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Original Expectations

Mark A. Graber

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Professor Kay’s increasingly lonely crusade for interpreting constitutional provisions in light of their original intentions captures how constitutions should be implemented immediately after ratification, with the important proviso that expectations matter as much as intentions. Insisting that the constitution on day one mandates X, even though everyone responsible for the constitution thought the constitution mandated not X, violates common sense. A jurisprudence of original intentions at day one acknowledges that constitutions are political documents that serve political purposes and avoids making linguistic theory the practical arbiter when debates break out over impeachment procedures, the regulation of slavery, and the status of state sovereign immunity. At day one, Professor Kay’s originalism best captures the constitutional commitment to rule of law and the underlying constitutional politics of ratification. Intentions and expectations guide the planning processes facilitated by the rule of law. Framers, at least in the United States, spend far more energy making predictions about how the Constitution will work than in laying out the meaning of particular phrases. The persons responsible for a constitution focus on intentions and expectations rather than meanings because their concern is with how the constitution as a whole will work and not with the best interpretation of a particular constitutional clause.

The reasons for preferring original intentions/expectations to original public meanings at day one provides grounds for abandoning all originalisms at day ten. If original public meaning cedes too much constitutional authority to linguists at the moment of ratification, both original public meaning and original intentions/expectations cede too much constitutional authority to historians over time. Doctrinalism at day ten better captures the constitutional commitment to rule of law than any form of originalism. When planning, people are far more likely to assume that constitutional decision makers will continue to do what they are doing than base decisions on original public meanings that may be unknown to both the planners and constitutional decision makers. Purposivism at day ten better incorporates constitutional developments—particularly those constitutional
developments ratifiers did not anticipate—than either original public meaning or original intentions/expectations.
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Original Expectations

MARK A. GRABER *

INTRODUCTION

Constitutional politics in Fredonia1 is structured by the excellent and widespread use of digital technologies. The Constitution of Fredonia was ratified by a popular referendum an hour after the final version of that text was approved by the constitutional convention that drafted that constitution. This ratification procedure had previously been approved by the people by a process that was remarkably consistent with every known consent theory. The conventional debates were public, followed intensely, and discussed in great detail in ways that left no segment of the Fredonian population believing that they lacked the time or information necessary to consider their ratification vote. Article I of the Constitution of Fredonia provides that the delegates at the constitutional convention will immediately upon ratification become the legislature of Fredonia.2 This provision was well known and adequately debated by both the members of the constitutional convention and by the general public. Remarkably, the final Constitution of Fredonia is almost identical to that of 1787. The only exceptions are the above provision in Article I, the inclusion of Article III, which is identical to the Eleventh Amendment to the Constitution of the United States, and a provision in Article V of the Constitution of Fredonia, that declares “this Constitution shall not be amended until ten years have passed after ratification.”3

The first debates in the Fredonian legislature, which began the afternoon the people ratified the constitution, revealed several related problems. Each concerned a divergence between what members of the Fredonian legislature agreed was the original public meaning of a

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1 Fredonia is the fictional country in the Marx Brothers movie, DUCK SOUP (Paramount Pictures 1933).


3 See RICHARD ALBET, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 204–05 (2019) (discussing the existence of similar provisions in several national constitutions).
particular constitutional provision and what members of the Fredonian legislature agreed were the original expectations of the Fredonian people when they ratified the constitution. Article I, Section 3, paragraphs 3 and 5 plainly mandate that the Vice President shall preside over the Senate when the Senate determines whether to convict an impeached Vice President. Nevertheless, no Fredonian intended, anticipated, or expected that the constitution would permit any person to be a judge in their trial, impeachment or otherwise. Article I, Section 8, paragraph 3 plainly mandates that Congress may regulate interstate commerce. Fredonians agree: that the interstate slave trade is interstate commerce; that prohibitions on commerce are forms of regulation; that a good faith constitutional interpreter could conclude that original public meaning of the commerce clause sanctions legislation regulating purely in-state activities that have a substantial effect on interstate commerce; and that slavery has a substantial effect on interstate commerce. Nevertheless, no Fredonian intended, anticipated, or expected that the constitution would permit the Fredonian legislature to forbid immediately the interstate slave trade or prohibit human bondage throughout the land. Article III plainly mandates that citizens of a state may sue their home state when making a claim “arising under this Constitution, the Laws of the United States, and Treaties made.” Nevertheless, Fredonians intended, anticipated, or expected that no state could be sued in federal or state court without the permission of that state.

How Fredonians should make these constitutional choices depends on the proper resolution of a longstanding debate between proponents of original public meanings and proponents of original intentions. Most contemporary originalists claim that constitutional provisions mean what

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4 The claims below about the original meaning and original intention of the Constitution of Fredonia are stipulations. Whether Americans in 1787 had the same expectations or the same understanding of the original public meaning of the relevant constitutional provisions is beyond the scope of this Paper. See infra notes 36–42 (noting these debates in the American context).

5 For this issue in the United States, see Michael Stokes Paulsen, Someone Should Have Told Spiro Agnew, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 75, 75 (William N. Eskridge Jr. & Sanford Levinson eds., 1998); Joel K. Goldstein, Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism, 44 ST. LOUIS L.J. 849 (2000).


7 See Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that the commerce clause allows for the regulation of any in-state activities with substantial effect on interstate commerce).


