The Practical Meaning of Originalism

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Originalism may be the most commonly accepted practice of constitutional interpretation, and it is certainly the most widely discussed. However, most of the analysis of the method is at a purely theoretical level and largely ignores practice at the Supreme Court. In this article, I consider six major sources of originalist evidence and how they have been used by justices on the Court. The recent era has seen a flourishing reliance on originalism, though it is not so conservatively oriented as often assumed. The research also shows that originalism appears to have no effect on how the justices vote. Their ideological preferences override whatever originalist sources seem to suggest. This is probably a consequence of the great indeterminacy of originalist sources, and it suggests that the debate of originalism is one of little practical meaning.
THE PRACTICAL MEANING OF ORIGINALISM

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In *District of Columbia v. Heller,* Justice Scalia’s majority opinion relied heavily on originalist materials, including dictionaries, the ratification debates, comments of the era, and other materials as well as historical analyses. Justice Stevens dissented from the decision but also relied heavily on originalist materials in his analysis, including comments from the ratifying conventions, James Madison, and George Washington. While the justices were split over the correct outcome, all appeared to agree that originalism was a proper means of analyzing the dispute. The opinion was said to show the “triumph of originalism.”

Yet in another opinion authored the same term, an opinion authored by Justice Scalia upheld the conviction of a defendant for promotion and possession of child pornography and rejected challenges to the criminal statute under the First Amendment and the due process clause, with nary a hint of reference to original intent. Justices Breyer and Stevens filed a concurring opinion that also ignored the materials of originalism. This article explores the degree to which originalism has been used in Supreme Court opinions, by which justices, and under what circumstances.

Although originalism is embraced by the Court, its use is not so widespread. A study of opinions since 1953 found that only 1.3% of the opinions on civil liberties, 2.2% of the opinions on government power and merely 15.9% of the opinions declaring a federal law unconstitutional cited *The Federalist.* The Court renders many constitutional decisions without referring to any

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3. The opinions in *Heller* have been described as “the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court.” Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924 (2009).

4. Perhaps the two groups had different approaches to originalism, with Justice Scalia’s majority opinion grounded in the “original public meaning” of the constitutional text while Justice Stevens’s dissent looked “to the original intention of the Framers.” Brian A. Lichter & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 492-493 (2009). Justice Scalia’s opinion, at least, was applauded by a leading originalist. *See, e.g.*, Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13. Another, however, found that details of the opinion departed so blatantly from originalism that it should not be viewed as a good originalist opinion. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (arguing that “the Court’s reasoning is at critical points so defective – and in some respects so transparently non-originalist – that *Heller* should be seen as an embarrassment for those who joined the majority opinion”). From a different perspective, see Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2007) noting that some observed that “the Court had interpreted the Second Amendment in accordance with the convictions of the twentieth century gun-rights movement and so had demonstrated the ascendancy of the living Constitution”).


originalist materials. While originalism has grown in usage in recent years, it is still not the prevailing method of resolving constitutional questions.

Originalism as a mode of constitutional interpretation has confronted considerable criticism. Despite the criticism, though, originalism remains appealing. Some claim that originalism is “now the prevailing approach to constitutional interpretation.” This article does not adopt a normative stand toward the approach but evaluates its use in Supreme Court practice and whether originalism is indeed the prevailing approach.

This study is limited to the Constitution as first drafted. Originalism is also an interpretive principle for other questions, such as the Civil War amendments to the original Constitution. However, limits on my resources prevented a comprehensive coding of these references. My study is limited to the original constitution and considers several prominent originalist sources and their use in Supreme Court opinions.

This research considers the relative use of originalist sources over time and which justices are most likely to use (or eschew use of) these originalist materials. I finally examine the association of use of originalism with ideology, to ascertain if originalism has a distinct ideological influence or if it constrains the ideological impulses of the justices. Before proceeding with this research, though, I explore the meaning of originalism and the relevant materials of originalism that can be empirically studied.

One of the central concerns of originalism “is that judges be constrained by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.” Without originalism, the argument goes, judges will be able to engage in willful decisionmaking, unhinged from the law. I examine this in my study and find that (a) the history of the use of originalism is quite different from that generally believed, (b) originalism is not the province of conservatives but is widely used by liberals as well and (c) originalism shows no indication of being a principled legal basis for constitutional decisions but serves at most as a rhetorical tool for justifying the justices’ ideologically preferred outcomes. Before I analyze these results, though, I assess the meaning of contemporary originalism and the sources relevant to its use.

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I. The Meaning of Originalism

An enormous amount has been written on originalism.11 This article does not aspire to be theoretically comprehensive, but some analysis of originalism is necessary for my descriptive study. We have various theories of originalism, which might be called semantic, applicative, and teleological originalism.12 Fundamental to all theories is that some meaning of the Constitution was fixed at the time of its enactment and that this meaning should govern interpretations of constitutional language even today. Yet many disputes remain, both among originalists and between originalists and those who reject the interpretive approach. The purpose of this article is not to enter this thicket, but some understanding of the meaning of originalism is necessary for my empirical study. I do not intend in this research to provide a definitive meaning for originalism, nor is this necessary. I hope to capture a general notion of originalism’s meaning and identify sources that would be used by an originalist opinion of the Supreme Court.

The phrase “original intent” is often used as the measure of originalism, but that phrase contains considerable ambiguity. In its earliest iteration, originalism was grounded in an investigation of the subjective intentions of the Framers of the Constitution.13 This approach was largely created as a conservative reaction to liberal Warren Court decisions.14 That Court’s activism was often viewed as political, rather than judicial, and departing from the original meaning of the Constitution. Use of original intent was pushed as a theoretical means of constraining the perceived excesses of the Warren Court.

Various theoretical problems with this approach were apparent. There was the traditional problem with ascribing intentions to a collective, as opposed to an individual.15 It became the “received wisdom among law professors . . . that originalism is dead.”16 The view of original intent propounded by Meese and Bork was “trounced by many academic critics.”17 In its first conception, the theory of originalism had some apparent weaknesses.

11 See Originalism is Bunk, supra note 000, at 6 (noting that the literature is “vast, and a thorough survey would fill books”).


13 See District of Columbia v. Heller and Originalism, supra note 000, at 927-928; Semantic Originalism, supra note 000, at 14-15 (tracing the early stages of originalism). See also Stephen M. Griffin, Rebooting Originalism, 2008 U. ILL. L. REV. 1185, 1188 (noting that the “old originalism also tended to rely on the subjective intentions or mental states of the founders as the most relevant evidence of the meaning of constitutional provisions”).


15 See, e.g., Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469, 477 (1981) (contending that there are “no, or very few, relevant collective intentions, or perhaps only collective intentions that are indeterminate rather than decisive one way or another”).


17 Id.
The original expected application theory might be lampooned as a “time-travel theory” of interpretation,\(^\text{18}\) in which the justices ask themselves: “How would James Madison have decided this case?” Such an approach seems silly, being tantamount to ancestor worship and asking an absurd question. The circumstances of the modern world are so different from that of the 18th Century that it is difficult to imagine how a time-transported Madison would decide a case of today.\(^\text{19}\) This position has been essentially abandoned.\(^\text{20}\) It is only a “caricature of originalism” to suggest that it asks about “the specific subjective intentions or expectations of individuals might be applied.”\(^\text{21}\)

Another generally discarded theory of originalism is the original view of “original intent,” based on the position of the Framers, as expressed at the Constitutional Convention. Yet these individuals had no “lawmaking authority,” so that reliance on their views was simply another form of ancestor worship.\(^\text{22}\) However admirable or impressive these individuals may be, they lacked the authority on their own to create a Constitution to govern America. The

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\(^{18}\) ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 328.

\(^{19}\) This thesis was ridiculed in the Harvard Law Record, lamenting the destruction of Justice Scalia’s time machine and asking “How will we ever know about what Jefferson would have thought about fake Twitter accounts as grounds for libel claims?” Howard G. Wells, Scalia’s Time Machine Fails; Jurist Forced To Call Constitution “Living Document”, HARVARD LAW RECORD (April 30, 2009).

\(^{20}\) See Mitchell N. Berman, Originalism and its Discontents (Plus a Thought or Two About Abortion), 24 CONST. COMM. 383385 (2007). See also Steven G. Calabresi & Livia Fine, Two Cheers for Professor Balkin’s Originalism, 103 N.W. U. L REV. 663, 666 (declaring that “[n]o one today seriously believes that the scope of congressional power” is “fixed by the problems that the Framers had in mind in 1787-1788 when the Constitution was ratified”). The “fact that the Framers in Philadelphia . . . expected a certain application of the text is of no moment at all.” Id. at 669.


\(^{22}\) Larry Kramer, Panel on Originalism and Pragmatism, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 151, 152-153 (S. Calabresi ed. 2007). See also John O. McGinnis & Michael B. Rappaport, A Pragmatic Defense of Originalism, in id. at 164, 171 (discussing how “focusing on original intent wrongly emphasized the subjective purposes of the Framers”).
traditional vision of originalism is now largely dormant.\textsuperscript{23} It was “trounced by many academic critics” in a “devastating” fashion.\textsuperscript{24}

The most common normative basis justifying originalist interpretation today is one of popular sovereignty and the rule of law.\textsuperscript{25} The Constitution was created and adopted by the people as law, and it has legal authority because of the democratic pedigree. Today, the “critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification.”\textsuperscript{26} The justification for this interpretive approach lies in popular sovereignty. The written Constitution was an expression of popular consent to a system of government. Although constitutional provisions may limit democratic choice, that is a part of the popular consent, and the Constitution may be amended when the people deem such action necessary.

Originalism may also be deemed necessary to the exercise of constitutional judicial authority. Judges have no authority save that provided by the Constitution, and such authority, originalists maintain, “can come only from the accuracy of its efforts to interpret the Constitution.”\textsuperscript{27} Judicial authority comes from enforcing the sovereign will of the people, as expressed in the written constitutional text. Central to originalism is the “claim that in constitutional adjudication we necessarily face the interpretive choice between the intentions of the Framers and the personal views of unelected federal judges, and that the former have a democratic legitimacy that the latter do not.”\textsuperscript{28} For many originalists, their theory provides the only basis for having an independent federal judiciary impose a veto on the actions of the more accountable branches of government.

\textsuperscript{23} See Jack M. Balkin, \textit{Original Meaning and Constitutional Redemption}, 24 \textsc{Const. Comm.} 427, 442 (2007) (noting that “[m]ost originalists . . . long abandoned original intention in favor of some form of original meaning originalism”); Richard S. Kay, \textit{Original Intention and Public Meaning in Constitutional Interpretation}, 103 \textsc{Nw. U. L. Rev.} 703, 703 (2009) (noting that originalists have “abandoned any pretension that the judge should attempt to ascertain the meaning actually intended by the constitution-makers”)

The traditional approach has not, however, been universally abandoned. \textit{See}, e.g., Walter Benn Michaels, \textit{A Defense of Old Originalism}, 31 \textsc{W. New Eng. L. Rev.} 21 (2009). Balkin notes that arguments “tend to conflate original meaning and original expected applications.” \textit{Original Meaning and Constitutional Redemption, supra} note 000, at 444. Moreover the views of original intention and original meaning “will tend to converge in practice even if the two concepts remain distinct in theory.” Caleb Nelson, \textit{Originalism and Interpretive Conventions}, 70 \textsc{U. Chi. L. Rev.} 519, 558 (2003).

\textsuperscript{24} RANDY BARNETT, \textsc{Restoring the Lost Constitution} 90 (2004). He went on to note that if “ever a theory had a stake driven through its heart, it seems to be originalism” \textit{Id.} at 91. At least until originalism changed “from original intention to original meaning.” \textit{Id.} at 92.

\textsuperscript{25} Semantic Originalism, \textit{supra} note 000, at 127. \textit{See also Rebooting Originalism, supra} note 000, at 1189 (observing that “[r]elatively abstract rule of law values are thus quite important to the new originalism”).

\textsuperscript{26} KEITH E. WHITTINGTON, \textsc{Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review} 35 (1999).

\textsuperscript{27} \textsc{Constitutional Interpretation, supra} note 000, at 154.

\textsuperscript{28} DENNIS J. GOLDFORD, \textsc{The American Constitution and the Debate Over Originalism} 2 (2005).
As a bottom line, the originalist theory is: “The original public meaning of the constitution is the law and for that reason it should be respected and obeyed.” Michael McConnell thus declared that if “the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted – to the best of our ability – as they meant them.” The Constitution has its own authorization of amendment of its terms. If later generations find a part of the original text unacceptable to them, the Constitution provides the power for them to change it. Failing to do so, the originalists argue, later generations have chosen to be bound by the original text and its meaning.

The prevailing view of originalism is based on the more general understanding or meaning of constitutional terms, especially as perceived by those who ratified the Constitution. The standard “is not what went through the minds of the Framers as they wrote and ratified the particular constitutional provisions they did, but rather the contemporaneous public understanding of the language comprising the document.” Some suggest that the new originalism is really no different from the old, but this philosophical question is beyond the scope of my analysis. Under the new originalism, “originalists maintain that it is the meaning of the text to the ratifiers that counts.” Justice Scalia explained the modern version of the theory:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention – Hamilton and Madison’s writings in The Federalist for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”

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29  Semantic Originalism, supra note 000, at 173. See also Keith E. Whittington, The New Originalism, 2 GEO. J. L. & PUB. POL’Y 599, 609 (2004) (emphasizing that the “new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted”).


31  Originalism is Bunk, supra note 000, at 9 (noting that criticisms of original intent have “pushed many in the growing originalist camp away from the framers in favor of the ratifiers”); Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 GEO. L.J. 1113, 1114 (2003) (observing that “originalist methodology has evolved over the past several decades from ‘original intent’ to ‘original understanding’ to, most recently ‘original meaning’”).

32  THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 117.


34  Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 576 (1994). See also, The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1138 (declaring that it is the “ratifiers’” understanding of the meaning of the Constitution that was “controlling”); Charles A. Lofgren, The Original Understanding of Original Intent?, 5 CONST. COMM. 77 (1988) (addressing the issue of ratifier intent); Original Intention and Public Meaning in Constitutional Interpretation, supra note 000 (discussing the advantages of reliance on the intent of the Framers).
give equal weight to Jay’s pieces in The Federalist, and to Jefferson’s writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute; the original meaning of the text, not what the original draftsmen intended.\textsuperscript{35}

Originalism is thus not some unique constitutional theory; it is simply standard legal interpretation.

Original public meaning relies on the fact that only the text of the Constitution acquired legal status. The Constitution was legally meaningless until ratified, so it was the ratification process that was crucial, not the perhaps unexpressed opinions of those at the convention drafting the text. Moreover, originalists have emphasized the democratic foundation of the Constitution. It was the ratification of the text that made the Constitution law, and the Constitution contained the democratic process for its own alteration. Originalists believe that dedication to democracy inherently implies reliance on originalism as an interpretive theory, based on the text’s original meaning. The intention of those at the Constitutional Convention, by contrast, lack the necessary democratic imprimatur.\textsuperscript{36}

James Madison once referred to the “intention of whose who framed” the Constitution but then quickly corrected himself to say “or rather, who adopted” it, indicating that the ratifiers were the relevant authority.\textsuperscript{37} He declared that when looking to the meaning of the Constitution, “we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”\textsuperscript{38}

This position suggests that originalism refers “to what the persons who participated in the state ratifying conventions thought that the Constitution meant.”\textsuperscript{39} Thus, the originalist objective is to find the meaning of “the text of the Constitution, as originally understood by the people who ratified it.”\textsuperscript{40} There is a distinction in the originalist camp between those who emphasize “ratifiers’ understanding originalism” and those who rely on “original public meaning.”\textsuperscript{41} This

\textsuperscript{35} A MATTER OF INTERPRETATION, supra note 000, at 38.

\textsuperscript{36} This position was most prominently taken by James Madison himself who said that looking for the meaning of the constitution should be found “not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.” Quoted in 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, 459.

\textsuperscript{37} ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 5.

\textsuperscript{38} 4 Annals of Cong. 776 (1976).

\textsuperscript{39} 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, 461. See also CONSTITUTIONAL INTERPRETATION, supra note 000, at 163-164 (stating that “originalism refers to the intentions of the various individuals who composed the ratifying convention and the degree of agreement that they expressed over the meaning of constitutional terms”).

\textsuperscript{40} Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power To Execute the Laws, 104 YALE L.J. 541, 551 (1994).

\textsuperscript{41} Originalism is Bunk, supra note 000, at 9; District of Columbia v. Heller and Originalism, supra note 000, at 930-934 (explaining the distinction). See also Larry Kramer, Two (More) Problems with Originalism, 31 HARV.
distinction is a theoretically subtle one, that will be generally lacking in practical meaning. Is there any reason to believe that the ratifiers understanding of the words differed from their contemporaneous public meaning? Consequently, I will conflate the two approaches in this article.

