WHAT IS ORIGINAL PUBLIC MEANING?

John O. McGinnis & Michael B. Rappaport

WHAT IS ORIGINAL PUBLIC MEANING?

John O. McGinnis & Michael B. Rappaport***

The concept of Original Public Meaning (OPM) unifies originalist scholars and judges around a single object of interpretation—the meaning of a text at enactment, whether of the Constitution or of a statute. But beneath that consensus lurks unsettling disagreement and confusion about what the public meaning is. Is the public meaning that which is understood by the ordinary public—the lay meaning—or by those more knowledgeable about the law—the legal meaning? The answer one gives affects the likelihood of finding accurate and determinate constitutional meaning. It can also make a great difference to the outcome of important cases, like the question of whether former President Donald Trump is disqualified from the presidency.

Unfortunately, many commentators embrace the lay meaning because they mistakenly believe that "public meaning" in OPM entails lay meaning. But the term "public meaning" did not originally signify the meaning understood by ordinary people. Instead, as we show in this first history of OPM, "public meaning" signified the meaning expressed by written text as opposed to the Framers' secret intent. That account of OPM distinguishes originalist textualism from originalist intentionalism and has nothing to do with distinguishing lay from legal meaning. Commentators are also misled by their view that Justice Scalia embraced lay meaning, but we show that he understood "public meaning" to connote only the expressed meaning.

While the lay-meaning view largely eliminates legal meanings from the Constitution, the expressed-meaning view is fully compatible with them. We show that Justice Scalia, in fact, explicitly embraced legal meaning as do leading advocates of OPM such as Dean John Manning and Professor Gary Lawson, and at least implicitly, so do those current Justices inclined to originalism.

The Article then addresses the question of whether the Constitution should be interpreted in accord with its lay meaning or its legal meaning. We argue that it should be interpreted based on its legal meaning, as the Constitution's extensive use of legal terms and its clear reliance on legal interpretive rules confirm that it was written in the language of the law. We reject Larry Solum's argument that the Constitution should be interpreted as understood by the lay public, who he claims was its audience. The nature of the document and the interpretive rules applied to it, not the audience to which it was addressed, provide the strongest evidence of the language in which it was written. Moreover, the Constitution had at least two audiences: the lay public, who elected representatives to ratify it, and the officials tasked with enforcing it. While the lay public needed only a general understanding to fulfill their role, the precision of legal language was necessary for officials to execute their duties effectively.

> "Sometimes context indicates that a technical meaning applies. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected. And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning." [1]
>
> Justice Antonin Scalia and Bryan Garner

---

* George C. Dix Professor in Constitutional Law, Northwestern University. Thanks to Dhruv Aggarwal, Peter Cates, Zach Clopton, Stephanie Didwania, Ari Glogower, Jamelia Morgan, Jide Nzelibe, and Jim Pfander for helpful comments.

** Hugh & Hazel Darling Foundation Professor of Law, University of San Diego.

1. ANTONIN SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (2012) [hereinafter SCALIA & GARNER, READING LAW].

INTRODUCTION

Original Public Meaning (OPM) provides the fundamental building block of originalism, and originalism is now a leading approach to constitutional and statutory interpretation—the latter through the theory known as textualism. Yet, confusion and debate exist about the nature of OPM. In fact, many judges and commentators may not even be aware of the serious disagreements. This Article identifies these differences of opinion and provides the clarification needed to rest originalism on a more secure foundation.

A central question about the nature of OPM for the Constitution is whether the Constitution's meaning is that which could be understood by members of the public—the lay meaning—or that which could by understood by those learned in the law—the legal meaning. This debate has large implications for constitutional theory because the legal meaning is often more precise.[2] This precision will often avoid the need to look outside the original meaning—a process known as construction—to resolve legal questions.

This debate also has implications for the outcomes of important cases. For example, the recent dispute over whether the original meaning of Section Three of the Fourteenth Amendment disqualifies former President Trump from becoming President again significantly turns on whether the provision is read in the language of the law or in lay language.[3] One question is whether the presidency constitutes an "officer of the United States."[4] While some have argued that the term has a technical legal meaning that excludes elected officers, such as the President, a lay-meaning reading of the term would render it either vague or as including the President.[5] Another question is who constitutes

2. PETER M. TIERSMA, LEGAL LANGUAGE 3 (1999) (noting the added precision of legal language).

3. The Supreme Court avoided these issues, deciding the case on other grounds. *See* Trump v. Anderson, 601 U.S. 100, 108–12 (2024). For the views of one of us on the decision, see Mike Rappaport, *The Originalist Disaster in* Trump v. Anderson, THE ORIGINALISM BLOG (Mar. 5, 2024, 8:00 AM), https://originalismblog.typepad.com/the-originalism-blog/2024/03/the-originalist-disaster-of-trump-v-andersonmike-rappaport.html [https://perma.cc/6975-G5XY].

4. *Anderson*, 601 U.S. at 107.

5. Two scholars have argued that if the "officer of the United States" in Section Three of the Fourteenth Amendment is understood in its lay meaning, it seems implausible that the President is not an "officer of the United States." *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 725–26 (2024). But considered as a technical legal term, it is not so clear the "officer of the United States" includes the President, particularly when comparing it to other similar references to "officers of the United States" in previous law. *See* Josh Blackman & Seth Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX REV. L. & POL. 350, 551–52 (2023) (arguing that the term should reflect its use in prior legal documents, including the Northwest Ordinance, and quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[O]bviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."). To be clear, we are not endorsing the Blackman-Tillman position. Even conceding that the legal meaning applies, Baude and Paulsen have counterarguments. We just mean to say that the lay/legal distinction is relevant.

"enemies" of the United States under the Clause.[6] While reading this term to have a lay meaning would render it vague, interpreting it to have a legal meaning arguably renders it clear.

It is important to emphasize at the outset that reading the Constitution in the language of the law does not mean that every term in the document always receives its legal meaning, even when that term also has a lay meaning. The language of the law contains all of ordinary English in addition to legal language.[7] Thus, it is entirely consistent with reading a document in the language of the law to interpret certain parts to have lay meanings. When a term has both a legal and lay meaning, the proper way to resolve the ambiguity is to look to context, structure, and purpose. Lay-meaning views of the Constitution, by contrast, either prohibit or greatly restrict interpreting terms to have legal meanings. The choice, then, is between an interpretation that allows both legal and lay terms or one that largely permits only lay language.

Unfortunately, the structure of this debate has been obscured by the problematic claim that the term "public meaning" in OPM refers to the meaning that an ordinary member of the public—a lay reader rather than a legally knowledgeable reader—would discern from the writing.[8] According to this understanding of public meaning, OPM by definition embraces lay over legal meaning.[9]

Thus, our initial question is not about how one should interpret the Constitution but instead about what the content of the interpretive approach known as OPM is. But this is a significant question because it is generally recognized that OPM is the leading originalist interpretive approach. Thus, what it requires is extremely important. Once we show that the meaning of OPM is agnostic between lay and public meaning, we then move onto the question of why the better view of interpreting the Constitution is according to the language of the law. Consequently, OPM can and should be the meaning under the language of the law.

To show the erroneousness of the claim that OPM is necessarily lay meaning, we, for the first time, present a history of the concept. We show that originally in the 1980s, the term "public" did not signify lay as against legal meaning.[10] Instead, it signified the expressed meaning as against the subjectively

6. Baude and Paulsen find "enemies" to be a "capacious term," as it is in lay language. *See* Baude & Paulsen, *supra* note 5, at 676. But Blackman and Tillman argue that it has a more precise and limited legal meaning reflected in Supreme Court case law from around the time of the Fourteenth Amendment's enactment and dating back to English law, limiting itself to enemies in foreign wars against the United States. *See* Blackman & Tillman, *supra* note 5, at 649–50.

7. *See generally* BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (3d ed. 2023) (noting that legal language refers not only to terms of art but to legal terms that have lay equivalents).

8. *See infra* notes 74–85 and accompanying text.

9. *See infra* notes 74–85 and accompanying text.

10. *See infra* Section I.A.

intended meaning.[11] The expressed meaning is the meaning conveyed by a text and the subjectively intended meaning is that intended by the authors of a text.[12] While the authors may have intended their words to have a certain meaning, the public meaning turns on what a reasonable and knowledgeable reader would have understood the words to have conveyed.[13] A secret intent does not change the expressed meaning.[14] The distinction between public meaning and subjective intent corresponds to the distinction between textualism and intentionalism.[15]

As time passed, some early adopters of OPM took the next step and argued in the late 1990s and early 2000s that the public meaning of the constitutional text was its legal meaning, showing the expressed-meaning understanding of OPM is fully compatible with legal meaning.[16] Only in 2008 did Larry Solum first use in an article the term OPM to mean the understanding of language by the lay public.[17] While Solum is certainly entitled to offer a different version of OPM, it is important that readers understand that his is not the only version and, in fact, is a later definition of its meaning.

Unfortunately, Solum's work has not indicated that the expressed-meaning version of OPM was long established before his own.[18] Perhaps as a result of his influential scholarship advocating for the lay meaning of the Constitution,[19] an increasing number of commentators, both originalists[20] and non-originalists alike,[21] now describe the OPM of the Constitution in terms of lay meaning,

---

11. *See infra* Section I.A.

12. *See infra* Section I.A.

13. *See infra* Section I.A.

14. *See infra* Section I.A.

15. *See infra* Section I.A.

16. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1390–91 (2019).

17. Lawrence B. Solum, *Semantic Originalism* 1 (Ill. Pub. L. Rsch., Working Paper No. 07-24, 2008) [hereinafter Solum, *Semantic Originalism*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

18. Solum does acknowledge the possibility of the expressed-meaning concept of public meaning very briefly, thanking one of us for pointing this out to him. Solum, *Public Meaning*, *supra* note 17, at 20 n.84, 20–21. But Solum does not say anything at all about the fact that this was the meaning used by the main commentators on public meaning. *Id.* Thus, the reader does not learn that the legal literature contains an alternative version of public meaning to the one for which he advocates.

19. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 951–52 (2009).

20. *See, e.g.*, Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 410 n.9 (2022); Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning, and the Ambiguities of Pregnancy* 4 (N. Ill. Univ. Coll. L. Legal Stud. Rsch., Working Paper No. 2024-31, 2023); Christina Mulligan, *Diverse Originalism, History & Tradition*, 99 NOTRE DAME L. REV. 1515, 1518 n.8 (2024); John M. Groen, *Takings, Original Meaning, and Applying Property Law Principles to Fix Penn Central*, 39 TOURO L. REV. (forthcoming 2024); Andrew Coan & David S. Schwartz, *Interpreting Ratification*, 1 J. AM. CONST. HIST. 449, 461–62 (2023).

21. *See, e.g.*, Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1170 (2023); Kevin Tobia et al., *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 431–32 (2023); Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB.

and there is a significant risk that the new meaning of OPM will be adopted without an understanding of the switch that has occurred.

One purpose of this Article is to call attention to this process of transmuting the meaning of OPM from the expressed-meaning concept to the lay concept. Our explanation will aid not only scholars but also judges, including Supreme Court Justices. As we show, the Justices themselves are not clear about what they mean by ordinary meaning or when they should apply the lay or legal meaning.[22]

Another source of confusion lies in a misreading of the jurisprudence of Justice Antonin Scalia, the most prominent early architect of OPM. Various scholars have viewed Scalia as an advocate of the lay-meaning version of public meaning.[23] But we show this claim is incorrect.[24] In his most elaborated writings, including his 1998 and 2012 books on interpretation,[25] Justice Scalia rejects the lay-meaning view, arguing in the latter book that constitutional and statutory language will often have a legal meaning.[26] While Justice Scalia's majority opinion in *District of Columbia v. Heller* has a paragraph that might appear to support the lay concept,[27] a single paragraph—even if one interprets it as supporting the lay concept—cannot overcome the other evidence pointing towards Justice Scalia's embrace of the legal-meaning view of statutory and constitutional language.[28] In addition to his books, Scalia also has various opinions that suggest the legal-meaning view, including portions of the *Heller* opinion itself.[29]

Understanding Justice Scalia's view in turn helps us make sense of the current originalist-leaning Justices who have not written nuanced treatises and sometimes are less than clear in their own opinions. We argue that the best reading of their opinions is that they have a presumption in favor of lay meaning but frequently overcome this presumption to use legal meanings

---

POL'Y 59, 83–84 (2023); James A. Macleod, *Surveys and Experiments in Statutory Interpretation*, CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURIS. (forthcoming) (manuscript at 1), https://papers.ssrn.com//SSRN-id4427847.pdf; Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 238 (2023).

22. *See infra* Section II.C.

23. *See, e.g.*, Benjamin Minhao Chen, *Textualism as Fair Notice?*, 97 WASH. L. REV. 339, 397 (2022) (noting that Justice Scalia prefers ordinary meaning); Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1424 n.26 (2017) (referring to Justice Scalia as a proponent of ordinary meaning). Others express puzzlement about his embrace of judicial canons of interpretation considering his assertion that ordinary meaning should be the touchstone of interpretation. *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation*, 84 MINN. L. REV. 199, 206 (1999).

24. *See infra* Part II.

25. SCALIA & GARNER, READING LAW, *supra* note 1; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998) [hereinafter SCALIA, A MATTER OF INTERPRETATION].

26. *See generally* SCALIA, A MATTER OF INTERPRETATION, *supra* note 25.

27. District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

28. *See infra* Part II.

29. *Id.* at 578–79. We discuss this issue at length. *See* Solum, *supra* note 19, at 940.

whenever the context suggests it is legal.[30] As the Bourgeois Gentilhomme spoke prose all his life without knowing it,[31] most Justices accept legal meaning without being explicit about it.[32]

Once one recognizes that there are two different versions of OPM, one can move on to the most important current dispute about how to interpret the OPM of the Constitution—whether it should be interpreted as lay readers would understand it or in accord with the sophistication provided by those with legal knowledge—without mistakenly concluding that the concept of OPM decides the matter.

Interpreting the Constitution in the language of the law is extremely important for originalism. The tremendous progress that recent originalist scholarship has made has been based, to a significant extent, on its uncovering of legal meanings.[33] An approach that reads the document as having only or primarily lay meanings fails to capture the rich and nuanced legal meanings that the legally sophisticated Framers placed in the Constitution. Moreover, without the added precision that legal meaning provides, modern originalism becomes more vulnerable to the charge that ambiguities or vagueness in constitutional provisions offer no more constraint than living constitutionalism.[34] The answer to whether the Constitution is written in lay or legal language is crucial for constitutional interpretation. For instance, if the term "unusual" in the Eighth Amendment prohibition on cruel and unusual punishment is interpreted according to an ordinary dictionary, its meaning is unclear.[35] But if the word is given its legal meaning at the time of its enactment, it captures the more precise common law concept "against long-settled practice."[36]

---

30. *See infra* notes 188–211 and accompanying text.

31. MOLIÈRE, LE BOURGEOIS GENTILHOMME (1670).

32. *See infra* Section II.C.

33. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192 (2016) (relying on common law to interpret "reasonable" in the Fourth Amendment); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677–78 (2012) (relying on common law to cash out the meaning of "due process" in the Fifth Amendment); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 460–70 (2010) (relying on antebellum court decisions to establish the meaning of "due process" in the Fourteenth Amendment); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–53 (2001) (looking to legal sources, including Blackstone and Vattel, to establish the meaning of "executive power"). It should be noted that some of these terms, like "reasonable" and "unusual," are terms extensively used in lay language, providing no notice by themselves that they are legal, and yet, scholars interpret them through the prism of the law. Other terms, like "due process" and "executive power," possess a lay and legal meaning and thus require context to determine whether to interpret them as lay or legal terms. This context includes the legal history of using these terms, and that is what these scholars have relied upon to give them a legal, rather than a lay, gloss. For the discussion of the problems that such terms pose for the lay concept of OPM, see Williams, *supra* note 33, at 445, 477–78.

34. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 732–34 (2011).

35. U.S. CONST. amend. VIII.

36. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) (using English common law to determine the meaning of "unusual").

Choosing the legal meaning also has implications for constitutional theory, including the important debate over interpretation versus construction. Many originalists believe that when the meaning of the Constitution runs out, interpretation is no longer possible.[37] In those circumstances, judges are in the "construction zone" rather than the "interpretation zone" of the Constitution and, therefore, must look outside the Constitution to implement it.[38] But due to the greater precision afforded by legal terms and methods, interpretation will bulk larger in constitutional law, and construction will have correspondingly less scope.