9 U.S. CONST. art. III, § 2.

the language of the provision meant to the general public the moment the provision was ratified.11 The Constitution of Fredonia, interpreted from this perspective, plainly mandates that the Vice President of the United States presides when the Senate determines whether to convict an impeached Vice President, plainly vests Congress with the power to regulate the interstate slave trade, arguably vests Congress with the power to prohibit slavery throughout the land, and plainly authorizes the national legislature to give federal courts jurisdiction over suits between a citizen and that citizen’s unconsenting home state. Professor Richard Kay and many members of the previous generation of originalists claim that constitutional provisions mean what the framers of those provisions intended or expected the moment the provision was ratified.12 The Constitution of Fredonia, interpreted from this perspective, does not mandate that the Vice President preside over the Senate when the Senate is determining whether to convict an impeached Vice President, does not permit the First Congress to ban either the interstate slave trade or prohibit slavery throughout the land, and does not authorize the national legislature to give federal courts jurisdiction over suits between a citizen and that citizen’s unconsenting home state.

The divergence between original public meaning and original intentions/expectations that Fredonians are experiencing must occur the instant the constitution is ratified. Both original public meaning and original intentions/expectations purport to be facts about constitutional politics at the time the constitution was ratified. Proponents of original public meaning champion the “fixation thesis.” This thesis maintains that the original public meaning of a text is fixed at publication or, in the case of a constitution, at ratification.13 The original public meaning of Article I, Section 3, the Commerce Clause, and Article III, Section 4 of the Constitution of Fredonia are the public meaning of those provisions when they were ratified. What people intend or expect at a certain time is also a historical fact. Constitutional ratifiers may subsequently change their minds or revise expectations in light of new evidence. Nevertheless, their public intentions/expectations at the moment of ratification fixes the original intention/expectation of the constitution, just as their physical

11 See ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 2–3 (2011) (“Although the first generation of originalists focused on the original intentions of the framers, contemporary originalists believe that the original meaning of the Constitution is the meaning that the words and phrases had (or would have had) to ordinary members of the public.”).

12 See Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226, 229–36 (1988) (laying out the nature of original intentions adjudication and describing the author’s model as one which “calls for judges to apply the rules of the written constitution in the sense in which those rules were understood by the people who enacted them.”).

13 See Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 NOTRE DAME L. REV. 1, 1 (2015) (“The meaning of the constitutional text is fixed when each provision is framed and ratified . . . .”).
position at the time of ratification fixes forever where they were when the constitution was ratified. The original intentions/expectations respecting who presides over the trial of an impeached Vice President, congressional power to regulate slavery, and state sovereign immunity are what Fredonians intended or expected when they ratified the Constitution of Fredonia. If, therefore, both original public meaning and original intentions/expectations are facts about constitutional politics at the moment of ratification, then any divergence between the two must occur at ratification.

Original public meaning and original intention/expectations are the only means for interpreting a constitution at day one. At day one, public meaning originalism and textualism are identical. Some textualists insist that the plain meaning of a constitutional text may change over time, but no time has elapsed for that change to occur. Independent doctrinal analysis at day one is impossible. No binding precedents exist that deviate from either original public meaning or public intention/expectation. Various forms of purposivism at day one collapse into original intentions or expectations. Dworkin’s distinction between concepts and conceptions, for example, occurs only over time. Ratifiers at day one believe that the best conception of the concept of equal protection is the conception they had of equal protection when the constitution was ratified. Constitutions must live a bit for living constitutionalists to come to believe that the best application of a general constitutional provision diverges from that intended or expected by the framers.

Part I of this Essay defends at day one Professor Kay’s increasingly lonely crusade for interpreting constitutional provisions in light of their original intentions. Insisting that the constitution on day one mandates X—even though everyone responsible for the constitution thought the constitution mandated not X—violates common sense. A jurisprudence of original intentions at day one acknowledges that constitutions are political

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14 See Leslie Friedman Goldstein, In Defense of the Text: Democracy and Constitutional Theory 3 (1991) (claiming that a textualist may interpret constitutional provisions in ways that “need not have been present in the conscious minds of the framers”).

15 Constitutional decision makers may choose to borrow from other regimes, but binding precedents are limited to decisions made interpreting the national constitutional, none of which at day one have been made. To the extent Fredonians at day one maintain that the Constitution of Fredonia should be interpreted consistently with the decisions of the Supreme Court of the United States, they are making either an original public meaning argument (the average Fredonian understood the meaning of constitutional provisions to be as interpreted by the Supreme Court of the United States) or an original intention/expectation argument (the average Fredonian intended or expected that Fredonian decision makers would be guided by the Supreme Court of the United States). See Jamal Greene, Rule Originalism, 116 COLUM. L. REV. 1639, 1641–43 (2016) (providing a discussion of original public meaning and original expectations).

documents that serve political purposes and avoids making linguistic theory the practical arbiter when debates break out over impeachment procedures, the regulation of slavery, and the status of state sovereign immunity. At day one, Professor Kay’s originalism best captures the constitutional commitment to rule of law and the underlying constitutional politics of ratification. Intentions and expectations guide the planning processes facilitated by the rule of law. Framers, at least in the United States, spend far more energy making predictions about how the constitution will work than in laying out the meaning of particular phrases. The persons responsible for a constitution focus on intentions and expectations rather than meanings, because their concern is with how the constitution as a whole will work and not with the best interpretation of a particular constitutional clause.

