

# Originalism Without Text

STEPHEN E. SACHS

**ABSTRACT.**—Originalism is not about the text. Though the theory is often treated as a way to read the Constitution’s words, that conventional view is misleading. A society can be recognizably originalist without any words to interpret: without a written constitution, written statutes, or any writing at all. If texts aren’t fundamental to originalism, then originalism isn’t fundamentally about texts. Avoiding that error helps us see what originalism generally *is* about: namely, our present constitutional law, and its dependence on a crucial moment in the past.

**AUTHOR.**—Professor of Law, Duke University School of Law.

Originalism is not about the text. On a conventional but mistaken view, to be an originalist is to read words in a particular way—to take a particular approach to divining the meaning of the Constitution’s text. It might be a good approach to meaning or a bad one; it might look to the Framers or the Ratifiers, to lawyers or the general public; but meaning itself is always the goal. The question the theory addresses is “what does the text of the Constitution mean?”; the answer originalism offers is “whatever it originally meant.” Or, as notably summarized by Lawrence Solum, originalism today is united by two “core ideas”:<sup>1</sup>

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1. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6 (2015).

- (1) The *Fixation Thesis*: that “[t]he meaning of the constitutional text is fixed when each provision is framed and ratified.”<sup>2</sup>
- (2) The *Constraint Principle*: that this “original meaning of the constitutional text should constrain constitutional practice.”<sup>3</sup>

These core ideas lie at the heart of the “New Originalism,” the movement’s dominant school.<sup>4</sup> They’re recognized as authoritative by both supporters and opponents.<sup>5</sup> Yet the core ideas serve better as a summary than a definition; using them to circumscribe the theory is a mistake. That’s because originalism doesn’t need to be about the meaning of any text. A society can be recognizably originalist without having a written constitution, written law, or any writing at all. If having a text isn’t fundamental to originalism, then originalism isn’t fundamentally about the meaning of texts. We could exclude such a society by stipulation, if we wished;<sup>6</sup> but that would save the core ideas only by sacrificing the coherence of the theory they describe.

In our society, of course, we do have a written Constitution, and debates about its meaning figure centrally in our constitutional law. Even so, these linguistic debates should be kept in their place. Treating the core ideas as firm requirements would exclude, without justification, a variety of theories more coherently brought within the

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2. *Id.* at 1; *see also id.* at 15 (stating the “fully elaborated version” of the Fixation Thesis as holding that “[t]he object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified”).
  3. *Id.* at 1.
  4. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 607-12 (2004).
  5. *Compare, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 & n.12 (2013), Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 & n.2 (2011), and Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1864 & n.104, 1865 (2013), *with, e.g.*, James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1786 (2013), Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1253 (2015), and Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 974 (2015). *See generally* Solum, *supra* note 1, at 6 n.28 (citing sources).
  6. *See* Solum, *supra* note 1, at 7 n.28.

originalist tent. A number of scholars, this author among them, have argued for shifting focus from original meaning to our *original law*: the law of the United States as it stood at the Founding, and as it's been lawfully amended since.<sup>7</sup> That law might well have been shaped in part by the original meaning of legal texts—so that the Constitution's meaning would indeed have been fixed at the Founding, and this fixed meaning would indeed constrain constitutional practice. The core ideas would then be contingent consequences, but not necessary features, of a broader commitment to originalism. Other scholars look to still different facts about the Founders—such as the values they expressed, the particular policies they endorsed, or the interpretive methods they employed.<sup>8</sup>

All these theories have something in common. They treat the content of American constitutional law as properly resting on its *origins*—on features of our legal Founding that remain legally operative today. Accepting them means treating modern law as vulnerable to history, as open to refutation by claims about the past. But each theory looks to different features of the Founding, and each might occasionally conflict with a view centered on the original meaning of language. Given the strong attachments or aversions people have to the 'originalist' label, it'd be nice to know how broadly it applies. Perhaps

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7. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 844–45 (2015); see also, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 n.16 (2015) (endorsing this view); Jeffrey Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 99 (2016) (same, but for different reasons); cf. Chris Green, *Posner and Segall's Evasion of the Sense-Reference Distinction*, ORIGINALISM BLOG (Dec. 9, 2016, 10:55 AM), <http://originalismblog.typepad.com/the-originalism-blog/2016/12/posner-segall-sense-and-reference.html> [<http://perma.cc/N25D-3DQY>] (endorsing such a “meta-originalism”).
8. See, e.g., Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161 (2013) (old-style original intentions); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–4 (1971) (original value choices); 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) (original methods); Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, LIBR. L. & LIBERTY (Dec. 2, 2014), <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track> [<http://perma.cc/YT7U-6W46>] (original policy decisions); cf. Solum, *supra* note 1, at 7 n.28 (noting the potential conflict between original meaning and original methods).

theories like these really ought to be cast out of originalism, into outer darkness, where there shall be weeping and gnashing of teeth. But that kind of move requires argument, not just stipulation.