My conflation, though, requires some further explanation. “Original meaning,” the most common originalist interpretation, requires an answer to the question: original meaning to whom? Randy Barnett says that original 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.”42 If this is the case, it seems essentially indistinguishable from the intent of the ratifiers’, who surely were “reasonable speakers of English.”43 Perhaps this was not the case, and Michael Stokes Paulsen maintains that “it matters not what any (much less all) of the Ratifiers actually intended or understood, but what the hypothetical reasonably well-informed Ratifier would have objectively understood the text to mean with all of the relevant information in hand.”44 Thus, evidence from the ratifiers may not be conclusive about original public meaning.45

J. L. & PUB. POL’Y 907, 909 (____) (observing that for newer originalists, “the authoritative intent is that of the people who had the power to make it law, not of the people who drafted the Constitution in Philadelphia).


43 Technically, original meaning is not what the ratifiers subjectively understood, but instead how the words of the Constitution “would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them.” The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1145. But the ratifiers were surely representative users of the language at the time, within the relevant political community. So their subjective understanding should be among the best available sources of the desired original meaning.

Professor Calabresi suggests that in the context of the civil war amendments he did “not claim Congress understood what it did when it passed the Fourteenth Amendment” but only made claims “about what the original public meaning of the text of the amendment must have been.” Steven G. Calabresi, A Critical Introduction to the Originalism Debate, in ORIGINALISM: A QUARTER CENTURY OF DEBATE (Steven G. Calabresi, ed.2007) at 1, 35. He does not explain, though, how he could possibly have a better grip on that “original public meaning” than would the contemporaneous members of Congress. See Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 706 (observing that ratification “was an intentional act and we cannot understand what it accomplished independent of what the people involved in it thought they were doing”). The author suggests that “the public meaning of the constitutional text will almost always mirror the intentions of the human beings who drafted and approved it.” Id. at 713.

44 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1162. See also Gary Lawson & Guy Seidman, The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation, 78 NOTRE DAME L. REV. 83, 90 (2002) (suggesting that the “proper object of constitutional inquiry is a hypothetical mental state, not an actual mental state”). For a discussion of the difficulties associated with such “hypothetical” observer determinations, see Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 721-722.

Moreover, this reliance on the hypothetical reasonable ratifier comes at considerable cost to the theory’s democratic and legal grounding. It was the actual ratifiers who had the legal authority to make the Constitution the law, through the reasonably democratic ratification process. The hypothetical reasonable ratifier had no such authority. I am aware of no theory ascribing power to what a reasonable ratifier, as opposed to the actual ratifiers, would believe.

45 See, e.g., Gregory E. Maggs, A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution, 87 B.U. L. REV. 801, 805-806 (distinguishing between the subjective original meaning to the ratifiers and the objective original meaning of the text).
This theoretical criticism of reliance on ratifiers may have little practical effect in interpretation, as the ratifiers’ subjective intentions, though possibly incorrect, may still be the best available guide to original public meaning. Robert Bork has noted that “what the ratifiers understood themselves to be enacting must be taken to be what the public at that time would have understood the words to mean.”\textsuperscript{46} Surely contemporaneous actual understanding is a close guide to contemporaneous reasonable understanding (presumably better than retrospective estimation), and the divorce of hypothetical and actual understanding could raise legal problems.\textsuperscript{47} This conflation also avoids unnecessary sticky issues of interpretive standards.\textsuperscript{48} Even assuming that the true standard of original public meaning is not theoretically identical to ratifier understanding, it seems plausible that ratifier meaning is the single best measure of original meaning available to us.

One important open question remains on proper originalist interpretation – the relevance of contemporary, often earlier, judicial opinions. These may be said to establish the original legal understanding of the words. Yet this approach seems to assume that the people (or ratifiers) were familiar with the detailed content of the law at the time, which seems dubious.\textsuperscript{49} One problem with this approach is that the original legal understanding of statutory interpretation could preclude consideration of the authors’\textsuperscript{50} intentionalist meaning. Some would overcome


\textsuperscript{47} It seems a bit presumptuous for a 21\textsuperscript{st} Century interpreter to suggest that they could better discern the meaning of 18\textsuperscript{th} Century words better than could an 18\textsuperscript{th} Century ratifier. \textit{See, e.g.}, Adam Samanah, \textit{Originalism’s Expiration Date}, 30 CARDOZO L. REV. 1295, 1340 (2008) (making the unexceptional suggestion that “the longer the temporal gap between an event and its investigation, the less reliable an investigator’s perceptions are likely to be”).

\textsuperscript{48} For a true textualist, the subjective intent of the ratifiers would be meaningless and the judge’s evaluation of original public meaning determinative. However, for an intentionalist, the understanding of those who produced the law would be a relevant consideration. In most cases, this difference may not matter much, because the contemporary understanding of the ratifiers may be the best guide to original public meaning. The occasional cases when this may not be true are not relevant to this article.

\textsuperscript{49} Even in the modern world, with more widespread public education and countless sources of information, knowledge of the content of judicial opinions is not high. “[N]ational public opinion polls typically report low levels of knowledge about the Supreme Court.” VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 6 (2003). The high water mark for such awareness was a study finding that as many as 40% of the people surveyed could recall specific Court decisions. \textit{Id.} at 52. It seems unlikely that an 18\textsuperscript{th} Century populace was familiar with the judicial decisions, some from England, that are used to interpret constitutional meaning.

\textsuperscript{50} \textit{See} Hans Baade, “Original Intent” in Historical Perspective: Some Critical Glosses, 69 TEX. L. REV. 1001, 1006-1011 (1991). He notes a speaker of the era who declared that it was the “universal practice of Courts of Law” that they would rely on the language of the acts and “never resort[ ] to the debates which preceded it.” \textit{Id.} at 1010.
this by suggesting that the proper intention was that of the “intelligent and informed people of the time.”

Originalists, though, tend to be “committed to the proposition that it is the ‘normal and ordinary as distinguished from technical meaning’” that governs constitutional interpretation. The contemporary philosophy is described as one of “original public meaning.” One might rely on legalistic interpretations if these were apparently embraced by the common public. However, this could not rescue reliance on original legal meaning as opposed to evidence of any different original public meaning. Even the “legal interpretive rule will often require the selection of the ordinary meaning rather than the legal meaning of a word in a legal document.”

The approach of relying on the impressions of the “intelligent and informed people” seems to undermine the democratic pedigree on which the Constitution’s authority rests. When electing a President, we do not require that voters be intelligent or informed or hypothetically reasonable. Moreover, it may imply that original meaning originalism could collapse back into reliance upon the now generally discredited theory of reliance upon intent of the better educated Framers.

An originalist problem arises when there is little or no evidence that a matter was considered by the Framers. “[M]ost originalists acknowledge that in many cases, there may be no intention to discover.” Into this gap comes constitutional construction. Some question

51 See, e.g., A MATTER OF INTERPRETATION, supra note 000, at 38. See also Guy Lawson & Guy Seidman, Originalism as a Legal Enterprise, 23 CONST. COMMENT. 47, 73 (2006) (suggesting that original meaning should be controlled by the person who was “highly intelligent and educated and capable of making and recognizing subtle connections and inferences”).

52 District of Columbia v. Heller and Originalism, supra note 000, at 967. One intriguing, insufficiently explored aspect of original meaning originalism is the definition of the object assigning meaning. Some suggest that it is the “average, informed speaker and reader of the language.” Vasan Kesavan & Michael Stokes Paulsen, Is West Virginia Unconstitutional?, 90 CAL. L. REV. 291, 398 (2002). For Larry Solum, it is “a competent speaker of American English.” Semantic Originalism, supra note 000, at 51.

53 See, e.g., Semantic Originalism, supra note 000, at 19.

54 Larry Solum provides a good example of this possibility, in referring to a hypothetical ratifier who doesn’t know the meaning of “letters of marquee and reprisal” and hence either consults a lawyer or perhaps simply defers to the lawyers. District of Columbia v. Heller and Originalis, supra note 000, at 968.

55 John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case against Construction, 103 NW. U. L. REV. 751, 757 (2009). The authors also make a persuasive (to me) case for position that contemporary rules of interpretation are important to originalist understanding, but this is quite different from the position that the technical legal, rather than popular, meaning of the words of the Constitution should govern its interpretation, though the authors seem to obscure this distinction. They dispute the claim that the ratification implied the ordinary meaning of the constitutional language. Id. at 771, but concede that legal rules “often require that the ordinary meaning of the language be employed.” Id. at 772. The approach would be highly relevant to questions of construction, though, as discussed below. While the authors take issue with constitutional construction itself, I believe a better view of their position is suggesting the proper method for such construction.

56 See Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, 723 (suggesting that this interpretation eliminates the “difference between intended and public meaning”).

57 Aileen Kavanagh, Original Intention, Enacted Text, and Constitutional Interpretation, 47 AM. J. JURIS. 255, 266 (2002).
whether constitutional construction is truly a form of originalism. By its nature, construction is “guided by something other than original meaning.” Construction is a political exercise and not legal interpretation and therefore not truly originalist decisionmaking.

Yet construction is a central aspect of contemporary originalism made necessary by the presence of vagueness in the constitutional text. Because it is the underlying textual vagueness that authorizes construction, it is a necessary offshoot of originalism. An application of construction in the presence of vagueness must remain “consistent with the core linguistic meaning of the text,” ascertained from originalist interpretation. Most original public meaning originalists “believe that most constitutional ambiguities can be resolved by resort to the publicly available constitutional context.” Construction is derived from the constitutional text, just as interpretation is. Construction cannot contradict “the meaning that does exist” from the originalist perspective. Construction need not be originalist in orientation – one might have rules that uncertainties be construed however necessary to promote justice or in deference to the political branches of government. In today’s theory, though, construction is a key offshoot of originalism.

Construction clearly grants additional discretion to the constitutional interpreter. This is a major pragmatic concern of originalists, as discussed below, reflecting their fear that interpretation will become unhinged from the original textual meaning. Yet this is an empirical question and not one that is demonstrable a priori. Those who believe in construction believe it can be done faithfully (a requirement of any originalist theory) and consistent with the original understanding. Their view is that construction is fundamentally grounded in the purposes animating the original Constitution as revealed by the original meaning of the text.

See District of Columbia v. Heller and Originalism, supra note 000, at 933 (noting that construction comes into play when the original textual meaning is “vague or underdeterminate”)

See Originalism is Bunk, supra note 000, at 63.

District of Columbia v. Heller and Originalism, supra note 000, at 934.


District of Columbia v. Heller and Originalism, supra note 000, at 979.

Semantic Originalism, supra note 000, at 70.

See CONSTITUTIONAL CONSTRUCTION, supra note 000, at 14.

RESTORING THE LOST CONSTITUTION, supra note 000, at 4. Thus, he distinguishes between extraconstitutional interpretation and contraconstitutional interpretation. Id. at 122-123. The “original meaning of the text can limit the range of acceptable choices made on nonoriginalist grounds.” Id. at 123. While construction is to some degree political, it is not “wholly” political. Id.

Semantic Originalism, supra note 000, at 74-75.

See Original Methods Originalism, supra note 000, at 777-778.
My assessment of originalism relies on the understanding that the legal power of the Constitution and the relevant assessment of original intent lies in the ratification. This interpretation is not necessarily that of the Supreme Court, which I am studying. An early opinion declared that the construction of the Constitution “must necessarily depend on the words of the constitution, the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes.” This language suggests that the Court viewed the relevant intent as being that of those who wrote the Constitution, not the ratifiers.

In this article, I focus on the Supreme Court’s use of originalism. While today most originalists suggest that the argument for reliance on evidence of the intent of the ratifiers is the stronger one, I will also measure the Court’s use of the intent of those who drafted the Constitution (though this may also be considered persuasive indirect evidence of the ratifiers’ intent). The following section describes the originalist materials I consider in this study.

II. The Materials of Originalism

Historical materials were central to original intent originalism but more ambiguous in the context of original public meaning originalism. The thrust of such originalism is the pursuit of an objective meaning of the text, rather than one that seeks the subjective intent of the relevant parties. Yet in discerning the original meaning, the evidence from the founding era seems highly relevant.

The historical record contains extensive discussion of the Constitution from numerous sources. There is considerable controversy over exactly what historical materials are most relevant and helpful to originalist interpretation. As I have observed, the legal authority of the Constitution derives from its ratification. Consequently, I consider evidence related to the ratifiers’ decision as direct sources of original intent, though the two may have considerable overlap. The opinions of the Framers themselves, such as from the Constitutional Convention, is also commonly used in originalist interpretation, though these resources were unavailable to those who ratified. Still, they may be considered at least indirect sources of original intent, reflecting upon the original public meaning of the constitutional language. Justice Scalia relies on all these sources simply because they “display how the text of the Constitution was originally understood.”

I distinguish between what I call direct sources from the time of ratification and indirect sources, such as the evidence of the intent of the actual convention drafters. This is but a

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69 See, e.g., RESTORING THE LOST CONSTITUTION, supra note 000, at 100.

70 See Original Intention, Enacted Text, and Constitutional Interpretation, supra note 000, at 255 (questioning “what evidence of intentions should we use: the ratification debates? private memoirs?”).

71 A MATTER OF INTERPRETATION, supra note 000, at 38. Justice Scalia concedes, however, that “it is often exceedingly difficult to plumb the original understanding of an ancient text.” Antonin Scalia, Originalism: The Lesser Evil, 57 U. CINN. L. REV. 849, 856 (1989).
tentative and uncertain distinction, though, for reasons that I explain below. Nevertheless, it provides a distinction that may be found to be empirically salient.

A. Direct Sources

My direct sources of originalism relies upon evidence from the period of ratification rather than the drafting of the Constitution. Raoul Berger suggests that the Framers were the “agents” of the ratifying people, who would consider their interpretation a relevant one.72 The records of the ratification period are quite limited, as I will discuss below. However, incompleteness does not mean inaccuracy, absent some reason to believe these records were systematically biased. An incomplete record need not be a wrong one. I consider three primary direct sources for originalist intent – *The Federalist*, the records of Elliot’s Debates, and contemporary dictionaries.

1. The Federalist

*The Federalist* is “often considered the most important of originalist sources.”73 It has “enjoyed canonical status in constitutional interpretation from the start.”74 The justices seem to feel it is “vested with a special kind of power to help resolve issues of constitutional meaning.”75 An early Court opinion declared that the *Federalist* “has always been considered as of great authority.”76 Not long thereafter, the Court declared that the *Federalist* “papers were received by the people of the States as the true exponents of the instrument submitted for their ratification.”77 *The Federalist* was regarded by Jefferson as “evidence of the general opinion of those who framed, and of those who accepted” the Constitution.78 Much more recently, the source has been called “the best single extra-textual source in explicating the Constitution.”79 Even if the

72 Original Intent: Bittker v. Berger, supra note 000, at 1215. Historian Clinton Rossiter said that it “would not be stretching the truth more than a few inches to say that *The Federalist* stands third only to the Declaration of Independence and the Constitution itself among the sacred writings of American political history.” CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 52 (1964).


74 The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1150.


statements made in such advocacy pieces were not entirely “candid,” it “must be presumed that the ratifiers acted on the basis of the general tenor of these representations.”

A study of the question concluded that there is “no way of determining just how effective Publius, the nom de plume adopted by the authors of The Federalist Papers was a weapon of the forces favoring ratification,” noting that the source “did not reach an audience of any significant size in 1787-88.” Reliance on The Federalist suggests that the ratifiers voted for the adoption of the Constitution in reliance on its representations, a dubious proposition. Even in New York’s convention, at which The Federalist was centrally aimed, its impact was “negligible.” There is “substantial reason to doubt that many of the ratifiers actually read The Federalist Papers.”

The timing of publication is also problematic, as The Federalist was published contemporaneous with the ratifying conventions, and five states had ratified the Constitution by January 9, 1788, “when substantially more than half of The Federalist Papers had not yet seen the light of day.” The papers were not completed until almost every state had already made its ratification decision. Moreover, it appears that “the average citizen had effectively made his decision about whether to ratify” even before the ratification conventions began. Consequently, the advocacy documents may have had relatively little to do with the decision to

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81 Elaine Crane, Publius in the Provinces: Where was The Federalist Reprinted Outside New York City?, 21 WM. & MARY Q. 589, 589, 591 (1964). See also The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1154 (observing that The Federalist was “not widely circulated throughout the United States”). Yet the Supreme Court declared that The Federalist Papers “were read by almost everyone.” Prigg, 41 U.S. at 594. Such a comment may raise a question about the Court’s reliability in evaluating originalist history, which I put off until later in the article.


84 A Concise Guide to the Federalist Papers, supra note 000, at 822. The author goes on to note that the source might still be valuable as a guide to “what proponents of ratification generally thinking.” Id. And it was the proponents who won the day with ratification. In addition, the “most important ratifiers” may have been influenced. Id. at 829.

85 The Bicentennial of the Jurisprudence of Original Intent, supra note 000, at 273. See also Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, supra note 000, at 846 (noting that “many states had ratified the Constitution prior to the publication of all of the papers”).

