 76-137, 184-89, 200-15; *see* KRAMER, *supra* note 89, at 9-18; PARKER, *supra* note 38, at 92; BANNER, *supra* note 38, at 12-13; LACROIX, *supra* note 89; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264-94 (2017); Campbell, *General Citizenship Rights*, *supra* note 89; Campbell, *supra* note 106; Golove & Hulsebosch, *supra* note 89; Lessig, *supra* note 89, at 14-17, 35-36.

[117] *See* GIENAPP, *supra* note 3, at 200-25; Campbell, *General Citizenship Rights*, *supra* note 89, at 691-99.

No longer versed in these legal languages, we struggle to see what they found obvious and logical.

This rupture in U.S. legal consciousness poses a major challenge to originalists who implicitly deny it. It undercuts originalists' common invocation of legal expertise to shield their interpretations of the constitutional past from historians' critiques. As leading originalist Randy Barnett has put it, "[S]ome [historians] apparently believe that they, and they alone, can recover the meaning of a law enacted in the Eighteenth Century when they would not be able to understand the meaning of a law enacted in the Twenty-First."[118] He adds: "some historians seem to think they can investigate the meaning of legal terms and concepts in the past without any legal training. For this it helps to be a lawyer."[119] But why would originalists, by virtue of being *modern lawyers*, have any special talent for understanding the premises that undergirded eighteenth- and nineteenth-century legal and constitutional thinking? Why would knowledge of how law works today illuminate how law worked a long time ago? Why would the legal past be uniquely accessible to those specially versed in deciphering the legal present? Those things would only be true if there was strong continuity between the intellectual world of the U.S. legal past and the intellectual world of the U.S. legal present—if, that is, the long arc of American legal thinking was not marked by rupture. Modern legal expertise and interpretive skill would only have special relevance *if* past and present were united by a common form of legal reason.[120] By privileging their own legal knowledge, originalists necessarily deny rupture in the history of the American legal imagination. They assume that James Wilson, Oliver Ellsworth, Samuel Chase, Joseph Story, or Stephen Field thought like lawyers do today. But there was rupture in American legal thinking, and significant rupture at that. Wilson,

[118] Barnett, *Challenging the Priesthood*, *supra* note 77.

[119] *Id.*

[120] Balkin notes that by "defining legal reason" in a particular way, "[originalists] seek to foreclose uses of history that might undermine their particular interpretive theories or might rebut arguments using those theories." BALKIN, *supra* note 11, at 250-51. But whose "legal reason": modern originalists' or the Founders'? Originalists tend to presuppose that they are largely one and the same. A good example of this conflation is John McGinnis and Michael Rappaport's theory of original methods originalism, which insists that the appropriate way to decipher the Constitution's original meaning is by using the legal interpretive methods that well-trained Founding-era lawyers supposedly would have used. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). The problem is, McGinnis and Rappaport describe eighteenth-century interpretive methods as if earlier lawyers shared their modern legal sensibilities, when in fact those earlier lawyers' interpretive habits were wedded to concepts like natural law, general law, general common law, and social compact theory that McGinnis and Rappaport ignore or disparage. Despite, therefore, insisting that we must interpret the Constitution like eighteenth-century lawyers would have, McGinnis and Rappaport end up disregarding how eighteenth-century lawyers reasoned about law and thus approached legal interpretation.

Chase, Field, and their legal peers did not think like lawyers do today. Understanding how they thought about law and reasoned with law requires shedding modern legal assumptions, not privileging them. Law was not simply law. It worked differently back then. Originalists who invoke specialized legal knowledge to cabin historians' critiques are therefore not defending legal expertise against historical expertise as they think—they are privileging modern legal expertise over past legal expertise. In so doing, they impose their own legal intuitions onto a past that did not wholly share them.

Due to the rupture separating our constitutional world from that of earlier U.S. constitutionalists, there's no reason to believe that modern lawyers have special access to understanding the legal thinking of that earlier world simply on account of their modern legal expertise. In many instances, that socialization could prove a hindrance as much as a help, something to be bracketed before one can comprehend the legal past on its own terms. Once in the past, there is still ample room for sophisticated legal analysis and considerable need for it. Founding-era jurisprudence was often technical and complex, requiring significant work to understand. If approached correctly, the lawyers' training and toolkit is enormously helpful in decoding it. But only if we recognize that we are studying a mental world unlike our own, and that we thus need to begin—as Thomas Kuhn always said about studying the history of science[121]—with humility, never convinced that we can automatically make sense of what we find. Plenty of modern lawyers have done this masterfully and have significantly advanced our knowledge of earlier constitutional and legal thinking in the process. Historians have no more of a monopoly on the past than anyone else. But whatever training one has, to understand early U.S. constitutional and legal thinking, one needs to put modern assumptions to the side and climb inside the minds of people who thought differently than we do about law and constitutions and see legal artifacts and concepts through their eyes. It will not do to instead blithely assume conceptual continuity between now and then, narrowly focus on bits of past legal doctrine and use modern legal tools to decipher it, and then tell historians that, because they don't understand law, they have no basis for critiquing this approach or the findings it yields.