Part II maintains that the reasons for preferring original intentions/expectations to original public meanings at day one provides grounds for abandoning all originalisms at day ten. If original public meaning cedes too much constitutional authority to linguists at the moment of ratification, both original public meaning and original intentions/expectations cede too much constitutional authority to historians over time. Doctrinalism\(^\text{17}\) at day ten better captures the constitutional commitment to rule of law than any form of originalism. People, when planning, are far more likely to assume that constitutional decision makers will continue to do what they are doing than base decisions on original public meanings that may be unknown to both the planners and constitutional decision makers. Purposivism, which encompasses structuralism and aspirationalism,\(^\text{18}\) at day ten better incorporates constitutional developments, particularly those constitutional developments ratifiers did not anticipate, than either original public meaning or original intentions/expectations.

This Essay breaks from almost all forms of originalism by highlighting the importance of original expectations.\(^\text{19}\) Expectations, the following pages suggest, are the stuff of constitutional politics. Expectations at day one provide the foundation for constitutional practice. People ratify a constitution on the basis of expectations about how the constitution will work. That the framers expected a certain result is, therefore, a reason at day one for constitutionally mandating that result. Much constitutional

\(^{17}\) For a brief outline of doctrinalism, see Mark A. Graber, A New Introduction to American Constitutionalism 78–81 (2013).

\(^{18}\) For a brief outline of purposivism, see id. at 81–83, 85–86.

\(^{19}\) For originalist objections to a jurisprudence of original expectations, see Lawrence B. Solum, Incorporation and Originalist Theory, 18 J. Contemp. Legal Issues 409, 414 (2009) (arguing that the “linguistic meaning . . . of a text” is different from “expectations about the application of that meaning”); Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 295–97 (2007) (discussing the difference between “original meaning” and “original expected application”).
debate is a consequence of constitutions failing to perform as expected. A jurisprudence that begins with original expectations will not resolve our contemporary constitutional problems, but is more likely to identify their cause than a jurisprudence that purposes to resolve contemporary problems by returning to the constitution in pristine form oblivious to how the constitution operating in pristine form is creating those problems.

I. ORIGINAL INTENTIONS/EXPECTATIONS AND ORIGINAL PUBLIC MEANING AT DAY ONE

Common sense dictates interpreting political documents at day one consistent with their original intentions or expectations. If the United States and Russia conclude an arms agreement that both parties expect will obligate each party to dismantle a particular weapon system, then that agreement should be interpreted as obligating each party to dismantle that weapon system, even if, on inspection, that result may not be mandated by the original public meaning of any provision in the treaty. The United States and Russia concluded the agreement because they anticipated that result. Interpreting the agreement in light of the original public meaning of treaty provisions when those treaty provisions diverge from the original expectations of the treaty would defeat the point of the agreement. The arms agreement is unlikely to survive one party unilaterally declaring they are not to be bound by the original intended expectation.

Common sense dictates that the same originalist principles should govern how constitutions are interpreted at day one. People ratify a constitution because they expect certain outcomes. Fredonians anticipated that an impeached Vice President would not preside over his or her Senate trial, that Congress would not ban the slave trade or slavery, and that states would not be sued without their permission. Constitutions are likely to malfunction immediately at day one if interpreted consistently with their original public meaning rather than original intentions/expectations. Interpreting Article I, Section 3 consistently with that provision’s original public meaning will immunize the Vice President of Fredonia from official sanction until the provision forbidding new constitutional amendments expires. States in Fredonia may face bankruptcy if Article III of the national constitution is not interpreted consistently with their anticipated immunity from private lawsuits for monetary damages. Justice may demand that states honor their contracts, but Fredonians committed to the rule of law will note that all parties to those contracts understood when they were made that Fredonian states had to consent to any lawsuit for nonpayment.

20 Chisholm v. Georgia, 2 U.S. 419, 456 (1793).
Slavery highlights the importance of treating constitutions as political documents. Prominent public meaning originalists in the United States celebrate those abolitionists who pointed out that, as a matter of original public meaning, the Constitution could easily be interpreted as anti-slavery. Randy Barnett urges contemporary constitutional theorists to take their cues from Lysander Spooner, who used a version of original public meaning to conclude that slavery was always unconstitutional in the United States.21 The political problem with Spooner’s original public meaning is that no southern framer at day one would have tolerated such an interpretation for an instant. Lysander Spooner’s constitution was not the Constitution most Americans thought they were ratifying in 1787, even if Spooner’s understanding of original public meaning was correct. Had Congressional majorities at day one began the process of emancipating all slaves in the United States or Fredonia, the point of the constitutional bargains over slavery would be defeated. Both regimes would have fallen apart almost immediately.