86 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1153 (setting out the comparative timing of publication and ratification).

87 Sources of Federalism, supra note 000, at 250. The members of the ratifying convention were pre-selected as Federalists or Anti-Federalists by the people based on their expected votes. Id.
ratify the Constitution. Indeed, there is “no good evidence that anyone, even in New York, relied on The Federalist as the basis for voting to ratify.”

The Federalist has great power in the eyes of many originalists. Its purpose was to persuade those reluctant to ratify the Constitution, “and the fact that ratification carried testifies that the persuasion was effective.” Even if they did not influence ratification, The Federalist might be viewed as a good reflection of the original understanding of the text’s meaning. Thomas Jefferson regarded the source as “evidence of the general opinion of those who framed” the Constitution. The source is said to approximate “a widely shared, then-existing, coherent understanding of the Constitution.” John Marshall declared that The Federalist corrected “numerous misrepresentations of the Constitution” expressed at the time. If so, it may be regarded as a good source for the original meaning of the text that was ratified.

Early cases relied on The Federalist, as noted above. In McCulloch v. Maryland, Chief Justice Marshall added a small caveat, explaining that The Federalist was entitled to “great respect,” but that the “correctness” of the claims made therein should not be presumed but must be evaluated. The source has held its importance over time. In an especially strong and recent affirmation of the source, Justice Souter wrote in Printz that “it is the Federalist that finally determines my position.” In the same decision, but taking the opposite side, Justice Scalia wrote that The Federalist was “usually regarded as indicative of the original understanding of the Constitution.”

Yet the significance of The Federalist remains debatable, despite its wide respect. John Manning contends that it was simply “an anonymous piece of political advocacy” and that it was “most unlikely that a reasonable ratifier would have viewed it as an authoritative source from which to gather constitutional meaning.” The advocacy motive behind the publication may undermine whether the authors truly adopted the original public meaning of the constitutional text, as opposed to the politically strategic meaning. The authors of The Federalist did not


90 See CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 52 (1964).


92 JOHN MARSHALL, LIFE OF WASHINGTON 131 (1807).

93 17 U.S. (4 Wheat.) 316, 433 (1819).


96 John F. Manning, Textualism and the Role of The Federalist in Constitutional Adjudication, 66 GEO. WASH. L. REV. 1337, 1350 (1998). See also A Concise Guide to the Federalist Papers, supra note 000, at 838 (suggesting that “partisan bias may have influenced the authors’ choices of words and phrases”).

97 See A Rhetoric for Ratification, supra note 000, at 534-535 (suggesting that the motivation of the authors of The Federalist can undermine the resource’s value as a measure of contemporaneous public meaning of the text).
anticipate it would have this force. They had “strategic objectives.” The source was published in New York and had only limited dissemination in other states, as noted above. Still, he suggests that The Federalist was relevant simply as reflecting “the way reasonable persons actually understood a text, giving such evidence particular force if those persons had special familiarity with the temper and events of the times that produced that text.”

The Federalist has other limitations as a resource. It may not provide clear answers, as Justice Scalia observed that the document “reads with a split personality” on matters of federalism. Scalia’s view is established in history. The authors of The Federalist sometimes took positions different from that within its pages. Such internal conflicts render the source a less reliable measure for original meaning. However, shortcomings of The Federalist do not completely demean its use in interpretation.

At the time of ratification, the lines were generally drawn between Federalists supporting the Constitution and Anti-Federalists, whose “unifying position was opposition to the ratification of the Constitution.” The Anti-Federalists supported local democracy, they were skeptical of a national government and feared its restrictions on personal liberty. They therefore opposed the

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98 See 4 THE PAPERS OF ALEXANDER HAMILTON 293 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (concluding that “not the authors, and probably few readers, realized that the essays which in the winter of 1788 appeared so frequently in the New York press under the signature of ‘Publius’ would become a classic interpretation of the Constitution of the United States”).

99 Id. at 1358. Madison himself cautioned that “it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates.” Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1816-1828 435-436 (J.P. Lippincott & Co. 1865). See Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, supra note 000, at 850 (noting how The Federalist arguments were “tailored to the political needs of the moment” and may have been “disingenuous”); Sources of Federalism, supra note 000, suggesting that “as evidence of the original understanding,” The Federalist “is suspect because of its obvious strategic objectives”).

100 See A Concise Guide to the Federalist Papers, supra note 000, at 815-816. The author notes that only a “few newspapers and magazines outside of New York” reprinted the source. Id. at 816.

101 Id. at 1355. See also Textualism and the Role of The Federalist in Constitutional Adjudication, supra note 000 (noting, after criticizing undue reliance on The Federalist, that it can still serve as “independently probative evidence of constitutional meaning.”).


103 See Alpheus T. Mason, The Federalist – A Split Personality, 57 AM. HIST. REV. 625 (1952) (pointing out contradictions between the essays of Madison and Hamilton); A Concise Guide to The Federalist Papers, supra note 000, at 833 (describing how the source is self-contradictory)

104 See Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, supra note 000, at 851 (observing that “commentators have noted differences between the arguments made in The Federalist and prior or subsequent positions held by its respective authors”).

105 A Concise Guide to the Federalist Papers, supra note 000, at 804 (reviewing nine criticisms of reliance on the source and noting that none of them were “so overwhelmingly strong” that they should prevent any reliance on the source).

106 Sources of Federalism, supra note 000, at 239.
Constitution’s creation of a more powerful national government and made arguments during ratification about the then proposed Constitution’s meaning.

The Anti-Federalists essentially lost the day in ratification. As an opponent, therefore, the significance of anti-Federalist writings is uncertain. Leonard Levy argued that “much of the Anti-Federalist literature was trash based on hysterical assumptions or on political calculations intended to deceive and incite fear of the Constitution.”107 Thus, some advocates of an independent treaty power have relied on ratification commentary by an Anti-Federalist “who was seeking to exaggerate the extent of federal powers in order to defeat the Constitution.”108 It is generally presumed that the opponents of a proposal have a greater incentive to provide misleading information about the proposal.109

There is a general principle of statutory interpretation that the comments of opponents of a bill that passed are entitled to less weight,110 so the Anti-Federalist positions might likewise be less reliable.111 While the Anti-Federalists may have engaged in deceptive and hyperbolic claims, as Levy suggested, the Court has used these expressed “fears” as evidence of constitutional meaning.112 This is a plausible usage. The views of the Anti-Federalists on original meaning could have been considered by the ratifiers as evidence of such meaning and may have even been relied on by some as reasons to vote for ratification.113

Thus, the writings of the Anti-Federalists may carry originalist interpretive value. They may reveal meanings shared with those of the Federalists, which would be significant evidence. Regardless of this, the Anti-Federalists were opposing the Constitution because of their view of the meaning of its words. Their views provide evidence as to “how the words, phrases, clauses, and structure of the Constitution were understood by those who read and used the text at the time.”114 They may be considered important sources “for a modern originalist interpretation of the Constitution.”115

107 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 4.


110 See, e.g., Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 449 n.46 (1988) (discussing the “traditional doctrine that views of opponents of legislation are entitled to little weight in the interpretive process”).

111 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1152 (drawing this analogy).

112 Sources of Federalism, supra note 000, at 257.

113 For a discussion of how The Federalist used Anti-Federalist claims as a basis for ratification, see A Rhetoric for Ratification, supra note 000, at 512-513.

114 The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1152 n. 147.

While the Federalists won the ratification struggle, that does not resolve matters of original meaning. Ratification could be seen as a rejection of the Anti-Federalist position. Conversely, though, ratification occurred “only because of Federalist assurances that the Constitution in fact addressed the Anti-Federalists’ concerns.”\textsuperscript{116} Simply because “the Anti-Federalists lost the war over whether the Constitution should be ratified, there is no reason to think that the Anti-Federalists lost every specific battle over how various provisions of the Constitution should be understood.”\textsuperscript{117} When Federalists responded to Anti-Federalist concerns about the meaning of the Constitution, this may be sound evidence of the contemporary understanding.\textsuperscript{118}

However, one should be cautious in relying on Anti-Federalist claims. They were opponents of ratification, and their arguments failed in the decision to adopt the Constitution. Since the essential Anti-Federalist message was that the Constitution would bring tyranny to America, it seems most likely that those who ratified the Constitution disagreed with their interpretation of its terms.\textsuperscript{119} Accordingly, their views should not be relied upon absent other historical evidence that supports them. The Federalist, though, may be given weight for originalist interpretation because it embodied “something like a then-consensus understanding of the Constitution’s meaning.”\textsuperscript{120}

2. Elliot’s Debates

The primary resource for records on the ratification of the Constitution is known as Elliot’s Debates, published between 1827 and 1830.\textsuperscript{121} There are other sources of ratification materials, but they were produced much later and therefore unavailable to the Supreme Court for most of its history.\textsuperscript{122} These discussions were central to ratification. Jack Rakove notes that from “the essays of ‘Publius’ to the ranting of the most fearful Anti-Federalist, every

\textsuperscript{116} Sources of Federalism, supra note 000, at 249.

\textsuperscript{117} Id. at 259.

\textsuperscript{118} William N. Eskridge, Should the Supreme Court Read The Federalist but Not Statutory Legislative History?, 1301, 1318 (1998) (noting that the Anti-Federalist arguments “are potentially worth a great deal because of their strategic posture”).

\textsuperscript{119} Turning Losers into Winners, supra note 000, at 877 (noting that “had the American people and the ratifiers they elected accepted the antifederalists’ interpretation of the intentions of the framers – it is unlikely that the Constitution would have been ratified”); A Rhetoric for Ratification, supra note 000, at 541 (contending that “when the ratifiers adopted the Constitution, it seems unlikely they said in effect: ‘We believe the troubling interpretations put forward by Brutus, rather than the more moderate interpretations put forward by Publius, but we are going to ratify anyway’”).

\textsuperscript{120} A Rhetoric for Ratification, supra note 000, at 541.

\textsuperscript{121} The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787 (J. Elliot ed., 1827-1830), available online at http://memory.loc.gov/ammem/amlaw/lwed.html.

\textsuperscript{122} For example, an extensive collection is found in the Documentary History of the Ratification of the U.S. Constitution (John P. Kaminski et al. eds. 1876-2007). This improved resource was begun in the 1950s but is still not completed.
commentator on the Constitution was interpreting its meaning.” Thus, these debates illuminate the meaning of the text from an originalist perspective. Of course, the differences in the interpretation given the text by contemporary commentators complicate the matter, but these discussions provide central evidence of meaning.

While the ratification debates might seem the ideal originalist source, one problem with relying on these records is their incompleteness. Extensive records of the debates “exist for four state ratifying conventions: Pennsylvania, Massachusetts, Virginia, and New York,” and “fragmentary records” exist for four more states: Connecticut, Maryland, South Carolina, and New Hampshire.” There are no records at all for five states. Insufficient “stenographic skills” compromised the available evidence for the recorded conventions. Accounts were not generally verbatim transcription, and the reporters may have been incompetent or “politically biased.”

The notorious originalist, Justice Thomas, noted this limitation, arguing that “arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary.”

Incompleteness does not utterly demean reliance on this source. Historical records are always incomplete, but we don’t disregard history. The available records do provide some information on the understanding of the Constitution for the ratifiers for whom we have records. Absent some reason to believe that there were systematic differences between the understanding in the recorded states and those unrecorded, there should be no serious errors. Ultimately, you go to court with the historical record you have, not the one you desire.

Elliot’s record may also be questioned for its accuracy. Elliot himself acknowledged that his reports “may, in some instances have been inaccurately taken down, and, in others, probably, too faintly sketched.” Elbridge Gerry, a member of the Philadelphia Convention complained that the debates “as published by the short-hand writers were generally partial and mutilated.” Madison reported to Elliot that aspects of the Virginia Convention’s record were “defective” and

123 ORIGINAL MEANINGS, supra note 000, at 39.

124 A Concise Guide to the Records of the State Ratifying Conventions, supra note 000, at 481.

125 The incompleteness means that no inference should be drawn from “silence in the records” and that states may have differed in their approaches, but we would be unaware of this given the limited records. See A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution, supra note 000, at 487.


129 See Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121, 151 (1996).

130 Quoted in ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 289.

131 Id. at 289. The editor of the debates for the Massachusetts Convention “doctored some speeches, altering the meaning of the speakers, and provided some spurious speeches as well.” Id.
“more or less erroneous.” The political partisanship of transcribers “compromised the quality of the record of convention debates” in Connecticut and New York. Justice Scalia observed that “many of the reports of the ratifying debates . . . are thought to be quite unreliable.” This concession is surely a significant one.

There is reason to believe that different contemporaries may have had different understandings of what they were adopting. For example, from the Constitutional Convention itself demonstrates such contradictions:

Sometimes Framers who voted the same way held contradictory opinions on the meaning of a particular clause. Each believed that his understanding constituted the truth of the matter. James Wilson, for example, believed that the ex post facto clause extended to civil matters, while John Dickinson held the view that it applied only to criminal cases, and both voted for the clause. George Mason opposed the same clause because he wanted the states to be free to enact ex post facto laws in civil cases, and he believed the clause was not clearly confined to criminal cases; but Elbridge Gerry, who wanted to impose on the states a prohibition against retroactive civil legislation, opposed the clause because he thought it seemed limited to criminal cases.

Justice Story, a contemporary, applied this to the ratification debates observing that in “different states and in different conventions, different and very opposite objections are known to have prevailed, and might well be presumed to prevail . . . to remove local objections, or to win local favor.” The ratification record has been characterized as “a cacophonous debate in which squibs, parodies, wildly fantastic predictions, and demagogic rhetoric alternated with the more serious analysis.” One can see this effect today in legislation, as disputes arise over the meaning of statutory words. This calls into question the existence of any original public meaning of the words of the Constitution. It can be difficult to ascertain a group’s belief from

132 Id. at 290.
133 The Creation of the Constitution, supra note 000, at 21.
134 Originalism: The Lesser Evil, supra note 000, at 856.
135 See A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution, supra note 000, at 491 (noting that “each of the ratifying conventions may have had a different understanding of the constitution”).
136 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 294.
138 Jake Rakove, Fidelity Through History (or To It), 65 FORDHAM L. REV. 1587, 1600 (1997). He observes that the “documentary record is ragged and uneven” and some records “are highly selective and abbreviated – often for partisan reasons – or simply inadequate.” Id. at 1602.
139 See Observations on Raoul Berger’s “Original Intent and Boris Bittker,” supra note 000, at questioning whether “a few scattered remarks” can reflect the understanding of “one thousand individuals” in the conventions and whether even a consensus of those individuals represented the understanding of Americans generally.”
the comments of selected group members.\textsuperscript{140} It certainly calls into question reliance on only limited ratification records.\textsuperscript{141} Barry Friedman thus observed:

The ratifiers were themselves a vast and motley bunch. How could one aggregate their many disparate intentions into any coherent whole? Worse yet, most of the ratifiers did not reveal their intentions on any question at all, let alone the questions of a contemporary society.\textsuperscript{142}

The disparities in understanding surely counsel caution in casual reliance on claims at a ratifying convention. Particular comments may have been idiosyncratic and not reflected the general view of the ratifiers. But a more comprehensive historical investigation may correct errors. The degree of disagreement may also be exaggerated – at the Virginia convention there was a “remarkable unanimity of individual utterances respecting judicial review.”\textsuperscript{143} And the comments bear upon, even if they do not conclusively resolve, “the manner in which speakers in 1787 and 1788 used the words and phrases in the Constitution.”\textsuperscript{144} The hazards of an incomplete historical record may be corrected by better history.

There are other criticisms of Elliot’s Debates as a reliable source. The accuracy of their records of comments could be questioned.\textsuperscript{145} Madison suggested that the Virginia record “contained internal evidence in abundance of chasms and misconceptions of what was said.”\textsuperscript{146} James Hutson’s study of the originalist period questions the “integrity” of records such as Elliot’s Debates and whether they are indeed “faithful records” of the era.\textsuperscript{147} If the document is not an accurate description of the ratification debates, its use as an originalist source is surely disputable.

There are legitimate criticisms of reliance on the ratification records, but they still might provide direct insight into the proper originalist interpretation. James Madison himself embraced this source of interpretation when he wrote that the “sense of the Constitution” could be found

\textsuperscript{140} See Jack N. Rakove, Comment, 47 MD. L. REV. 226, 229 (suggesting that “it is far from clear whether or how one can assign any coherent intentions to groups of individuals acting with a range of purposes and expectations and reaching decisions through a process of bargaining and compromise”).

\textsuperscript{141} See, e.g., The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1162 (asking “why should one state ratifying convention’s understanding . . . bind the understanding of the entire nation?”).


\textsuperscript{143} Original Intent and Boris Bittker, supra note 000, at 738.

\textsuperscript{144} A Concise Guide to the Records of the State Ratifying Conventions, supra note 000, at 492.

\textsuperscript{145} See Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725, 1802 n.405 (1996) (observing that the official reporter for the Pennsylvania and Maryland ratifying conventions “was often too drunk to take anything down, much less take anything down accurately”).