As is now clear, the only justification for that conclusion would be if modern legal science happened to neatly align with eighteenth- and nineteenth-century legal science. Modern originalists who wish to wield the special expertise of lawyers to keep historians at bay would need to prove *that*. They would have to demonstrate that there hasn't been meaningful rupture in our constitutional consciousness between then and now. They would have to demonstrate that a vast body of scholarship based on considerable historical research and evidence is, in fact, mistaken. Proving that, however, would have little to do with the special techniques of modern lawyering. It would instead require a substantial

[121] THOMAS S. KUHN, THE ROAD SINCE STRUCTURE: PHILOSOPHICAL ESSAYS, 1970-1993, WITH AN AUTOBIOGRAPHICAL INTERVIEW 15-20, 59-60 (James Conant & John Haugeland eds., 2000).

historical investigation in its own right—a vast course of study that few originalists have yet been willing to undertake—that doesn't merely assume jurisprudential continuity but in fact proves it.

Here, certain originalists might be tempted to pivot to alternative ground: to concede that past U.S. constitutionalists harbored different jurisprudential assumptions but to stress that this fact is irrelevant to originalism because it is a modern legal theory based on modern premises. On this view, originalism is neither justified by nor dependent on the Founders' jurisprudential beliefs. Whether historical rupture in U.S. constitutional thinking poses a challenge to originalism will thus depend on which kind of originalism one happens to defend.

Those originalists whose jurisprudential theory is tied to Founding-era legal views might be vulnerable to the kind of historical rupture highlighted thus far. The leading candidate would surely be original law originalism—which is most prominently defended by William Baude and Stephen Sachs.[122] They claim that originalism is "our law" today based on a positivist account of our official legal practice and culture.[123] The rule of recognition that legal officials in our culture follow, they argue, is a form of originalism.[124] On account of that contingent social fact, we trace the legal chain back to the Founding and work forward from that official starting place, recovering the original law of the Constitution as recognized by legal interpreters at the Founding.[125] Modern originalism is thus predicated on earlier legal thinking—our law today depends on original jurisprudence.

But those originalists who reject Baude and Sachs's jurisprudential account might be unbothered by the problem of constitutional rupture. Rather than linking originalism to original jurisprudence, they seek to sever it. This would seem true of many leading proponents of public meaning originalism[126] (which is often regarded as the most popular version of originalism), who eschew a positivist defense of originalism in favor of a conceptual one.[127] Originalism is

[122] *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

[123] *See* Baude & Sachs, *supra* note 122, at 1458.

[124] William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 179 (2023).

[125] Baude & Sachs, *supra* note 69, at 809-11; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017); William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 883-94 (2023).

[126] *See generally* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV 1953 (2021); Gienapp, *supra* note 5 (discussing the shift from original intent originalism to public meaning originalism).

[127] *See, e.g.*, SCALIA, *supra* note 6; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111-13

legally valid, they claim, not because of anything the Founders did but on account of independent normative and jurisprudential reasons offered today. Originalism is our law not because it is our law in practice (based on a positive account of how legal officials behave) but because, given the nature of our Constitution, it provides the best account of legal validity in our constitutional system.[128] By the most popular account in this vein, originalism is the only way to interpret the Constitution that respects the supreme lawmaking authority that created it.[129] The Constitution is legally valid today because each of its provisions were formally enacted by a legitimate lawmaking process. They were ratified by the sovereign people who alone enjoyed the authority to enact them. To preserve this legitimacy requires enforcing the original meaning as understood by the ratifying public at the time of enactment. Originalists who justify originalism on these grounds thus proceed according to the dictates of modern, not Founding-era, jurisprudence. They search for the Constitution's original public meaning not because of anything the Founders or their immediate successors thought about the nature of law but because originalists have their own independent justifications for regarding this form of constitutional meaning as binding today. From this perspective, legal expertise is useful, not because it unlocks Founding-era jurisprudence, but because it allows modern interpreters to understand, based on knowledge of modern jurisprudence, which historical facts make a difference for modern law.[130]

In short, then, jurisprudential rupture is inconsequential to this form of originalism because it claims to be bound only by what the text of the Constitution originally expressed to the ratifying public, not the theories of law

(1999); BARNETT, *supra* note 6, at 129; Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 3, 2019) (unpublished manuscript); Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 479-80 (2023).