The choice between legal and lay meanings also has important implications for the new statistical approach to interpretation—corpus linguistics—which uses large data sets to determine the meanings of words and phrases.[39] The accuracy of this approach depends on what data sets are used.[40] A search for legal, as opposed to lay meaning, demands a different data set.[41]

In the second half of this Article, we argue against the lay-meaning concept of public meaning.[42] Our argument that the Constitution is written in the language of the law is based on the proposition that the way to determine the language in which the Constitution is written is to examine the document.[43] A careful review of the document shows that it contains at least 100 terms with legal meanings and possibly as many as 250 such terms.[44] A document written in lay language would not contain so many legal words. An examination of the document also shows that it assumes the application of many legal interpretive rules.[45] Various constitutional clauses are specifically written so that they invoke certain distinctive legal interpretive rules.[46]

Additionally, early jurists and legislators alike interpreted the document according to its legal meaning.[47] Together, this evidence makes a powerful case for concluding that the Constitution is written in the language of the law. This language-of-the-law reading of the Constitution is entirely consistent with the expressed-meaning concept of public meaning. Thus, readers of the

37. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

38. *Id.* at 471 ("Irreducible ambiguity, vagueness, contradictions, and gaps create constitutional questions that cannot be resolved simply by giving direct effect to the rule of constitutional law that directly corresponds to the communicative content of the constitutional text. Such cases are underdetermined by the meaning of the text . . . .").

39. James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical,* 126 YALE L.J. 21, 21, 24 (2016).

40. *See id.* at 23.

41. *See id.* at 25.

42. *See infra* Parts III & IV.

43. *See infra* Part III.

44. *See infra* note 230 and accompanying text.

45. *See infra* Part III.

46. *See infra* Part III.

47. *See infra* notes 248–72 and accompanying text.

Constitution who adhere to OPM properly interpret it as having legal meanings and properly use legal interpretive techniques to determine its meaning.

Finally, we consider the competing theory of Larry Solum.[48] Solum is one of the best originalist scholars, but on this issue, we continue to disagree with him. While Solum defines OPM as the meaning that the lay public gives to the Constitution, he does not merely rely on that definition but presents arguments for following the lay meaning. He argues that in determining the meaning of the Constitution, one must ask to whom the Constitution was addressed.[49] Concluding that the Constitution was addressed to the lay public,[50] he maintains that the Constitution must be read in lay language.[51]

We challenge each of the steps in this argument.[52] First, we argue that the meaning of the Constitution depends on the language in which it is written, which depends principally on examining the document.[53] Second, even if one thought the relevant criterion were the group to which the Constitution was addressed, Solum is mistaken that the Constitution was addressed solely to the lay public.[54] He wrongly assumes that a document must be addressed to one entity; instead, speech is often addressed to more than one group.[55] The Constitution was in fact addressed both to those with legal knowledge—judges, executive officials, and legislative officials who would implement it—and to the lay public.[56] In this situation, we argue that judges and government officials should follow the Constitution's legal meaning.[57]

Moreover, even if the document were addressed to a single entity, his arguments that the best choice is the ordinary public are not persuasive. The historical statements he relies on are largely either not close in time to the Framing or do not necessarily endorse the lay-meaning approach.[58] Instead, the statements from the Framing appear to support choosing the more common meaning, whether it be legal or lay, a position vastly different from Solum's.[59]

His argument that the Constitution's ratification by the people entails a lay-meaning view is also mistaken.[60] The Constitution mandated ratification by conventions representing the people, not by the direct endorsement of the

48. *See infra* Part IV.
49. Solum, *Public Meaning*, *supra* note 17, at 1969–71.
50. *Id.* at 1982.
51. *Id.* at 2028–29.
52. *See infra* Sections IV.A–IV.E.
53. *See infra* Section IV.A.
54. *See infra* Section IV.B.
55. *See infra* Section IV.B.
56. *See infra* Section IV.B.
57. *See infra* Section IV.B.
58. *See infra* Section IV.E.
59. *See infra* Section IV.E.
60. *See infra* Section IV.C.

people themselves.[61] One of the significant reasons for employing representation is that the representatives had knowledge that the public lacked.[62] Thus, the manner of ratification suggests that the public's knowledge was deemed insufficient.[63]

A signal problem for Solum's lay-meaning view is that he must explain the numerous technical words in the Constitution that are obviously incomprehensible to the lay public. He attempts to do this by arguing that the legal terms like "Letter of Marque and Reprisal"[64] indicate to the public that they are legal and, therefore, that they must consult a lawyer to understand their meaning.[65] But even if one assumes that telling people that they must consult a lawyer makes a technical term accessible to them, there are various problems with this argument. One problem is that people are not put on notice of a term with a legal meaning if the term, such as "recess,"[66] has both a lay and a legal meaning.[67] Consequently, Solum is led to argue that terms with both lay and legal meanings should only be given lay meanings.[68] But that approach risks distorting the meaning of the substantial number of constitutional terms that have both lay and legal meanings.

Solum's proposed solution also creates another significant problem. While Solum attempts to ground his position in the original meaning by quoting various historical figures, his actual position—refusing to read terms with both lay and legal meanings to have a legal meaning—appears to be historically unprecedented. Some jurists, like Justice Joseph Story, advocate a presumption in favor of lay meanings, but they do allow legal meanings where the context supports it.[69] No one to our knowledge has ever argued that terms with both lay and legal meanings should never be interpreted to have a legal meaning.

This Article contains four parts. Part I provides a history of OPM. It shows that the term "public" in OPM originally was meant to distinguish between the expressed meaning and the Framers' subjective intent. While OPM was not directly addressed in the debate between lay and legal meanings, important architects of OPM also embraced interpreting the Constitution to have legal meanings. Larry Solum's equating OPM with lay meaning was an innovation in the traditional meaning of OPM.

---

61. U.S. CONST. art. VII.

62. *See* Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 16 (1998) (explaining that representatives help citizens avoid the burden of becoming knowledgeable about issues).

63. *See id.*

64. U.S. CONST. art. I, § 10, cl. 1.

65. Solum, *Public Meaning*, *supra* note 17, at 2028.

66. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 3.

67. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1550 (2005).

68. Solum, *Public Meaning*, *supra* note 17, at 1957.

69. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 295 (Boston, Little, Brown, & Co. 1873).

Part II then shows in detail that Justice Scalia, sometimes claimed as an adherent of the lay concept of OPM, fully accepted constitutional interpretations that yielded legal meanings. Part II also briefly canvasses the current originalist-oriented Justices of the Supreme Court and argues that they are best read as accepting that the Constitution is written in the language of the law, even if they believe that that language incorporates a preference for lay meaning when context does not suggest otherwise.

Part III describes why the OPM of the Constitution is as a matter of fact its legal meaning, offering evidence from its language, from its explicit and implicit references to legal interpretive rules, and from early interpretations based on legal meanings. Part IV then critiques Solum's theory that the Constitution should be interpreted based on its lay meaning.

I. THE ORIGINS AND TRAJECTORY OF OPM

In this Part, we review the evolution of public meaning. We show that the term "public" in OPM did not originally mean the ordinary meaning in the sense of the meaning available to lay people—what we call the "lay concept" of public meaning. Instead, when that term (and its earlier versions) was introduced in the 1980s, it meant the expressed meaning of the text—what we call the "expressed-meaning concept" of public meaning—as opposed to the subjective or secret intent of a law's enactor. Even at this time there were hints that OPM was best understood as fully allowing legal meanings. By the late 1990s, and then even more clearly in the first decade of the 2000s, scholars increasingly indicated that the expressed-meaning concept of public meaning was fully consistent with understanding terms to have legal meanings.[70] For instance, Gary Lawson, who was the first to explicitly use the term OPM, clearly embraced the proposition that this meaning was derived legally.[71] Only in 2008 did Larry Solum try to shift the meaning of OPM to the lay concept.[72]

A. The 1980s and Early 1990s: Debate Over Intent Versus Text

The revival of originalism began with several originalist scholars relying upon the original intentions of the Framers and ratifiers as the basis of constitutional interpretation.[73] Attorney General Meese publicized this perspective in a famous speech calling for a jurisprudence of original

70. *See, e.g.*, Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

71. *Id.* at 874–77.

72. *See* Solum, *Semantic Originalism*, *supra* note 17.

73. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 5–6 (1971); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY 19 (2d ed. 1997).

intention.[74] But nonoriginalist scholars sharply criticized original-intention originalism. For instance, Paul Brest observed that different Framers may have had different intentions and that there was no principled way of summing their intent.[75] Jefferson Powell showed that the Framers themselves did not have an intentionalist approach to legal interpretation.[76] Shifting to OPM originalism from original-intention originalism became the principal response by originalists to the criticisms of original-intention originalism.[77]

In his 1986 remarks before the Attorney General's Conference on Economic Liberties, then-Judge Antonin Scalia began the transformation from an originalism of original intent to one that focused on "the most plausible meaning of the words . . . to the society that adopted it—regardless of what the Framers . . . intended."[78] While he did not use the term OPM, he did use original meaning as a way of capturing the "most plausible meaning of the [text]" and contrasting it with what the Framers intended.[79] Although others, beginning with Gary Lawson, added "public" to the term "original meaning" to make clearer the contrast between transparently public text and the possibly secret intent,[80] contemporary scholars identify Justice Scalia as a "founding member of the public meaning originalist school" and proffer this address as evidence of his central role in creating the modern concept of OPM originalism.[81]

It is hardly a surprise that in this speech Justice Scalia did not *focus* on the question of whether original meaning allowed legal meanings because that issue was orthogonal to the criticisms that had been levelled against originalism. Instead, Justice Scalia spent much of his speech making clear why the meaning society gave to the text was distinct from discerning the authors' intentions.[82] He quoted Madison's statement that in contrast to the text, "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and

74. Edwin Meese III, Att'y Gen., Speech Before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Paul G. Cassell ed., 1986) ("The text of the document and the *original intention of those who framed it* would be the judicial standard in giving effect to the Constitution." (emphasis added)).

75. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980); *see also* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981).

76. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

77. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999).

78. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 103 (U.S. Dep't of Just. ed., 1987).

79. *Id.* at 103–04.

80. Solum, *Semantic Originalism*, *supra* note 17, at 14.

81. Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1424–25, 1425 n.7 (2021).

82. Scalia, *supra* note 78, at 104–05.

incidental decisions of the Convention can have no authoritative character."[83] Moreover, Justice Scalia referenced how Madison and other Framers explicitly rejected the use of the *Journal of the Convention* to guide constitutional interpretation:

> If you had asked the participants at the Constitutional Convention whether their debates could be an authoritative source for construing the Constitution, there is no doubt that the answer would have been no. This is apparent not only from the fact that the use of legislative history was in those days anathema—as it remains today in England—but also from many extrinsic indications. The *Journal of the Convention*, for example (which was taken in fairly slipshod form and never reviewed by the whole body) was not immediately published, but was turned over to George Washington, subject to disposition by the future Congress under the new Constitution. It remained under seal in the Department of State until it was published by resolution of Congress (after editing by Secretary of State John Quincy Adams) in 1818.[84]

Note that Justice Scalia, even in this early speech, relied on a rule of legal interpretation from the Framing as part of his argument to establish that the meaning should not be gathered from intent. This reference suggests that Justice Scalia recognized early that the Constitution's meaning can be fully derived only by those knowledgeable about law—a view inconsistent with the lay concept of OPM.

Significantly, Justice Scalia asserted that the Framers' comments might have more weight in interpretation because the Framers were more knowledgeable about the Constitution:

> This does not mean, of course, that the expressions of the Framers are irrelevant. To the contrary, they are strong indications of what the most knowledgeable people of the time understood the words to mean. When the proponents of original intent invoke the Founding Fathers, I in fact understand them to invoke them *for that reason*. It is not that "the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it"; but rather that "the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this."[85]

Thus, the most probative evidence to Justice Scalia in determining meaning is not what the public or most of society thinks but what the most knowledgeable think. And part of being the most knowledgeable includes having legal knowledge.

---

83. *Id.* at 105 (quoting *Letter from James Madison to Thomas Ritchie (Sept. 15, 1821)*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/04-02-02-0321 [https://perma.cc/6BDD-4T2S]).

84. *Id.* at 104 (emphasis omitted).

85. *Id.* at 103.

The first academic to use the full term OPM was likely Gary Lawson in his 1992 article, *Proving the Law*.[86] It is clear from the context that he too equated the phrase to what he calls "originalist textualism"—a "method specif[ying] . . . the meaning of a particular text."[87] Lawson, like Justice Scalia, preferred a search for meaning from objective, publicly available sources rather than a search from private sources or intentions.[88] The overall purpose of Lawson's article is to establish what weight of evidence is necessary to establish meaning.[89] Once again inquiry into the lay or legal concept would have been orthogonal to his enterprise.[90]

But like Justice Scalia, Lawson hinted at the plausibility of OPM being the legal meaning. In an article written in the same year as *Proving the Law*, Professor Lawson with co-author Patricia Granger stated:

> For example, originalists will seek to identify those rights the violation of which the *general public* in 1789 would have thought "improper." Under originalist premises, this list can include rights the eighteenth-century public did not actually acknowledge but would have acknowledged *if all relevant arguments and information had been brought to its attention*—just as electronic surveillance can be a "search" within the original meaning of the Fourth Amendment if the eighteenth-century public, knowing what we know today about technology, would have fitted such surveillance within its concept of a search.[91]

Here, Lawson and Granger focused on an informed public with all relevant arguments—a stance which certainly comports with attributing knowledge to the interpreter of all relevant legal arguments.

---

86. Lawson, *supra* note 71, at 859.

87. *Id.* at 875. To be sure, Lawson also uses the phrase "ordinary [original] public meaning[]" one time in this article. *Id.* But he does not appear to use "ordinary" as the opposite of "legal," but in the sense of "usual" or "common." This conclusion is bolstered by the thesis of the article. It is concerned with proving the meaning, where the usual meaning is what is being sought by proof. *See generally id.* Moreover, as we note below, Lawson in subsequent writings believed the object of interpretation in the Constitution is its legal meaning.

88. *See id.* at 874–75.

89. *See generally id.*

90. This was the focus of major scholars who used the terms in subsequent years as well. *See, e.g.*, Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 510 (1996) ("Do we seek the original subjective intentions of the authors, or the original public meaning of the text?"); Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1858 (1997) ("Although [Lawson] concedes that one can imagine a sense of the word 'interpretation' in which the document is viewed as a poem or a private diary, '[t]he presumptive meaning of a recipe is its original public meaning.'" (second alteration in original)).

91. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 330 (1993) (emphasis added) (footnote omitted); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 n.1 (1994) [hereinafter Lawson, *Rise*] (also referencing "informed public").

B. The Late 1990s Movement Towards the Consistency of OPM with Legal Meaning

By the late 1990s, Justice Scalia—the first mover of OPM—suggested that the OPM was entirely consistent with legal meanings.[92] In his 1998 Tanner Lectures at Princeton University, in a passage advocating for the expressed meaning rather than the subjective intent of the Framers, Justice Scalia revealed that he did not understand the expressed meaning to be restricted to meanings that the lay public would gain from the language: "The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, *placed alongside the remainder of the corpus juris*."[93]

The *corpus juris* is defined as the comprehensive collection of the law of a nation.[94] Placing a provision in the entire context of the *corpus juris* is something only lawyers could effectively do,[95] strongly suggesting that Justice Scalia was rejecting the lay version of public meaning.

Professor Lawson made the point even more clearly in 1999:

> As is generally the case with constitutional terms, the original meaning of the [T]akings [C]lause must be sought through careful historical analysis of what a fully informed eighteenth-century audience would have believed rather than from economic logic or unreflective reliance on plain language; *the seemingly transparent meaning of the language may well conceal a deeper, more technical meaning*.[96]

Lawson maintains that the audience should be one that is fully informed and that a fully informed person would know about the technical meaning of terms.[97]

C. The 2000s: Discussion of the Meaning of OPM Before Solum

In the early 2000s, some scholars used language that one could possibly interpret as having endorsed in passing the lay concept of public meaning.[98] In 2002, for instance, Michael Paulsen, writing with Vasan Kesavan, described the "the language [the Constitution] would have had (both its words and its grammar) to an average, informed speaker and reader of that language at the time of its enactment into law."[99] But their stance is not clear because the term

---

92. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 25, at 17.

93. *Id.* (emphasis added).

94. *See* Thomas D. Russell, *Disrupting Frivolous Defenses*, 52 LOY. U. CHI. L.J. 907, 932 n.174 (2021).

95. After all, learning and working with the *corpus juris* is a lawyer's entire profession.

96. *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1086 (1999) (emphasis added) (footnote omitted).

97. *See id.*; *see also* Lawson, *Rise*, *supra* note 91, at 1231 n.1.

98. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002).

99. *Id.* at 398.