## I

Consider the following hypothetical:

The society of Freedonia has no writing and no written law. Its legal rules are passed down through oral traditions, which provide for councils of elders to do limited judicial work. Freedonia goes through a period of legal tumult, in which influential council decisions are said to have misstated the traditional rules and to have exceeded the councils' authority. A Great Council is held, in which it's agreed—in substance, and without resolving on any canonical form of words—that all innovations to date are to be accepted as necessary evils, but that no new innovations are to be allowed, and that the ancestral traditions are otherwise to be preserved inviolate. Generations pass, and again some councils begin to overstep these limits, arguing that the traditions must be altered to accommodate modern circumstances. Other Freedonian elders criticize their fellows for failing to apply the law as approved at the Great Council.

Are these critics originalists?

True, they aren't trying to construe a constitutional text. Without a paper record, it might be hard to *know* what the older traditions were, or to be sure that they differed from those of the present day. But it's a question of empirics, not of theory, how much anyone knows about the past. Maybe the elders learned the traditions in their youth, or consulted people who did; maybe they reviewed audiotapes of oral histories helpfully recorded by visiting anthropologists. The nature of the evidence doesn't matter. The older rules themselves were real, the modern divergence from them may well be real, and the elders' criticism of that divergence strikes a familiar originalist tone.

True also, the elders aren't trying to enforce a written law. A society can have "written law" without writing, of course; it can transmit an enacted text by word of mouth just as it can on paper. The Constitution would still be "written law" if it were recorded as a string of ones and zeros in ASCII format, or as a set of interpretive

dance steps—or if we all just memorized it, taught it to our children, and then burned the National Archives. It would still contain particular terms, adopted on a particular occasion, and carrying legal significance by virtue of their adoption. Yet a society doesn't have to structure its law this way. In our hypothetical, the Council approved no canonical *formulation* of its decision (say, 'NO NEW INNOVATIONS ALLOWED') that might serve as a text to be interpreted later. Maybe the Council ran more as a discussion session than a legislative assembly, breaking up once a consensus emerged. Or maybe everyone simply understood what was agreed upon, reporting it back to friends and colleagues in variously worded but substantively consistent ways.

The case would be no different had the Council proceedings been fully recorded. Maybe some unofficial reporters sat in and composed famous sagas about the deliberations; these sagas would be texts, and they might even be written down (the anthropologists again), providing full accounts of the proceedings. But like the year-books in medieval England, these accounts would be mere evidence of the underlying legal standards: they would be written texts, but not written *law*.<sup>9</sup> A society can do plenty of writing about legal rules that stay "unwritten"; it can describe its customary traditions in academic treatises, formularies, case reports, and so on, while the traditions themselves remain purely customary. What makes them so, as Blackstone put it, is that "their original institution and authority are not set down in writing, as acts of parliament are," but they instead "receive their binding power, and the force of laws," simply by usage and reception.<sup>10</sup>

Other customary traditions work the same way. Plenty of books describe the rules of English grammar, and some of them—like Strunk & White<sup>11</sup>—occasionally carry enough authority to influence the practice. But none of these books *establish* rules of grammar, the

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9. Cf. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 179–81 (4th ed. 2002) (describing the year-books as a mixture of unofficial case reports and student lecture notes).

10. 1 WILLIAM BLACKSTONE, COMMENTARIES \*64.

11. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (3d ed. 1979).

way that statute books *establish* rules of law.<sup>12</sup> Individual statements about grammar and spelling might be more accurate or less (“I before E, except after C,” “never end a sentence with a preposition,” and so on), yet the particular form of words we use to express the rules has no independent significance. What matters is whether our formulations get the substance of our practice right.

So the Freedonian elders aren’t seeking to enforce a particular legal text, whether transmitted by paper or by word-of-mouth. They seek only to enforce the Council’s mandate. In other words, they wish to recover a *norm* that was adopted, a *decision* that was made—not the meaning of some particular piece of *language*, which was merely “a faint and distant echo” of these things,<sup>13</sup> and which not everyone agreed on anyway.