[128] Most originalists are liable to insist that originalism is our law, but by this they could mean two very different things. Baude and Sachs claim that originalism is our law because they believe it is our official legal practice. The rule of recognition sanctioned by legal officials in our legal culture is a form of originalism. But most other originalists do not subscribe to this view. Originalism arose, after all, as a critique of our official practice, based on the belief that the Supreme Court and the supporting legal culture were being unfaithful to the Constitution. Originalism served as a call to restore the true law to official practice precisely because it had been abandoned in official practice. To these originalists, originalism is our law not because of our official practice but because originalism is normatively and conceptually the true law in our constitutional system, no matter whether those in control of the law happen to adhere to it.

[129] SCALIA, *supra* note 6, at 38-39; WHITTINGTON, *supra* note 127, at 110-59; Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1998); Barnett & Solum, *supra* note 127, at 480.

[130] *See* sources cited *supra* notes 76-77 and accompanying text.

that might have originally surrounded it.[131] *What* the Founders created is all that matters; not *how* those Founders happened to understand their creation. Our law today therefore does *not* depend on original jurisprudence.

For this version of originalism no less than any other, however, the problem of historical rupture still poses a fundamental challenge. Public meaning originalists who claim not to be bound by the jurisprudential views of the Founders fail to appreciate how and why Founding-era legal thinking nonetheless impinges directly on their theory. Public meaning originalists are correct that they promote independent normative and jurisprudential reasons for following the original meaning of the Constitution—independent justifications that seemingly have little to do with the Founders' own constitutional and legal assumptions. But none of those jurisprudential arguments justify how public meaning originalists define "original public meaning" to begin with. That's because, as far as they're concerned, there's nothing to justify. As public meaning originalists stress time and again, deciphering original public meaning is a strictly empirical exercise that follows logically from the nature of the Constitution.[132] Their theory comes in two steps: first we figure out what the Constitution originally said; then we explain why we, today, ought to be bound by that original meaning. And it is presumed that the first step in the theory (the empirical step) is self-justifying. The original meaning of the Constitution is whatever it was—an exercise in recovering a fact. But in outlining the empirical exercise, without realizing it, public meaning originalists in fact impose a robust conception of constitutionalism onto the Constitution they claim to be passively interpreting. They presuppose a particular model of constitutional meaning, one that defines what the Constitution is (a text), what kind of content it has (textual content), how it communicates that content (through textual communication), and how that content is fixed (through textual codification). It's a model that fundamentally defines what "original public meaning" *is*: the set of propositions communicated by the text of the original Constitution. Whereas public meaning originalists justify why we should adhere to original meaning and why original meaning should be understood as original public meaning (as opposed to, for instance, the originally intended meaning of the Constitution's framers), they take for granted how original meaning works. Before they even get to their jurisprudential justifications at step two, they have already presumed so much

[131] Solum, *supra* note 126, at 2042; Evan D. Bernick & Christopher R. Green, *There Is Something That Our Constitution Just Is*, 27 TEX. REV. L. & POL. 247, 277-80, 289-90 (2023) ("Textual originalists are not committed to everything the Founders believed, of course; they are only committed to the *meaning* that the Founders expressed by means of the Constitution's text in context.").

[132] *See, e.g.*, BARNETT, *supra* note 6, at 389-95; ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 4-6, 35-38, 133 (2017); Barnett & Solum, *supra* note 127, at 479. *See generally, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485 (2008);

that demands independent justification at step one. They simply assume without warrant that their model of constitutional meaning is a logical entailment of the fact that the U.S. Constitution is written.