"average" may be attempting to rule out the idiosyncratic member of the community. The requirement that he be informed could include legal information, and the authors state that the readers must be conceived as "fully informed."[100] Moreover, these scholars did not specifically reject legal meaning and seemed focused on contrasting OPM with the possible secret meaning of intent.[101]

By the mid-2000s some other scholars rejected the lay concept of public meaning in favor of allowing legal meaning.[102] In 2005 John Manning, a former clerk to Justice Scalia and a leading proponent in the academy of textualism, suggested that the public meaning of a statute may be its legal meaning rather than its meaning to the lay public.[103] In commenting on an opinion written by Justice Scalia, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, he noted that:

---

100. *Id.* at 294. In 1994, Steven Calabresi and Sai Prakash said that the way to interpret language was with "a dictionary and a grammar book." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 556 (1994). It might be argued that these tools are readily available to the ordinary public and therefore the authors are rejecting the possibility that legal meaning could be original meaning. But this would be mistaken for at least three reasons. First, as with Justice Scalia's speech, this article is not expressly considering the question of lay versus legal meaning but instead is focused on the expressed-meaning versus subjective-intent issue. *See id.* at 545–46. Second, it is not clear that these tools are readily available to the lay public, because the term "dictionary" might include legal dictionaries. *See id.* at 578 n.141 (using Black's Law Dictionary as a source for evaluating the scope of executive authority). Third, at other times in this very article they use legal meaning to give context to the President's power, referring to Blackstone's legal theories, which of course could not be found in a dictionary. *See, e.g.*, *id.* at 605, 605 n.250, 607 n.261. Furthermore, both Calabresi and Prakash in other writings rely on legal sources to establish meaning. *See, e.g.*, *id.*; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1180 n.139 (1992) (relying on Blackstone's definition of "supreme" and "inferior" to understand the meaning of those terms in the Constitution); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (relying on English legal history, Blackstone, and earlier state constitutions to discern the meaning of "good behavior"); Prakash & Ramsey, *supra* note 33 (relying on English history and Blackstone to discern the meaning of executive power in foreign affairs); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003) (same); s*ee also* Barnett, *supra* note 77, at 621 (discussing use of dictionaries to find meanings for the terms of a contract rather than relying on intent).

101. Paulsen and Kesavan indicate their possible embrace of the lay concept in another article, but again the focus is on distinguishing public meaning from possibly secret intent. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118, 1201 (2003) ("If the project of constitutional interpretation is to determine the *original meaning* of the Constitution—which we define as the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted—and not to determine either the Framers' or Ratifiers' *subjective intention*, it is not at all clear that it is 'cheating,' or even ill-advised, to use the secret drafting history of the Constitution as another extratextual source of constitutional meaning."); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) ("'[O]riginal meaning' refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted. . . . By contrast, 'original intent' refers to the goals, objectives, or purposes of those who wrote or ratified the text. These intentions could have been publicly known—or hidden behind a veil of secrecy. They could and indeed were likely to be in conflict."). Again, Barnett's statement is made in the context of a contrast between public and secret meanings, not between the lay and legal concept of public meaning. Both concepts advance a view of the object of interpretation as public, not secret.

102. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005).

103. *Id.* at 438.

> [Justice Scalia's] opinion appears to capture the technical meaning quite admirably, but it also highlights the fact that when textualists impute to legislators the understanding of a reasonable member of the relevant linguistic community (here, lawyers or wildlife afficionados), they do not purport to describe what legislators actually knew when they voted for a bill. In the unlikely event that any meaningful proportion of legislators had any actual intent about what "take" means, I doubt that many in fact knew of nor assented to the specialized legal meaning reflected in the sources cited by Justice Scalia.[104]

In 2006, Gary Lawson, the academic who introduced OPM to originalist terminology, clearly endorsed reading the Constitution in the language of the law:

> A careful reading of the Constitution will, of course, be informed by insights from disciplines such as history, psychology, and linguistics. But the raw material is there for anyone to see. Understanding the thoughts of "We the People" is not a distinctively historical, psychological, or linguistic task. *It is an act of legal construction, based on a legal document, using legal language, in a legal context*. For lack of a better description, it is a legal enterprise.[105]

It is odd to claim that OPM connotes lay meaning when the person who coined the term believed it comprised legal meaning.

D. The Late 2000s: Solum's Embrace of the Lay Concept of OPM

In 2008 in an unpublished article, Larry Solum for the first time unambiguously employed the lay concept of OPM.[106] That date is two decades after the term had become part of the conversation about originalism, a decade after Justice Scalia suggested that determining OPM required the aid of the

---

104. *Id.* at 437–38 (emphasis omitted). To be sure, that article evaluates the meaning of the Constitution, not a statute. *See also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 82–83 (2006) ("Textualists also rely on off-the-rack canons of construction peculiar to the legal community, including some substantive (policy-oriented) canons that have come to be accepted as background assumptions by virtue of longstanding prescription. Such interpretive techniques inevitably require judges to go well beyond the four corners of the text to determine the often abstruse details of *technical meaning*." (emphasis added) (footnotes omitted)).

105. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 80 (2006) (emphasis added); *see also id.* at 51 ("The Constitution is a legal document. It should not be surprising that a legal document is best construed through legal means.").

106. *See* Solum, *Semantic Originalism*, *supra* note 17, at 2. In an online dialogue with Robert Bennett in 2006, Solum distinguished original-meaning originalism from original-intention originalism. *See* Colloquy, *A Dialogue on Originalism Occasioned by Bennett's Electoral College Reform Ain't Easy*, 101 NW. U. L. REV. 31, 33 (2006). In passing he wrote there: "[OPM is what an ordinary reader (putting aside some complexities about specialized audiences) would have understood the text to say, and not the intentions or purposes of the framers or ratifiers, that is authoritative." *Id.* We do not read that single sentence as a statement, let alone an explication, of Solum's theory that the word "public" in OPM is to be interpreted as requiring lay meaning except for obviously legal terms. It does not use the word "public" and may in fact be consistent with a view that some terms may have multiple audiences, a stance not unlike our own. It is also from an online dialogue rather than a formal article.

corpus juris, and two years after Gary Lawson argued that OPM was the lawyer's understanding of the meaning.[107]

And then in 2009, for the first time in a published article, Solum advanced the lay concept of the OPM:

> What about sentence or expression meaning? In the context of the Constitution, the equivalent idea is clause meaning—the meaning of the constitutional text is a function of the conventional semantic meaning of the words and phrases combined by the rules of syntax into clauses, which function as operative units of meaning in the constitutional context. . . . This question points us to ordinary and conventional meanings of the words and phrases of the Constitution. Rather than assigning these words and phrases special or idiosyncratic meanings based on the secret and divergent intentions of multiple authors, *an ordinary member of the public would have been required to look to common usage and public meanings*.[108]

Although Solum did not explicitly use the term OPM, it is evident from this passage and the article as a whole that he is referring to OPM.

In this article Solum also sought to address a potential obstacle to defining public meaning as the lay meaning. How can the lay meaning be applied when the Constitution uses technical or legal meanings? In an innovative move, Solum's argument introduced a novel view about the relation of technical "terms of art"—which we would classify as legal terms—to lay meaning.[109] Solum argued that the lay concept of OPM can accommodate constitutional clauses that lack "normal" and "ordinary" as opposed to "technical" meaning.[110] Solum proposed a possible "division of linguistic labor" in which a subgroup of language users—lawyers—may provide the meaning for terms of art[111]:

---

107. Solum first employed the term OPM in 2006. *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 163 (2006). But he does not use it to connote the meaning that a term would have in lay language. Instead, he mentions the term twice, first to neutrally claim that "original public meaning" is at the core of contemporary originalist scholarship. *Id.* Second, Solum uses OPM in refuting the misconception that "Formalism Excludes Consideration of Purpose." *Id.* at 172. Solum maintains that the purpose of a particular rule may assist in "discerning its original public meaning." *Id.* In neither instance does Solum define OPM. He also discusses OPM in Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 150 (2007) ("The meaning of the Constitution is best understood as the clause meaning of its provisions. . . . But in those cases in which the original public meaning of the Constitution has been swept away by a shift in the linguistic winds, the clause meaning is the 'sentence meaning' that would have been assigned at the time the Constitution was ratified and not the sentence meaning that we would assign based on contemporary linguistic practices."). But this article also does not equate ordinary and lay meaning.

108. Solum, *supra* note 19, at 951–52 (emphasis added).

109. *Id.* at 968.

110. *Id.* at 967.

111. Solum, *Semantic Originalism*, *supra* note 17, at 54–56. While Solum used this argument to address terms with unambiguous legal meanings, he did not attempt to explain how to accommodate legal meanings when a term had both a lay and legal meaning. His approach is to treat the terms as only having a lay meaning on the ground that the lay public would not know about the legal meaning. *See id.*

> There is, however, another option open to original public meaning originalism. Where a word or phrase lacks a "normal and ordinary" meaning, then the public meaning of the provision might be provided by a division of linguistic labor that assigns linguistic responsibility for "terms of art" to specialized subgroups of language users. . . . When a member of the public at large encounters a constitutional term of art her understanding of its meaning may involve a process of deferral. Consider the following example: an ordinary citizen reads the phrase "letters of marque and reprisal," and thinks, "Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer." Accordingly, ordinary citizens would recognize a division of linguistic labor and would defer understanding of the term of art to those who were members of the relevant group and those who shared the understandings of the members of the relevant group.[112]

While Solum's argument is original, its originality reinforces that it had departed from the prior understanding of OPM as referring to the expressed meaning of the text. Although Solum is certainly entitled to adopt a new and different understanding of an existing term, it would have been good practice, to avoid confusion, if he had indicated that he was using the term in a novel way.

Finally, we note that the term OPM would not be the natural way to convey the lay concept. Legal and lay meaning are both public in the important sense that they are not secret, and thus the phrase on its face does not favor the lay over legal concept. Instead, the public's original meaning would better capture ordinary as opposed to legal meaning than OPM. The ordinary public's original meaning or ordinary citizen's original meaning would capture that view even better.

II. JUSTICE SCALIA AND THE OTHER ORIGINALIST JUSTICES' VIEW OF THE OPM

A. Justice Scalia's Endorsement of Legal Meaning

It is worth discussing at greater length Justice Scalia's views on OPM because he is often wrongly identified as a proponent of the lay concept.[113] In this Section, we show that in his scholarly writings he strongly argued that the original meaning of the Constitution and statutes fully included legal meaning. He also took that approach clearly in some Supreme Court opinions. In *District*

112. Solum, *supra* note 19, at 968 (footnote omitted); *see also* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 413–14 (2009) (considering the ways in which the presence of "terms of art" in the Constitution can challenge the "starting assumption" that the OPM of particular provisions was "fixed at the time of origin by conventional semantic meaning of the words and phrases and by the conventions of syntax and grammar at the time that the provision in question was framed and ratified.").

113. *See* sources cited *supra* note 23.

of Columbia v. Heller,[114] his approach is less clear, but even a closer review of *Heller* shows that it is hard to take this opinion as unambiguously embracing the lay concept.

We have already noted that Justice Scalia was an originator of the concept, if not the label, of OPM as early as his 1986 speech to the Department of Justice.[115] Justice Scalia then reaffirmed his views in his widely read 1997 book, *A Matter of Interpretation*.[116] There, Justice Scalia made clear that he was not opposed to all notions of intent, only the subjective intent of the lawgiver.[117] He embraced a different type of intent that was consistent with the publicly expressed meaning of the text:

> The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. As Bishop's old treatise nicely put it, elaborating upon the usual formulation: "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended." And the reason we adopt this object[ive] version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of [the] law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.[118]

It makes sense that Justice Scalia's early writings focused on this point. At the time, the debate was between original intent and OPM.[119] Today, it seems clear that the OPM position has prevailed.[120]

By contrast, the question of whether the public meaning was the nonlegal meaning understood by the lay public or if it included a legal meaning known to people learned in the law was not a focus of debate at the time. Thus, it is no surprise that there are no extended statements about the issue during this period from Justice Scalia. Yet, even in the early years, it seems clear that Justice Scalia was not adopting a lay language reading of the Constitution. Even in the quote above, where Justice Scalia's focus is on expressed intent versus subjective intent, his statement indicates that he rejects an exclusive focus on nonlegal meaning. As noted above, Justice Scalia writes: "We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the

114. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

115. *See* Scalia, *supra* note 78, at 103.

116. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 25, at 3.

117. *Id.* at 17.

118. *Id.* (alteration in original) (emphasis omitted) (footnote omitted).

119. *See supra* Section I.A (describing the debate between original-intention originalism and OPM around the time of Scalia's early writings).

120. *See* Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749, 761 (2017).

text of the law, placed alongside the remainder of the *corpus juris*."[121] Obviously, the lay public will not be familiar with "the remainder of the *corpus juris*";[122] therefore, this objectified intent will not be fully open to their understanding.

While Justice Scalia's early work suggests an acceptance of legal meaning, his later work makes clear his full acceptance of such meaning in the interpretation of statutes and the Constitution.[123] In his 2012 treatise, written with Bryan Garner, Justice Scalia's principal aim is to defend a position of ordinary meaning in context.[124] While his reference to ordinary meaning might lead some readers to assume that Justice Scalia was rejecting legal meaning, nothing could be further from the truth. The term "ordinary meaning" is ambiguous. One understanding of ordinary meaning contrasts ordinary meaning with technical or legal meaning. Under this understanding of ordinary meaning, Justice Scalia's advocacy of ordinary meaning would involve rejecting technical or legal meaning.

But another understanding of ordinary meaning can contrast ordinary meaning with extraordinary or unusual meaning. That is, the ordinary meaning is the most frequent or a frequent usage of a term. Thus, Justice Scalia's advocacy of ordinary meaning is not inconsistent with his acceptance of technical or legal meaning if one uses the term ordinary meaning in the latter way.

Clearly, Justice Scalia is using the term "ordinary meaning" in the latter way as a contrast with unusual meaning. He writes that while "[m]ost common English words have a number of dictionary definitions, some of them . . . [are] rarely intended. One should assume the contextually appropriate ordinary meaning."[125] In other words, one should prefer the usual meaning rather than the unusual meaning.

Justice Scalia then makes clear that this interpretation of ordinary meaning is entirely consistent with legal meaning. He writes: "Sometimes context indicates that a technical meaning applies. . . . Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected . . . . And when the law is the subject*, ordinary legal meaning* is to be expected, which often differs from *common meaning*."[126] Justice Scalia here sees legal meaning as a form of technical meaning that applies when the context supplies it. And, "when the law is the subject"—which regularly occurs in documents about the law, such as the Constitution and statutes—"*ordinary legal meaning* is to be expected."[127]

---

121. SCALIA, A MATTER OF INTERPRETATION, *supra* note 25, at 17.

122. *Id.*

123. *See* SCALIA & GARNER, READING LAW, *supra* note 1.

124. "One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise." *Id.* at 70.

125. *Id.*

126. *Id.* at 73 (emphasis added).

127. *Id.* (emphasis added).

This language confirms that Justice Scalia is not using ordinary meaning as a contrast with legal meaning but is instead using it to mean a frequent meaning. Thus, a focus on ordinary meaning is entirely consistent with accepting legal meanings.[128] To clarify, Justice Scalia refers to "ordinary legal meaning," which means the legal meaning that is frequently used.[129] If ordinary meant nonlegal or lay, ordinary legal meaning would be an oxymoron.

The concept of ordinary legal meaning is important. It suggests that when the context implies a legal meaning, an interpreter should prefer the ordinary legal meaning—the usual legal meaning. While there may be "a number of" legal meanings, one should prefer the "contextually appropriate ordinary" legal meaning.[130] As will be discussed below, this accords entirely with our approach to interpretation.[131]

Justice Scalia dedicates a significant portion of his writing to clarify that he believes interpretation involves finding legal meaning from the language of statutes and the Constitution.[132] He believes that this occurs both in the case of unambiguously legal language and from language that has both an ordinary and a legal meaning.[133]

Justice Scalia makes his acceptance of legal meaning clear both in general statements about interpretation and through particular interpretations. An example of the former involves Justice Scalia approvingly quoting Justice Frankfurter's statement that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[134] Similarly, Justice Scalia endorses the canon of imputed common law meaning: "The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common law meanings . . . . If the context makes clear that a statute uses a common law term with a different meaning, the common law meaning is of course inapplicable."[135]

He also gives many examples of words that should receive a legal meaning rather than the ordinary meaning. He writes that the term "person" is presumed under the law to denote a corporation and other entity, not just a human being.[136] A criminal statute that prohibited enticing or permitting "any child under the age of seventeen . . . to . . . [p]erform any sexually immoral act" did not include, as a "child under the age of seventeen," a sixteen-year-old girl who "had already been emancipated and twice married" under the civil law

128. *See, e.g.*, *id.* at 77.

129. *See, e.g.*, *id.* at 73, 76–77.

130. *Id.* at 70.

131. *See infra* note 308 and accompanying text.

132. SCALIA & GARNER, READING LAW, *supra* note 1, at 73–76.

133. *Id.* at 73.

134. *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

135. *Id.* at 320–21.

136. *Id.* at 273.

applicable in Louisiana.[137] The term "consideration" in a statute did not have the ordinary meaning of "something to be taken account of" but instead the legal meaning of "value given in exchange for a benefit."[138] Justice Scalia argues that a mistaken release of a prisoner could have constituted an escape under the legal meaning of the term, which had traditionally defined an escape to include "a release authorized by a jail[o]r but without legal sanction," even though it did not constitute an escape under ordinary language.[139]

While many of these examples come from statutes, Justice Scalia had the same view of constitutional interpretation. He believed that the interpretive rules that applied to statutes also usually applied to the Constitution. In his treatise, he first included a large section on "Principles Applicable to All Texts," including the ordinary-meaning canon.[140] He then had a separate section titled "Principles Applicable Specifically to Governmental Prescriptions."[141] Justice Scalia wrote that "[m]ost of these rules apply as well to the interpretation of constitutions, which are assuredly authoritative governmental dispositions."[142] The example that Justice Scalia gives—that the constitutional doubt canon "can logically have no application in the constitutional context"[143]—suggests that he regards the statutory rules that do not apply to the Constitution as a very narrow exception, because the only example he gives is a rule that could not apply to the Constitution.