\textsuperscript{146} Quoted in ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 14.

\textsuperscript{147} The Creation of the Constitution, supra note 000, at 1-2.
“in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States.” He suggested that the ratifiers’ exposition was “authoritative.” While the ratification record was historically limited to several states, they have been called the “bellwether states, representing a fine sampling.” Once again, imperfection does not demean consideration of this evidence for original meaning.

Some have contended that the ratifiers are not reliable originalist sources, because they were limited to an “up or down” vote on the entire text and could not amend. It is possible “that the Ratifiers disliked the wording of specific provisions, but not enough to risk rejecting the entire Constitution.” As a legal matter, though, this criticism seems irrelevant. The law does not defer to the political views of the ratifiers, just their acts. If the ratifiers understood the meaning of constitutional language and ratified that language, it matters not that they hated that language; they still transformed it into law.

The critics of reliance on The Federalist and the ratification debates may be persuasive in suggesting that they do not qualify as expressions of the corporate intent of those who adopted the Constitution, but this fact does not demean their relevance. Under the original public meaning approach to originalism, they provide evidence of the understanding of what the Constitution meant at the time. Because they reflect only the opinions of individuals, they cannot be considered dispositive but they may still be considered highly relevant evidence. The fact that analysis does not always “yield certain conclusions” does not make the approach unworkable; the process of examination should “lead toward increased agreement on questions of constitutional interpretation.” Moreover, indeterminacy is a comparative matter, and originalism may be as determinate as alternative interpretive methods.

3. Dictionaries

A dictionary from the time might seem to be strong evidence of the meaning of the words of the Constitution. Yet the reliance on dictionaries for the interpretation of legal terms can itself

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148 FARRAND, supra note 000, at 474.

149 Letter from Madison to M.L. Hurlburt (May 1930) in 9 WRIGINTS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910).

150 Original Intent: Bittker v. Berger, supra note 000, at 1219.


152 See Fidelity Through History (or To It), supra not 000, at 1604 (noting that whatever the limitations of the historical record historians may still “provide informative and bounded accounts of the range of potential meanings that Federalists and Anti-Federalists attached to particular clauses”).


154 See Earl M. Maltz, The Failure of Attacks on Constitutional Originalism, 4 CONST. COMM. 43, 51 (1987); ROBERT H. BORK, THE TEMPTING OF AMERICA 163 (1990) (acknowledging that two judges might disagree over the correct originalist interpretation but stressing that this “in no way distinguishes the task from the difficulties of applying any other legal writing).
be criticized. While dictionaries define words generally, they lack context. Dictionaries only define words, not full phrases such as those used in constitutional interpretation. Moreover, little effort is made to demonstrate the familiarity of the ratifiers with the contents of particular dictionaries. Consequently, they may not serve as a reliable tool for ascertaining the meaning taken by those with the authority to make the Constitution the law of the land.

Earlier dictionaries, such as those used by originalists, were prescriptive, stating how words should be used and not necessarily describing how they were commonly used. Dictionaries may reflect older usages, even obsolete ones, and “may not describe the current state of the language, even immediately after publication.” Dictionaries may contain a class bias, reproducing meaning of elites but not the people more generally. At the time of ratification “no American dictionary existed,” which forces reliance on external English sources. Despite these shortcomings, dictionaries would seem a reasonable source to use for ascertaining the original public meaning of the Constitution.

The Court has not fashioned “any specific analytical framework to guide its dictionary referencing.” A study of the 1997-1998 term found that the Supreme Court cited to 120

155 The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1201 (suggesting that contemporary discussions of the Constitution are superior to such dictionaries).
157 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1203 (citing examples of how definitions of isolated words could miss constitutional meaning).
158 Blinding Light, supra note 000, at 513.
159 Cf. John Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639, 1655 (2002) (critiquing a claim on war power for its failure to “draw connections” between sources illustrating the meaning of the phrase “declaring war” with the ratification itself.
160 See Rickie Sonpal, Old Dictionaries and New Textualists, 71 FORDHAM L. REV. 2177, 2182-83 (2003). This process may also have involved political considerations. Id. at 2212. See also Jason Weinstein, Against Dictionaries: Using Analogical Reasoning To Achieve a More Restrained Textualism, 38 U. MICH. J. L. REFORM 649, 658 (2005) (observing that early dictionaries “were written by elites who wished to convey the correct usage of phrases and terms,” but this may have failed to reflect the more commonplace meanings of words).
161 Id. at 2190. Even if a dictionary appears contemporaneous with the words to be interpreted, it may have simply copied a definition from a much earlier edition. Id. at 2210.
163 Blinding Light, supra note 000, at 513.
164 An otherwise critical source for dictionary usage has noted that dictionaries may be a helpful source for determining word meaning, at least when used in tandem with other sources. Old Dictionaries and New Textualists, supra note 000, at 2220.
165 James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 18 HARV. L. REV. 643, 674 n. 147 (2004). This is “particularly problematic when the statute is old because the
It is speculated that Justice Scalia chooses dictionaries based on their availability in his chambers. The choice of dictionaries may be a crucial one, as commentators have reached very different interpretations of the constitutional word “commerce,” depending in part on such a choice.

Given the importance of such choice, some raise the danger of dictionary-shopping for definitions that conform to the preferences of the justices. A justice may cite a dictionary that supports a given resolution of the case, but omit other dictionaries, without any coherent explanation for the choice. As a result, one is left with the suspicion that the justice may have simply sought out supportive authority and ignored contradictory authority. Occasionally, one sees curious choices. In California v. Hodari D., the Court declared that “[f]rom the time of the founding to the present” the term seizure had a certain meaning and cited dictionaries from 1828, 1856 and 1981. Discerning meaning at the “time of the founding” would seem to call for a dictionary published at that time, not forty years later. Other opinions seem somewhat more disciplined; a dissent by Justice Thomas cited five dictionaries produced between 1670 and 1796 for the definition of the term “impost.”

This study selects two dictionaries from the era that appear to be among the most commonly used by the Court. Samuel Johnson produced a leading dictionary of the time used by the Supreme Court. Another was produced by Thomas Sheridan. These appear to be the modern reader may lack an intuitive sense of whether the word is a term of art.”

See Old Dictionaries and New Textualists, supra note 000, at 2204. This difficulty applies obviously to constitutional interpretation as well.


SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773). See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1157 (discussing the significance of usage of this dictionary). Although Johnson’s dictionary is regarded as important and used by the Court (see below), it presented the meanings of words in England and dismissed American meanings. See Old Dictionaries and New Textualists, supra note 000, at 2185. He did not intend his definitions “to be impartial descriptions of the meanings of the words.” Id.

THOMAAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)
dictionaries most used by the Court. Although the justices occasionally use other early dictionaries, studying these two provides a reasonable measure of dictionary usage that has no apparent skewing effect for any results.

B. Indirect Sources

I characterize sources that are not directly associated with the ratification process as indirect sources of original meaning. Because ratification was the relevant legal event, sources that predate ratification are of uncertain relevance. As roughly contemporary commentaries, though, they may still shed light on the original public meaning. Madison preferred the voice of the ratifiers to the Framers but nevertheless regarded the Framers’ debates as “presumptive evidence of the general understanding at the time of the language used.” Insofar as we have no cumulative interpretation of any ratifying convention, but only individual speakers at the convention, the indirect records might be considered the equal of this source.

I evaluate three sources that I have characterized as indirect. The first is Madison’s notes from the constitutional itself, compiled by Farrand. These have been dismissed as nothing but words from a “private pen” that lacked legal authority, but they may still shed light on the meaning of the words of the Constitution. As described below, the indirect sources may at least sometimes be as or more reliable as the direct sources from the ratification period.

1. Farrand’s Records

A prominent indirect source of originalism is Madison’s notes on the Constitutional Convention. While others took notes during the proceedings, Madison’s are more comprehensive and have carried the field as an interpretive resource. Although prominent,

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174 Quoted in Original Intent and Boris Bittker, supra note 000, at 736. He lumped this source with the ratifying conventions and The Federalist as the best source of constitutional meaning. Id.

175 See Akhil Reed Amar, Our Forgotten Constitution: A Bicentennial Comment, 97 YALE L.J. 281, 288 (1987) (suggesting that notes from the constitutional convention could be seen as “accurate but indirect evidence of the way many leaders in 1787 thought”); Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 719-725 (emphasizing the importance of these sources for interpreting the original public meaning of the Constitution and for its own sake); Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (declaring that “the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it”).


178 Thus, “Why should we assume that those who merely ratified the Constitution grasped its meaning better than those who wrote it?” Jack Rakove, Mr. Meese, Meet Mr. Madison, in INTERPRETING THE CONSTITUTION, supra note 000, at 183.

179 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1122 (reporting that “Farrand’s Records quickly became the standard reference work for the proceedings of the Philadelphia Convention of 1787 in the Supreme Court and elsewhere”).
some have suggested that it “borders on ‘cheating’” to use these records as evidence of original intent. This critique often emphasizes the 6cy of the records at the time of the ratification, but this does not demean the source as evidence of original meaning.

A further criticism of this source is its incompleteness. The records were not published until 1840 and were not available to those who ratified the Constitution. Madison’s recording of comments at the Convention was incomplete and included only a minority of the discussion. He probably “reported no more than ten percent of an average hour’s proceedings.”

Raoul Berger argues that the “fact that recording may be incomplete does not necessarily impeach the accuracy of what was recorded.” He suggests that a “richly informed scribe,” such as Madison, “may be trusted to separate the wheat from the chaff.” This is certainly true, insofar as it goes. One might presume that Madison recorded the most relevant discussion, and its incompleteness does not necessarily demean the accuracy of what he wrote. While the chief sin of this resource may be “omission,” this alone does not demean it “unless the omissions somehow seriously distort the overall context of the Philadelphia Convention.”

However, the accuracy of *Farrand* depends on the reliability of Madison as an interlocutor. He was fallible, as every human is, and he may have biased the records with selective drafting. Some alleged that Madison was a forger who “tampered with the notes . . . in order to suit his own political advantage and that of his party.” The evidence does not support this strong criticism, but there remain questions about the accuracy of Madison’s notes. For example, followers of Hamilton challenged the source’s “veracity and an

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180 *The Interpretive Force of the Constitution’s Secret Drafting History*, supra note 000, at 1116.

181 *Id.* at 1189. The authors suggest that these statements may be “more reliable evidence of original public meaning than partisan statements made by the same Framers (and others) under the public eye.” *Id.* This claim seems too strong, insofar as the statements at the Convention were also partisan, just for a different audience, but the comments are nevertheless somewhat probative of original meaning.


185 Original Intent and Boris Bittker, *supra* note 000, at 735. He reports that on selected issues that he studied the notes of Madison confirmed to the reports of others. *Id.* at 735-736.

186 *The Interpretive Force of the Constitution’s Secret Drafting History*, *supra* note 000, at 1196.

187 For example, he may have reported his own speeches “at greater length than the speeches of others.” ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, *supra* note 000, at 287.

188 *The Creation of the Constitution*, *supra* note 000, at 25.

189 See *id.* at 27-32. See also *The Interpretive Force of the Constitution’s Secret Drafting History*, *supra* note 000, at 1192-94 (defending the source from these criticisms.

190 *Id.* at 32-33.
undercurrent of skepticism about their accuracy has continued ever since.”

Conversely, there is reason to give some credence to Farrand. Jefferson embraced the accuracy of Madison’s notes on the convention.\(^{193}\) John Quincy Adams, who organized the papers for publication, stated that they provided a “correct and tolerably clear view of the proceedings of the Convention.”\(^{194}\) While no source is perfect, Farrand does report on the discussions at the Convention. The interlocutor, Madison, would be considered an important originalist source in his own right.

Even if accurate, the importance of Farrand is debatable. James Madison himself said that as a “guide in expounding and applying the provisions of the Constitution,” the “debates and incidental decisions of the Convention can have no authoritative character.”\(^{195}\) Yet he and other Framers took these records seriously for constitutional interpretation.\(^{196}\) Numerous Framers participated in the ratifying conventions, and they were frequently called upon to describe the meaning of constitutional terms.\(^{197}\) At the Supreme Court, Justice Rehnquist has invoked “the original understanding at Philadelphia,”\(^{198}\) not that of the ratifying conventions.

More seriously, Garry Wills suggested that if the record of the Constitutional Convention “had come to light at the time of the ratification debates, the Constitution would never have been passed.”\(^{199}\) This suggests that the meaning ascribed the words by those at the Convention was not the same as the meaning of those who ratified. The records were studiously kept secret at the time, apparently so that they would not be made a “shuttlecock of political controversy.”\(^{200}\) The significance of this secrecy is uncertain, however. A critic may believe that secrecy suggests that the Framers’ intentions would not have been ratified, but an alternative belief would simply be that the presence of opposition arguments and lack of consensus would have strengthened the hand of those who opposed ratification.

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\(^{191}\) The Creation of the Constitution: The Integrity of the Documentary Record, supra note 000, at 25.


\(^{193}\) See 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 453 (Lester J. Cappon ed., 1959) (quoting Jefferson’s declaration that Madison’s notes were compiled “with a labor and exactness beyond comprehension”).

\(^{194}\) Quoted in Blinding Light, supra note 000, at 504.

\(^{195}\) Quoted in ORIGINAL INTENT AND THE FRAMERS CONSTITUTION, supra note 000, at 1.

\(^{196}\) See Original Intent and Boris Bittker, supra note 000, at 736-737 (discussing contemporaneous comments of numerous Framers).

\(^{197}\) Id. at 737.


\(^{200}\) Original Intent and Boris Bittker, supra note 000, at 738.
While the amount of weight to be ascribed to Madison’s notes is surely disputable, it arguably “displays how the text of the Constitution was originally understood and used by the hypothetical ratifier.” The source has been called the equivalent of “a contemporaneous dictionary.” The “framers at Philadelphia apparently had a fixed vision of the meanings of the terms they chose” and “picked words quite carefully to convey precisely what they meant, no more and no less.” As such it might be considered the equal of the direct sources such as actual dictionaries and perhaps superior, as it is specific to the Constitution and less abstract than dictionaries necessarily need be.

2. Correspondence of Prominent Founders

The relevance of such correspondence of Madison and others who drafted the constitution is uncertain. Keith Whittington noted that the “discovery of a hidden letter by James Madison revealing the ‘secret, true’ meaning of a constitutional clause would hardly be dispositive to an originalism primarily concerned with what the text meant to those who adopted it.” In contemporary originalism, the “actual subjective intentions of particular human beings” are not relevant except as they expressed an understanding of the meaning of the content of a constitutional provision. Yet they are relevant for the latter purpose, and hence cannot be reasonably ignored.

Given the limited available evidence on the understanding of the ratifiers, we may have “little choice but to accept the intent of the Framers as a fair reflection of it.” The “private writings” of the Framers may therefore be sources of original public meaning. While these letters may seem to have less relevance than the debates set forth in Farrand, they are nonetheless used by the Court. Different Framers may have had varying views, just as in the case of the differences among ratifiers, of course.

The significance of correspondence of the time has not been much explored. Such correspondence might be considered to have the virtue of sincerity. Posturing for public purposes should be absent from private correspondence, which presumably reflects the authentic attitudes of the writer. Of course, the non-public nature of the correspondence also means that

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201 The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1118. See also Larry Kramer, Fidelity to History – and Through It, 65 FORDHAM L. REV. 1627, 1643 (1997) (suggesting that the “records of the Federal Convention might help to improve our comprehension of how the Ratifiers understood the Constition”); Saikrishna B. Prakash, Unoriginalism’s Law Without Meaning, 15 CONST. COMM. 529, 537 (1998) (arguing that the framers’ comments “are often a fairly good reflection of what that phrase or provision commonly was understood to mean”).

202 Id. at 1147.


204 The New Originalism, supra note 000, at 610.

205 Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 710.


207 The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1150 n.134.
the ratifiers were unaware of its contents. The letters have the advantage of accuracy; though they are not necessarily a complete record of correspondence, we know exactly what the authors said. Of course, they represent the views of only a single person, which might limit their persuasiveness, especially under an original meaning approach. For purposes of this study, I examined the use of letters from five Framers, Madison, Jefferson, Washington, Adams, and Jay.

3. Declaration of Independence

Reliance on the Declaration of Independence to interpret the Constitution has been undertaken but remains controversial.208 It was written years before and could not account for the intervening experience with the Articles of Confederation. Its use in constitutional interpretation has been called “almost incomprehensible.”209 Raoul Berger rejects the use of the Declaration as the product of “rebels and revolutionaries,” in contrast to the “[m]en of substance” who drafted the Constitution itself.210 Justice Scalia similarly suggested that the Declaration was for “aspirations,” but that the Constitution, unlike the Declaration “is a practical and pragmatic charter of government” that contains “no such philosophizing.”211 Yet for some, analysis of the Declaration is fundamental evidence of original intent. Henry Jaffa argued that the “principles of the Constitution are to be found in the Declaration of Independence.”212 The Declaration is said to be “at the heart of the Constitution”213 and “fundamental to a proper understanding of the Constitution.”214 The Declaration could shed light on the meaning of the words of the Constitution if one accepts that “the Framers intended that the Constitution protect the tenets set forth in the Declaration of Independence,” so that a “fair interpretation of the constitution should not violate the purpose for which our Nation was founded.”215 Those who would rely on the Declaration “focus almost exclusively” on its declaration of inalienable rights in the second sentence.216


210 Original Intent and Boris Bittker, supra note 000, at 732. Hence, he argues that appeals to the Declaration of Independence “are not so much attributable to originalists as to activists.” Id.