If we attend to historical rupture, however, we see that this favored model of constitutional meaning is hardly entailed by the Constitution. Indeed, on account of the very different ways eighteenth-century Americans understood fundamental law and constitutionalism, constitutional meaning was understood much differently at the Founding than the model favored by public meaning originalists assumes.[133] What the Constitution originally expressed to the public was a function of how constitutions were understood to acquire and communicate content, which in turn was a function of how law and constitutionalism were themselves understood to work.[134] As we have seen, at the Founding and for decades to follow, it was assumed that fundamental law blended positive with non-positive law, enacted constitutional text with general legal principles. As we have also seen, it was assumed that a constitution of government rested on the foundation of an unwritten social compact, an initial constitutional agreement that created lots of binding fundamental law especially pertaining to fundamental rights. The Constitution, thus, communicated a lot of its content outside of its textual commands. Its meaning did not simply run through its language. Its full meaning was only visible to those who could read the Constitution in the conceptual language in which it was written.[135] Those earlier forms of jurisprudential thinking that public meaning originalists assume they can ignore were in fact inextricably intertwined with the content that the Constitution publicly communicated. As a historical matter, the Constitution's original public meaning was a direct product of the Founders' assumptions about constitutionalism and fundamental law.[136] That means that when public meaning originalists define original public meaning exclusively in terms of enacted text, they actively rewrite the very Constitution they claim to take as written, erasing and distorting large swaths of its original content.[137]

Bringing Founding-era constitutional thinking back into focus shows, first, that public meaning originalists' model of public meaning is wholly optional, and, second, that it deviates sharply from the kind of model the original Constitution in fact presupposed. There is thus a gap between the Constitution's "original meaning" based on public meaning originalists' stipulated conception of original public meaning and the Constitution's historical original meaning based on the Founding generation's own rival conception of constitutional

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[133] GIENAPP, *supra* note 3 at 67-137.

[134] *Id.* at 67-116, 200-25.

[135] *Id.* at 200-25; Campbell, *General Citizenship Rights*, *supra* note 89, at 691-99.

[136] GIENAPP, *supra* note 3, at 67-116, 200-15.

[137] *Id*. at 221-25.

In taking their own understanding of the Constitution for granted, doctrinaire originalists erase the Constitution's historical identity. They impose their own assumptions onto it . . . [in] place of the Founding-era assumptions they've quietly discarded. They don't take the Constitution as they find it; they twist it into novel form. *Id.* at 222.

meaning. Because public meaning originalists ignore rupture in U.S. constitutional consciousness and the ways in which constitutional thinking was entwined with constitutional meaning, they fail to attend to this gap, much less justify why we should pretend that an anachronistic form of constitutional meaning based on an anachronistic understanding of constitutional meaning should be treated as the Constitution's original meaning—especially when doing so ignores the Constitution's historical original meaning that was based on a different understanding of how constitutions communicated meaning. If we are to abandon the Constitution's authentic historical eighteenth-century original public meaning in favor of a contrived nonhistorical non-eighteenth-century "original public meaning," we should know why. Because for all their normative and jurisprudential arguments in support of originalism, public meaning originalists have yet to provide a justification of that sort. All of their normative and jurisprudential arguments explain why we should follow original meaning rather than non-original meaning today; none of them explain why we should pretend that "original meaning" was something that it was not.

Public meaning originalists cannot ignore historical rupture either, then, and certainly not on account of any normative or jurisprudential arguments they have made to date. Deep changes in American constitutional thinking are as relevant to their stated project as they are to any other brand of originalism. Dismissing, bracketing, or ignoring these changes will not suffice.

A reckoning is in order. Originalists need to recognize that the Constitution's original eighteenth-century meaning was inextricably entangled with radically different understandings of law and constitutionalism, and, from there, recognize the gap between their modern conception of constitutional meaning and the historical one that once reigned. Then they need to adjust in one of two directions. They either, one, need to significantly remodel their theory to be consistent with earlier forms of constitutionalism and jurisprudence. As originalists committed to recovering what was original, they need to get across the rupture that has separated us from original constitutionalism and retrieve original meaning from that lost world.[138] Or, two, they need to acknowledge that their conception of original meaning is a modern fiction and that they are not

[138] In certain respects, because their version of originalism is consciously linked to the Founders' jurisprudence, Baude and Sachs seem interested in recapturing the Constitution of the past. They are certainly more interested than most other originalists in following the historical evidence and recovering earlier jurisprudential perspectives, rather than remaining dogmatically stuck in the present. But they often fail to follow through on their own arguments. While they are invested in earlier approaches to law, such as general law, they tend to sever them from the broader legal imagination that gave rise to them. Often, it is past law without past legal thinking—the past without the past. That is because, ultimately, they are invested in legal continuity across U.S. constitutional history. Consequently, they are not quite willing to embrace the kind of historical rupture and discontinuity emphasized by legal historians. They tend to filter older jurisprudential ideas through a modernist lens to make those concepts suitable for the modern legal world. Their originalism is, therefore, as modern as the rest. *Id.* at 234-38; *see, e.g.*, Lessig, *supra* note 89, at 35-36.

straightforwardly recovering something rooted in the historical past.[139] They need to accept that they are instead inventing a past. And they need to supply the normative and jurisprudential defense they have yet to provide for doing *that*.