Justice Scalia's view that the ordinary meaning of the Constitution includes the legal meaning of a term when the context supports it is strongly supported by one of Justice Scalia's most important originalist opinions, *Crawford v. Washington*.[144] In this decision, Justice Scalia interpreted the Confrontation Clause of the Sixth Amendment to limit out-of-court testimonial statements, such as those made during interrogations by law-enforcement officers.[145] Such statements can only be admitted at trial if the witness is unavailable to testify and the defendant had a prior opportunity for cross examination.[146]

In reaching these conclusions, Justice Scalia relied upon the traditional common law right to cross examine witnesses.[147] *Crawford* cites numerous English and early American cases as well as historical incidents that informed

137. *Id.* at 73 (alteration in original) (quoting LA. STAT. ANN. § 14:92 (2023)).
138. *Id.* at 74.
139. *Id.* at 75.
140. *Id.* at 49.
141. *Id.* at 241.
142. *Id.* at 246.
143. *Id.*
144. *See* 541 U.S. 36 (2004).
145. *Id.* at 54.
146. *Id.*
147. *Id.*

the common law right.[148] Obviously, readers without legal knowledge could not interpret and understand the right as Justice Scalia articulated it. Nor would lay readers know that the common law historically afforded criminal defendants a specific right. Thus, Justice Scalia's *Crawford* opinion strongly embraces the legal meaning of a constitutional provision.

There are many other instances of Justice Scalia's reliance on the legal meaning in interpreting the Constitution. For instance, he used it in determining the scope of the Fourth Amendment: "In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."[149]

Justice Scalia also appealed to the English common law—a background that would not have been familiar to lay readers—in justifying his view of the scope of the findings that must be made by the jury under the Sixth Amendment: "This rule reflects two longstanding tenets of common law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'"[150]

He also deployed legal meaning in interpreting the structural provisions of the Constitution as well as the Bill of Rights, relying on the law before and surrounding the enactment of the Constitution. For instance, Justice Scalia accepted that Article III permitted certain public rights to be adjudicated by non-Article III judges because of the legal traditions in both England and in colonial America—traditions with which a lay reader would, again, not have been familiar.[151]

---

148. *Id.* ("[T]he 'right . . . to be confronted with the witnesses against him,' *is most naturally read as a reference to the right of confrontation at common law*, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." (emphasis added) (citations omitted)); *see also* Giles v. California, 554 U.S. 353 (2008) (making a similar point).

149. Virginia v. Moore, 553 U.S. 164, 168 (2008). Similarly, he appealed to the English common law to determine the scope of searches that were not reasonable under the Fourth Amendment, finding that the curtilage of a house was protected from search without a warrant. Florida v. Jardines, 569 U.S. 1, 6 (2013). For further discussion of these and other cases in which Justice Scalia uses English law to the fix the meaning of the American Constitution, see Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1952–57 (2017).

150. Blakely v. Washington, 542 U.S. 296, 301–02 (2004).

151. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67 (1989) ("[T]he English and American traditions established that [such adjudications] did not, without consent of Congress, give rise to a judicial 'controversy' within the meaning of Article III."). While Justice Scalia does not use the term "legal meaning" in Noel Canning v. NLRB, 573 U.S. 513, 580–83 (2014), he makes central use of what he calls the "formal," as opposed to the "colloquial," meaning of "recess" to defend his view that the recess where the President can

B. The Paragraph from Heller

These points about Justice Scalia's view of the appropriateness of interpreting constitutional provisions to have a legal meaning when the context suggests it are strongly supported by Justice Scalia's writing. Yet, these points are less well known because of a single paragraph in one of his most famous originalist opinions. In *District of Columbia v. Heller*, Justice Scalia wrote:

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." United States v. Sprague, 282 U.S. 716, 731 (1931); see also Gibbons v. Ogden, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[152]

In contrast to Justice Scalia's views discussed previously, Justice Scalia here appears to be voicing something like the nontechnical-meaning view. He says the Constitution was meant to be understood by the voters and should not get a technical meaning.[153]

While Justice Scalia seems to reject legal meaning here, it is not entirely clear that this is the best way to interpret this passage. In this Section, we offer an alternative interpretation that has some support in the citations Justice Scalia offers. We do not claim that this alternative interpretation is necessarily the best one, but we are confident that even if one interprets this passage to follow the nontechnical view, Justice Scalia's overall position is that the Constitution and statutes should be interpreted to have ordinary legal meanings when supported by context.

One reason to question that Justice Scalia is adopting a lay-meaning view is that it is inconsistent with his own position from both before and after *Heller*.[154] But if Justice Scalia believed that statutory and constitutional provisions should be given a legal meaning when supported by the context, then it is hard to understand how he could include such language in one of his most salient originalist decisions.

Second, and even more significantly, this interpretation of Justice Scalia's words appears to conflict with important parts of the remainder of the *Heller* opinion. In *Heller*, he relied upon legal meaning of ambiguous terms at several

---

make appointments without Senate confirmation under the Recess Appointment Clause includes only the period between sessions of Congress. That formal meaning relies on evidence of the meaning that was given in state constitutions immediately before the Constitution's enactment. *See* Rappaport, *supra* note 67, at 1552 (noting that this meaning of recess appeared in the Massachusetts and New Hampshire Constitutions prior to the U.S. Constitution).

152. District of Colombia v. Heller, 554 U.S. 570, 576–77 (2008) (alteration in original).

153. *Id.*

154. *See supra* Section II.A (arguing that Justice Scalia endorsed the legal-meaning view).

parts of the opinion.[155] For example, in *Heller*, Justice Scalia relied upon legal materials and an important eighteenth-century English case to support his claim that the prefatory clause of the Second Amendment does not limit the operative clause.[156] It is possible, even likely, that readers without legal knowledge would interpret the prefatory clause and the operative clause to accord with one another and, therefore, to have the prefatory clause limit the operative clause. It seems unlikely that Justice Scalia would contradict himself in the same opinion, but that is a very real possibility.

Justice Scalia also relied on other legal materials in *Heller*. He cited the meaning of the Declaration of Right, which was a British statute.[157] He also cited Blackstone's discussion of the "right of having and using arms," referring to Blackstone as "the preeminent authority on English law for the founding generation."[158] Justice Scalia also referred to the meaning of state constitutional provisions from before and shortly after the Constitution's enactment.[159] Further, Justice Scalia referred to a legal dictionary for the definition of arms[160] and to Cooley's Legal Treatise,[161] as well as to legal commentaries by Wiliam Rawle and John Norton Pomeroy, for limitations on the right.[162]

Given Justice Scalia's arguments in the *Heller* opinion and his positions in other writings, one might attempt to reinterpret his statements in *Heller* to avoid a significant contradiction if there is a reasonable way of doing so. How then might Justice Scalia's contrast between normal and ordinary meaning be distinguished from secret and technical meaning without interpreting the latter terms to reject legal meaning?

The starting point to this alternative interpretation is to dig a bit deeper into the two cases that Justice Scalia cites. Neither case involved a rejection of legal meanings per se. Instead, they involved the rejection of unexpressed intent that might have been justified on the basis of a far-fetched technical argument.

In *United States v. Sprague*, the Court rejected a challenge to the ratification of the Eighteenth Amendment.[163] The challengers argued that Congress's decision to have the Eighteenth Amendment ratified by the state legislatures (rather than state conventions) was unconstitutional.[164] Although the Constitution clearly states that Congress is entitled to choose between these methods, "as the one or the other Mode of Ratification may be proposed by

155. *See, e.g.*, *Heller*, 554 U.S. at 570.
156. *Id.* at 577–80.
157. *Id.* at 593.
158. *Id.* at 593–94 (citation omitted).
159. *Id.* at 585, 601–03.
160. *Id.* at 584.
161. *Id.* at 616–17.
162. *Id.* at 626.
163. United States v. Sprague, 282 U.S. 716 (1931).
164. *Id.*

the Congress,"[165] the challengers argued that because the Eighteenth Amendment cut back on individual rights rather than allocating government powers, it needed to be ratified by state conventions.[166] The challengers argued "that it was the intent of its framers, and the Constitution must, therefore, be taken impliedly to require, that proposed amendments conferring on the United States new direct powers over individuals shall be ratified in conventions."[167]

But the Court rejected this argument, writing that "[i]f the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than [t]o phrase [A]rticle [V] as to exclude implication or speculation."[168] Thus, *Sprague* did not turn on any rejection of legal meaning but instead on the impropriety of relying on an unexpressed intent when the language clearly contradicted that intent.

A similar result was reached concerning the page of *Gibbons v. Ogden* that Justice Scalia referenced.[169] At that page, Chief Justice Marshall rejected an argument that Congress's "powers ought to be construed strictly."[170] He wrote that there is not "one sentence in the [C]onstitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule" of strict construction.[171] Instead, Chief Justice Marshall argued that one should follow the "natural sense" of the words, which does not suggest a strict construction.[172] Thus, once again, the case relied upon by Justice Scalia did not involve the rejection of legal meaning.[173] In fact, at various points

---

165. U.S. CONST. art. V.

166. *Sprague*, 282 U.S. at 729.

167. *Id.*

168. *Id.* at 732.

169. District of Colombia v. Heller, 554 U.S. 570, 576 (2008) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824)).

170. *Gibbons*, 22 U.S. (9 Wheat.) at 188.

171. *Id.* at 187–88.

172. *See id.* at 188–97.

173. For example, Chief Justice Marshall wrote:

> It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the [C]onstitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

Id. at 191.

Similarly, in the paragraph that Justice Scalia cited, Chief Justice Marshall arguably invoked another legal interpretive rule. In discussing the extent of the power conferred on Congress, Chief Justice Marshall wrote:

> If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage,

in the opinion, Chief Justice Marshall appeared to invoke legal interpretive rules.[174] Instead, Chief Justice Marshall appeared to reject "unexpressed intent."

The issues resolved in the two cases that Justice Scalia cited suggest an alternative interpretation of his language. Given that both cases cited by Justice Scalia did not turn on the Court rejecting legal meaning but instead focused on unexpressed intent, how can we understand the Court's language? First consider "normal" and "ordinary." We have already seen that "normal" and "ordinary" do not have to mean the nonlegal meaning of a word.[175] In fact, Justice Scalia often used "normal" and "ordinary" to mean a frequently used meaning, including when he uses the term "ordinary legal meaning" to refer to a frequently used legal meaning.[176] Thus, we can understand this language as referring to usages that are frequently employed.

Now consider "secret" and "technical." It is clear what is meant by secret. In both cases, an unexpressed intent would be secret and not known. But what of technical? If it does not mean the legal or expert meaning, what does it mean? We can understand the term "technical" here as "according to a strict legal interpretation."[177] This seems to be a disparaging usage of the term, which involves a far-fetched, strict legal argument. Sometimes "technical" is employed to dismiss an action, such as with a "mere technical violation."[178] An example is when an officer "had no knowledge of the crimes, although he was in technical command of the men who committed them."[179] The examples from the cases Justice Scalia cited can be thought of as involving an unexpressed intent that was argued to be relevant based on intent or presumed intent; that intent was justified based on technical-sounding arguments that were far-fetched. Thus, one might understand "secret" and "technical" to be referring to an unexpressed intent based on far-fetched technical arguments grounded in unexpressed intent.

This interpretation not only fits the two cases that Justice Scalia cited but also *Heller* itself. It seems that Justice Scalia was concerned about an interpretation of *Heller* that would find an intent—an unexpressed intent, given his view of the role of the prefatory clause—to limit the meaning of the

---

> in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.

Id. at 188–89.

174. *Id.* at 188–89, 191.

175. *See supra* note 125 and accompanying text.

176. *See supra* notes 126–29 and accompanying text.

177. *Technical*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2348 (1986).

178. *See, e.g.*, Oak Plaza, LLC v. Buckingham, No. CV DKC 22-231, 2023 WL 2537661, at *6 (D. Md. Mar. 16, 2023) ("Rather, when a service error is a mere "technical violation" of Rule 4, service may still be valid . . . ." (citation omitted)).

179. TIME, *WAR CRIMES: Sober Afterglow* (Nov. 7, 1949, 12:00 AM), https://time.com/archive/6603417/war-crimes-sober-afterglow/ [https://perma.cc/8WU5-FRZB].

operative clause of the Second Amendment. He was arguing against this far-fetched technical reading.

In the end, we do not necessarily maintain this is what Justice Scalia meant. In isolation, the language seems like it suggests a rejection of legal meaning. But when it is considered in conjunction with the legal arguments in *Heller* and Justice Scalia's acceptance of legal meaning in his jurisprudence, this interpretation has the virtue of reconciling the language here with those other aspects.

But even if one concluded that this passage contradicted Justice Scalia's other writings, we are confident that it is the other writings that reflect Justice Scalia's actual view. Significant parts of a legal treatise are much more likely to reflect Justice Scalia's position than a single paragraph in a judicial opinion. In fact, given that Justice Scalia needed four other Justices to support his opinion to make a majority, it is entirely possible that this language was inserted based on the desires of another Justice. Thus, we conclude that Justice Scalia rejected the lay view and embraced legal meaning when the context supported it.

C. The Current Originalist-Oriented Justices' Implicit Endorsement of Legal Meaning

Unlike Justice Scalia, the current originalist-oriented Justices have not generally written scholarly works that explore the relation between the lay- and expressed-meaning versions of OPM.[180] Perhaps as a consequence, each of these Justices' comments on the subject are generally quick and offhand, and may not even be consistent.[181] While some opinions use language that some might view as supporting the lay view of OPM, this language, so interpreted, is inconsistent with other opinions of the originalist-oriented Justices that embrace legal sources of meaning.[182] Despite these possible inconsistencies and uncertainty, one might charitably interpret the general view of these Justices as accepting that constitutional language can be given legal meanings but employ a presumption in favor of lay meaning—one of the alternatives we have noted above.[183] That presumption can be overcome by context, including a context that would not be fully understandable to lay readers.[184]

It would be desirable if the Justices, at least the originalist-oriented ones, made clear the sense in which they were using the term "ordinary meaning" and developed a more clearly shared framework for the interplay between lay and

180. The main exception is Justice Amy Coney Barrett, who was a scholar of statutory interpretation before joining the bench. *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017).

181. *See generally* William Eskridge et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611 (2023).

182. Other commentators have questioned the consistency and coherence of Justices' opinions on the issue of ordinary meaning. *See id.* at 1637–39 (2023); Tobia et al., *supra* note 21, at 377–80.

183. *See supra* text accompanying note 30.

184. *See* Tobia et al., *supra* note 21, at 377–79.

legal meaning. This analysis can make a difference to judicial outcomes. This Article aims to facilitate such a consensus among Justices as well as scholars.

One problem is that the term "ordinary meaning" can mean either the usual meaning or the lay meaning of a term or phrase.[185] Clarity requires that judges make clear which use of the term that they intend. For that reason, we generally use the term "lay meaning" to refer to nonlegal meaning. In his scholarship, as we have discussed above, Justice Scalia used the term ordinary meaning, but understood it to mean usual meaning, as shown by his use of the term "ordinary legal meaning," signifying the meaning that is usual in a legal document.[186]

A second problem is that, even if we assume the Justices use "ordinary" meaning to signify lay meaning, they are unclear about the circumstances in which lay and legal meaning apply. Clarity is important because they do not consistently interpret text according only to the lay meaning of words and the context available to lay people. To be sure, sometimes the Court seems to suggest that lay meaning governs unless the law explicitly says otherwise. For instance, the Court has suggested that in the absence of a statutory definition, the ordinary meaning of a statutory term is to be followed.[187]

More typical, however, is the more cautious but vague formulation of a preference for ordinary meaning. For instance, Justice Neil Gorsuch has stated that "[t]he law's ordinary meaning at the time of enactment *usually* governs . . . ."[188] Justice Gorsuch's claim that the ordinary meaning *usually* governs suggests that the legal meaning sometimes governs. Therefore, he is best understood as claiming there is a presumption for lay meaning. This presumption does not prevent him from appealing to legal meaning when arguing that the term "extension" can include reviving a license that has already been terminated by appealing to a similar use of the term in civil procedure.[189] Unsurprisingly, Justice Amy Coney Barrett complained in that case that Justice Gorsuch was not following the ordinary meaning.[190]

The presumption in favor of ordinary meaning also does not prevent Justice Gorsuch from applying legal interpretive rules, such as the clear statement rule, in cases that present major questions in administrative law.[191] Understanding the operation of this rule, not to mention the context that triggers it, demands legal knowledge.[192] Moreover, Justice Gorsuch analogizes

185. *Compare, e.g.*, SCALIA & GARNER, READING LAW, *supra* note 1, *with* Solum, *supra* note 19, at 951–52.