On the core-ideas account, then, the elders are excluded by definition from the domain of originalists. The law in Freedonia is indifferent to the Fixation Thesis. The meaning of a text might generally be fixed at the time of its creation, or it might not; but Freedonian law doesn’t rest on the meaning of a particular text, so it’ll be the same either way. And without such a text, there’s no fixed meaning which ought, per the Constraint Principle, to constrain Freedonian constitutional practice.

At the same time, though, we can perfectly well understand the critics as leveling an ordinary originalist critique. They’re trying to recover the content of the law as it stood at a specific point in history, because they believe that this antique law determines the law as it stands today. And they criticize their fellow officials, those who wish to modernize their society’s rules, for failing to adhere to binding rules inherited from the past—rules in place at the time of the Great Council, the founding moment of the Freedonian legal system.

To anyone conversant with the last several decades of originalism debates, the Freedonian arguments should sound familiar indeed.

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12. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1800–01 (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012)).

13. S.E. Thorne, *The Equity of a Statute and Heydon’s Case*, 31 ILL. L. REV. 202, 203 (1936), *reprinted in* *ESSAYS IN ENGLISH LEGAL HISTORY* 155, 156 (1985).

The elders' effort to recover old customs looks an awful lot like modern American originalists digging up Founding-era law on removal, stare decisis, or sovereign immunity.<sup>14</sup> These originalists aren't merely figuring out *what certain writings communicated* at some point in the past (such as by consulting a dictionary or a linguistic corpus);<sup>15</sup> they're using those writings to determine *what the law was* back then, with all its various exceptions, augmentations, and epicycles included.<sup>16</sup> They look not only for "the statements found in the texts of constitutions,"<sup>17</sup> as John Finnis puts it, nor even for the aspects of historical context that might enrich those statements' meaning,<sup>18</sup> but for "the *propositions* which are true, as a matter of law," in virtue of the written statements and context along with other legal rules extant at the time.<sup>19</sup> If you wanted to know whether a foreign murder statute applies to cases of duress, you wouldn't learn much from how the society uses words like 'every,' 'person,' 'who,' or 'kills,' or the entire phrase in context; you'd need to learn more about their legal system as a whole.<sup>20</sup> (And determining what documents count as "the text" may itself require extensive legal reasoning, often involving doctrines of unwritten law.<sup>21</sup>) How language was used may be a crucial input,

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14. See, e.g., Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1165–77 (2009); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

15. See, e.g., James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 20 (2016).

16. See, e.g., Brief of Originalist Scholars as *Amici Curiae* in Support of Respondent, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), at 14–18.

17. 4 JOHN FINNIS, *Introduction to PHILOSOPHY OF LAW: COLLECTED ESSAYS I*, 18 (2011).

18. See, e.g., Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1129–32 (2015).

19. FINNIS, *supra* note 17, at 18.

20. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105–07 (2017).

21. See, e.g., John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

but as William Baude and I have argued, “law begins and ends the inquiry.”<sup>22</sup>

This is far from the only way to be an originalist. But it surely shouldn’t be excluded at the outset. And given how much the research and arguments of the Freedomian elders resemble those of American originalists, assigning them some other label (like ‘foundationalist,’ or ‘schmoriginalist,’ or whatever) would seem to distort more than it clarifies.

## II

Solum’s work suggests a potential response. Perhaps the Freedomians really do rely on fixation after all. To the extent that they take account of the traditions as they stood at the Great Council, they merely fix the traditions instead, taking these fixed traditions to constrain future constitutional practice.<sup>23</sup>

This argument is insightful, but it doesn’t quite work. It’s true that any plausible approach to originalism hangs its hat on *something* fixed at a crucial moment in the past; there’s no ‘originalism’ without something ‘original’ to look back to. But the Fixation Thesis, by its terms, “is not a claim about the fixation of constitutional doctrine.”<sup>24</sup> That’s a matter for the Constraint Principle. And if the Fixation Thesis were about doctrine, it wouldn’t be supported by the affirmative case Solum makes for it; his arguments rest on general propositions in the philosophy of language,<sup>25</sup> which has nothing to say, at least not directly, about the content of any one society’s law.<sup>26</sup> Whatever the

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22. Baude & Sachs, *supra* note 20, at 1083.

23. See Solum, *supra* note 1, at 29 n.87 (describing original-methods originalism as fixing methods, not communicative content).

24. *Id.* at 15; see also *id.* at 32, 34–35.