This latter track is certainly available. Originalists of all stripes could adopt it and accept that they are doing something inherently presentist—that they distort the past, pretend that earlier legal thinkers thought about law and constitutionalism like they do now, and interpret the Constitution today based on that fiction. They could accept, in other words, Balkin's portrayal of what they're up to—of all the ways in which, by their participation in modern legal rhetoric and the assumptions undergirding it, they approach law from the perspective of modernity. They could accept that they are molding a usable past.[140] They could accept, as Balkin puts it, that "[o]riginalist theories select elements from the historical record, leaving much of the messy details of history on the cutting-room floor. . . . beat[ing] the past into a shape that can serve present-day objects."[141] They could accept, in short, that they are making constitutional memory rather than recovering constitutional history.

So why haven't they? The answer, in part, as we've seen, is that they don't recognize the problem. They don't appreciate the depth of rupture in American legal thought and the attendant need to historicize the constitutional past, so they assume their renderings of that constitutional past are authentic. As Jud Campbell rightfully notes, "[O]ne worries that originalists often do not appreciate how much th[eir] approach *creates* a new past."[142]

But there is surely a deeper explanation why originalists would be loath to embrace Balkin's suggestion that they are constructing the past. Originalism's core self-identity and governing justification have both long been predicated on the belief that they are *not* doing this.[143] Were originalists to admit that Balkin is right, in effect they would be acknowledging that they don't in fact recover an objective, real original Constitution rooted in the constitutional past, but instead that they invent one for modern legal purposes. They would forsake authentic historical original meaning (embedded in the conceptual framework of law and constitutionalism operative in the past) for constructed legal original meaning (predicated on suspending disbelief and pretending that the Founders thought about law and constitutionalism as modern lawyers do now). Such an admission could work in theory and even be justified by modern jurisprudence. But it would likely prove fatal in practice, both rhetorically and substantively, by severing originalists from the past to which they are staked. There's a reason why originalist writings are not filled with disclaimers of the following sort: "By the Constitution's 'original meaning' we, of course, don't mean what the Constitution actually meant to actual people at the time of its birth." It's no

[139] GIENAPP, *supra* note 3, at 241-42.

[140] *See* BALKIN, *supra* note 11, at 254-68.

[141] *Id.* at 242.

[142] Campbell, *Determining Rights*, *supra* note 89 (manuscript at 56).

[143] *See* GIENAPP, *supra* note 3, at 246-48.

surprise, then, that originalists haven't embraced Balkin's framing and accepted their inherent modernism with the same zeal that he has. They can't accept historical rupture in our constitutional tradition without giving away the game.

IV. LIVING ORIGINALISM

If the idea of constitutional rupture poses such problems for doctrinaire originalism, what of Balkin's own form of originalism: living originalism?[144] Taking rupture, modernity, and presentism seriously might reveal what has always distinguished living originalism from its originalist counterparts. Where other forms of originalism must overcome presentism to maintain their legitimacy, living originalism can embrace it. Because it is *living*.

As we have seen, Balkin's form of originalism is fully conscious of its own modernism. Like Lawrence Lessig's own innovative method of constitutional interpretation that he has analogized to constitutional translation and has presented as a kind of originalism,[145] what sets Balkin's living originalism apart is its deep appreciation of constitutional historicism and discontinuity. It fully embraces rupture in U.S. constitutional time.

Based on that, Balkin's living originalism breaks from conventional forms of originalism in a range of ways. Whereas other forms of originalism sharply differentiate themselves from living constitutionalism, Balkin has eagerly blurred the lines, insisting that these two supposedly opposing methods of interpretation in fact fuse together.[146] That is in part because he is committed to a different form of constitutional fidelity than that which orients most originalists, one that stresses that fidelity to the Constitution requires carrying it forward into times for which it was not drafted—making it "our law" through the construction of constitutional memory.[147] That form of fidelity can work across historical rupture for it assumes historical rupture (or at least significant change over time). Other forms of originalism, by contrast, typically look backward to maintain fidelity. Thanks to these differences, Balkin conceives of history differently than do other originalists. He sees it as a resource, not a command—it is not something we obediently follow, but something we use, something from which we learn, and something by which we shape our

[144] JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) (arguing that living constitutionalism and originalism are compatible); BALKIN, *supra* note 11, at 97-119.