186. SCALIA & GARNER, READING LAW, *supra* note 1, at 73.

187. Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 85 (2018).

188. Bostock v. Clayton County, 590 U.S. 644, 674 (2020) (emphasis added).

189. *See* HollyFrontier Cheyenne Refin. v. Renewable Fuels, 594 U.S. 382, 390–91 (2021).

190. *See id.* at 401–07.

191. *See* West Virginia v. EPA, 597 U.S. 697, 736 (2022).

192. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (wrestling with the complexity of interpretive rules—like clear statement rules—and the duty to be "faithful agents of Congress").

this clear statement rule to clear statement rules for sovereign immunity and retroactive liability[193]—rules that would also be unknown to lay people.

Justice Samuel Alito also makes abstract statements about ordinary meaning like those of Justice Gorsuch. He has stated, "Without strong evidence to the contrary . . . , our job is to ascertain and apply the 'ordinary meaning' of the statute."[194] Again, Justice Alito appears to be employing a presumption. Besides joining in Justice Gorsuch's concurrence on the major questions doctrine, Justice Alito has interpreted several other statutes against the background of the *corpus juris*,[195] even though a lay person would not know that background.

For instance, he has read a statute that could have been read under a lay interpretation to require an immigrant's immediate arrest to instead permit an arrest substantially after the immigrant was released from custody.[196] Justice Alito's preferred interpretation was based in part on the "legal backdrop" that "an official's crucial duties are better carried out late than never."[197] Another example involves Justice Alito's resolution of the word "induce" by reference to the *corpus juris*—the meaning of the word in case law interpreting similar statutes.[198]

Despite her objection to Justice Gorsuch's use of legal meaning in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, Justice Barrett also employs legal meaning.[199] For instance, she argued that the term "access" in a statute about access to a computer is a technical legal term.[200] She did so over a dissent by three Justices who argued for the lay meaning of access.[201] Perhaps not surprisingly for a former clerk of Justice Scalia, she defended her position by citing the pages from his treatise that we have quoted that defend the use of ordinary legal meaning.[202] Thus, Justice Barrett, too, should be understood as accepting the use of legal meanings.

Chief Justice John Roberts has also made statements adopting a presumption in favor of ordinary meaning.[203] He states, "When a statute does not define a term, we *typically* 'give the phrase its ordinary meaning.'"[204] Like the other Justices mentioned, he is merely employing a presumption and is willing

193. *West Virginia v. EPA*, 597 U.S. at 737.

194. *Bostock*, 590 U.S. at 714 (Alito, J. dissenting) (emphasis omitted).

195. *See, e.g.*, Nielsen v. Preap, 586 U.S. 392 (2019).

196. *See id.*

197. *Id.* at 411 (citing Sylvain v. Att'y Gen. of U.S., 714 F.3d 150, 158 (3rd Cir. 2013)).

198. *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 761–66 (2011) (resolving meaning of the word "induce" by analyzing case law interpreting the word in similar statutes); *see generally* John O. McGinnis, *The Contextual Textualism of Justice Alito*, 46 HARV. J.L. & PUB. POL'Y 671 (2022).

199. *See* Van Buren v. United States, 593 U.S. 374, 386–87 (2021).

200. *Id.*

201. *Id.* at 397 (Thomas, J., dissenting).

202. *Id.* at 388 (quoting SCALIA & GARNER, READING LAW, *supra* note 1, at 73).

203. *See, e.g.*, FCC v. AT&T Inc., 562 U.S. 397 (2011).

204. *Id.* at 403 (emphasis added) (quoting Johnson v. United States, 559 U.S. 133, 138 (2010)).

to apply legal interpretive rules, like constitutional avoidance, to depart from ordinary meaning.[205]

Justice Clarence Thomas also embraces a presumption in favor of ordinary meaning.[206] But like Justice Scalia, Justice Thomas recognizes that common law terms, even those that have a lay meaning, should be interpreted to comport with their technical, legal meaning.[207]

Justice Kavanaugh also has expressed support for legal meaning.[208] In interpreting the phrase "discriminate . . . because of sex" in *Bostock v. Clayton County*, Justice Kavanaugh relied on legal usage to determine the meaning of the phrase. Moreover, he distinguished "ordinary" meaning from "literal" meaning, not "ordinary" from "legal" meaning.[209] Thus, in that case, he followed Justice Scalia in understanding "ordinary" as the ordinary legal meaning of a term, something to be decided by considering the *corpus juris* not readily available to lay readers.

In sum, there appears to be a consensus among those Justices who style themselves originalists or have affinities for originalism that while there is a presumption for lay meaning, it can be overcome by context, including a context that demands legal knowledge and therefore that lay people would generally not recognize.[210] As discussed below, this approach is not unlike the position of Justice Joseph Story almost two centuries ago.[211]

While we believe this is the best interpretation of the Justices' statements, a great deal of confusion could be avoided if judges and commentators were more careful with their use of the term "ordinary meaning," which has more than one meaning. One meaning of ordinary meaning is the most frequent or common usage of a term—in contrast to the extraordinary or unusual meaning.

---

205. *See* NFIB v. Sebelius, 567 U.S. 519, 562 (2011) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." (Holmes, J., concurring) (alteration in original) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)); *see* Tobia et al., *supra* note 21, at 380 (making this point).

206. H. Brent McKnight, *The Emerging Contours of Justice Thomas' Textualism*, 12 REGENT U. L. REV. 365, 369 (1999/2000).

207. *See, e.g.*, Molzof v. United States, 502 U.S. 301, 306 (1992) (treating punitive damages as a common law term).

208. Bostock v. Clayton County, 590 U.S. 644, 790–91 (2020) (Kavanaugh, J., dissenting).

209. *Id.* at 788–89.

210. While most of our examples are from statutory interpretation, we are not aware of any opinions in which the Justices draw a distinction between statutes and the Constitution for this purpose. Moreover, some of the legal interpretive rules, like the clear statement rules, *see supra* notes 191–93 and accompanying text, are themselves derived from constitutional principles and would not be accessible to a lay person without legal knowledge of both the Constitution and its relation to statutes. And in some constitutional cases, the Justices accept legal meanings in the same manner recommended by Justice Scalia, like Chief Justice Roberts and Justice Kavanaugh did in Torres v. Madrid, 592 U.S. 306, 312 (2021) (interpreting seizure in light of common law). Justice Gorsuch, in dissent, joined by Justices Alito and Thomas, stated that the majority's interpretation of "seizure" violated "ordinary meaning" but was also inconsistent with the common law roots of the term "seizure." *Id.* at 325–26. Justice Gorsuch's objection to the use of common law by the majority appears based on its lack of thoughtfulness, not its relevance. *Id.* at 326–28.

211. *See infra* Section IV.E.2.

But another usage of ordinary meaning is the lay meaning of a term—in contrast to the technical legal meaning of a term. The first of these usages is consistent with interpreting terms to have legal meanings whereas the second is not. Judges and commentators should clearly indicate which meaning they are employing.

Second, even if justices do employ the term ordinary meaning to mean lay meaning, they should be clearer about the circumstances in which they nevertheless apply legal rather than lay meaning. In particular, if they employ, as it appears, only a presumption in favor of lay meaning, they should more clearly acknowledge that, depending on the context, interpreting terms according to their legal meaning is not out of bounds.

III. THE CONSTITUTION'S EVIDENCE FOR THE LANGUAGE-OF-THE-LAW VIEW

In this Part, we first clarify what is meant—and what is not meant—by saying that the Constitution is written in the language of the law. In particular, we clear up one possible confusion: it does not follow that because the Constitution is written in the language of the law that all of its provisions should receive a legal rather than a lay meaning. The language of the law is a more encompassing language than ordinary English, incorporating all of ordinary English plus the specialized meanings and rules that lawyers distinctively employ.[212] We then briefly summarize our argument that the Constitution is written in the language of the law, showing why the analysis of the document itself provides the most important support for determining its language.

The language of the law possesses two characteristics of language used by lawyers. First, the language of the law includes an extensive vocabulary of legal terms.[213] An example of the difference between reading a term in lay language and the language of the law is the term "unusual" in the Cruel and Unusual Punishments Clause.[214] In ordinary language, "unusual" is vague in scope.[215] How infrequent does something have to be to be unusual? Is the time to measure frequency just the present or does it include the past? But in legal language at the time of the Constitution's enactment, "unusual" meant practices that were against "immemorial usage."[216] Law is not unique in this respect: many subject-matter areas deploy technical terms, often for the similar objective of precision. Psychology, philosophy, and medicine, for instance, all employ

212. *See generally* GARNER, *supra* note 7 ("The term [legalism] refers not to unsimplifiable terms of art (like *habeas corpus*) but to legal jargon that has an everyday English equivalent.").

213. *See generally* BLACK'S LAW DICTIONARY (12th ed. 2024).

214. U.S. CONST. amend. VIII.

215. *See Unusual*, DICTIONARY.COM, https://www.dictionary.com/browse/unusual [https://perma.cc/RN5U-2SPS] (defining "unusual" as "not usual, common, or ordinary; uncommon in amount or degree; exceptional").

216. *See* Stinneford, *supra* note 36, at 1745.

technical languages that contain technical terms, some of which include terms that exist in ordinary language but are given a more precise technical meaning.[217]

Second, the language of the law employs distinctively legal interpretive rules that help with precision or, in some cases, reflect normative values themselves.[218] Some legal interpretive rules are more formal versions of those found in ordinary, lay language. An example is the rule against surplusage, which applies more strongly in formal legal documents.[219] Others appear unique to law and aid in interpreting particular kinds of provisions. An example is the rule of lenity, which applies only to criminal provisions.[220] A third category encompasses rules that indicate the object of interpretation. An example is a rule directing interpreters to inquire into the original public meaning or the original intent.[221]

But the language of the law does not employ only terms and interpretive rules unique to law. Like other technical languages, the language of the law is a supplement to ordinary language, using many entirely lay terms.[222] First, as a result, even in a pervasively legal document, many terms and provisions with meanings are wholly cashed out by lay language. Second, even the legal meaning is often not wholly different from the lay meaning but merely has more precise contours. Third, there are many terms that have both a lay meaning and a legal meaning.

When a term has both a lay and a legal meaning, the language of the law has resources to disambiguate such ambiguities. There is an interpretive rule—the technical/ordinary language rule—which determines whether language should be understood in its technical or ordinary sense.[223] There are three plausible formulations of this rule to determine whether an ambiguous term has a legal or a lay meaning. All depend, as do most resolutions of ambiguity, on the surrounding context, including such matters as adjacent words, the relevant structure, and the historical background. One rule is to consider this context with no presumption either in favor of the legal or lay meaning. The others are to have a presumption in favor of either the legal or the lay meaning. We do not take a final position on which is the correct rule. But all of these rules are themselves legal interpretive rules.

---

217. *See, e.g.*, *APA Dictionary of Psychology*, APA, https://dictionary.apa.org/ [https://perma.cc/7MSM-M5PM]; SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016); *Medical Dictionary of Health Terms: A-C*, HARV. HEALTH PUBL'G (Dec. 13, 2011), https://www.health.harvard.edu/a-through-c#A-terms [https://perma.cc/7FAP-QK9Q].

218. *See* SCALIA & GARNER, READING LAW, *supra* note 1, at 174–79.

219. *See id.*

220. *See, e.g.*, Jim Chen, *Law as a Species of Language Acquisition,* 73 WASH. U. L. Q. 1263, 1299 (1995).

221. McGinnis & Rappaport, *supra* note 16, at 1409–18 (showing that reference to substantive intent was not an interpretive rule at the time of the framing).

222. *See* Samantha Hargitt, Note, *What Could Be Gained in Translation: Legal Language and Lawyer-Linguists in a Globalized World*, 20 IND. J. GLOB. LEGAL STUD. 425, 427 (2013).

223. *See* SCALIA & GARNER, READING LAW, *supra* note 1, at 73 (discussing how context can disambiguate technical and ordinary meaning).

A. Determining the Language of the Constitution

The main way to determine the language in which a document is written is to examine its language. To see if a document is written in Middle English or Modern English, or in ordinary English or technical legal English, one would first read the document and see what words it used, what syntax it exhibited, and what interpretive rules it presupposed. To make a decision in a dispute about what language a document is written in, one must have knowledge of the two contending languages. Without knowing the language of the law, it would be difficult to determine whether the document was written in ordinary English or the language of the law.

It might be thought that many readers of the Constitution did not know the language of the law and therefore the document could not be written in that language. But the language a document is written in is a different question than whether the audience can understand it. Moreover, there are entirely legitimate reasons why an author might use a specialized language that not everyone in his audience can fully understand. That decision might be made if there is thought to be a need for the greater precision that a specialized language allows. And the decision to adopt the specialized language might be strengthened if those who do not fully understand it can get the gist of it, with questions of details to be provided by those who know the language.

That is the case with the Constitution. The drafters of the Constitution, who knew the language of law, had good reasons to write the document in that language. The language of the law is more precise, having evolved over hundreds of years of Anglo-American jurisprudence to reduce ambiguity and vagueness.[224] It is more concise, allowing more information to be conveyed in a shorter document, particularly because important concepts had a meaning that was honed through legal history.[225] Moreover, much of the time the document would be used by officials to regulate their conduct and officials could be expected to know the language of the law. Finally, those who drafted it recognized that it would be ratified in a deliberate, public process in state conventions, where lawyers would be available to explain its fine points to non-lawyers.[226]

224. *See* TIERSMA, *supra* note 2, at 3 (noting the added precision of legal language).

225. *See id.*

226. *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* 1 HOW DEMOCRATIC IS THE CONSTITUTION? 102, 104–05 (Robert A. Goldwin & William A. Schambra eds., 1980) (explaining that the institutional setting of representative government would promote collective knowledge and reasoning).

B. Evidence that the Constitution Is Written in the Language of the Law

We now turn to the determinative evidence as to what language the Constitution is written in—the document itself. The first key piece of evidence is the extensive usage of legal terms throughout the original Constitution. We have identified over 100 uses of terms with a legal meaning. Some, like "Bill of Attainder," possess an unambiguous legal meaning.[227] Others, like "recess," carry a legal meaning as well as an ordinary meaning.[228] But this catalogue may understate the number of legal terms. There are many terms, such as "natural born Citizen," "Office of honor," "Trust and Profit," and "Rules of Proceedings," that may, upon further investigation, turn out to have legal meanings.[229] If the terms with possible legal meanings are included, the count approaches 250 terms with a possible legal meaning.[230] Significantly, the Bill of Rights, enacted at virtually the same time as the original Constitution, also contains a high proportion of terms with legal meanings.

"Ex post facto" offers an excellent example of a term that has both a lay and legal meaning.[231] It has a lay meaning that covers retroactive laws that are either civil or criminal, whereas its legal meaning covers only retroactive criminal laws. In fact, at the Constitutional Convention, James Madison had assumed that it covered retroactive civil laws, but John Dickinson examined Blackstone and concluded that it covered only retroactive criminal laws.[232] The Supreme Court then, in *Calder v. Bull*, gave the term its legal meaning.[233]

The Constitution's provisions and structure also strongly indicate that the application of the legal interpretive rules was assumed when the Constitution was written. For example, the non obstante provision of the Supremacy Clause was drafted with common law interpretive rules in mind.[234] The relevant

---

227. John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of Law*, 59 WM. & MARY. L. REV. 1321, 1370 (2018) (quoting U.S. CONST. art. 1, § 9, cl. 37).

228. *Id.* at 1371 (quoting U.S. CONST. art. II, § 2, cl. 3).

229. *Id.* at 1374 (quoting U.S. CONST. art. II § 1, cl. 5; U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. I, § 5, cl. 2)).

230. *Id.* at 1375 (recounting 242 terms with a possible legal meaning).

231. U.S. CONST. art. I, § 9, cl. 3. Solum uses the appearance of the term "ex post facto" in the Constitution to support the proposition that words are used in their ordinary sense. He notes that at the Virginia ratifying convention, George Mason said that words should be understood in their ordinary rather than technical sense when he disputed that ex post facto should be confined to criminal law rather than also encompassing the civil law. But, as Solum himself recognizes, a single statement hardly establishes the language of the Constitution. Moreover, Mason was an opponent of ratification. Edmund Randolph, a proponent and distinguished lawyer, refuted Mason on this point immediately after Mason spoke. 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 463–71 (Washington, Jonathan Elliot 1828). Far from showing what Solum thinks, the weight of the evidence shows that at the Framing and in the Early Republic, the ratifiers gave "ex post facto" a legal meaning—one that would not have been apparent to "ordinary folk."

232. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448–49 (Max Farrand ed., 1911).

233. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798).