Original intentions/expectations treat ratifiers as political actors with political purposes. Kay writes, “Legal obligations arise because we recognize law-making authority vested in certain human beings.”22 What matters is what these political actors think they are doing when they draft and ratify constitutional texts. Persons can achieve political goals constitutionally only through communication. Nevertheless, when implementing constitutional and other political texts, priority should be given to what the ratifiers were consciously trying to achieve rather than to what they may have accidentally communicated. If Fredonians intended their constitution to provide an effective impeachment process, disable Congress from immediately prohibiting the slave trade, and grant states immunity from private lawsuits for monetary damages, those expectations should guide how the Constitution of Fredonia should be implemented at day one. “[I]t is hard to see,” Kay writes, “[what the political rationale would be for a theory that elevates a text for reasons unrelated to the people and circumstances which created it.”23

Original public meaning at day one replaces politics with etymology. Rather than ask what people thought they were doing when they drafted and ratified constitutional provisions, those who champion original public meaning turn to linguistic theory when determining who presides over the trial of an impeached Vice President, whether Congress may ban the

21 See generally Randy E. Barnett, Was Slavery Unconstitutional Before the Thirteenth Amendment: Lysander Spooner’s Theory of Interpretation, 28 Pac. L.J. 977 (1997) (discussing Lysander Spooner’s theory that slavery was unconstitutional before the passage of the Thirteenth Amendment).
22 Kay, supra note 12, at 232.
23 Id. at 234.
interstate slave trade, and the conditions over which persons can sue states for monetary damages. Lawrence Solum, the leading champion of public meaning originalism, maintains “the communicative content of the constitutional text was fixed at the time each provision was framed and ratified” and “that the original meaning of the constitutional text should constrain constitutional practice.” One problem with this substitution is that constitutional decision makers lack the knowledge necessary to evaluate a contested theory of meaning. The more important problem is that what might constitute interpretation in other enterprises should not govern what constitutes interpretation in political enterprises.

Constitutional decision makers lack the expertise to determine the merits of the linguistic theory underlying original public meanings. Solum insists that, while context matters, we can determine the communicative content of a constitutional provision independently from the intentions of the persons responsible for that text. We can determine the meaning of “interstate commerce” with only minimal attention to other constitutional provisions and the overall structure of the Constitution. Kay disagrees, as does Lawrence Lessig. Lessig insists that constitutional provisions do not have meaning independent of other constitutional provisions and the overall structure of the text. The commerce clause is part of a Wittgensteinian language game, and cannot be understood in absence of all elements of the constitutional language game. Lessig writes,

The question of the commerce clause’s power is not determined on its own. It is instead read along with the necessary-and-proper clause . . . in light of a more general principle about implied limits on the scope of an “enumerated constitution.”

Whether this is a correct understanding of Wittgenstein is beside the point. Constitutional decision makers who at day one know their conscious public intentions when ratifying the constitution have no basis for choosing

25 Id. at 1.
26 Id. at 27–29.
27 See id. (distinguishing between original intentions and original public meaning).
28 Kay, supra note 12, at 229–30.
32 LESSIG, supra note 29, at 46.
between interpretations of Wittgenstein or some other philosopher\(^{33}\) when determining whether the original public meaning of the words they used is not consistent with the constitutional expectations/intentions.

Kay and others recognize that the constitutional rules for the impeachment process, the constitutional status of slavery, and the constitutionality of suing unconsenting states for monetary damages cannot possibly turn on the dominant understanding of “interpret” in contemporary linguistic theory.\(^{34}\) Common sense belies claims that whether someone ought to be executed, whether the President can torture suspected terrorists, and whether Congress may require healthy persons to buy life insurance depends, even in part, on the proper interpretation and evaluation of Wittgenstein’s *Philosophical Investigations*.\(^{35}\) Proponents of original meaning go awry by beginning with a generalized theory of interpretation and then asking whether that theory of interpretation should constrain constitutional decision makers.\(^{36}\) Kay and other constitutional theorists adopt the better approach. They first consider how a constitution should be implemented and then describe their best conclusions or all plausible conclusions as “interpretation.”\(^{37}\) This approach is consistent with the meaning of “interpret” in constitutional practice. Supreme Court opinions routinely use “interpret” in ways inconsistent with originalist theory.\(^{38}\) Philip Bobbitt describes six different methodologies for determining the meaning of constitutional provisions only one of which is related to original public meaning.\(^{39}\) Original intentions and original expectations are more important than original public meanings when interpreting political documents because those documents are designed to bring about consciously intended results and expectations rather than communicate certain meanings that framers may not have been aware of at the moment of ratification. No one should care whether poetic interpretation is as dependent on original intentions or expectations. The

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\(^{33}\) See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 489–90 (2013) (relying heavily on Paul Grice, even as he acknowledges “significant” differences in their accounts of meaning).

\(^{34}\) See, e.g., Kay, *supra* note 12, at 289 (claiming contemporary majority opinions are not reflected in the original intentions of drafters).


\(^{37}\) Kay, *supra* note 12, at 231–32.


role of original intentions or expectations and original public meanings in poetry depends on the nature and purposes of poetry rather than on some universal standard for determining what should be called “interpretation” in all human endeavors.\(^{40}\)

Rule of law values favor interpreting constitutional provisions at day one consistently with their original intentions/expectations. The rule of law is desirable, commentators point out, because stable law enables people to plan. Frederick Schauer explains,

> Arguments for rule-based decision-making have traditionally focused on the ability of rules to foster the interrelated virtues of reliance, predictability, and certainty. According to such arguments, decision-makers who follow rules even when other results appear preferable enable those affected to predict in advance what the decisions are likely to be. Consequently, those affected by the decisions of others can plan their activities more successfully under a regime of rules than under more particularistic decision-making.\(^{41}\)

Ratifiers plan on the basis of their conscious intentions and expectations. Fredonian voters anticipate that impeached officeholders will not preside over the Senate trial that determines whether to convict an impeached officer. Fredonian slaveholders commit to union on the assumption that Congress will not immediately ban the international slave trade or prohibit slavery altogether. States make fiscal plans confident they cannot be sued for monetary damages.