[145] Lessig has likened constitutional interpretation to translation because the task, as he sees it, is to decipher something written long ago and apply it to a very different context than the one in which it was written. He calls this "two-step" originalism. The interpreter must first understand what the Constitution meant in its original context before then carrying that meaning into the modern target context by translating it. Maintaining fidelity to the original meaning often requires changing it. LESSIG, *supra* note 1, at 49-69. Like Balkin's living originalism, Lessig's account of constitutional translation is thus deeply attuned to rupture in U.S. constitutional history. *See* GIENAPP, *supra* note 3, at 245-46.

[146] BALKIN, *supra* note 11, at 97-119.

[147] *Id.* at 224-27 ("For the law to be our law, we must be able to identify with it as ours.").

present.[148] History is something we draw on to construct the best version of the Constitution in the present. Other originalists, conversely, very much see history as a command.[149]

Balkin thus has no qualms about wrenching the constitutional past into the constitutional present. Seemingly alone among originalists, he not only accepts but embraces the constructed nature of original meaning.[150] He is adamant, in ways few other originalists could easily accept, that originalism is a modern theoretical construct that "filters and reconfigures the past" in order "to produce a legal meaning that constitutional interpreters living today might actually use."[151] He seems content treating originalism as a form of modern constitutional memory, for what else, from Balkin's perspective, could it be? In defending his brand of originalism as a form of constitutional memory, Balkin challenges other forms of originalism to be so candid. The reasons why they can't do not hinder him.

In short, living originalism is originalism fully conscious of its modernity. And that consciousness makes all the difference. Most originalists currently appeal to the past without recognition of what they are appealing to or how their presentist assumptions distort it. They are not conscious of their own legal modernity or what it entails. Because of how their modernity structures their engagement with the past, they often practice a form of living constitutionalism without realizing it.[152] Were they to become conscious of that fact, their relationship to the constitutional past would surely change. They would likely begin to see the past as a resource rather than a command—or they would at least see the role they play in creating the commands they purport to follow. They would be mindful of how their theory is creating a past more than it is recovering one. In the process, they would surely be forced to abandon the stronger arguments that have long guided originalism, the ones living originalists like Balkin have purposefully eschewed.

Originalism cannot easily survive the fact of historical rupture in American constitutionalism, not without significant accommodation. But living originalism can—its use of history does not purport to be rooted in a pre-rupture past but instead is rooted in a post-rupture present. In that regard, it shows how we might use history in our constitutional present without losing sight of how we are using it.

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[148] *Id.* at 10-13 (arguing that history is "a way that we reason with each other in the present rather than a collection of mandates from the past").

[149] *Id.* at 115 ("The problem of thick theories of original public meaning is that they attempt to leverage merely persuasive authority into mandatory authority, and appeals to the past into commands from the past.").

[150] *Id.* at 242 ("All legal theories reconfigure history to theory in varying degrees. All legal theories beat the past into shape . . . . Theories of original public meaning, in short, construct the past so that it can serve the needs and values of the present.").

[151] *Id.* at 122.

[152] GIENAPP, *supra* note 3, at 242-44; BALKIN, *supra* note 11, at 92-93, 170-72.

For whatever happens, Americans will continue to appeal to the constitutional past for authority. They will continue to make and wield constitutional memory. That will never cease. But what hopefully will is the belief that those residing in the legal present can access that past without any difficulty. Hopefully, interpreters will recognize they are separated from the past by a rupture in legal thinking. That rupture does not mean we are cut off from our constitutional past, forever unmoored from it. We are still deeply connected to it: we can learn from it, take inspiration from it, condemn it, emulate it, build on it. What we cannot do is find ready-made answers to most of our urgent constitutional questions—we cannot easily find outputs written in the language of modern law and reflecting modern legal consciousness that tell us what to do. We find materials with which to work, not clear legal commands written in the familiar terms of our time.

By appreciating rupture in American constitutional history, we can better understand both past and present. We can better understand the early history of the Constitution, and the distinctive forms of constitutional thinking that accompanied it, while also better understanding the Constitution that we know today, the one that emerged from significant changes in constitutional thinking. Coming to terms with constitutional rupture does not sever us from the Constitution but allows us to better appreciate what it once was and now is.