234. *See infra* notes 239–45 and accompanying text.

provision reads: "[A]nd the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*."[235] As Caleb Nelson has shown, the italicized language was inserted to prevent the application of a common law rule.[236] That rule disfavored repeals by implication, requiring a court to try to harmonize a new statute so that it did not contradict an older one.[237] If it had been applied, federal statutes might have been contorted so as not to contradict state statutes and thus not been given their full effect, thus weakening the force of federal law.[238]

The non obstante clause was enacted against this legal background. At common law, when legislators sought to avoid the application of the canon disfavoring repeals by implication, they included a clause with this "notwithstanding" language, and the courts would follow this term-of-art instruction.[239] The Constitution then assumes not only that a legal interpretive rule would apply to it but that seemingly ordinary language that was actually a term of art would negate that legal interpretive rule, itself based on another legal interpretive rule. Thus, the Clause presents convincing evidence that the constitutional enactors assumed that legal interpretive rules would apply to the Constitution.

Solum's response to our discussion of the non obstante clause is both inadequate and irrelevant.[240] He dismisses as implausible, without any stated reason, the argument that the language of the non obstante clause may have been added as an additional safeguard against a legal argument.[241] Solum also fails to offer any competing explanation of his own for this distinctive language, seemingly treating it as accident.[242] Nor does he even cite Nelson's article that provides a detailed explanation based on legal context that would be unknown to lay citizens, let alone refute its reasoning.[243] Solum's analysis shows the poverty of the lay-meaning view for constitutional interpretation. Such a view impedes our understanding of the Constitution's drafting and meaning.

Solum's observation that the language in the non obstante clause can be understood by ordinary people is orthogonal to the question of whether its inclusion provides evidence that the Constitution was to be interpreted according to legal rules. The phrase was added because, in its absence, it was thought that the rule about harmonization would have been applied.[244] And non-lawyers certainly would not have been aware of that rule of harmonization.

---

235. U.S. CONST. art. VI, cl. 2 (emphasis added).
236. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 241–42, 246–48 (2000).
237. *Id.*
238. *Id.*
239. *See* Nelson, *supra* note 236, at 232.
240. Solum, *Public Meaning*, *supra* note 17, at 2031.
241. *Id.*
242. *See generally id.*
243. *See generally id.*
244. *See* Nelson, *supra* note 236, at 232.

It thus shows that the Constitution was expected to be interpreted according to applicable legal rules unless those rules were countermanded.[245]

Similar inferences about the Constitution's legal nature can be drawn from the Constitution's use of a preamble and prefatory clauses for which there were established rules of legal interpretation.[246] Preambles and prefatory clauses introduce ambiguity in lay language by raising questions about their relations to the operative clauses of provisions, but legal interpretive rules on the role of preambles and prefatory clauses clarify matters.[247] Thus, the Constitution was written with the expectation that such clarifying legal rules would be applied. Otherwise, those who drafted the Constitution could be charged with introducing unnecessary ambiguity into its meaning.

Finally, in the Early Republic, both those who were experts in the language of the law, such as jurists, and those who were not all experts about it, such as legislators, confirmed the language-of-the-law thesis because they interpreted the Constitution by reference to legal terms and to a wide variety of legal interpretive rules.[248] Besides the rule governing technical and lay language, interpreters employed the rule of lenity,[249] the rule that the specification of particulars is the exclusion of generals,[250] the negative-pregnant rule,[251] the rule that the purpose of a provision should guide the interpretation of unclear language within it,[252] the rule that historical practice may help determine the meaning of a provision,[253] the rule of intra-textualism,[254] the rule that both the letter and the spirit of a provision bear on its meaning,[255] the rule that the

245. The resolution of the interpretive dispute between Solum's interpretation and Nelson's view (which we adopt here) of the non obstante clause seems clear. Under Solum's interpretation, the non obstante clause is a mere redundancy, without any obvious need for the redundancy. By contrast, under Nelson's view, the non obstante clause is keyed to a set of specific common law interpretive rules. The possibility that this was done by accident is vanishingly small, which strongly supports Nelson's view.

246. McGinnis & Rappaport, *supra* note 227, at 1381–83.

247. District of Columbia v. Heller, 554 U.S. 570, 577–78 (2008) ("Logic demands that there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

248. McGinnis & Rappaport, *supra* note 227, at 1383–94 (providing many examples of the use of legislative interpretive rules from both judicial opinions and legislative debates).

249. *See* Commonwealth v. Caton, 8 Va. (4 Call) 5, 18 (1782) (attorney arguing for prisoners invoked a rule of lenity).

250. THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

251. THE FEDERALIST NO. 32, at 199–200 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

252. *See* 35 ANNALS OF CONG. 318–19 (remarks of Sen. Barbour); 2 ANNALS OF CONG. 1949–50 (remarks of Rep. Gerry).

253. *See, e.g.*, *Caton*, 8 Va. (4 Call) at 10 (opinion of Wythe, J.) (interpreting provisions about impeachment in light of English historical practice).

254. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–14 (1819) (comparing uses of the word "necessary"); *see also* 35 ANNALS OF CONG. 318–19 (1820) (remarks of Sen. Barbour).

255. *See Caton*, 8 Va. (4 Call) at 19 (opinion of Pendleton, J.).

interpretation of a document should accord with its nature,[256] the rule that repeals by implication are disfavored,[257] and the rule that provisions should be interpreted in accord with legal maxims—such as no man should benefit from his own wrong.[258]

The most famous disputed issue of constitutional interpretation in the Early Republic—the constitutionality of the Bank of the United States—turned on the application of interpretive rules, including legal interpretive rules.[259] Such rules were distinctly legal in two senses. First, they gained their authority through the imprimatur of law. Second, they were not rules that directly followed from linguistic regularities but had a normative component.

On the first point, Hamilton in his opinion on the Bank of the United States is explicit that the intention of the Constitution "is to be sought for in the instrument itself, according to the usual and established rules of construction."[260] The use of "established" suggests that the rules depend on their sanction in law.

Elbridge Gerry was even more explicit in arguing for established rules. James Madison had argued against the constitutionality of the Bank and laid out five rules of interpretation that would guide his analysis of the issue.[261] Gerry argued against some of these rules precisely because they were not sanctioned by law:

> [A]s [Madison's] rules, being made for the occasion, are the result of his interpretation, and not his interpretation of [these] rules; as they are not sanctioned by law exposition, or approved by experienced judges of the law, they cannot be considered as a criterion for regulat[ion] . . . judgment. . . , but may, if admitted, prove an *ignis fatuus*.[262]

Although Gerry had been an opponent of the Constitution, he, like Hamilton, embraced conventional legal interpretive rules, laying out each of

256. Part of the debate over the constitutionality of the Bank of the United States turned on the rules appropriate to interpret the legal document at issue. Opponents saw the Constitution as a compact among the states and therefore favored strict construction. Defenders of its constitutionality, like Chief Justice Marshall, saw the Constitution as a delegation of powers among the people and opposed that interpretive rule. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1248–49 (1987).

257. *See* Nelson, *supra* note 236, at 254–56 (showing how the non obstante clause in Article VI presupposed the operation of this legal rule).

258. *See* 8 ANNALS OF CONG. 2261 (1799) (remarks of Rep. Bayard).

259. Other scholars looking at the early interpretation of the Constitution agree that the use of interpretive rules to fix meaning was widespread. For instance, Leonard Levy notes that "[t]he one point on which nearly everyone agreed, during the [B]ank controversy, was that the Constitution should be construed according to conventional rules of interpretation." *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988).

260. Opinion of Alexander Hamilton, on the Constitutionality of a National Bank (Feb. 23, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 101 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley 1967) (1832).

261. 2 ANNALS OF CONG. 1896 (1791) (remarks of Rep. Madison).

262. 2 ANNALS OF CONG. 1946 (1791) (remarks of Rep. Gerry).

Blackstone's established rules for statutory interpretation before applying them to the question of the Bank's constitutionality.[263] The similarity between Hamilton and Gerry shows the consensus approach of experienced lawyers in constitutional interpretation when the Constitution was enacted. They both embraced the language-of-the-law view.

Some of the rules proffered in the debate to aid in the interpretation of the Constitution were distinctive legal rules. For instance, Gerry applied the absurdity rule to his interpretation of the Constitution as regards the Bank.[264] This rule is a legal, not linguistic, interpretive rule. As its best-known contemporary critic shows, the absurdity doctrine assumes a baseline of shared values rather than relying on social and linguistic claims that can be inferred from the text.[265] It thus requires an explicit invocation of values rather than mere semantics.

The importance of legal interpretive rules is also illustrated by another issue that arose during the constitutional debate over the Bank. Edmund Randolph and Alexander Hamilton disagreed on the legal interpretive rules that should dictate how strictly one should interpret the word "necessary."[266] Randolph acknowledged that, in general, constitutions should be interpreted more liberally than statutes because they had less detail.[267] But he argued that the federal Constitution should be interpreted more strictly than a state constitution because of the greater chance of error in defining the limited powers of the former rather than the more general powers of the latter.[268]

Hamilton argued for a more liberal interpretive rule, expressly disputing Randolph's arguments:

> This restrictive interpretation of the word *necessary*, is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defen[s]e, [etc.,] ought to be construed liberally in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcation of the boundaries of its powers, but on the nature and object[] of government itself. . . . The Attorney General admits the *rule*, but takes a distinction between a State and the Federal [C]onstitution. The latter, he thinks, ought to be construed with greater strictness, because there is more danger of error in defining partial than general powers. But the reason of the

263. *Id.*

264. *Id.* at 1947–48.

265. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2400–02 (2003).

266. *Compare* Opinion of Edmund Randolph, Attorney General of the United States, to President Washington (Feb. 12, 1791), *in* LEGISLATIVE AND DOCUMENT HISTORY OF THE BANK OF THE UNITED STATES 87 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley 1967) (1832), *with* Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 260, at 98–99.

267. Opinion of Edmund Randolph, Attorney General of the United States, to President Washington, *supra* note 266, at 87.

268. *Id.*

> *rule* forbids such a distinction. This reason is, the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of [N]ational, than of State administration. The greater danger of error, as far as it is s[upposable], may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation.[269]

Here, Hamilton and Randolph both tried to determine what legal interpretive rules to apply to the federal Constitution, recognizing that the previous rules applied to written legal texts might need to be modified. They used common law methods to make these determinations. When an issue was unclear, the common law resolved it by appeal to custom, precedent, and the reason of the law.[270] Hamilton and Randolph both appealed to such a method to differentiate the proper application of traditional legal interpretive rules to statutes, state constitutions, and the federal Constitutions.[271] This is manifestly a legal dispute about the legal rules that should guide interpretation, not one captured by linguistic methods alone that lay people would readily understand.[272]

IV. A CRITIQUE OF SOLUM'S LAY-LANGUAGE VIEW

We next consider the competing theory of OPM of Lawrence Solum, who argues that the OPM refers to the meaning that the lay public gives to the Constitution. As we have noted, Solum is largely responsible for disseminating the view that the OPM rejects legal meaning. Here, we carefully review his argument for the view that the Constitution should be interpreted in accordance with its lay meaning and reject it on several grounds.

We begin by describing Solum's argument, because we believe that its structure is important for evaluating it. Solum argues that the meaning of the Constitution depends crucially on to whom the Constitution was addressed.[273] Solum next asserts that the Constitution was addressed to the lay public.[274] Therefore, he concludes that the Constitution should be understood as a

269. Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, *supra* note 260, at 98–99.

270. *See* McGinnis & Rappaport, *supra* note 16, at 1400.

271. To be more specific, Hamilton and Randolph are applying "the reason of the law"—a common law process—as a meta rule to determine what interpretive rule should be applied. *See id.* at 1389–92, 1400 (discussing use of meta rules).

272. Solum has not responded specifically to our examples of the pervasive use of legal rules by jurists in the Early Republic. But it is possible that Solum might argue that the application of interpretive rules may be examples of construction, as he has stated elsewhere, not interpretation, *see* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1627–29, and thus they do not undermine his view that original public meaning is ordinary. But the claim that the rules must relate to construction rather than interpretation depend on his assertion being contested here—that the Constitution's meaning is that which would be assigned by "ordinary folk." We show that the Constitution's meaning is legal and thus legal rules help constitute its meaning.

273. Solum, *Public Meaning*, *supra* note 17, at 1975 ("Who were the intended readers of the constitutional text?").

274. *Id.* at 1975–82.

document written in nonlegal, lay language. After reaching this conclusion, Solum then attempts to address an obvious problem with his argument—that there are numerous terms in the Constitution that are unambiguously technical.[275] He attempts to explain this by offering an approach that he calls a division of linguistic labor.[276]

We disagree with each step in Solum's argument.

A. Determining What Language the Constitution Is Written in

Solum argues that the meaning of the Constitution depends on what the authors of a constitutional text are attempting to communicate.[277] He writes that when interpreting the meaning of the Constitution, we seek the "communicative meaning of what is written or what is said."[278] In determining that communicative meaning, Solum maintains that one must ask to whom the Constitution was addressed.[279] Solum then argues that the Constitution was addressed to the ordinary, lay public.[280]

We disagree with Solum that the dominant consideration in determining how to interpret terms in the Constitution is to ask to whom the Constitution was addressed. In determining whether constitutional language should be understood to have a legal or lay meaning, we believe the dominant consideration is to ask in what language the Constitution is written. If the Constitution is written in the language of the law, then one should interpret its terms accordingly.

We can certainly understand why Solum believes that the person to whom a document is addressed is relevant. If person *A* writes a letter to *B*, then one would expect person *A* to use a language that *B* would understand.

But in our view, the person being addressed is distinctly a secondary consideration. The dominant method for determining what language a document is written in is to read the document itself. This method clearly takes priority over the method that asks to whom the document is addressed. If *A* writes a letter in French to *B*, then the letter will still be in French, even though *B* does not understand French. Of course, it is reasonable to ask why *A* would write a letter in French to *B* if *B* does not understand the language. But there are many reasons why that might happen, such as the fact *A* does not know English, which is the only language *B* understands. *A* may reasonably believe that *B* will be able to have someone translate the letter for him.

275. *Id.* at 1981–82.
276. *Id.* at 1982.
277. *Id.* at 1967.
278. *Id.* at 1968.
279. *Id.* at 1974.
280. *Id.* at 1976–82.

If we are to determine what language the Constitution is written in, we should examine the document and see what words and forms it uses. The people to whom it is addressed is a secondary consideration, relevant if the other evidence is somehow equivocal. And as we have shown above, the Constitution is clearly written in the language of the law, using unambiguous technical terms, ambiguous technical terms, and legal forms throughout, done for entirely understandable reasons.[281]

B. To Whom Is the Constitution Addressed?

But even if one thought the audience to whom the Constitution was addressed was the relevant criterion, Solum is mistaken that the Constitution was solely addressed to the public. Solum's analysis assumes that the Constitution was addressed to a single group.[282] He then concludes that the Constitution was addressed to the lay public rather than to those learned in the law.[283]

But Solum's assumption that the Constitution must be addressed to only one group is mistaken. Many written and oral communications are made to multiple audiences. For example, imagine that a medical patient is being treated by his internist, and the internist contacts a specialist for a recommendation while the patient is in the internist's office. The internist places the specialist on the speaker phone, and the specialist speaks to both the internist and the patient.

In this situation, the specialist may use technical medical terms, even though she is addressing both the patient and internist, and she knows the patient will not understand some of these terms. The specialist's use of technical terms should be understood in the technical language of medicine. The precision of these technical terms facilitates a more accurate communication than ordinary language. While the patient may not fully understand the terms, the internist can explain the recommendations to the patient. And in cases where the specialist's language is ambiguous between a technical and nontechnical meaning, there should be no hesitancy in concluding that the specialist was intending to convey a technical meaning if the context, including the medical context, makes that the more persuasive interpretation.

In our view, this situation resembles the one involving the Constitution. The Constitution was addressed to at least two groups: the lay public and government officials (judges, executive officials, and legislators with legal

281. *See* McGinnis & Rappaport, *supra* note 227.

282. Solum, *Public Meaning*, *supra* note 17, at 1975 (listing possible intended audiences). Solum does acknowledge the possibility of a hybrid audience, including both the public and government officials knowledgeable in law, but surprisingly states that he will not discuss these possibilities. *Id.*

283. *Id.* at 1975–82.

knowledge who would be implementing the Constitution).[284] Each group has distinct duties under the Constitution. The government officials are tasked with implementing the Constitution.[285] The language of the law would be extremely useful for them.[286] The precision that the legal language offers would help them implement the Constitution without undue discretion.[287] And their greater knowledge of the law allows them to understand that language with technical meanings.

By contrast, the lay public is mainly tasked with electing representatives and government officials.[288] When the Constitution was first adopted, each state held a convention to determine whether to ratify the document.[289] The convention delegates were selected through elections by the people.[290] Similarly, during the Constitution's operation, the people elect legislators, who then decide whether to amend the Constitution.[291] Finally, government officials, primarily in the legislatures and the executive branch, operate the government and are required to conform their actions to the Constitution.[292] Thus, to elect these various officials, voters would need some knowledge of the Constitution.

Given these distinct roles for the government officials and the voters, how can we understand the language of the Constitution? It would make sense for the language to receive its legal meaning to allow each group to fulfill its role. To allow the judges and government officials to implement the Constitution, it would be extremely useful for them to use the legal meaning of the document, since it would afford greater precision as to the meaning of the Constitution.[293]

---

284. *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 495 (2018) ("[T]he British tradition from which American constitutionalism developed regarded the constitution as addressed to . . . officials, including judges.").