Ratifiers do not plan on the basis of original public meanings when those meanings diverge from their conscious public intentions or expectations. No one can be wrong about or unaware of their conscious intentions or expectations, but people can be mistaken or unaware of the original public meaning of a constitutional provision. Fredonians may not have read the Constitution with sufficient care to realize that Article I mandates that the Vice President presides when the Senate determines whether to impeach a convicted Vice President. Fredonian slaveholders may simply have taken members of the ratifying convention at their word when they declared “the Constitution gives the national government

\(^{40}\) These constitutional practitioners are unlikely to accept interpretation by the discernment of original public meaning and debate whether original public meaning should constrain constitutional decision-making. There is a strong sense that the persons responsible for implementing a constitution should interpret that constitution. Calling a process “interpretation,” in this sense, is a powerful argument for legitimacy. For this reason, rather than decide what constitutes interpretation first, we should consider how the constitution should be implemented and describe our best conclusion or all plausible conclusions “interpretations.”

\(^{41}\) Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 137–38 (1991).
no power to emancipate slaves.” When ratifiers are aware of a divergence between their original intentions/expectations and the original public meaning of a constitutional provision, they will plan on the basis of their original expectations. Fredonian state officials who believe assurances that, despite what appears to be the plain meaning of Article III, states will enjoy immunity from private suits for monetary damages will budget consistently with the anticipated immunity.

Original intentions/expectations capture what citizens debate when constitutions are framed and ratified, at least in the United States. Consider several of The Federalist’s greatest hits.

- “Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and act in unison with each other.”

- “A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States.”

- “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”

- “[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . .”

These claims are all predictions about what would happen should the Constitution be ratified. Nowhere in the Federalist Papers do Hamilton, Madison, or Jay explore the original public meaning of the commerce clause or any other provision that has been the subject of interpretive controversy for the past two centuries. Hamilton asked, “What is the liberty of the press? Who can give it any definition which would not leave

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42 See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 286 (Jonathan Elliot ed., 2d ed. 1974) (quoting Charles Cotesworth Pinckney: “We have a security that the general government can never emancipate them, for no such authority is granted”).


the utmost latitude for evasion?" Many Federalists described constitutional restrictions on government, standing alone, as “parchment barriers.” Anti-Federalists leaned as heavily on expectations rather than on analyses of original public meaning. When Brutus declared, “[t]he judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states,” he was making a prediction based largely on his belief that federal judges “will be interested in using this latitude of interpretation.”

The debate over the Equal Rights Amendment illustrates how Americans consider expectations rather than public meanings when deciding whether to ratify short constitutional amendments. Jane Mansfield details how the proponents and opponents of the ERA considered whether that amendment would compel single-sex bathrooms, abortion, and women in the military. Few discussions outside the law reviews analyzed the public meaning of the phrase: “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”

More often, debaters made predictions about how various governing institutions would interpret those words. In particular, Mansbridge notes how much of the debate centered on how the Supreme Court would likely implement the ERA. She initially favored influencing future Supreme Court decisions by “creating a legislative history that made clear Congress’s assumption that the ERA would not require the military to assign women draftees to combat on the same basis as men.”

Conservatives, Mansbridge notes, “feared that the Supreme Court would use the ERA in a multitude of unforeseeable ways, just as it has used the Fourteenth Amendment in ways no one foresaw when that amendment was being debated in the 1860s.”

Original intentions/expectations better capture how constitutions tend to be ratified as wholes, at least in the United States. Jack Rakove points out that Americans in 1787–89 voted on the entire Constitution, not on

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51 Id. at 421.
52 See Jane J. Mansbridge, Why We Lost the ERA 61–63, 84–89, 90–91, 112–13 (1986) (discussing the concerns of proponents and opponents of the ERA regarding its interpretation).
53 Id. at 61.
54 Id. at 60.
55 Id. at 52, 60, 89.
56 Id. at 89.
57 Id. at 53.
particular provisions.\textsuperscript{58} Article VII was designed to require “the state conventions to approve or reject the Constitution as a whole—not to ratify it in parts.”\textsuperscript{59} Federalists insisted the “imbecility”\textsuperscript{60} of continued governance under the Articles of Confederation made ratification imperative.\textsuperscript{61} They pointed to all the luminaries who helped frame the text.\textsuperscript{62} Neither ratification strategy was conducive to considered reflection on the public meaning of constitutional provisions. Debate, even in state conventions that considered the Constitution provision by provision, centered on how the different parts of the Constitution would interact to produce a regime. Federalists and Anti-Federalists were far more concerned with expectations as to who would implement the Constitution than with the correct interpretation of constitutional language.\textsuperscript{63} Americans debated whether the Constitution would establish an aristocracy or promote rule by the virtuous.\textsuperscript{64} Slaveholders worried about southern control over national institutions.\textsuperscript{65} Alexander Hamilton spoke for all these constituencies in \textit{Federalist} 31 when he declared, “all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”\textsuperscript{66}

The American experience with ratification provides strong foundations for interpreting the Constitution on day one, consistently with original intentions/expectations when original intentions/expectations diverge from original public meanings. Americans, when debating the Constitution and subsequent constitutional amendments, spend more energy debating predictions about how constitutional provisions will be interpreted than on the correct interpretation of those provisions. They follow Hamilton and worry more about the institutions that implement constitutional provisions than the proper interpretation of the text. Many persons responsible for constitutions and constitutional amendments make decisions on the basis of who supports ratification and what they have been told are the consequences of ratification, rather than on a close reading of the text. To