211 A MATTER OF INTERPRETATION, supra note 000, at 134.

212 See THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 102-103.


215 Paolo Torzilli, Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution, 40 CATH. LAW. 197, 201-202 (2000). See also TO SECURE THESE RIGHTS, supra note 000, at
In the balance, the “vast majority of scholars, including the vast majority of originalist scholars, do not include any unique role for the Declaration in constitutional interpretation.” Others, though, argue that the Declaration should have a small to even a large role in constitutional interpretation. In the constitutional convention discussion “although the delegates had much to say about the nature of government, they referred only twice to the Declaration” and the constitutional text did not “incorporate any of its language.” Thus, “the Framers and Ratifiers used or referred to the Declaration very rarely.” When comments about the Declaration were made, they “centered on its impact vis-à-vis independence and not on its role in constitutional interpretation.”

Yet the absence of direct references does not refute the view that the theory of the Declaration pervaded the background view of the Constitution. Scott Gerber essentially maintains that the Declaration establishes the fundamentality of natural rights, which were discussed extensively during the ratification. The Declaration was not expressly discussed, because it was the settled foundation.

59 (claiming that the “primary goal” of the Constitution was “to provide the institutional means to secure the natural-rights philosophical ends of the Declaration”).


Lee J. Strang, Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?, 111 PENN ST. L. REV. 413, 432 (2006). See also Jason F. Robinson, Gerber’s To Secure These Rights, 12 J. LAW & POL. 123, 126 (1995) (noting that lawyers “often consign the Declaration, which has no official legal status, to a marginal position in Constitutional interpretation”). Liberals and conservatives “may disagree on virtually every major judicial question; but they are united in their near universal disregard for the role of the Declaration in constitutional adjudication.” Id. at 128.

Originalism, the Declaration of Independence, and the Constitution, supra note 000, at 434-436.


Id. at 440.

Id. at 443.

TO SECURE THESE RIGHTS, supra note 000, at 57-92. See also HADLEY ARKES, BEYOND THE CONSTITUTION 40-46 (1990) (contending that the Constitution was simply the means of implementation of the principles of the Declaration of Independence); CHARLES E. RICE, THE WINNING SIDE; QUESTIONS ON LIVING THE CULTURE OF LIFE 327 (1999) (arguing that the principles of the Declaration “out to inform our understanding of the purpose of the Constitution”).

This pervasiveness, though, has not been clearly established. See generally The Changing Reputation of the Declaration of Independence, supra note 000 (suggesting that in the immediate pre-constitutional era the document did not carry great weight for the founders). The Federalists of the era, who have primary responsibility for the Constitution, were not enthusiastic about the Declaration and its preamble. Id. at 566-568. In these days, historians have suggested that the Declaration “was at first forgotten almost entirely” by Americans. Robert M.S. McDonald, Thomas Jefferson’s Changing Reputation as Author of the Declaration of Independence: The First Fifty Years, 19 J. EARLY REPUBLIC 169, 179 (1999). See also PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 212 (1997) (suggesting that the Federalists of the era simply chose to “forget the Declaration of Independence.” There was “scant evidence from the time of the Framing
The Declaration has one major shortcoming as compared with the other sources discussed above – it is not contemporary. For originalists, meaning is fixed at the time of enactment, not more than a decade earlier. One might imagine that the principles of the Declaration formed the basis for the Articles of Confederation, but this was the government system repudiated by the enactment of the Constitution. Nor does the original Constitution speak of individual rights, just limited powers of government institutions.

The Declaration has a major advantage as well, though. Its content is known. Unlike the great uncertainty about the reliability of the record of Farrand or Elliot’s record of ratification debates, there is little doubt about the accuracy of the Declaration. In addition, the Declaration was a corporate declaration, not the opinion of one or a few individuals of the era and may therefore better reflect a consensus view. Hence, there is some reason to give the Declaration of Independence a role in assessing the original meaning of the Constitution.

4. Summary

The difference between my direct and indirect sources may not be great or even exist at all. The evidence of public reliance on my direct sources is thin. As noted above, The Federalist was not broadly available or widely read at the time of all of the ratifying conventions. Under the original public meaning theory, The Federalist may still be relevant, not because anyone read and relied on it, but because it is a contemporaneous discussion of the words of the Constitution. But this same reasoning might apply to other indirect sources of original meaning.

It has been suggested that “there is no reason to believe that Farrand’s Records is less reliable than Elliot’s Debates.” Historians would “naturally assume that the Framers of the Constitution would be a more reliable guide to its meaning than the understandings (or we could say, the first interpretations) of the Ratifiers.” As a matter of simple realism, it may be that “the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.” One might expect that “in most instances the

and Ratification that anyone was thinking of the Constitution as an extension of a political theory announced in the Declaration.” The Declaration of Independence in Constitutional Interpretation, supra note 000, at 134.

Of course, knowing the words is not the same as knowing the meaning of the Declaration, and a broad invocation of natural rights may be unhelpful. See, e.g., Originalism, the Declaration of Independence, and the Constitution, supra note 000, at 463 (suggesting that the “deep, continuing disagreement on the meanings of the terms in the Declaration’s rights phase shows that judges could derive little, if any, interpretative guidance from them”). The Declaration may be difficult to interpret because there were no contemporary explanations of its meaning, such as The Federalist serves the Constitution. See The Changing Reputation of the Declaration of Independence, supra note 000, at 558.


The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1195.

Fidelity Through History (or To It), supra note 000, at 1600.

understanding of the drafters of the Constitution should be the same as the ratifiers.”

However, the “ultimate value of such additional sources . . . is merely evidentiary in the effort to elucidate the intent of the ratifiers.” Those present at the Constitutional Convention were not obviously representative of those ratifying the text, so their understanding of original meaning might well have been different.

I have omitted numerous sources that have sometimes found use in originalist analysis. Originalist interpretation may rely upon congressional or judicial decisions made in the first years after ratification. There is reason to question that such materials reflect the original understanding of the instrument at the time of ratification. Reliance on this source contains an implicit presumption that government action at the time must have been constitutional, a presumption that defeats the very purpose of judicial review, which contains a presumption that the Congress may not get the Constitution right. Early legislators had the same incentives as today’s legislators, for policy ends and re-election, which could overcome their views on the constitutionality of action. Such actions amount to what is known as “post-enactment legislative history” in the statutory interpretation context, where it is generally given little weight. One should hesitate to embrace an interpretive principle that makes the Alien and Sedition Acts of 1798 into constitutionally acceptable actions. James Madison “voted in

229 Douglas G. Smith, Does the Constitution Embody a “Presumption of Liberty?”, 2005 U. ILL. L. REV. 319, 325 (2005). Alternatively, one might suppose “that ratifiers of a constitutional provision may delegate some measure of authority to the drafters of the constitutional text in the expectation that courts will rely upon such evidence as one source of authority in interpreting the constitution.” Id. at 326.

230 CONSTITUTIONAL INTERPRETATION, supra note 000, at 36.


232 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) invalidated a law of the First Congress, suggesting its fallibility, at least by judicial standards.

233 See Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 CONST. COMM. 191, 216 n. 90 (2001) (stressing that the early members of Congress were “not disinterested spectators on constitutional issues; their own powers, and those of their constitutional competitors, are on the line”). Consequently, early enactments “may be less reliable, rather than more reliable, indicators of original meaning.” Id. Justice Brennan has thus recognized that legislators, “influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be true of the Members of the First Congress as any other.” Marsh v. Chambers, 463 U.S. at 814-815 (Brennan J., dissenting).

234 See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 185 (1994) (declaring that the “interpretation given by one Congress . . . to an earlier statute is of little assistance in disclaiming the meaning of that statute”); Consumer Product Safety Commission v. GTE Sylvania, Inc. 447 U.S. 102, 118 n.13 (1980) (holding that subsequent legislative history provides “an extremely hazardous basis for inferring the meaning of a congressional enactment”). Reliance on such sources is challenged because they “cannot be challenged or corrected by the enacting legislators and are often likely to represent simply a legislator’s attempt to accomplish after the fact what he or she could not accomplish during the debate of the measure.” T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20, 41 n.96 (1988).

235 See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1169-1175 (questioning the constitutionality of this and other decisions made by early Congresses).
Congress for a bill that he later, in a private capacity, stated to be unconstitutional.\textsuperscript{236} These materials seem less reliable.\textsuperscript{237}

The sources coded in this study are an incomplete set of originalist materials used by the Court. For example, the Court has frequently used Story’s Commentaries on the Constitution.\textsuperscript{238} Another source sometimes employed is that of learned commentators. A prominent early commentary was provided by Justice Story.\textsuperscript{239} However learned, though, Justice Story can offer only one man’s opinion, expressed about a half century after the time ratification, who was quite young at the time of ratification and had his own apparent political bias.\textsuperscript{240} The source has been both praised and severely criticized,\textsuperscript{241} but, whatever its accuracy, it is not included in this study.

Blackstone’s Commentaries provide another source for originalist constitutional interpretation\textsuperscript{242} on which the Court has occasionally relied.\textsuperscript{243} Blackstone was a primary source of the Framers’ consideration of constitutional issues.\textsuperscript{244} Blackstone, of course, was an Englishman, describing the law of a country from which America rebelled\textsuperscript{245} and describing English common law, not that of America.\textsuperscript{246} Our history “makes clear that some constitutional


\textsuperscript{237} \textit{See Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power To Execute the Laws, 104 YALE L.J. 541, 550-551 (1994) (concluding that it “is better to examine exhaustively the pre-ratification material first and only look at the post-ratification material if it is absolutely necessary to do so”). They suggested that the members of the First Congress “were not infallible interpreters of the constitutional text.” Id. at 556.}

\textsuperscript{238} \textit{See The Supreme Court and Opinion Content, supra note 000, at 330 (surveying the use of various sources since 1953 and finding Story’s Commentaries the fourth most cited, after The Federalist, Farrand, and Elliot’s Debates. \textit{See also Textualism and the Role of The Federalist in Constitutional Adjudication, supra note 000, at 1356 (noting reliance on Story not because his positions “could have informed the ratifiers’ constitutional intent or understanding, but presumably because they reflect the considered analyses of intelligent observers far closer to the relevant events than we are today”).}}

\textsuperscript{239} \textit{See The Interpretive Force of the Constitution’s Secret Drafting History, supra note 000, at 1178-79 (criticizing reliance on this source)}

\textsuperscript{240} \textit{See, e.g., H. Jefferson Powell, Joseph Story’s Commentaries on the Constitution: A Belated Review, 94 YALE L.J. 1285 (1985).}

\textsuperscript{241} \textit{See Textualism and the Role of The Federalist in Constitutional Adjudication, supra note 000, at 1353-54 (suggesting that Blackstone may be a better source of original meaning than The Federalist).}

\textsuperscript{242} \textit{See, e.g., Crawford v. Washington, 541 U.S. 36, 42-50 (2004) (using Blackstone and other common law sources from the period to interpret meaning of the Confrontation Clause).}

\textsuperscript{243} \textit{See BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 161 (1993).}

\textsuperscript{244} \textit{See Semantic Originalism, supra note 000, at 110 (emphasizing that the Constitution “brought into being a new legal regime” which calls into question using prior legal rules for its interpretation).}

\textsuperscript{245} \textit{See, e.g., Bernadette Meyler, Towards a Common Law Originalism, 59 STAN. L. REV. 551, 556-557 (2006) (noting that there was no one state of common law at the time, and that American states had diverged from}
arrangements were aimed at extending existing British practices, while others were aimed at repudiating those practices.”

Blackstone’s writings obviously do not distinguish the two cases.

Blackstone’s legal method is arguably contrary to original meaning originalism, because it emphasized the evolution of the law. Moreover, historical evidence suggests that Blackstone may not have been representative of the law at the time. For a time, state governments prohibited their judges from relying upon Blackstone, for fear of such foreign influence. He was invoked on behalf of the Alien and Sedition Acts for the proposition that free speech only involved prohibition on prior restraint, a position that has not stood the test of time. Blackstone did not present “sophisticated accounts of English common law,” but instead represented a strategic effort to manipulate legislation. And while the actual drafters of the Constitution were presumably familiar with Blackstone, the broader population’s familiarity with his writings are surely limited. The interpretive standard is “ordinary public meaning,” not “ordinary elite meaning.” Hence, Blackstone would seem to be an uncertain guide to original public meaning.

The validity of these alternative sources is certainly debatable, and they may be defended as “second-best” sources of original meaning in the absence of better sources. Their exclusion from this study does not imply their worthlessness. My resource limits prevent a completely comprehensive analysis of all originalist materials. Absent any reason to believe that my sources present a skewed depiction of the Court’s usage of original materials, though, there is not reason to question my results. Some have contended that originalists should rely more on secondary sources than on these early primary documents, but this is not the Court’s practice.

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248 See generally id.

249 See Emily Kadens, *Justice Blackstone’s Common Law Orthodoxy*, NW. U. L. REV. (forthcoming) (finding that Blackstone was more Langdellian, while most judges of the time had a more pragmatic approach to deciding cases).


252 *Towards a Common Law Originalism*, supra note 000, at 562.

253 *The Interpretive Force of The Constitution’s Secret Drafting History*, supra note 000, at 1182.

254 Such skewing is concededly a possibility. It may be that a given justice believes that a source such as Justice Story has high veracity in the interpretation of constitutional meaning and uses it more frequently. If so, I would underestimate that justice’s devotion to originalism. Hence, my study may be limited to the study of reliance on the sources that I have employed in this research.

C. Reliability of Different Sources for Constitutional Decisionmaking

One major controversy over reliance on originalist materials lies in the reliability of the historical evidence. The “ultimate problem lies in the difficulty of discerning objective meaning in a broadly worded document that attempted to strike compromises among competing interests, the ratification of which invited proponents and opponents alike to urge particular constructions of the document that would serve their immediate ends.” While the text of the Declaration of Independence is strong evidence, many other sources have serious shortcomings. A review of the record found that the sources had “been compromised – perhaps fatally – by the editorial interventions of hirelings and partisans” and to “recover original intent from these records may be an impossible hermeneutic assignment.” Stephen Siegel maintains that “originalism is impossible because history is too nuanced and ambiguous to give determinate answers to today’s constitutional controversies.” Others suggest that “the best professional historians know better than to be originalists, but that some constitutional lawyers and scholars who have taken the turn to history do not.”

Some suggest that the originalist record was hopelessly indeterminate, noting the existence of disagreements about the meaning of the Constitution in the 1790s. The newer originalism may be subject to greater indeterminacy than the search for original intent. A leading history argues that the framing and ratification of the Constitution “involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree.” Justice Brennan contended that typically, “all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions.” Justice Jackson compared the effort to recover original understanding to the

256 Peter J. Smith, Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning, 52 U.C.L.A. L. REV. 217, 225 (2004). It is the “rare dispute today that can find a direct answer in the historical record in which originalists seek the original understanding.” Id. at 231.

257 The Creation of the Constitution, supra note 000, at 2.


259 CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS, supra note 000, at 111.


261 See Two (More) Problems with Originalism, supra note 000, at 910 (observing that “the indeterminacy of intent was magnified by the expansion of individuals whose intent was to be considered” in the ratification period).


challenge that Joseph faced in interpreting the dreams of Pharaoh.\textsuperscript{264} Thus, there may have been no true original meaning for its words that can be discerned today.\textsuperscript{265}

Yet few dispute that it is possible to capture some meaning from the text of the Constitution and the original record. There is little question about the basic ability of Congress to tax and borrow and regulate commerce. Although the dimensions of these powers are greatly contested, there is certainly a core about which there is little dispute. Debates over original meanings commonly occur at the margins, where the record may be highly indeterminate, but that fact should not obscure the extent to which some determinate meaning may be found or the usefulness of such a finding. History is never a “precise science,” but this does not mean “that we can never know anything about history.”\textsuperscript{266}

Keith Whittington concedes that the “historical record his hardly perfect” but argues that there is “little reason or concluding that it is generally radically deficient.”\textsuperscript{267} Randy Barnett suggests that the opposition to originalism is not that “it cannot be done,” but “because the original meaning of the text can be ascertained and they find this meaning to be inadequate or objectionable.”\textsuperscript{268} Historian Jack Rakove notes that “skepticism about the limits of judicial reasoning does not require a blanket dismissal of the possibility that historically grounded approaches . . . might yield fruitful results.”\textsuperscript{269} Originalists recognize that the available materials will not resolve every contemporary legal question. Justice Scalia conceded that it “is exceedingly difficult to plumb the original understanding of an ancient text.”\textsuperscript{270} Yet difficult is not impossible, and making the best effort to ascertain original meaning may be the best approach to constitutional interpretation.