285. *See, e.g.*, U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

286. In fact, "[g]overnment officials are charged with knowledge of constitutional developments, including all available decisional law." Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988) (citing Gutierrez v. Municipal Court, 838 F.2d 1031, 1048 (9th Cir. 1988)).

287. TIERSMA, *supra* note 2, at 3 (noting the added precision of legal language).

288. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.").

289. *See* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 458 (2009).

290. Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J.L. & PUB. POL'Y 61, 146 (2017) ("The consent of the governed was obtained by having special elections for delegates to every state ratifying convention. No state was bound to obey the Constitution until its people gave their consent. Moral legitimacy and legal propriety were in competition at times.").

291. The rules for election of legislators are set forth in Article I and for constitutional amendment in Article V.

292. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

293. *See* TIERSMA, *supra* note 2, at 3 (noting the added precision of legal language).

While this precise meaning would not be fully understood by the lay public, that would not significantly interfere with them performing their function. It is not necessary for the public to understand the details of the Constitution in order to decide whether to ratify the Constitution and to elect officials that will implement or decide whether to amend it.[294] Instead, it is sufficient to understand the broad outlines of the Constitution to make a determination whether it should have been adopted or whether it should be amended.

Similarly, when an amendment is being proposed, people then can focus upon the amendment and the defects in the Constitution it addresses. If the legal details of the proposed amendment or of the existing Constitution are relevant, then those details will become part of the debate and people with knowledge of the law will discuss the precise meaning of the relevant constitutional provisions. Thus, the legal details will ultimately be presented to the public when necessary.

While one might find this arrangement suboptimal as compared to a situation where the public has full knowledge of the legal details, it is important to remember that this is the typical situation in representative government. Even where no legal expertise is required, representatives are still assumed to be much more informed about the issues involving the passage of legislation and other matters than the ordinary public.[295] That is one of the main reasons for representative government, which the constitutional enactors understood and prized.[296]

Put differently, even if no legal expertise is involved, most people will not understand the details of a debate about public policy. Understanding these details requires significant attention and effort, and most people do not have the time or inclination to engage in this activity.[297] Instead, they come to a general understanding of the issues and decide who to vote for on that basis.

Moreover, even those with general legal knowledge will not necessarily know the legal details about a constitutional issue. A precise legal understanding of provisions requires significant effort, often including significant research into the legal meaning of terms.[298] Thus, the notion that the legal language in constitutional provisions represents the most significant bar to understanding

---

294. For instance, Brutus and Hamilton explained Article III even as they debated the wisdom of its provisions. *See generally* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7 (2006) (discussing Brutus' concerns about judicial supremacy and Hamilton's response).

295. *See* Cass, *supra* note 62, at 16 (explaining that representatives help citizens avoid the burden of becoming knowledgeable about issues).

296. *See* Bessette, *supra* note 226, at 104–05 (explaining that the institutional setting of representative government would promote collective knowledge and reasoning).

297. On the extent and reasons for public ignorance of policy details, see generally ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2d ed. 2016).

298. *See, e.g.*, Stinneford, *supra* note 36 (an eighty-page article to establish the meaning of "unusual" using English common law sources).

constitutional debates is mistaken. Most people would not understand the details of the debate even if it did not use legal language. And most lawyers may not understand the details of a debate involving legal language.

C. Popular Sovereignty and the Language of the Law

Solum also argues that the popular sovereignty and republican nature of the Constitution suggest that it is written in ordinary language.[299] He contends that if the people are sovereign and are to make decisions as voters, then the constitutional language must be accessible to them.[300]

But Solum's argument here is mistaken. The view that popular sovereignty (and republicanism) requires that the Constitution be understood in lay language is problematic for various reasons. First, there is no necessary or even significant connection between popular sovereignty and lay language. It is not unusual for ordinary people to use the language of the law to secure its benefits in legal documents.[301] For example, at the time of the Constitution's enactment, an individual might have signed a will that provided, "I, John Smith, being of sound mind, do hereby bequeath . . ." even though Smith did not understand much of the language in the will, which was written by his lawyer. Similarly, one cannot infer from the fact that the Constitution speaks in the name of "We the People"[302] that ordinary people fully understand all of its language.

Second, while the claim that the Constitution should be read in lay language superficially suggests that this arrangement is protecting ordinary people, it actually operates to harm the people in an important way. This lay-language view largely prevents the Constitution from employing the language of the law. Since the language of the law has significant benefits, including limiting the discretion of government officials,[303] this constraint encumbers the choices of the people.

Third, it is true that the Constitution was conceptualized as being adopted by the people. In addition to the language "We the People," the Constitution provided that the people would decide whether to adopt the Constitution by making that determination in special conventions established for that purpose.[304] But once again this feature of popular sovereignty does not imply that the Constitution is written in lay language. In fact, it suggests the opposite.

---

299. Solum, *Public Meaning*, *supra* note 17, at 1976.

300. *Id.* ("If the people are sovereign, then they must participate in ratification of the Constitution—and meaningful participation requires that the meaning of the constitutional text be accessible to them.").

301. *See* Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 711 (1998) (noting that it is not unusual for lawyers to draft documents in a client's name).

302. U. S. CONST. pmbl.

303. *See, e.g.*, TIERSMA, *supra* note 2 (mentioning the potential benefit of greater precision).

304. U.S. CONST. art. VII.

Representative assemblies, like the state conventions that ratified the Constitution, are used rather than a vote of the people because their composition and organization allow for a more deliberative and informed decision.[305] In other words, it is recognized that the public will not have the same knowledge and opportunity to make a wise decision as the conventions do. For example, it is often said that the Anti-Federalists elected more delegates to the Convention than the Federalists, but that the Federalists prevailed through deals at the Convention that the public was not part of, such as a Federalist promise to add the Bill of Rights.[306] Ratification based on these deals does not make the Constitution any less based on popular sovereignty nor does the fact that the Constitution is written in the language of the law.[307]

D. The Existence of Explicit Legal Language

Another serious problem with Solum's argument involves the many explicitly legal terms in the Constitution, such as "Letters of Marque and Reprisal," "admiralty jurisdiction," and "Bill of Attainder," and the even greater number of terms, like "executive power" and "good behavior" that are ambiguous, having both legal and lay meanings.[308] Together, there are more than 100 uses of these terms in the original Constitution.[309] The unambiguously legal terms provide strong evidence that the Constitution is written in the language of the law. Solum tries to explain these terms away by appealing to a division of linguistic labor in which people are put on notice by legal terms that they should ask a lawyer. But the division-of-linguistic-labor argument does not address the inference that should be drawn from these many explicit legal terms about the language in which the document is written. Second, it does not address the many ambiguous terms that will not put a lay reader on notice to ask a lawyer. Third, Solum never shows why the notice provided under his own theory by numerous explicit terms is limited to notice of those individual terms

305. *See* Bessette, *supra* note 226, at 104–05 (explaining that the institutional setting of representative government would promote collective knowledge and reasoning).

306. *See, e.g.*, Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (explaining that Madison persuaded Anti-Federalists in the Virginia Convention to ratify the Bill of Rights and then made good on his promise in Congress).

307. It is sometimes objected that not everyone at the ratification conventions had legal knowledge. While this is true, it is largely beside the point. A much greater percentage of people at the conventions than in the public generally would have full or at least some knowledge of legal matters. In fact, many ordinary members of the public would have been illiterate. Moreover, a very high percentage of the speakers at the conventions would have had legal knowledge and therefore would have informed the conventions about such matters. Thus, overall, the conventions were in a better situation to understand and evaluate a Constitution written in the language of the law.

308. *See* McGinnis & Rappaport, *supra* note 227, at 1370–71 (quoting U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 8, cl. 11).

309. *See supra* note 227 and accompanying text.

rather than putting a reader on notice that the document as a whole is itself legal.

1. The Evidence of Explicit Terms

These explicit legal terms do not have lay meanings and therefore are unambiguously and obviously legal terms. These terms show that the Constitution is written in the language of the law. One or two isolated terms might be dismissed but a considerable number clearly indicates that legal language is being used.

Moreover, these legal terms put the lay reader on notice that this document is not written exclusively in lay language. It contains terms that he or she will not understand, and which will likely be perceived to be legal terms. Thus, these explicitly legal terms present a clear problem for the lay-language view, since they indicate the Constitution is written in legal language and puts lay readers on notice of this fact.

How then does Solum address this problem? He first seeks to establish, through various popular-sovereignty arguments discussed above, that the Constitution is addressed to the lay public.[310] In making this argument, he largely ignores what is one of the clearest pieces of evidence against him—that the Constitution contains explicit legal terms. After concluding that the Constitution is addressed to ordinary people, he only then seeks to explain away the explicit legal terms.[311] He does so by claiming that there is a division of linguistic labor.[312] Under this view, the lay public can recognize explicit legal terms without knowing their meaning.[313] The public can then seek out those learned in the law to explain those terms.[314] As a result, the language of the Constitution will then satisfy his overall requirement that it be accessible to the public, albeit through indirect means.[315]

But this ordering of the argument should not obscure the sleight of hand that Solum has employed. By concluding that the Constitution is addressed to the public before he discusses the explicit legal terms in the Constitution, he avoids confronting one of the strongest arguments against his view—that a document containing so many explicit legal terms is obviously a legal document. While he attempts to show through the division-of-linguistic-labor argument

310. *See* Solum, *Public Meaning*, *supra* note 17, at 1982 (quoting U.S. CONST. pmbl.) ("It seems unlikely that a document that begins with the words 'We the People of the United States' was not intended to communicate to the public."). Solum also relies on a choice between a Constitution addressed exclusively to lawyers versus a Constitution addressed to the public. But this is a false alternative. As we have argued, the Constitution can be addressed to both the public and to lawyers in separate ways.

311. Solum, *Public Meaning*, *supra* note 17, at 1981.

312. *Id.* at 1982.

313. *Id.*

314. *Id.*

315. *Id.*

that the public will not be fooled as to these legal terms, that demonstration is beside the point. He has never rebutted that the explicit legal terms in the Constitution are powerful evidence that it is a legal document. This evidence, when combined with the other evidence that it is written in the language of the law, appears overwhelming.

2. The Problem of Ambiguous Terms

Even if one accepts Solum's division-of-linguistic-labor argument, there are still problems. The division of linguistic labor only makes the Constitution accessible to the public in Solum's framework if the terms are patently legal. As interpreted by Solum, this arrangement does not work for terms that are ambiguous—that have both lay meanings and legal meanings, such as "good behavior"—because the lay pubic will not realize that these terms have legal meanings.[316] Since the lay public will be unaware of their legal meanings, judges will always be required to interpret these terms in accord with their lay meaning. Otherwise, the constitutional meaning will violate Solum's requirement that it be accessible to the public, and as we have shown, there are a large number of these ambiguous terms.[317]

The presence of these ambiguous terms creates significant difficulty for Solum. The use of such a large number of ambiguous terms casts doubt that the drafters were assuming that these terms would be consistently interpreted in accord with their lay meaning. Moreover, interpreting them consistently to have lay meanings would risk creating a significant distortion in the Constitution's meaning. In discussing these terms, Solum suggests two possible explanations for them. First, he raises the possibility that the drafters made a mistake.[318] But given the number of such ambiguous terms, this proposition is implausible. No one at the time suggested it. Second, he says that the language might have been designed to intentionally mislead the public.[319] But there is no substantial evidence of this either. In fact, given the large number of unambiguous legal terms, the legal form of the document, and its self-declaration as the "supreme Law of the Land,"[320] it is hard to believe they could be deceived after reading it. The better explanation is that the Constitution is written in the language of the law with rules to disambiguate between lay and legal meaning based on context.

316. Solum himself provides an example of such a term that is ambiguous between legal and lay meaning: direct tax. *Id.* at 2034. He concedes that it is possible that the document might not have succeeded in communicating the meaning of that term. *Id.* at 2035.

317. *See* McGinnis & Rappaport, *supra* notes 227–30 and accompanying text.

318. Solum, *Public Meaning*, *supra* note 17, at 2025.

319. *Id.*

320. U.S. CONST. art. VI, cl. 2.

3. The General Notice Implicit in the Division of Labor

Finally, Solum's argument based on the division of linguistic labor supports our position, not his. Solum argues that explicit legal terms are consistent with his approach, even though they will not be understood by the public, because the public will know that they are legal and will know to consult someone who has knowledge of the law.[321] But this argument cannot be limited merely to explicit legal terms.

If one is reading a document and it uses numerous terms that have an explicit legal meaning, one is put on notice not only that those terms require legal knowledge to be understood. One is also put on notice that the document as a whole might require legal knowledge to be understood. Those explicit terms reinforce other cues that inform a lay reader that it might require legal knowledge to understand the document as a whole. The document itself is a formal document. Its subject is law. It proclaims itself the "supreme Law of the Land."[322] And it contains many terms that, even if they are not unambiguously legal, will nonetheless seem law-ish to an ordinary reader, such as "jurisdiction."

The lay reader would then have the common reaction that someone has when asked to sign a formal legal document that has certain technical language within it: "It sounds reasonable, but I will have to have my lawyer look at it to make sure." Put differently, the division of linguistic labor applies not merely to isolated words but also to documents that put a lay reader on notice that they might be written in the language of the law.

During the debates over the Constitution, the lay reader of the Constitution would be in a comparable situation as the lay reader who consults his lawyer about a contract. The lay reader would have been put on notice that the Constitution contains explicit legal terms and other seemingly legal aspects. He would then have had access to the debates over the proposed Constitution, which included a considerable number of exchanges between those learned in the law over the meaning of the document.[323] Thus, the lay reader would have access to information about a Constitution written in the language of the law.

E. Solum's Historical Evidence

Solum claims that historical evidence supports the lay concept of OPM because commentators around the time of the Constitution's enactment made statements suggesting that the document was read in its ordinary language.[324] But this evidence is unpersuasive for several reasons, as this Section will show.

---

321. Solum, *Public Meaning*, *supra* note 17, at 1982.

322. U.S. CONST. art. VI, cl. 2.

323. For discussion of the richness and ubiquity of the ratification debates, see PAULINE MAIER, RATIFICATION 1787–88 (2010).

324. *See* Solum, *Public Meaning*, *supra* note 17, at 1976–80.

First and most importantly, the statements are often taken out of context. When context is supplied, many statements cited by Solum are best read as orthogonal to the debate between the lay and legal readings of the Constitution. Instead, they support reading language in its more common or natural way, which is not necessarily the lay meaning. Others support the language-of-the-law reading, because they recognize that context, including legal context, may be needed to determine whether a provision is best read as written in lay or legal language. Second, James Wilson's commentary cited by Solum is aspirational, not a positive description of the way the Constitution was to be interpreted. Third, other evidence cited by Solum is from too late a period to provide convincing evidence of how the Constitution was viewed at the time of enactment. Such late sources have little weight in originalist analysis.[325] In any event, none of the statements supports Solum's historically unprecedented lay reading of the Constitution.

1. Chief Justice Marshall and Justice Story in Majority Opinions

The most valid category of evidence offered by Solum is from Chief Justice John Marshall and Justice Joseph Story in majority opinions from the Early Republic.[326] But these statements read in context do not embrace the claim that the Constitution should be read as if it were written in lay language.

The language of Chief Justice Marshall and Justice Story in these opinions claiming that the Constitution should be interpreted to accord with its "obvious and natural" meaning,[327] its "natural and obvious sense"[328] or its "natural sense"[329] does not support Solum's lay reading of the Constitution. At the time, the term "natural" meant "[p]roduced or coming in the ordinary course of things."[330] This sense of "natural" distinguishes between the common as opposed to uncommon meaning of a word, not the legal as opposed to lay meaning. Just as a word can have a common or an uncommon lay meaning, so a word can have a common or uncommon legal meaning. The legal meaning in that circumstance can be described as the more "common" or even the more "ordinary" one. As noted above, Justice Scalia made exactly this point: "[W]hen the law is the subject*, ordinary legal meaning* is to be expected."[331]

One might argue that the lay meaning is more natural than the legal meaning because it is more common. Even if this claim were true, it merely

325. *See* Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1649 (2008) (noting the weaker probative value of evidence as it becomes temporally distant from the Framing).

326. Solum, *Public Meaning*, *supra* note 17, at 1978–79.

327. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 367 (1819).

328. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

329. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

330. *Natural*, 2 WEBSTER'S DICTIONARY, at 21 (1st ed. 1828).

331. *See supra* text accompanying note 134 (emphasis added).

suggests that one would more often follow the lay meaning than the legal meaning, not that one should never follow the legal meaning. It would thus still not support Solum's position, because the ultimate choice between legal and lay meaning would depend on the context—one that itself might well be legal.

But the claim that a preference for the natural or common meaning of words is a preference for lay meaning is not necessarily correct. The question is ultimately not what is the more natural meaning of a word or a provision in the abstract but what is the more natural meaning in the context of a legal document like the Constitution. In that situation, it might well be more natural to have a legal meaning. If so, this suggests that the language of the law should prefer legal meanings. Again, the entire context of the document about which Chief Justice Marshall or Justice Story are speaking counts—a context which Solum ignores.