25. See *id.* at 20–29.

26. See Baude & Sachs, *supra* note 20, at 1089–92; see also Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217, 233 (Andrei Marmor & Scott Soames eds., 2011) (noting that “[p]hilosophy of language and Gricean theory have nothing to say about what we should *deem* to be the content of the legislature’s intentions”).



correct analysis of the meaning of texts in general (public meaning, speaker's meaning, whatever), the Freedonian legal system might obstinately persist in giving legal effect to something else. Or it might refuse to adopt any authoritative linguistic formulations—favoring oral traditions that might, as Brian Simpson wrote of *res ipsa loquitur*, be expressed in six different ways by six different legal scholars.<sup>27</sup> The original traditions might still be law for modern Freedonia, or they might not, but the truth of the Fixation Thesis as applied to particular texts won't affect them one way or the other.

A second response might be that Freedonia indeed fixes, not the meaning of a single communication, but that of many communications at once. Whatever the Council decided, other people had to find out somehow. What actually constrains legal behavior in Freedonia isn't what Council members said to each other, but the reports that came back to everyone else—and we can't sensibly consult these reports without treating *their* meaning as fixed.

This response does invoke a version of both fixation and constraint. Yet it isn't quite the same version as that of the core ideas. It dispenses with the idea of a binding legal text (an idea central to the Constraint Principle) in favor of a panoply of Council-member statements which themselves lack any formal status as law. This response may fit better with Larry Alexander's view of originalism as "authority-preserving".<sup>28</sup> short of directly reading the Council members' minds,<sup>29</sup> fixing the meaning of their communications to others might be the next best way to respect their unique lawmaking authority over time. Even authority-preservingness, though, may demand more than we need for originalism. The point of having the authority was to produce some *norms* for others to follow. And a legal system can preserve those norms without needing to preserve the authority that produced them. (Suppose that Schmeedonia is exactly like Freedonia—

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27. A.W.B. SIMPSON, *The Common Law and Legal Theory*, in *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 359, 371 (1987).

28. Larry Alexander, *Aggregating States of Mind: A Response to Fallon 5* (USD Legal Studies Research Paper No. 17-258, Jan. 10, 2017), <http://ssrn.com/id=2916864>.

29. See generally Larry Alexander, *Telepathic Law*, 27 *CONST. COMMENT.* 139 (2010).

except that instead of a Great Council, it held a months-long “National Conversation on Custom,” reaching precisely the same result in the end. Here there’s no obvious relationship of authority-and-subject;<sup>30</sup> but do the Schmeedonians have any worse claim to being originalists?)

A third response might be that the Fixation Thesis is still true in Freedonia; it’s a philosophical claim about how language works, and it should be equally true in all times and places. Instead, we should grasp the nettle and declare Freedonia a nonoriginalist society, because it rejects the Constraint Principle’s requirement of a written text. After all, the modern scholars who rank customary principles over constitutional text often describe themselves as firm opponents of originalism.<sup>31</sup>

But the Freedonians don’t describe themselves that way, and we shouldn’t either. Their attention to custom is crucially determined by *the past*, not just by the present. They look to a certain set of customs only because, as a matter of historical fact, those were the customs the Council entrenched. If some Freedonians *wanted* to replace their unwritten customs with a fixed text, they’d find themselves—in typical originalist fashion—to be unhappily constrained by the past, facing legal barriers imposed by their continued adherence to an original customary law.

In this respect, the Freedonian critics couldn’t differ more from those who treat our Founding-era written law as having since been supplanted by a “common law approach to the Constitution.”<sup>32</sup> Whether and how much the Freedonian rules may change depends on what their original customs will allow. (Our own Constitution called for different rules before and after the year 1808,<sup>33</sup> but no one sees that as a blow to originalism.) Maybe Freedonia’s customs called for *lots* of change, based on drifting patterns of language-use or the

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30. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 75 (3d ed. 2012) (noting the difficulty of “saying that here the ‘bulk’ of the society habitually obey themselves”).

31. See *generally* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

32. *Id.* at 5.

33. See U.S. CONST. art. I, § 9, cl. 1.

meandering preferences of judges; that might seem as nonoriginalist as it gets.<sup>34</sup> But so would the core-ideas account, applied to a constitution with an Evolving Meanings Clause (say, commanding that the text be read “according to the latest trends and judicial whimsies”). Respecting the original meaning of *this* provision would mean disregarding the original meaning of everything else. We might think that’s a silly way to run a legal system; James Madison thought so too.<sup>35</sup> Yet the search for original meaning, just like the search for original custom, is no more or less originalist depending on what it happens to discover—which is all that a theory can promise, unless it abandons method for substance.