Moreover, inaccuracies characterize all history. Yet we believe we can glean some understanding from the historical record. Even a critic of the accuracy of the record noted that there was consensus “on fundamentals” and we can “discern with ease many matters of overweening importance on which the Framers agreed.”\textsuperscript{271} He concluded that there can be “an ascertainable and enormously important original intent as to which one might almost say that a collective mind existed.”\textsuperscript{272}

\textsuperscript{264} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-635 (1952).

\textsuperscript{265} The difficulties of ascertaining a single intent for a document with multiple authors are well established. See, e.g., Kenneth A. Shepsle, Congress is a ”They,” Not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. ECON. 239 (1992).

\textsuperscript{266} A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution, supra note 000, at 488.

\textsuperscript{267} CONSTITUTIONAL INTERPRETATION, supra note 000, at 162.

\textsuperscript{268} RESTORING THE LOST CONSTITUTION, supra note 000, at 96.

\textsuperscript{269} Fidelity Through History (Or to It), supra note 000, at 1588.

\textsuperscript{270} Originalism: The Lesser Evil, supra note 000, at 856.

\textsuperscript{271} ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 299.

\textsuperscript{272} Id.
For originalists, the judge “acts at least in the first instance as a historian.” Even if history theoretically could be informative, though, that does not demonstrate that the Supreme Court can successfully operationalize the use of originalism in decisionmaking. The Court’s use of history has been often challenged. The common phrase challenging the Court’s decisionmaking is “law office history,” meaning that the courts do a poor job of historical analysis. Instead, history becomes simply a tool of propaganda. Just as “lawyers would not trust historians with their cases, historians shouldn’t trust lawyers with the past.” In fact, historians are often critical of legal theories of originalist meaning. If courts cannot accurately evaluate historical evidence, the value of originalism is called into question.

In the 1960s, Alfred Kelly wrote the class criticism of the Court’s use of history. He reviewed numerous cases throughout the Court’s own history and found that reliance on history was “an apparent rationale for politically inspired activism that can be indulged in the name of constitutional continuity.” He emphasized that this misuse of history was common to both liberals and conservatives. The errors are due in part to the nature of the adversary system and biased presentation and the desire to ask questions the “past cannot answer.” Professor Kelly concluded that the reliance on history called “to mind the manipulation of scientific truth by the Soviet government in the Lysenko controversy.” An update of Kelly’s thesis in the late 1990s found much of it remained valid.

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273 The Misconceived Quest for the Original Understanding, supra note 000, at 218.

274 See, e.g., Morgan Cloud, Searching Through History: Searching for History, 63 U. CHI. L. REV. 1707, 1745 (1996) (arguing that such “work is not constitutional history; it is not legal history; it is not history” but it is “a lawyer’s selective use of historical data to advance a legal argument”); Saul Cornell, The Original Meaning of Original Understanding, 67 MD. L. REV. 150, 150 (2007) (contending that the new original public meaning originalism “is really nothing more than the old law-office history under a new guise”).


276 See Neil M. Richards, Clio and the Court: A Reassessment of the Supreme Court’s Uses of History, 12 J. POL. 809, 832 (1997) (citing several examples).


278 Id. at 131.

279 Id. at 132 (noting that “the ‘liberal history’ of the present Court is not much better than the business-minded vested rights ‘history’ of Chief Justice Fuller, at least when tested by the common tenets of constitutional historians”).

280 Id. at 156. The lawyers of course try to present a one-sided view, and the “training, psychology, and inclination of most justices, who have been tempered in the fires of legal practice and the exigencies of politics, make it unlikely that they will prove capable” of any dispassionate search for historical truth

281 Id.

282 Id. at 157. Indeed, Kelly himself confessed to manipulating history in connection with his personal work on an NAACP brief in Brown, where he was “carefully marshaling every scrap of evidence in favor of the desired interpretation and just as carefully doctoring all evidence to the contrary.” See ORIGINALISM IN AMERICAN LAW AND POLITICS, supra note 000, at 104.

283 See generally Clio and the Court: A Reassessment, supra note 000.
There are two distinct aspects to the criticism of the Court’s use of history, as necessitated by originalism. The first is that the justices are not trained historians and that the legal procedures they use distort the search for historical truth, sometimes called law office history. The same criticism has been made of academics’ presentation of originalist arguments. The Second Circuit has observed that “judges are not historians with fancy robes and life tenure.”

David Strauss discussed this problem in the context of *Brown v. Bd. Of Education.* He observes that while Judge McConnell believes that the opinion was correct on the standards of originalism, the Court conceded otherwise. This meant that “the best lawyers in the country, the best historians in the country, the Supreme Court justices and their clerks, with all the resources available to them and with every incentive to discover the original understanding, did not succeed in recovering that original understanding.” This suggests that the effective operationalism of original understanding may not be realistic.

In *Brown*, the justices could not find originalist support for their desired result. The more common practice, though, is for the justices to exaggerate the originalist support for their conclusions. Thus, “to some degree all of the justices seek to determine original interpretations where the available historical evidence is too ambiguous to support them.” A major flaw commonly ascribed to the Court is its use of history without appreciation of context.

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284 See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (suggesting that the “habits of poorly supported generalization – which at times fall below even the standards of undergraduate history writing – pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution”).

285 Arnold’s Wines, Inc. v. Boyle, 571 F.3d 185, 200 (2009). See also Velasquez v. Frapwell, 160 F.3d 389, 393 (1998) (noting that “judges do not have either the leisure or the training to conduct responsible historical research or competently umpire historical controversies”).


288 Id.

289 See also Living Originalism, supra note 000, at 284-285 (discussing contrasting originalist views of the result in *Brown*).

290 *Clio and the Court: A Reassessment*, supra note 000, at 887.

291 *Clio and the Court: A Reassessment*, supra note 000, at 889. The author notes that “The Federalist seems always to be used in this manner – a handbook to constitutional interpretation that is never discussed as the hastily-written and often inconsistent polemic that it is.” Id. at 889-890. See also Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 WEST VA. L. REV. 601 618 (2003) (suggesting that the justices “systematically cite passages [of The Federalist] as authority without even a cursory examination of the validity of the surrounding text or the document as a whole”).
A commitment to originalism “requires a high degree of confidence . . . in the capacity of judges (and other concerned parties) to read [the historical sources] intelligently.”

If the justices are poor historians, originalism might seem a poor tool for constitutional interpretation, but the problem might be remedied. Law schools could expand historical training, *amici* from historians could be given greater weight, and justices could work on improving their aptitude. If originalism controlled constitutional interpretation, one might expect more scholarship to shed light on contested questions. In any event, “there is no reason, in principle, why one would not be able to find out what the Framers intended, at least in some cases.”

The epistemic problem does not utterly defeat the originalist approach to interpretation, though it surely complicates it in practice.

The second potential problem is in the effect of judicial ideology. As addressed below, there is considerable evidence that the decisions of the justices on constitutional questions are influenced, if not driven, by their ideological desire for a particular case outcome. It may be that originalism is intrinsically conservative in its results, which could skew any reliance on originalist sources. Alternatively, it may be that the indeterminacy of originalist sources allows the justices to selectively rely upon them when convenient for their preferred outcome. Thus, “[l]iberal interpretations of history can be used to justify liberal outcomes, and conservative interpretations can counter them.”

The theory of originalism has coalesced around original meaning. The trick is identifying that original meaning so as to resolve contemporary legal controversies. This requires a daunting search into the historical record. The ability of justices to undertake and effectively resolve such a search is uncertain and must be tested, not merely assumed. The following section of this article embarks on an empirical study of the use of certain direct and indirect sources in the opinions of the Court. I examine relative usage by different justices and the degree to which ideology colors the originalist inquiry in practice.

### III. The Justices of Originalism

Some suggest that the justices have “professed to favor a constitutional jurisprudence of original intent since the first decade of its history.” Others, though, have observed that “the notion that the Constitution means what it meant in 1789 has had virtually no currency in the Supreme Court during most of this century.” Steve Griffin questions “whether any federal judge, alive or dead, has ever followed as a matter of consistent judicial philosophy what new originalists recommend.” Jeffrey Rosen has lamented the abstract discussions of originalism, suggesting

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293 *Original Intention, Enacted Text, and Constitutional Interpretation*, supra note 000, at 258.

294 *Clio and the Court: A Reassessment*, supra note 000, at 888-889.

295 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at ix.


297 *Rebooting Originalism*, supra note 000, at 1191. A prominent history of the early Marshall Court observed that the justices relied in part on originalism but also used “natural law, local practices and rules, principles of
that judges “should be evaluated by what they do, not what they say.” Only an empirical analysis can determine the dimensions of the practice of originalism at the Supreme Court.

While quantitative analysis of originalism has been sparse, the Court’s use of The Federalist has seen some empirical analysis. Citations have been compiled, and the most commonly used individual Papers have been identified. Relative use of The Federalist over time has been studied, finding that its apex is recent. One study suggested that their use was motivated by a desire to legitimize opinions reached on other grounds. Another suggested that the references were used to establish an “ethos of objectivity” and the “perception of infallibility,” with The Federalist used as the “secular equivalent to citing the Bible.”

Even when cited, the significance of the originalist materials has been disputed. Following an extensive analysis of citations to The Federalist, the author concluded that it was “hard to come up with more than a small handful of cases where The Federalist even arguably played a decisive role in the Court’s decision.” The fact that the justices do not routinely resolve cases on originalist materials, such as The Federalist, may defeat any claims that the justices are strongly originalist in constitutional decisionmaking, but the frequency of citations to these materials suggests they may have some influence.

equity, and what they termed ‘general principles of republican government.’”


Jeffrey Rosen, Originalism and Pragmatism: False Friends, 31 HARV. J. LAW & PUB. POL’Y 937, 944 (2008). He also suggests that the idea that originalism could restrain judges was “illusory,” id. at 937, but that claim was only an intuitive one.


The Supreme Court and Opinion Content, supra note 000. See also Robert J. Hume, The Use of Rhetorical Sources by the U.S. Supreme Court, 40 LAW & SOC’Y REV. 817 (2006) (finding that the Court appears to use high profile sources, including The Federalist, to legitimate decisions).

The Supreme Court and the Federalist Papers, supra note 000, at 315.

The Supreme Court and the Federalist Papers, supra note 000, at 313. He found that in the late 19th Century, the justices who cited The Federalist most often “seemed the least influenced either by its content or its persuasive authority.” Id. at 262. For the 1835-1865 period, he similarly found that the resource “played a marginal role at best in either determining the outcome of any case in which they were mentioned or even played a significant role in how the justices reached their conclusions.” Id. at 259. For the first third of the century, he found that “The Federalist played little role in the outcome of the cases.” Id. at 255. However, in Marbury, he concluded that it was likely that “The Federalist No. 78, significantly influenced Marshall’s views on the role of the Court and that those views led to the Court’s unanimous decision that both legislative and executive acts were subject to judicial oversight.” Id. at 252.
Another study examined citations in the contest of federalism disputes in certain divisive opinions since 1970. He divided the references into the categories of nationalistic Federalist statements, moderate Federalist statements responsive to Anti-Federalist concerns, and the Anti-Federalist declarations themselves. The study found that the justices who favored states rights relied on Anti-Federalist concerns to suggest that the ratifiers and the ultimate Constitution recognized their worries over excessive nationalization of power, while those who were less solicitous of states rights relied on the same materials to argue that the Constitution rejected those concerns and nationalized power. Hence, he suggested that “one of the principal justifications for originalism – that it will constrain the ability of judges to impose their own views in the course of decisionmaking – might not be accurate as a descriptive matter.”

Another study examined how The Federalist was used in majority and separate opinions in the same case. Nearly twenty percent of the time, when the majority opinion cited The Federalist, a concurring or dissenting opinion did likewise. There was no apparent ideological association with citation to The Federalist in these cases.

My study builds upon this past research and expands upon it in several significant ways. First, I consider a number of sources other than The Federalist, which has been the exclusive resource for the empirical research to date. Second, I analyze each justice vote, while the prior research has focused only on those who author the opinions containing the citations to originalist sources. Joining an opinion with originalist content, rather than another opinion, has significance. If the dissent cites originalist materials, but the majority does not, the justice’s choice of opinion to join would be salient. Moreover, the members of the majority coalition

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305 Sources of Federalism, supra note 000.

306 Id. at 255.

307 See id. at 259-265. A clear example of this is found in Justice Thomas’s opinion declaring that when an Anti-Federalist attack on the Constitution was “followed by an open Federalist effort to narrow the provision” the “appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.” Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J. concurring). The significance of this distinction is debatable, as a D.C. Circuit opinion observed that the fact that “the dissenting delegates were political losers does not undercut their status as competent users of late-eighteenth-century English.” Parker v. District of Columbia, 478 F.3d 370, 385 n.10 (2007).

308 Sources of Federalism, supra note 000, at 279.


310 Id. at 96.

311 Id. at 100-101.

312 This may facilitate a test for authentic originalism. It is widely believed that citations to The Federalist may be made for rhetorical influence, not their substance. If the other sources do not share this effect, they could be more reliable measures for true originalist influence on decisionmaking.

313 Reliance only on opinion authors produces some selection effects. I.e., a given justice may cite originalist materials more often merely because the justice happened to be assigned opinions in which these materials were more relevant. By analyzing all votes, one can more reliably compare justices of the same time period.
have some influence over the nature of the majority opinion.\textsuperscript{314} Citations in an opinion are not necessarily those of the author but may have been pushed by others. Third, I consider other relevant variables, such as the ideological nature of the opinion.

A citation may be important, even if the source is not relied upon. There are many constitutional cases in which no originalist materials are cited. In others, they are cited in one of several opinions, but not another. The lack of citations may be appropriate, even for an originalist, because the applicable materials of the founding era may simply be absent or wholly indeterminate. Of course, if historical materials are often useless, this would seem to significantly undermine the principles of originalism for constitutional interpretation. If one opinion cites to originalist materials, though, the true originalist should at least address them, if only to distinguish their relevance from the instant case. The failure to even mention originalist evidence found relevant by another justice shows some measure of disrespect to the originalist materials.

The task of identifying and coding originalist references is an extensive one, and this study is only partial. I have limited my analysis to the original founding era of the Constitution and not considered the Court’s interpretation of the Amendments, though originalism has been significant in the latter cases, especially with respect to the Fourteenth Amendment. Hence, the study is limited to interpretation of the original text. This may have a biasing effect on the study of originalism overall. Those regarded as the leading originalists (Justices Scalia and Thomas) have been criticized for ignoring the methodology in Fourteenth Amendment cases.\textsuperscript{315} Thus, my study of the association of justices with originalism and ideological use of originalism is not comprehensive and should be considered only a test of interpretation of originalist intent for the founding period.

Another possible limitation of the study is the presumption that justices relied on originalist sources for originalist purposes. It has been suggested that judges rely on the \textit{Federalist Papers}, “surely not because” they represented the original understanding but because “they are intelligent analysis based upon sophisticated political theory.”\textsuperscript{316} While this may be sometimes be true, its generalization is “questionable,” as many judicial opinions “expressly say that the \textit{Federalist Papers} demonstrate the intent of the Framers, the understanding of the ratifiers, or the original objective meaning of the Constitution.”\textsuperscript{317} In any event, the consideration of originalist sources seems the best available objective measure of justices’ fealty to originalism.

\textbf{A. Data}

\textsuperscript{314} This is especially true for the fifth voter in a coalition in a 5-4 decision. That justice must be placated, or the majority may become the minority. One analysis found that the opinion author had the most influence over the content of an opinion, but that the median justice also had influence. Chris W. Bonneau, Thomas H. Hammond, Forrest Maltzman, & Paul J. Wahlbeck, \textit{Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court}, 51 AM. J. POL. SCI. 890 (2007).

\textsuperscript{315} See infra at ____.


\textsuperscript{317} \textit{A Concise Guide to the Federalist Papers}, supra note 000, at 825.
The data for this research were taken per a Westlaw search for certain language in Supreme Court opinions. For example, a search was undertaken for the term “Federalist.” Cases were then screened to exclude uses of the word that did not involve a reference to The Federalist. Similar analyses were employed for each of my originalist sources. No attempt was made to assess the significance of the reference to the justice’s opinion, which would be unduly subjective.

Each of the justice votes for each case was then associated with each reference. If the justice authored or joined the opinion citing a particular originalist source, he or she was coded “1” for the case. If not, the coding was “0.” If that justice joined a dissenting or concurring opinion that also cited the particular source, that opinion was coded as “1.” If the majority opinion (or other opinions) did not, they were coded with a “0.”