\textsuperscript{58} \textsc{Jack N. Rakove}, \textit{Original Meanings: Politics and Ideas in the Making of the Constitution} 106 (1996).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{The Federalist} No. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\textsuperscript{61} \textsc{Rakove, supra} note 58, at 188–89.
\textsuperscript{62} \textit{Id.} at 135–37.
\textsuperscript{63} For the general contours of the debate, see \textit{Id.} at 131–60; \textsc{Michael J. Klarmann}, \textit{The Framers’ Coup: The Making of the United States Constitution} 397–545 (2016).
\textsuperscript{65} \textit{See Graber, Dred Scott, supra} note 8, at 101–06 (discussing Southern interests in protecting slavery through the political process, “proponents of slavery were nationalists whenever they thought uniform federal legislation more likely than diverse state laws to serve Southern interests”).
\textsuperscript{66} \textit{The Federalist} No. 31, at 196 (Alexander Hamilton).
move back to Fredonia, the following considerations suggest that if Fredonians ratified a constitution in part because they expected the Vice President would not preside when the Senate was considering impeaching a convicted Vice President, Congress would not immediately ban the international slave trade; states would be immune from private lawsuits for monetary damages; and the Supreme Court would not require women to be sent into combat. This would suggest popular sovereignty and common sense both favor interpreting the constitution consistently with what people thought they were doing when they ratified the text than with what linguistic theory informs the people of Fredonia the words of the Constitution of Fredonia actually mean.

II. ORIGINAL INTENTIONS/EXPECTATIONS AND ORIGINAL PUBLIC MEANING AT DAY TEN

Original intentions/expectations and original public meaning both over time become less attractive means for interpreting and implementing constitutions. As the temporal distance from ratification increases, alternative methods of constitutional interpretation become plausible. These alternatives better focus constitutional decision makers on appropriate questions for determining whether to execute murderers or allow Congress to pass a national health plan than either original intentions/expectations or original public meanings. Doctrinalism better guarantees the rule of law than any method of originalism. Various forms of purposivism better enable constitutional decision makers to respond to unanticipated constitutional developments. Original intentions/expectations has the virtue of asking an important question: is the constitution functioning as intended/expected? But it cannot provide answers to that question or questions about how the constitution should be implemented when important constitutional institutions and practices are not functioning as intended/expected.

Americans, Fredonians, and other members of constitutional regimes gain additional interpretive opinions over time. Constitutional decision makers create precedents. These precedents sometimes fill gaps in original intentions/expectations/public meanings. Other precedents are inconsistent with original intentions/expectations/public meanings. These developments make doctrinalism possible at day ten. As gap-filling and inconsistent precedents accrue, constitutional decision makers must decide to remain originalists, committed to original intentions/expectations/public meanings, or become doctrinalists, committed to abiding by longstanding practice. Concepts and conceptions diverge. Citizens who at the time of ratification agreed that capital punishment was not cruel and unusual punishment may now conclude that capital punishment is cruel and unusual. Constitutional institutions do not function as expected. Citizens who anticipated that elected officials would be loyal to their home institution must decide how
to implement separation of powers principles when governing officials become more loyal to members of their party.\textsuperscript{67} These, and related unforeseen developments, make purposivism possible at day ten. As regimes change in ways unanticipated by the persons responsible for the constitution, constitutional decision makers must decide whether to remain originalists, committed to interpreting the constitution only in light of developments foreseen or accounted for by the persons who framed the constitution, or become purposivists, committed to finding ways to achieve original constitutional ends in light of unexpected constitutional developments.

Common sense dictates that at day ten who presides over the Senate trial of an impeached Vice President, congressional power to ban the interstate slave trade, and state immunity from private suits for monetary damages should not depend on what an historian finds in an old attic. What prominent historians believe to be the original intentions or expectations and original public meanings of constitutional provisions changes over time. Some changes reflect better history or better historical methods. Other changes, most notably changes in the historiography of the post-Civil War Amendments, reflect ideological changes that influence the conclusions historians reach on originalism and what counts as evidence of original intentions, expectations, or public meanings.\textsuperscript{68} Even if constitutional decision makers professing history do not simply pick their favorite historians when making constitutional decisions,\textsuperscript{69} the history of history suggests no ideologically neutral history exists that achieves originalism’s promise of stable meanings rooted in objective facts.\textsuperscript{70}

\textsuperscript{67} See Daryl J. Levinson & Richard H. Pildes, \textit{Separation of Parties, Not Powers}, 119 Harv. L. Rev. 2312, 2324–25 (2006) (“[I]n the broad run of cases . . . party is likely to be the single best predictor of political agreement and disagreement.”).

\textsuperscript{68} See Pamela Brandwein, \textit{Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth} 1 (1999) (describing how “[t]he competition to interpret Reconstruction history involves issues of race, rights, and national identity”); Randall Kennedy, \textit{Reconstruction and the Politics of Scholarship}, 98 Yale L.J. 521, 521 (1989) (arguing that what “cements” the linkage between the Reconstruction period to the present is the “belief that ‘original intent’ should play an important, if not decisive, role in determining how statutes and constitutional provisions are applied”). This process of historical reconstruction rooted in present concerns began almost immediately after ratification. Jonathan Gienapp, \textit{The Second Creation: Fixing the American Constitution in the Founding Era} 3 (2018).