Given Freedonia’s respect for binding original constraints, whatever they might be, why deny it the ‘originalist’ label? Why focus on compliance with a writing-focused Constraint Principle? Not all law is written law, and not every society needs to rely on it in the same way. Insisting on the original communicative content of a specific constitutional text would be like insisting that the year-books be treated as modern official reporters; we could be *reading* the text correctly while utterly misunderstanding the legal role it was to play. Restricting originalism to societies with written constitutions would be no less arbitrary than expecting all societies to have them.

### III

All definitions are arbitrary in some sense. As a stipulated term, we can define ‘originalism’ however we like. If the core-ideas account matches general practice, and especially if it pays its way by usefully distinguishing different phenomena, then there’s no point fighting over labels. As Solum puts it, an effort to include other theories within the tent is “a move in a metalinguistic negotiation over ‘originalism,’”

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34. See Solum, *supra* note 1, at 62–63 (describing such a view as a “rival of originalism”).

35. See, e.g., Letter from James Madison to Henry Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 441, 442 (Phila., J.B. Lippincott & Co. 1867) (“What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!”).

an argument over how best to use “the word and associated concept.”<sup>36</sup> So long as we’re careful about our terms, and clear about which theories we have in mind, maybe Solum is right that “nothing substantive hangs on [the] point.”<sup>37</sup>

But this doesn’t mean the argument is empty. For one thing, the core-ideas formulation is *also* a move in a metalinguistic negotiation, one that may or may not capture the current linguistic practice or a useful family resemblance among concepts. Fights over words are often really fights over the nature of the world the words describe. To borrow examples from David Plunkett and Timothy Sundell, when we dispute whether Secretariat was an ‘athlete,’ or whether waterboarding is ‘torture,’ we’re not just speculating about how other English-speakers use words, but arguing about something real: how to place ideas in a preexisting web of connotations and connections, “how to carve up the world with the concepts we employ.”<sup>38</sup> Stipulating artificial terms (like ‘torture-A’ and ‘torture-B’) might clarify academic discussions, but it wouldn’t tell us what we really want to know: whether the notions we often associate with ‘torture,’ full stop, are properly associated here too.

The same goes for ‘originalism.’ As Solum has correctly noted, “Originalism is not a natural kind”;<sup>39</sup> even our best summary of this broad family of theories might not carve nature at the joints. To the extent, though, that we seek to order and systematize our thought or speech, our choices to deploy or withhold ‘originalism’ ought to respond to both usage and theory: to common intuitions and ways of invoking the label, and to a coherent account (or sympathetic reconstruction) of what the people we generally recognize as ‘originalists’

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36. *Id.* at 7 n.28.

37. *Id.*

38. David Plunkett & Timothy Sundell, *Dworkin’s Interpretivism and the Pragmatics of Legal Disputes*, 19 *LEGAL THEORY* 242, 263–65 (2013).

39. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 32 (Grant Huscroft & Bradley W. Miller eds., 2011).

generally assert.<sup>40</sup> When arguing for a particular view, particularism is fine; some individual version of originalism might offer the “best understanding” of the doctrine, to which originalists of all stripes ought to incline.<sup>41</sup> But when addressing the field as a whole, both usage and theory should nudge us toward a bigger tent.

As to usage, the broad agreement that text is centrally important to originalism can be explained by the fact that, in our society and with our history, the text *is* centrally important. That this importance is contingent doesn’t make it less true. Contingency does, however, explain why many scholars have failed to pay attention to cases in which originalism is practiced quite differently—to cases, for example, in which important parts of our original law were unwritten.<sup>42</sup> Think, again, of what are widely understood to be *originalist* arguments about the removal power, stare decisis, or sovereign immunity.<sup>43</sup> These doctrines are a source of vague embarrassment for an originalism centered on specific constitutional phrases; the Eleventh Amendment really doesn’t say everything the Court said in *Alden v. Maine*.<sup>44</sup> Yet *Alden* might still be right, and on wholly originalist grounds.<sup>45</sup> If

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40. Cf. David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 127 ETHICS (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2964089](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964089) (manuscript at 10) (noting that the authors “do not aim to capture the full range of ways that [a particular] term . . . is used,” but rather “to pick out a theoretically interesting and unified philosophical project, which, at the same time, draws on key strands of existing usage of the term”).