For an example of the operation of the coding system, consider Hamdi v. Rumsfeld. Justice Souter wrote an opinion concurring in part and dissenting in part, which was joined by Justice Ginsburg, in which he cited The Federalist. Justice Scalia wrote a dissenting opinion in which he was joined by Justice Stevens, which also cited The Federalist numerous times. Justice Thomas wrote a dissenting opinion, in which he cited The Federalist once. The majority opinion, authored by Justice O’Connor and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, did not cite to The Federalist. Under my coding, Justices Souter, Ginsburg, Scalia, Stevens, and Thomas receive a “1” in the column for this case, for citing The Federalist. Justices O’Connor, Rehnquist, Kennedy, and Breyer receive a “0” in this column for this case, because some other justice relied on The Federalist in an opinion in the case and they did not.

Justices Scalia and Stevens’ opinion in Hamdi also cited a letter of Jefferson for which they received a “1” in the column for this case. Justice Thomas’s opinion also refers to this letter as providing some evidence for a particular originalist interpretation but finds it “plainly insufficient to rebut the authorities on which I have relied.” Under my system, Justice Thomas also gets credit for using this originalist source (Jefferson’s letters), even though he did not rely on it for his decision. His reference showed respect for an originalist resource and the fact that its power was outweighed by other originalist sources does not demean the reliance on originalism. All the other justices received “0” in the column for Jefferson’s letters for this case, because they did not mention the source.

This approach yielded a dataset in which we know how often each justice relied on an originalist source in an opinion or did not rely on the source when another opinion relied on such an originalist source. The database contains 535 cases for the entire history of the Supreme Court.

B. Relative and Historic Use of Originalist Sources

The first analysis is the relative use of my direct and indirect sources overall and changes over time. I have identified six sets of originalist sources from the Framing period that are
commonly used by the Court, as discussed above. Table 1 displays the frequency with which each of these sources received a “1” coding. These numbers are not cases but reliance by individual justices. A unanimous opinion that used one of these sources would thus be counted nine times. This survey covers the entire history of Supreme Court opinions.

<table>
<thead>
<tr>
<th>Source</th>
<th>Number of Reliances</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Federalist</td>
<td>2870</td>
</tr>
<tr>
<td>Elliots Debates</td>
<td>1000</td>
</tr>
<tr>
<td>Dictionaries</td>
<td>213</td>
</tr>
<tr>
<td>Farrand</td>
<td>630</td>
</tr>
<tr>
<td>Framer Letters</td>
<td>593</td>
</tr>
<tr>
<td>Declaration</td>
<td>275</td>
</tr>
</tbody>
</table>

Thus, we see 4813 references to my direct sources of original understanding and 1498 references to my indirect sources. This is consistent with modern understandings of the source of original understanding. Of the Founder letters, by far the most frequent reliance was on those of Jefferson.321

The overwhelming importance assigned to *The Federalist* is interesting and perhaps troubling. As discussed above, its authoritativeness is not transcendentally greater than that of other originalist sources. *The Federalist* is, however, more renowned than other sources, which suggests the suspicion that it is being cited by the Court more to impress the opinion’s reader than as a true basis for the Court’s decision.322 The relative significance given to the letters of Jefferson might also be viewed as more a reflection of his iconic status than as true indications of constitutional standing.

While the overall measure of reliances is one measure of the relative significance of originalist sources, another might be found in the degree to which they compelled justice votes. The next compilation provides a measure of the consensus in opinions on which at least one justice relied on one of the originalist sources. Table 2 reports the frequency with which these sources commanded the justices of the deciding Court.

<table>
<thead>
<tr>
<th>Source</th>
<th>Consensus</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Federalist</td>
<td>.612</td>
</tr>
<tr>
<td>Elliots Debates</td>
<td>.525</td>
</tr>
<tr>
<td>Dictionaries</td>
<td>.418</td>
</tr>
</tbody>
</table>

321 There were 287 reliances on the letters of Jefferson, 159 reliances on those of Madison, 78 on those of Washington, 60 on those of Adams, and 9 on those of Jay. The disproportionate references to Jefferson might be questioned, given his lesser involvement in the actual constitutional drafting, but he is surely an iconic member of the founding generation.

322 See *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, supra note 000 (making this explanation for citations to *The Federalist*).
Thus, when one justice used *Farrand*, 62% of the justices voting in the case also relied on this source, but when one justice used one of the dictionaries, only about 42% of the justices joined in this reliance. The greater consensus might be associated with the precision of the source. While *The Federalist* and *Farrand* speak directly to the constitutional text, a dictionary is only general and lacks the context of the full language of the text. These results provide some evidence of the relative reliability and significance of the sources for evaluating constitutional claims.

While this data provides some evidence of the significance accorded the evidence from the originalist source in the case, it must be used cautiously. Other factors will influence the degree to which the justices joined. Different cases will have different ideological valences, which will substantially influence the degree of agreement, as discussed below. The cases also cover many different time periods, when norms of consensus differed. Moreover, some justices have not been originalists in orientation, which also differed over the time periods in which the cases were cited, and non-originalists might not be expected to rely upon these originalist sources.

The next analysis considers the relative usage of originalist sources in Supreme Court opinions over time. Larry Kramer has suggested that the “idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, merged only in the 1970s and 1980s.” This claim is not precisely accurate, as modern reliance on originalism cannot be considered exclusive – many opinions omit originalist interpretation, and other sources such as precedent are commonly employed. The claim captures the widespread impression, though, that originalism is the ascendant philosophy for constitutional interpretation.

The increased relative reliance on some originalist sources over time can be striking. For example, for the nearly two hundred years up to 1987, the Johnson and Sheridan dictionaries, though available to the justices, were cited in only four cases and used by only thirteen justices who joined opinions that relied on them. In the two ensuing decades, these dictionaries were cited in twenty cases in opinions joined by seventy-three justices. This is an tremendous increase in recent times, as if the Court just discovered this originalist resource.

The growth in reliance on other sources is not so striking but still quite apparent. Consider the most common originalist source, *The Federalist*. The following dot-plot displays the number of justices who joined an opinion citing this source by twenty year periods since 1800.

![Figure 1: Use of *The Federalist* Over Time](image)

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323 See Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988) (describing how earlier justices were much less likely to write concurring or dissenting opinions). This may not distort the results much, however, as reliance on the originalist sources is largely a modern phenomenon (when dissents are common), as demonstrated below.

324 Larry Kramer, *Two (More) Problems with Originalism*, supra note 000, at 908.
For much of our history, the use of *The Federalist* fluctuated at relatively low levels. The justices’ usage of this originalist source grew until 1880, after which it declined sharply until 1920. The ensuing era saw a steady growth, with a dramatic increase beginning in the 1960s and an explosion in usage with the 1980s. 1995 was the year that saw the most justice-reliances on *The Federalist*.

The next graph reveals the use of another common indirect source of originalism, *Farrand*, using the same twenty-year periods as in the preceding table.

Figure 2
Use of *Farrand* Over Time
Farrand was unused in the very earliest period, of course, because the materials were unavailable (it was first published in 1840). Even so, it was never mentioned in a Supreme Court opinion until 1945. The source saw a remarkable increase in use beginning in the 1960s, with only a very slight increase in the period after 1980. This source saw its greatest use in 1982 and 1983, with some decline thereafter.

The next analysis considers the use of Elliot’s Debates over time, and it might be considered a very apt direct source of original intent.

Figure 3
Use of Elliot’s Debates Over Time
Elliot’s Debates were first published in 1836. Much like the other prominent sources, it saw a dramatic increase beginning in the 1960s. The justices actually relied on this source less after the 1980s, which seems inconsistent with claims about the ascendancy of the new originalism. The year in which the most justices relied on this source was 1961.

The recent Court’s turn to originalism appears to be relatively more grounded in dictionaries and The Federalist, rather than other sources. While these originalist resources are direct and consistent with the themes of contemporary originalism, the reduced reliance on Elliot’s Debates is not. My study does not consider every conceivable originalist source, and the justices may be relying more on some resources that I don’t measure.

There is some irony found in the historical analyses. While an early motivation for use of originalism was a reaction to the Warren Court’s liberal decisions, the Warren Court era saw significantly increased reliance on originalist sources, as compared with all previous Courts. It is commonly believed that originalism’s “vanguard” came “in the 1970s and 1980s.” Yet the history demonstrates a flowering of reliance on originalist sources during the Warren Court era. The period of Court history that, to that date, most relied on originalist sources was seen as contrary to originalism. Perhaps the critics believed that the Warren Court’s reliance on originalism was selective and insincere, in pursuit of the justices’ ideological ends. This is an

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325 For an example, see Bell v. Maryland, 378 U.S. 226, 288 (1964) (Goldberg, J., concurring) (declaring that the justices’ sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers”).

inevitable risk of the theory, which I will explore below for all the recent justices. Before doing so, I look for the affinity of particular justices for reliance on originalist sources.

C. Comparative Practices of Justices and Originalism

This section compares justices in their use of originalist sources, as measured by the number of opinions they joined that used one of the originalist sources that I measure. While authorship of opinions using originalist sources could be viewed as a better measure for fealty to originalism, limiting the analysis to opinion authors would substantially reduce the size of the sample, and opinion content is not purely the product of the opinion’s author. Moreover, each justice is an independent actor, fully capable of filing a concurring opinion if the majority’s case is insufficiently (or unduly) originalist from the view of a particular justice.

Among the current justices, originalism’s “most ardent proponents” are said to be Justices Scalia and Thomas. Justice Scalia is said to be unique in his “notable role as the Court’s most consistent forceful advocate of constitutional interpretation according to the intent of the Framers.” Justice Scalia’s position on originalism has seen far more discussion than any other justice, much of it critical, claiming that his professed devotion to originalism is insincere. Thus, some say that what “is notably absent from Scalia’s major opinions is any sense that his rulings were initially motivated by a study of the historical record.” When originalist history is “inconvenient” to Justice Scalia, “he simply ignores it.” Randy Barnett concludes that “Justice Scalia is simply not an originalist.” Others have criticized Scalia for reliance on original expectations of the Framers originalism, rather than the original meaning of the text.

327 Any majority opinion speaks for the entire coalition, and justices other than the author may have had input into its contents. Justice Rehnquist observed that decisionmaking “inevitably has a large individual component,” but that it is “filtered through the deliberative process of the court as a body.” William H. Rehnquist, Remarks on the Process of Judging, 49 WASH. & LEE L. REV. 263, 270 (1992). He notes that in a narrowly decided decision, the opinion author “is under considerable pressure” to satisfy the demands of each of his or her majority coalition members. Id. at 302. The general theory is that “Supreme Court opinion authors make strategic calculations about the need to craft opinions that are acceptable to their colleagues on the bench.” Paul J. Wahlbeck, James F. Spriggs, II, & Forrest Maltzman, Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court, 42 AM. J. POL. SCI. 294, 294 (1998).

328 Vikram David Amar, Morse, School Speech, and Originalism, 42 U.C. DAVIS L. REV. 637, 637 (2009).


333 See Living Originalism, supra note 000, at 253 (describing his reliance on the practice of the “first Congresses and presidents”).
Justice Thomas may have surpassed Justice Scalia as the leading originalist on the Court. His opinions “display the vehemence of conservative originalism.” His opinions in *Lopez* and *U.S. Term Limits*, have been called the “most uncompromising originalist opinions in decades.” He “seeks to base his opinions on the original intent,” his opinions are “replete with references to the primacy of the Framers’ intentions,” and he treats them as “compelling directives that dictate the outcomes and reasoning in cases.” A reading of opinions found no more “consistent originalism and dedication to founding principles and documents than one sees in the Supreme Court jurisprudence of Justice Thomas.” Others have found that Justice Thomas employs different types of originalism in different cases, rather than using one consistent theory.

Yet the fidelity of Justice Thomas to originalism has also been challenged. Critics suggest he will “use originalism where it provides support for a politically conservative result, even if that support is weak,” but “where history provides no support [for his preferred outcome], he’s likely to ignore it altogether.” An in depth analysis found that he was not a “consistent originalist in practice,” as history guided only some of his judicial opinions. The author concluded that Thomas was an “amateur historian” who would reject “the weight of historical scholarship” in order to reach “more politically palatable conclusions.” A review of his record indicates that Justice Thomas “is less a consistent originalist than he is a consistent conservative.” A conservative editorialist took Thomas (and Scalia) to task for ignoring originalism in 14th Amendment opinions.

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334 Clio and the Court: A Reassessment, supra note 000, at 884.


338 *Living Originalism*, supra note 000, at 303-304.

339 *The Supreme Court and the Federalist Papers*, supra note 000, at 249 n. 27 (suggesting that Justice Thomas has been inconsistent in the importance he placed on *The Federalist* and that this suggests that his reliance “is simply strategic or opportunistic”).


341 Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE, supra note 000, at 88.

342 *Id.* at 89-90.


344 Ramesh Ponnuru, *When Judicial Activism Suits the Right*, N.Y. TIMES, June 24, 2009, at A25 (declaring that Justice Thomas was “the most originalist member of the court” but noting that “originalist analysis has been notably absent” from his affirmative action opinions).
There may be no thoroughgoing originalists on the Court, justices who consistently rely on originalism to resolve constitutional questions. Richard Fallon has written:

Indeed, all of the current Justices, including the self-proclaimed originalist Justices Scalia and Thomas, have self-consciously accepted the authority of precedents that could not themselves have been justified under originalist principles. It is also pertinent that all of the Justices, again including the originalists, apparently converge in recognizing as currently valid a number of past decisions that many scholars think would be difficult if not impossible to justify on originalist grounds. These include decisions establishing that paper money is constitutional, as is Social Security; that the Equal Protection Clause bars race discrimination in the public schools; that Congress has broad power under the Commerce Clause to regulate the national economy; that the Due Process Clause of the Fifth Amendment . . . restrains the federal government from employing racial or gender-base classifications; and that the Equal Protection Clause requires the distribution of voting rights on a one-person, one-vote basis.  

The fact that no justice is universally originalist, though, does not refute the possibility that different justices may be relatively more or less originalist or even predominantly originalist in orientation. If one is devoted to the interpretive methodology, the relatively more originalist justice could be preferred. Thus, justices Scalia and Thomas might be relative originalists, and this may have significance. Justice Breyer might be best known as a justice who is not an originalist. He has publicly argued for a consequentialist approach to interpretation of the Constitution. One survey found that he cited The Federalist in a few cases but that in none of them was the source “anything more than a bit player.” However, he has emphasized the importance of considering “those who wrote the Equal Protection Clause” when interpreting the 14th


346 This is not necessarily so, however. Originalism could be deployed insincerely to advance willful judging, as discussed below. Such insincere use of originalism would presumably not be greatly applauded, even by believers in originalism.

347 See Two Cheers for Professor Balkin’s Originalism, supra note 000, at 701 (describing him as the only “justice on the current Supreme Court who rites openly consequentialist opinions of the living Constitution variety”).

348 STEPHEN G. Breyer, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 9-12 (2008). This consequentialism does not ignore originalism, though. He emphasized the need to understand and focus on the “purposes” of the Constitution as opposed to the “Framers’ original expectations, narrowly conceived.” Id. at 115-116.

349 The Supreme Court and the Federalist Papers, supra note 000, at 311.
Amendment. Justice Breyer has suggested that the Establishment Clause should be interpreted so as “to implement the “basic value that the Framers wrote the clause to protect.” Justice Breyer has plainly not ignored originalist interpretation, but he may be considered the least originalist of the contemporary Court.

Other justices have a more ambiguous association with originalism. Justices Kennedy, Ginsburg, and Stevens are not known as originalists, but neither are they regarded as so anti-originalist as Justice Breyer. The survey of the opinions of Justice Stevens found use of originalist sources but noted that the role of The Federalist in his opinions apparently was simply performing a “ceremonial function.” Justice Kennedy has been viewed as “a Burkean, not an originalist.” He has actually declared that the “doctrine of original intent does not tell us how to decide a case.” The Court appears to have a variety of perspectives on originalism, which might be expected to show up in the justices’ comparative reliance on originalist sources.

The newest justices are not yet well defined in their devotion to originalism. During his confirmation, Chief Justice Roberts rejected being categorized as an originalist but also declared support for the consideration of original intent. Nor did Justice Alito strongly embrace the methodology. In their hearings, “[n]either justice identified himself as an originalist.” Yet both “evinced considerable sympathy with originalist interpretation.” The jury is still out on Justices Roberts and Alito; both have expressed interest in using originalism but not as a single guiding principle for their decisions. In a survey of business cases, neither “seems to embrace

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351 ACTIVE LIBERTY, supra note 000, at 121.

352 See, e.g., John C. Eastman, Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?, 94 GEO. L.J. 1475, 1477 (2006) (observing that Justices Stevens, Souter and Ginsburg were “not known for their devotion to the originalism enterprise”).

353 The Supreme Court and the Federalist Papers, supra note 000, at 308.


359 See Talking Originalism, supra note 000, at 109 (contrasting Roberts and Alito with Scalia and Thomas, described as the “only committed originalists on today’s Court”).