Solum also relies on Chief Justice Marshall's opinion in *McCulloch v. Maryland* which stated that a detailed Constitution:

> would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[332]

Solum reads this proposition as "based on the assumption that the Constitution was drafted so that its meaning would be accessible to the public."[333]

But this claim is mistaken and again fails to take account of context. The argument is not based on ensuring that the public can understand all the details of the Constitution. A legal code is a long, interrelated document. If the Constitution were that long, the public could not understand the basics of the document, regardless of whether it was understood in lay or legal language. It would be too long to even read superficially. For instance, California's constitution, which has 62,000 words, is so long it is hard for anyone to fully comprehend.[334] Thus, a lay reader would not even get the gist.

The Constitution that Chief Justice Marshall defends in *McCulloch* itself involves abstract inferences: "Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[335] If clear knowledge of the details were required, then it would be a problem that unsophisticated, lay readers will have a difficult time determining what "minor ingredients" are contained in the "objects

332. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

333. Solum, *Public Meaning*, *supra* note 17, at 1980.

334. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 347 (2010).

335. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

themselves."[336] Thus, the context that Chief Justice Marshall himself provides cuts against Solum's claim because regardless of whether the Constitution is read in legal or lay language, it is not fully accessible to the public.

2. *Justice Joseph Story's Treatise*

Solum also relies on a passage in Justice Story's constitutional treatise[337]:

> In the first place, then, every word employed in the constitution is to be expounded in its *plain, obvious*, and *common* sense, *unless the context furnishes some ground to control, qualify, or enlarge it*. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or *juridical research*. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and *fitted for common understandings*. The people make them; the people adopt them; *the people must be supposed to read them*, with the help of common sense; and cannot be presumed to admit in them any *recondite meaning*, or any extraordinary gloss.[338]

It might seem that these words support Solum's claim, but they do so only if the larger context is ignored.[339] This neglect of context is our most fundamental objection to almost all Solum's evidence. Here, a closer reading of the treatise—both this passage and others in the same chapter—shows that Justice Story's views are consistent with reading the Constitution in the language of the law. In this passage Justice Story states that the "ordinary" meaning controls "unless the context furnishes some ground to control, qualify, or enlarge it."[340]

Thus, Justice Story's statement does not claim that one should always read constitutional language to have a lay meaning. Rather, whether one interprets words to have a legal meaning depends on context. Justice Story does not follow Solum's thesis because a provision might have both legal and lay meanings, and the case for the legal meaning might be stronger, even if a lay reader would not realize it. To determine whether to choose the lay or legal meaning requires consideration of the context, which may itself require legal knowledge.

Another passage of the treatise, not quoted by Solum, makes this point even clearer:

> In the next place, where technical words are used, the technical meaning is to be applied to them, unless it is repelled by the context. But the same word

336. *Id.*

337. Solum, *Public Meaning*, *supra* note 17, at 1977.

338. STORY, *supra* note 69, at 157–58 (emphasis added).

339. We find similar problems of ignoring context elsewhere. *See infra* text accompanying notes 348–72.

340. STORY, *supra* note 69, at 157.

> often possesses a technical, and a common sense. In such a case the latter is to be preferred, unless some attendant circumstance points clearly to the former. No one would doubt, when the constitution has declared, that "the privilege of the writ of *habeas corpus* shall not be suspended," unless under peculiar circumstances, that it referred, not to every sort of writ, which has acquired that name; but to that, which has been emphatically so called, on account of its remedial power to free a party from arbitrary imprisonment. So, again, when it declares, that in suits at *common law*, &c. the right of trial by jury shall be preserved, though the phrase "common law" admits of different meanings, no one can doubt, that it is used in a technical sense. When, again, it declares, that [C]ongress shall have power to *provide* a navy, we readily comprehend, that authority is given to construct, prepare, or in any other manner to obtain a navy. But when [C]ongress is further authorized to *provide* for calling forth the militia, we perceive at once, that the word "provide" is used in a somewhat different sense.[341]

The lay reader is not likely to know that the word "provide" in the phrase "provide a navy" has a legal and thus more capacious meaning, but Justice Story gives it a legal meaning, a position inconsistent with Solum's. Justice Story's overall position is that one should start with a presumption of lay meaning that can be overcome by contextual evidence—evidence that itself could be legal in nature and that might not be accessible to a lay member of the public. That position is consistent with one of the possible rules for choosing between the legal and lay meaning of a term—a rule that itself comports with the language-of-the-law view of the Constitution.[342]

3. Aspirational Statement

Solum also adduces a statement of James Wilson[343]:

> Some, indeed, involve themselves in a thick mist of terms of art; and use a language unknown to all, but those of the profession. By such, the knowledge of the law, like the mysteries of some ancient divinity, is confined to its initiated votaries; as if all others were in duty bound, blindly and implicitly to obey. But this ought not to be the case. The knowledge of those rational principles on which the law is founded, ought, especially in a free government, to be diffused over the whole community.[344]

This statement of Wilson's is aspirational in two respects. First, he did not say how a document was to be interpreted as a matter of positive law, only how

---

341. *Id.* at 159.

342. *See* STORY, *supra* note 69 and accompanying text. Another problem with relying on the Justice Story treatise is that it was written forty-four years after the Constitution was ratified.

343. Solum, *Public Meaning*, *supra* note 17, at 1978.

344. 1 JAMES WILSON, *Of the Study of the Law in the United States* (1790-1791), *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D (Philadelphia, At the Lorenzo press, printed for Bronson and Chauncey 1804), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 436 (Kermit L. Hall & Mark David Hall eds., 2007).

it ought to be interpreted as a normative ideal. Second, he appears to think eventually that the "principles on which law is founded,"[345] which are themselves presumptively legal, will become known in time to the entire community. Thus, even his ideal may well be to read a document legally only when the public comes to have legal knowledge. At the time, this hope was consistent with an optimistic view of human progress.[346] The world would improve through the diffusion not only of scientific, but civic, knowledge, presumably including knowledge of the legal historical background that gave rise to the Constitution.[347] That this progress has not occurred may be unfortunate, but it would not change the reality of the nature of the Constitution's meaning.

4. Chief Justice Marshall in Ogden v. Saunders

Solum also relies on a passage from *Ogden v. Saunders*[348]:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words, that its words are to be understood in that sense *in which they are generally used by those for whom the instrument was intended*; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.[349]

It might seem that this passage supports Solum's position, but even this support is unclear. If the Framers wrote the Constitution for multiple audiences, as we suggest, the words of the instrument may have legal meanings because a legal audience was part of the audience for those they were intended.

But even if the passage is taken in the sense Solum claims, it is very weak support for several reasons of context—by now a familiar theme of our issues with Solum's evidence. First, it appears in a dissenting opinion that differs from the position taken by Justices in the majority.[350] The issue in *Ogden* was whether a state bankruptcy law, existing at the time at which a contract is made, can alter the obligation to fulfill the contract in the future.[351] Chief Justice Marshall argued that a "contract" derives from an intrinsic obligation that preexists law and which even state laws existing at the time of contracting cannot

345. *Id.*

346. *See* Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 21 (2001).

347. *Id.* (emphasizing the Framers' hopes for civic and political progress).

348. Solum, *Public Meaning*, *supra* note 17, at 1979.

349. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (opinion of Marshall, C.J.) (emphasis added).

350. *Id.* at 332 ("[I] have taken a different view of the very interesting question which has been discussed . . . .").

351. *Id.* at 215.

fundamentally alter.[352] That is plausibly a lay view of what a contract is. In contrast, some Justices in the majority had a more legalistic understanding of "contract" as a creature of positive law, subject to the laws of the state at the time at which they are struck.[353] Thus, those Justices may be said to adopt a legal meaning of contract that may well not have been that of a lay reader who is more influenced by the moral sense of the term.

Second, Chief Justice Marshall's dissent is late—almost forty years after the Constitution was ratified. The farther from the time of the ratification, the less persuasive is the claim that it expresses the understanding at the time of ratification.[354]

Perhaps most importantly, the statement is not consistent with Chief Justice Marshall's overall jurisprudence because the great Chief Justice often relied on legal interpretive rules.[355] For instance, in *Gibbons v. Ogden*,[356] he argued that navigation was included within Congress's power under the Commerce Clause on the grounds that the Constitution elsewhere excluded from Congress's authority certain powers over navigation.[357] In support of this view he cited a legal interpretive rule:

> It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.[358]

Besides invoking this rule about exceptions, Chief Justice Marshall also applied the venerable legal interpretive rule about consulting the spirit of the entire instrument. As he put it in *Sturges v. Crowninshield*, "[A]lthough the spirit

352. *Id.* at 344–48.

353. *See, e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 258–59 (Washington, J., dissenting) ("And if it be true, that this is exclusively the law to which the constitution refers us, it is very apparent, that the sphere of State legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form."); 25 U.S. (12 Wheat.) at 317 (Trimble, J., dissenting) ("[T]he law binds him to perform his engagement, and this, is, of course, the obligation of the contract." (emphasis omitted)).

354. *See* Prakash, *supra* note 325, at 1649.

355. *See* McGinnis & Rappaport, *supra* note 227, at 1370–77.

356. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

357. *See, e.g.*, U.S. CONST. art. 1, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

358. *See Gibbons*, 22 U.S. (9 Wheat.) at 191.

of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."[359]

Chief Justice Marshall also recognized the absurdity rule—another legal interpretive rule—in several opinions. For instance, in *Trustees of Dartmouth College v. Woodward*, he held that a corporate charter was a contract under the Contracts Clause.[360] But he conceded that even if something is within the literal scope of a provision, it may not reflect its legal meaning:

> The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.[361]

Thus, in the full context of Chief Justice Marshall's jurisprudence, it may well be better to understand the passage that Solum quotes as a presumption in favor of lay meaning. But it is also possible that Chief Justice Marshall was making an argument for a specific outcome using a method that was at odds with the rest of his jurisprudence. Regardless of what Chief Justice Marshall wrote in *Ogden*, his overall approach supports the language-of-the-law reading of the Constitution.

5. Brutus

Solum also relies on Brutus, an Anti-Federalist opponent of the Constitution.[362] But once again, looking at the entire context of Brutus's writing as well as the passage Solum cites shows that Brutus did believe that the Constitution would be interpreted to have a legal meaning. Solum quotes Brutus as follows:

> They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with *the common, and generally received acceptation of the words* in which it is expressed**,** *regarding their*

359. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

360. Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

361. *Id.* at 645; *see also Sturges*, 17 U.S. (4 Wheat.) at 203 ("But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.").

362. Solum, *Public Meaning*, *supra* note 17, at 1977.

> *ordinary and popular use, rather than their grammatical propriety*. Where words are dubious, they will be explained by the context.[363]

Even if this passage meant what Solum assumes it means, it does not follow that Brutus believes that the Constitution is to be interpreted according to the lay language. Brutus elsewhere makes clear that he believes the Constitution will in fact receive an interpretation in which legal interpretive rules will be paramount.

For instance, in the very same essay Brutus made clear that the courts would give "the constitution a legal construction, or to explain it according to the rules laid down for construing a law."[364] In another essay he argued that the objectives of the preamble would have interpretive force in construing the Constitution.[365] The reason for his view was an interpretive rule: "It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution."[366] Looking at the entire context of his writing, it is impossible to conclude that he believed the Constitution would be interpreted according to a lay person's understanding.

To be sure, Brutus did not like this result. He was unhappy that the Constitution would be read with lawyer's craft to consolidate powers in the federal government.[367] For that reason, he was an opponent of both judicial review[368] and the Constitution.[369]

But even the passage that Solum quotes does not support his position once its language is fully understood. Solum is reading "common" and "generally received acceptation" and "ordinary and popular use" as indicating the lay-language meaning. But, as we have noted before,[370] this is not the only way to read these terms. These same terms might be referring to the way that most people most often use language in the relevant context. To put the point differently, a word might have a couple of different meanings, but one might be a much more common one in the text to be analyzed. And that is the one that should be preferred because of its common usage in context.

---

363. BRUTUS, XI (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 419 (Herbert J. Storing ed., 1981) (emphasis added).

364. *Id.*

365. BRUTUS, V (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 388, 389 (Herbert J. Storing ed., 1981).

366. *Id.*

367. *See* McGinnis & Rappaport, *supra* note 227, at 399.

368. *See* Saikrishnah B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism*, 79 TEX. L. REV. 1459, 1518 (2001).

369. *See* Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 137 (2003).

370. *See supra* notes 316–17 and accompanying text.

If that is the meaning that Brutus has in mind, then it is not at all clear that he supports the lay-meaning reading. The most common use of the word in the context of a statement does not necessarily mean the lay meaning. It might also refer to the legal meaning. There might be several legal meanings, with one being a much more common legal meaning.

It is true that for words that have both a lay and legal meaning, the lay meaning is likely to be the more common meaning. But if the context suggests that the legal meaning is the correct one or might be, the better interpretation might be the legal meaning.

A similar passage from Blackstone may clarify the quotation from Brutus, because it seems clear from the language used that Brutus was consulting Blackstone's commentaries in this section.[371] Here is what Blackstone says:

> Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf, which forbad a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon.[372]

This passage suggests that Blackstone was concerned that interpreters choose more common meanings instead of overly literal meanings, not lay meanings instead of legal meanings. "Lay hands on a priest" was understood not to have its literal meaning but to also include hurting a priest with a weapon. Since Brutus was relying on this language from Blackstone, it seems likely that he was also concerned about avoiding overly literal meanings.

Thus, Brutus provides yet another example why the statements on which Solum relies should not be given the reading that the casual reader might give them.

6. Inconsistency of the History with Solum's Position

One last argument against Solum's historical argument may be the strongest. While Solum relies on historical evidence, this should not obscure that his position is historically unprecedented. We are not aware of any person in the Anglo-American (or any other) tradition who adopted his precise position. Recall that Solum believes that provisions that are explicitly technical should receive a technical interpretation but that provisions that have both a legal and lay meaning should always receive lay meaning.[373] We have not

371. *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1109 (2003) (noting Brutus's paraphrase of Blackstone).

372. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59–60 (1895).

373. Solum, *Public Meaning*, *supra* note 17, at 2030 ("[T]he presence of terms with both ordinary and technical legal meanings in the constitutional text was not understood at [the Framing] as inconsistent with the idea that the constitutional text was addressed to the public—and that the ordinary meanings should prevail.").

discovered any observer who adopts that position. The person seemingly closest to Solum's position—Justice Story—rejects Solum's position because he merely adopts a presumption in favor of lay meaning but allows legal meaning when the context supports it.[374] Commentators who might be interpreted as claiming that the language should always be given a lay meaning do not actually follow that position.

Moreover, as Solum acknowledges, it follows from his position that the Constitution will have failed to succeed in communicating anything at all, if the public does not recognize a term of art for what it is.[375] Given the number of terms of art in the Constitution, both patent and latent,[376] his theory makes that unhappy event likely. But in contrast to Solum, everyone proceeds on the assumption that the provisions of the Constitution have a meaning. No one treats a failure of communication as even a remote possibility.

CONCLUSION

When interpreting the term "public" in the phrase "original public meaning," it has become increasingly common to believe that it conveys the understanding of the Constitution that the lay public would gather from the language. Larry Solum has the leading theoretical account of this view—one that has contributed to this increasingly common view. But this claim is wrong as a matter of both the history of the term and the best understanding of originalism. As a matter of history, the term "public" was only meant to distinguish the expressed meaning of a public text from the potentially secret meaning that comes from focusing on Framers' intent. Many of those who first argued for OPM also embraced the legal understanding of constitutional and statutory language over the lay concept, recognizing the Constitution was a pervasively legal document.

Understanding OPM through the lay concept is also wrong as a matter of theory—indeed of the original understanding of the Constitution. Just as the original meaning determines the appropriate reading of each individual provision, so does the original document as a whole determine the language in which the Constitution is written. We have shown the document pervasively reflects legal language. It is full of both legal terms and terms that are not obviously legal but require an understanding of law to determine whether they are legal. The constitutional text also presupposes that it will be interpreted according to legal interpretive rules, and jurists and representatives in the Early Republic who applied these rules.

374. *See supra* Section IV.E.1.

375. *See* Solum, *Public Meaning*, *supra* note 17, at 2034–35.

376. *See supra* notes 116, 118, 344 and accompanying text (providing many examples of such terms).

While Solum believes that the intended audience is the central consideration, the audience is as secondary as Framers' intent is secondary for determining the meaning of particular terms. Moreover, there is no reason that audiences could not have been multiple. The meaning of the document for one audience—the lay public—was clear enough to decide about ratification, particularly with the aid of experts like both the Federalist and Anti-Federalist pamphleteers. But for executing the details of government, the audience was government officials and those who would come before them in courts and other agencies. For that audience, the more precise legal meaning was available and controlling. The richness of both contemporary originalist scholarship and judicial opinions confirms that the legal concept is both used and needed to resolve detailed questions of constitutional law.