41. Sachs, *supra* note 7, at 864; *see also id.* at 819 (“Not everyone agrees with this picture, of course; not even all ‘originalists.’”).

42. *See* Baude & Sachs, *supra* note 20, at 1137–38; Sachs, *supra* note 7, at 849–52.

43. *See* sources cited *supra* note 14.

44. Compare U.S. CONST. amend. XI (limiting suits against states in federal court), with *Alden v. Maine*, 527 U.S. 706 (1999) (forbidding Congress from authorizing such suits in state court), and John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1727 (2004) (noting the difference). *See generally Alden*, 527 U.S. at 729 (stating that “[b]ehind the words of the constitutional provisions are postulates which limit and control” (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934))).

45. *See* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 8–9, 15–18 (2017); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1868–75 (2012).

originalism draws on Founding-era legal rules as well as Founding-era language, then no embarrassment is necessary: this is the ordinary work of originalist scholarship, not some unusual exception. (Or think of those “original intent” scholars for whom Paul Brest coined the term,<sup>46</sup> who highlight what the Founders intended to achieve, whether or not their substantive intentions were successfully encoded in the meaning of text.<sup>47</sup> This project may have its flaws,<sup>48</sup> but it may also be what most Americans assume ‘originalism’ is about<sup>49</sup>—and any definition excluding them has been drawn far too tight.)

As to theory, in offering a coherent account of the doctrine, we should focus on what makes originalism distinctive with respect to the questions it addresses as well as the answers it offers. What’s unique about originalism isn’t necessarily an approach to reading; originalists read documents in pretty much the same ways that other people do.<sup>50</sup> Instead, as sophisticated nonoriginalists have noticed, originalism as a category of legal theory makes distinctive claims about our society’s law.<sup>51</sup> And the crucial feature of those legal claims, the most comprehensive and useful description one could give them, is that they render the law in some sense *vulnerable* to original facts—facts about a founding moment of overriding legal significance, with the capacity of upsetting any subsequent innovations. That “what you wish cannot be done, for so it was laid down in the time of the Great Council” is perhaps *the* paradigmatic originalist move; and it can be made just as well in Freedonia as in the United States.

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46. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

47. Cf. Alicea & Drakeman, *supra* note 8, at 1166 (distinguishing “the Framers’ subjective intentions” from “the objective meaning of the text itself”); Smith, *supra* note 8 (defending recourse to the former).

48. See, e.g., Stephen E. Sachs, *Saving Originalism’s Soul*, LIBR. L. & LIBERTY (Dec. 17, 2014), <http://www.libertylawsite.org/liberty-forum/saving-originalisms-soul/>.

49. See Donald L. Drakeman, *What’s the Point of Originalism?*, 37 HARV. J.L. & PUB. POL’Y 1123, 1136 (2014) (describing poll data).

50. See, e.g., Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL’Y 485 (2008).

51. See Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 561 (2013) (noting originalist claims “about the ultimate criteria or determinants of constitutional law”).

## IV

To summarize: if the Freedomian critics really are originalists, then originalism isn't fully described by the two "core ideas." General claims about the communicative content of texts are practically important but inessential to originalism, because we can have originalism without any authoritative text to analyze. Any past decision, including the resolution of a Great Council, could have been expressed in many different formulations, so long as the ultimate legal *proposition* was the same—much the way that '9+3' and '7+5' refer to the same thing by different means. And preserving legal propositions, as opposed to the meanings of words, is often what originalists care about most. (If we're not going to preserve the propositions the Constitution enacted, then there's not much importance to fixing the meaning of its words; and if we *are* going to preserve the propositions, then the meanings will usually come along for the ride.)

Freedomia is just a hypothetical, and it's also a special case. In the real world, where literacy is widespread and ink is plentiful, we tend to write these things down: "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."<sup>52</sup> In our system, originalism makes good use of the advantages of written language.<sup>53</sup> But the two don't always go together. As Andrew Coan has argued, a society might use written legal instruments without using them in a particularly originalist way.<sup>54</sup> And the converse is also true: you can have a bona fide originalism in a society that uses no written instruments at all. Which of the two (if either) appears in a given society is a matter of empirics, not of definition. If that's right, then much of the constitutional theory of the past few decades—theory that's placed crucial weight on concepts of writtenness—might need to be rewritten.

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52. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

53. See Randy Barnett, *An Originalism for Nonoriginalists*, 45 *LOYOLA L. REV.* 611, 629–36 (1999).

54. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 *U. PENN. L. REV.* 1025 (2010).