\textsuperscript{69} See Mark A. Graber, \textit{Clarence Thomas and the Perils of Amateur History}, in Rehnquist Justice: Understanding the Court Dynamic 70, 70 (Earl M. Matz ed., 2003) (describing that Justice Thomas’s originalism does not exhibit “the virtues claimed for originalism in theory” and would “dishearten proponents of that historical approach to constitutional interpretation or the judicial function”).

\textsuperscript{70} See Peter Novick, \textit{That Noble Dream: The “Objectivity Question” and the American Historical Profession} 1 (1988) (arguing that “[h]istorical objectivity is not a single idea, but rather a sprawling collection of assumptions, attitudes, aspirations, and antipathies” (internal quotation marks omitted)).
Moreover, no one has suggested a good reason why Fredonians or anyone else at day ten should abandon longstanding practices simply because historians have uncovered manuscripts that seem to prove that longstanding doctrine, broadly thought to be rooted in original intentions, expectations, or public meaning is, in fact, inconsistent with what the framers intended or expected and the original public meaning of constitutional language.

Doctrinalism at day ten better captures the rule of law values underlying constitutionalism than any version of originalism. Persons who at day one are more likely to be aware and plan on original intentions or expectations than original public meanings over time are more likely to be aware of and plan on longstanding precedents than original intentions or expectations. Journalists are more likely to be aware of the actual malice rule announced by *New York Times Co. v. Sullivan*\(^{71}\) than what the framers thought about the constitutional status of libel law. Speakers who believe a divergence exists between longstanding precedent and original intentions or expectations are likely to plan on the Supreme Court continuing to follow longstanding precedent, either because the Justices are doctrinalists or because the Justices are not likely to be persuaded to abandon mistaken beliefs that longstanding precedent is consistent with the original constitutional understanding of libel law.\(^{72}\) Aspiring writers seeking to avoid paying monetary damages can discover the contemporary status of libel law by reading the United States Reports. No one can plan on the basis of George Washington’s presently unknown journal of the constitutional convention, buried deep in the walls of Mount Vernon, which, when discovered, will reveal the definitive account of the original public meaning, intention, or expectation of federal power to regulate false statements about public officials.

Some version of living constitutionalism and the Dworkian distinction between concepts and conceptions at day ten better captures the framing concern for a functional constitution than any version of originalism. Constitutions at day one are more likely to secure their animating purposes by being implemented consistently with their original intentions or expectations rather than being implemented consistently with their original public meaning over time because they are being implemented in the ways that best achieve those purposes in light of unforeseen developments, instead of being implemented in ways framers who did not anticipate those

\(^{71}\) 376 U.S. 254, 279–80 (1964) (declaring that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

\(^{72}\) No justice even responded when Justice Thomas called on the Supreme Court to rethink *Sullivan* in light of the original understanding of free speech. McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari).
developments thought best. Constitutions are means for coordinating political activity, maintaining stable rule, fostering deliberative government, promoting national aspirations, and establishing the compromises that enable people with different values to share the same civic space.\textsuperscript{73} Ratifiers believe that a constitution implemented consistently with their original intentions or expectations will achieve those constitutional purposes only in light of shared assumptions about future developments. The constitutional compromises over slavery were rooted in widespread beliefs that slaveholders would always control at least one branch of the national government.\textsuperscript{74} The Civil War Amendments were rooted in expectations that a united antislavery Republican Party would control the national government for the foreseeable future.\textsuperscript{75} The problem at day ten is that time dashes many framing expectations. Westward expansion fueled an unanticipated and dramatic increase in free state population.\textsuperscript{76} The Republican Party became less powerful and less committed to racial equality after Americans ratified the Fourteenth Amendment.\textsuperscript{77} In these circumstances, framing purposes could no longer be achieved by the means the framers thought would achieve those ends; a united south after 1860 lacked the power to veto anti-slavery legislation.\textsuperscript{78} The Republican Party after 1876 no longer had the popular support or inclination to pass legislation protecting persons of color.\textsuperscript{79} If, as original intentions/expectations maintain, framing purposes at day one should take priority when implementing the constitution, then constitutional decision makers should abandon original intentions/expectations at day ten when those intentions/expectations under changed circumstances are more likely to frustrate than achieve constitutional purposes.

Consider a topical example of an instance when original constitutional means may subvert original constitutional purposes. Many framers may have preferred a narrowly defined impeachment clause because they feared legislators might invoke impeachment to bend a weaker executive to their will.\textsuperscript{80} The more vital constitutional problem at present is that Presidents

\textsuperscript{73} GRABER, A NEW INTRODUCTION, supra note 17, at 40.
\textsuperscript{74} GRABER, DRED SCOTT, supra note 8, at 92–93.
\textsuperscript{75} See Mark A. Graber, Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory, 62 ST. LOUIS U. L.J. 639, 646 (2018).
\textsuperscript{76} See GRABER, DRED SCOTT, supra note 8, at 126–28.
\textsuperscript{77} STANLEY P. HIRSHSON, FAREWELL TO THE BLOODY SHIRT: NORTHERN REPUBLICANS & THE SOUTHERN NEGRO, 1877–93 (1962).
\textsuperscript{79} Id. at 104.
acting as near constitutional dictators may be enfeebling legislatures.\textsuperscript{81} Interpreting the impeachment clause with a bias against legislative power will likely have perverse effects in a regime in which the executive is far more powerful and Congress far weaker than the framers anticipated. Plain constitutional language may not be interpreted away. Nevertheless, given the historic flexibility of the phrase “high crimes and misdemeanors,”\textsuperscript{82} the better view may be to give Congress more leeway than the framers might have to determine when and whether a President is unfit for office.

A constitutional focus on original intentions or expectations is nevertheless vital for thinking about maintaining constitutional regimes. Constitutional regimes consist of a set of values, a set of institutions designed to achieve those purposes, and a people who are presumed to share those values and know how to operate those institutions.\textsuperscript{83} The most fundamental question for implementing a constitution over time is whether constitutional institutions when functioning normally still achieve constitutional values, whether the people still share those values and whether the people can operate the constitutional machinery in ways that achieve those values. Original intentions/expectations is the starting point for such analysis even if that alpha is not the alpha and omega.

CONCLUSION

Implementing a constitution at day ten requires a robust account of original intentions or expectations that incorporates the complex “web of beliefs”\textsuperscript{84} that explain why different Americans supported ratifying the Constitution. Some beliefs were about particular results. The framers expected that the Vice President would not preside over the trial of an impeached Vice President and that slave trade would not be banned at day one. Other beliefs concerned very general values. The framers were “dedicated to the proposition that all men are created equal.”\textsuperscript{85} The persons responsible for the Constitution had other beliefs at varying levels of generality. They believed free speech was an element of republican

\textsuperscript{81} The classic works in this tradition are ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

\textsuperscript{82} See MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 19 (2018) ("[A] recurrent point made during the ratification conventions and early years of the Republic was that the meaning of ‘other high crimes and misdemeanors’ had to be worked out over time.").


\textsuperscript{84} W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (2d ed. 1978).

government and that states enjoyed some measure of sovereignty. As important, Americans in 1787 had beliefs about the nature of politics and future developments that help explain why they thought the institutions they had designed would have achieved the expected results. They expected that national politics would be less partisan than local politics. They expected population shifts would maintain the balance of power between free and slave states. To add further complication, no two ratifiers based their support of the Constitution on identical belief systems. Some belief systems that supported ratification were very different from other belief systems that supported ratification. South Carolinians ratified a constitution that they anticipated would be far more pro-slavery than the constitution ratified in New Hampshire.

Persons implementing a constitution cannot maintain this web of beliefs, intentions, expectations, and public meanings in pristine form. Living originalists and others point out that over time constitutional decision makers regard as incoherent what appeared to the framers to be a fairly consistent belief system. As important, constitutional decision makers over time realize that the empirical foundations of the Constitution have crumbled. National politics is as partisan as local politics. Population is moving northwestward instead of the anticipated southwestern direction. The Constitution in these circumstances cannot be operated in pristine form. Severe constitutional failures are likely to occur should constitutional decision makers attempt to operate in pristine form a constitution designed on the assumption that national politics would be less partisan than local politics when national politics is more partisan than local politics. The Civil War resulted when Americans could not adjust original constitutional practices in light of unexpected demographic changes to meet the more vital goal of maintaining national unity.

The constitutional status of George Washington highlights the relevance and irrelevance of original intentions, or expectations, for

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87 Graber, Dred Scott, supra note 8, at 92.
89 See Jack M. Balkin, Living Originalism 142 (2011); Lawrence Lessig, Fidelity and Constraint: How the Supreme Court Has Read the American Constitution 47–48 (2019) (analyzing the evolution of constitutional interpretation under originalism).
90 Graber, Dred Scott, supra note 8, at 153–71.
constitutional decision making at day ten. The framers expected George Washington to be the first President. Members of the constitutional convention allocated presidential power in part on the assumption that Washington would be elected. Charles Thach observed, “that the first President was to be Washington had an undoubted effect. When men spoke of the great national representative, of the guardian of the people, they were thinking in terms of the Father of His Country.”

Pierce Butler, a delegate to the framing convention, maintained that executive powers “would not have been so great had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Powers to be given a President, by their opinions of his Virtue.” No one thinks that these expectations gave Washington a constitutional right to be elected. Nevertheless, granting future Presidents, most notably Donald Trump, the powers the framers expected to be wielded by someone with Washington’s character and abilities may subvert rather than sustain the constitutional order.

Professor Kay has made a vital contribution to constitutional scholarship by his dogged efforts to keep original intentions alive. His work reminds us that constitutions are political texts that constitutional decision makers should interpret and implement consistently with their animating political ends. Original intentions/expectations at day one avoids making linguistic theory the arbiter of important constitutional questions. Professor Kay correctly insists we keep constitutional attention on what people were doing when they ratified the Constitution and what they expected to be the fruits of their labor rather than on public meanings that many framers may not have considered. Original intentions/expectations at day ten highlights the many contemporary constitutional debates that are consequences of constitutional failures to perform as expected. The challenge constitutional decision makers face in the twenty-first century is finding the interpretive strategies that enable the Constitution to be implemented in ways that best serve the animating purposes of that text and subsequent amendments. This Essay joins Professor Kay’s distinguished efforts to put politics back into constitutional interpretation at day one, even as he would disagree strongly with my account of constitutional politics at day ten.