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the originalist position” set out by Justices Scalia and Thomas. Chief Justice Roberts has been described as “more a doctrinalist (and also, perhaps, a pragmatist) than an originalist.” While Justice Sotomayor is too new to the Court to be characterized, conservatives opposed her because she did not “appear to support originalism.” These justices have decided relatively few cases in my study period, though, so I will be unable to assess their relative reliance on originalist sources.

A study of comments made by the prospective justices of the Rehnquist Court during their confirmation processes sought to measure their relative originalism. The veracity of such confirmation comments may be questioned, of course, because they are appealing to a congressional audience with its own interpretive preferences. The results revealed Justice Ginsburg to be the least originalist (plausibly) but Justices O’Connor and Breyer to be the most originalist (much less plausibly). While this measure seems a questionable one facially, its accuracy can be tested by the relative use of originalist materials in opinions.

The conservative justices, especially Scalia and Thomas, are clearly more associated with originalist interpretation than are the liberal justices. Yet the degree of this commitment is uncertain, though. Cass Sunstein has contended that “originalism has not been a significant theme on either the Rehnquist Court or the Roberts Court.” As noted above, dedication to originalism is relative and needs to be measured empirically, not anecdotally. To measure relative commitment of various justices to originalism, I provide the number of opinions they authored or joined that relied on originalist sources.

To evaluate the relative devotion of different justices to originalism, I consider the number of opinions they authored or joined that cited an originalist source and the percent of the opinions they joined that cited an originalist source, when some justice cited an originalist source in an opinion. One would expect that if a justice were truly devoted to originalism, he or she would more frequently cite originalist sources in opinions and seldom entirely ignore originalist sources cited by another justice. The following table breaks down this use for justices

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360 Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979, 990 (2009). See also *The Death of Judicial Conservatism*, supra note 000, at 4 (suggesting that the “two Bush appointees show no signs of being tempted to be originalists”).


362 When Judicial Activism Suits the Right, supra note 000.


364 Id. at 142.


366 Mere reliance on total number of invocations of originalist sources would be misleading because the justices served for very different time periods and heard different numbers of cases with correspondingly greater or lesser opportunities to cite originalist sources.

367 It may be, of course, that an originalist source is cited when it is entirely inappropriate to resolution of the case. In this circumstance, one would not expect a truly originalist justice to rely on the inapposite source.
involved in at least thirty cases in which originalist sources were invoked. Separate data are provided for direct and indirect sources. The second and fourth columns give the percent of the time that the justice joined an opinion citing an originalist source, when some Court opinion in the case cited that source, when the source was clearly “in play” at the Court.

Table 3
Justice Use of Originalist Sources

<table>
<thead>
<tr>
<th>Justice</th>
<th>Use of Direct Sources</th>
<th>%Direct Sources</th>
<th>Use of Indirect Sources</th>
<th>%Indirect Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>31</td>
<td>50.8%</td>
<td>16</td>
<td>37.2%</td>
</tr>
<tr>
<td>Blackmun</td>
<td>77</td>
<td>48.7%</td>
<td>35</td>
<td>57.4%</td>
</tr>
<tr>
<td>Brennan</td>
<td>94</td>
<td>52.2%</td>
<td>48</td>
<td>54.5%</td>
</tr>
<tr>
<td>Breyer</td>
<td>55</td>
<td>58.5%</td>
<td>22</td>
<td>55%</td>
</tr>
<tr>
<td>Burger</td>
<td>52</td>
<td>58.4%</td>
<td>30</td>
<td>65.2%</td>
</tr>
<tr>
<td>Douglas</td>
<td>42</td>
<td>53.2%</td>
<td>25</td>
<td>46.3%</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>64</td>
<td>61.5%</td>
<td>19</td>
<td>67.9%</td>
</tr>
<tr>
<td>Harlan</td>
<td>59</td>
<td>57.8%</td>
<td>30</td>
<td>68.2%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>85</td>
<td>55.5%</td>
<td>26</td>
<td>50%</td>
</tr>
<tr>
<td>Marshall</td>
<td>64</td>
<td>58.2%</td>
<td>33</td>
<td>50.8%</td>
</tr>
<tr>
<td>O’Connor</td>
<td>104</td>
<td>53.3%</td>
<td>42</td>
<td>60%</td>
</tr>
<tr>
<td>Powell</td>
<td>72</td>
<td>70.6%</td>
<td>26</td>
<td>60.5%</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>138</td>
<td>56.8%</td>
<td>52</td>
<td>59.1%</td>
</tr>
<tr>
<td>Scalia</td>
<td>105</td>
<td>63.6%</td>
<td>22</td>
<td>55%</td>
</tr>
<tr>
<td>Souter</td>
<td>72</td>
<td>56.3%</td>
<td>27</td>
<td>57.4%</td>
</tr>
<tr>
<td>Stevens</td>
<td>125</td>
<td>55.3%</td>
<td>56</td>
<td>68.3%</td>
</tr>
<tr>
<td>Stwart</td>
<td>56</td>
<td>54.9%</td>
<td>27</td>
<td>47.4%</td>
</tr>
<tr>
<td>Thomas</td>
<td>83</td>
<td>72.2%</td>
<td>25</td>
<td>58.1%</td>
</tr>
<tr>
<td>Warren</td>
<td>23</td>
<td>44.2%</td>
<td>14</td>
<td>48.3%</td>
</tr>
<tr>
<td>White</td>
<td>89</td>
<td>56%</td>
<td>46</td>
<td>59.7%</td>
</tr>
</tbody>
</table>

There can be no conclusive absolute ranking of the justices. The justices did not all overlap in time; they heard different cases with different opportunities to invoke originalist sources. One can get a rough association for the justices’ relative originalism from the data. A more originalist justice would have greater absolute use of originalist sources and a greater percentage of usage in cases where some justice cited an originalist source. The difference between direct and indirect sources is not a great one, though some justices, such as Powell and Thomas clearly rely more heavily on direct sources. The latter figure may be more salient, because it takes opportunities into account, to a degree.368 Perhaps a better originalist would also have a greater

However, I would expect a truly originalist justice to confront the originalist citation in his or her separate opinion and distinguish it, explaining why the originalist source was not helpful, rather than simply ignoring the source. True originalism surely requires that others’ originalist sources be analyzed.

368 This percentage number is also an imperfect one. As the more recent Court is more likely to use certain originalist sources, earlier justices may have a higher number simply because the other members of the Court were less likely to invoke one of the originalist sources studied.
reliance on direct, rather than indirect, sources, though the extent of this effect is debatable, as discussed above.

The table makes clear that the justices are generally more likely to use direct sources, rather than the sources I have characterized as indirect, though this is not universally the case. Not only do they make more absolute use of direct sources, they are somewhat more likely to invoke such sources when some justice does so in an opinion. This is generally, but not exclusively, due to reliance on *The Federalist*. Use of this source may be attributable to its relative value, though it has its own profound shortcomings as I discussed above. Alternatively, it may be due to the iconic status of *The Federalist* and its use may be a rhetorical trope, rather than a sincere determinant of the opinion.

The data suggest that Justice Thomas may be the most originalist in the Court’s recent history, at least by use of direct sources. Justice Scalia would also be among the most originalist justices, but neither stand out by a clear cut margin over other justices. Justice Ginsburg, for example, shows a roughly equal devotion to originalism in her shorter time on the Court and especially high reliance on indirect sources. Moreover, on recent Courts, there are no truly non-originalist justices. Justice Breyer, often characterized as non-originalist, uses these originalist sources often. Even the Warren Court justices, who used originalist sources somewhat less, used them frequently, though Justice Warren himself may be the least originalist judge of this sample. Justices Roberts and Alito so far appear fairly originalist, but the number of opinions in my database is too small to draw any conclusions about their practice.

There was also some difference in the justices’ relative reliance on particular originalist sources. One striking result was the relative affinity of Justice Thomas for the dictionaries studied. When one of these dictionaries was used in an opinion, he joined that opinion over 93% of the time. The comparable figure for Justice Scalia was only 60%. Justice Blackmun rarely used the dictionaries, citing them only 12.5% of the time that some justice used them. The importance of this association should not be exaggerated though, the dictionaries were used in only 15 opinions while Justice Thomas was on the Court.

Other interesting affinities are present. Justice Stevens was especially inclined to rely upon letters from Jefferson or Madison, using them twice as often as Justice Scalia, in virtually the same set of cases. Justices Thomas, Scalia, and Ginsburg were especially reliant on *The Federalist*. These associations are interesting, but the sample sizes are small for many other sources so it is difficult to know how much to make of the associations of justices and particular sources.

The overall data suggest that conservative justices are indeed more originalist but only by a small margin. There is relatively little difference among the justices in their use of the originalist sources studied. These findings on the devotion of particular justices to originalism are somewhat limited by my incomplete resources. It might be, for example, that a justice was very originalist but simply preferred sources other than those I have used in the study (though generally scanning the cases does not reveal any such justice). My research considers only the 18th Century constitutional founding, and a study of the use of originalism in interpretation of the constitutional amendments, especially the 14th Amendment, might reach different results. But this study at least captures an important aspect of originalism, involving the interpretation of the original Constitution.

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369 See *The Supreme Court and Opinion Content*, supra note 000. A description of the iconic status of *The Federalist* may be found at *A Rhetoric for Ratification*, supra note 000, at 528-530.
IV. Ideology and Originalism

As noted above, the case for originalism seemed to be ideologically results-oriented, in response to the Warren Court liberal decisions (even though those decisions often used originalist sources as support of their outcomes). This need not be the case with contemporary originalism, which allegedly would let the ideological chips fall where they may, so long as the method is faithfully applied. Yet examination of results remains relevant. Such examination may serve as a test of the Court’s ability to faithfully apply the interpretive method. It is possible that justices employ originalism only as a device to reach the results they have chosen for ideological or other reasons. This section considers that possibility.

I have above discussed many flaws with the historical record but also noted that this does not utterly destroy the value of that record. An honest searcher may find helpful information, even answers, to questions of original meaning. However, the flaws in the record also facilitate manipulation of the historical record to produce support for whatever results the less honest searcher desires to reach. The justices are said to “reach results first and then find reasons, precedents, and historical support.”

Long before the modern era, it was observed that the Court’s use of originalism was “to affirm a conclusion which apparently, and sometimes assertedly, rests chiefly upon other grounds.” It is “not uncommon for the majority and the dissent to rely on the same founding-era statement to support competing views of the original understanding.” While this might be sincere disagreement in the presence of indeterminacy, it may be ideological manipulation of the originalist record.

Considerable research indicates that the justices of the Supreme Court cast votes that show systematic ideological influence, as they show very different patterns in voting in the same cases. Even when confronted with the same precedents in the parties’ briefs, the justices interpret them differently and produce different ideological outcomes. One study of the constraining effect of precedent analyzed whether justices who dissented from a landmark opinion of the Court continued to dissent from its progeny. They found that this was overwhelmingly the case and concluded that “precedent rarely influences United States Supreme Court justices.” This case is not undisputed, as reconsideration of its data has yielded contrary

370 See “Original Intent” in Historical Perspective, supra note 000, at 1103-04 (suggesting that “it is now impossible to overlook that the entire documentary record of the establishment of the Constitution of the United States is so defective that reliance on it alone invites judicial creativity”).

371 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 299.

372 Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, supra note 000, at 443. See also The Most Sacred Text, supra note 000, at 72 (noting that whenever “the Court found that history presented views contrary to its planned holding, the Court rejected, ignored, or distorted that history”).

373 Sources of Federalism, supra note 000, at 254.


375 Id. at 287.
results, and other research indicates that precedent can shape the Court’s results. A study of circuit court opinions found a modest effect of precedent on constraining the decisions of judges. The profound ideological differences in outcomes among justices confronting the identical precedents in particular cases, though, do not give much evidence that precedent is significantly constraining for justices of the Supreme Court.

This is not encouraging for those promoting reliance on originalism. The information available from a precedent seems much more definite than that of the originalist sources. For a precedent, the Court has available the entirety of the opinion and the entirety of any dissenting opinions, in contrast to sources such as *Farrand* or Elliot’s Debates, plus other background information on the decisions. Moreover, the precedent is direct insight into the legal understanding of the relevant parties (the deciding justices), while the originalist sources are only indirect insights into the understanding of the relevant parties (the general population of the time). Precedent would seem more determinate than originalism, yet it is readily manipulated ideologically.

Reliance on originalism could be clouded by ideology, much like precedent. Thus, Justices Scalia and Thomas are said to “perceive remarkable similarities between their own values and those of the founding generation.” The “problem for self-styled ‘originalists’ like Justices Scalia and Thomas is not that they are wrong about abortion but that they often ignore the Constitution’s historical meaning in other areas when it conflicts with their political and ideological goals.” Justice Scalia is said to use originalism “selectively when it leads to the conservative results he wants, but ignores [it] when it does not generate the outcome he desires.” If these claims are true, it suggests that originalism, however appealing in theory, is

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379 The justices have considerable discretion in the precedents to be cited and how to interpret them. See Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1272-76 (2008) (studying choice of precedents cited in majority opinions vs. the briefs of the parties and identifying considerable disparity).


not a meaningful standard for the Court’s decisionmaking in practice. The justices may only selectively invoke originalism in support of their preferred outcomes (or they may choose reliance on originalism rather than other legal sources because it conduces to their preferred outcomes).

A. The Intersection of Ideology and Originalism

Ends-oriented or willful judging on the Court is widely criticized, yet commonly identified. This section considers how originalism may affect such ideological decisionmaking. Some perceive originalism as intrinsically conservative, though the data on justices’ use of originalist sources appear to provide only slight support for this. Some supporters of originalism have argued that its use constrains ideological judging, though critics commonly disagree. This section examines the hypotheses about the intersection of originalism and ideological decisionmaking.

Historically, “original intent had no political coloration.” In current times, though, originalism is largely regarded as a conservative form of interpretation and “believed to serve a conservative political agenda.” Originalism was strongly propounded by Attorney General Meese as a “rationale for overturning many of the crucial decisions of the Warren and Burger Courts. On the contemporary Court, the conservative justices are those associated with reliance on originalism. Indeed, the push for originalist interpretation began as a drive to combat “liberal judicial activism.” One study of the use of The Federalist papers found that conservative justices, when authoring an opinion, were more likely to cite them than liberals. The intrinsic association of originalism with conservative decisions, though, is not plainly established. David Strauss argues that there “is no reason to view [originalism] as a conservative approach to the Constitution.” Perhaps not, though the common association of originalism and conservatism suggests otherwise.

Perhaps originalism inherently tends to produce decisions that today’s ideological conservatives prefer. If so, the theory might be favored by conservatives simply because it

383 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at xii.

384 THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 34.

385 Clio and the Court: A Reassessment, supra note 000, at 827; THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 20-24 (describing the development of originalist theory as a backlash against liberal Warren Court decisions); ORIGINALISM IN AMERICAN LAW AND POLITICS, supra note 000, at 9 (observing that originalism was “politically attractive” in that it “implied conservative policy results as opposed to the prior wave of liberal Supreme Court decisions”).

386 See Original Meaning and Constitutional Redemption, supra note 000, at 443.

387 The Supreme Court and Opinion Content, supra note 000, at 333.

388 See THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 53 (noting that “the example of Justice Black’s incorporation doctrine suggests that originalism at times will yield liberal as well as conservative results”).

389 The Death of Judicial Conservatism, supra note 000, at n.13.
produces ideologically appealing consequences.\textsuperscript{390} Thus, “methodological intuitions are based on the perceived policy outcomes of implementing a methodology.”\textsuperscript{391} The theory is that “individual judges – who today have broad choice among interpretive methods – will tend to select the interpretive method that, other things being equal, minimizes the extent to which they must deviate from their preferred outcomes.”\textsuperscript{392} Hence, conservatives could prefer originalist interpretation because it produces desired conservative results in constitutional decisions.\textsuperscript{393} There is a suggestion that conservative affinity for originalism may be time bound, as “useful” when attacking liberal precedents but less appealing when they are “comfortable” with a more conservative status quo.\textsuperscript{394}

However true the association of conservatism and originalism might be as a descriptive measure of how justices select methods, it does not bear on the question of the objectively proper method. From a purely legal perspective, an interpretive method stands on its theoretical basis, independent of the results it produces. Thus, if conservative justices choose originalism simply because it produces conservative results, that motive is irrelevant to whether or not originalism is legally optimal. If this effect were true, it would not by itself demean originalism. Perhaps conservative results \textit{are} the correct ones. However, the asserted conservative domination of originalism as an interpretive theory is incomplete.

In the academy, liberals have increasingly made the case for originalist interpretation.\textsuperscript{395} Most recently, Jack Balkin has taken a stand in favor of originalist principles of constitutional interpretation.\textsuperscript{396} Moreover, even most of the liberal critics of originalism do not entirely reject

\begin{itemize}
  \item \textsuperscript{390} See Sara C. Benesh & Jason J. Czarnezki, \textit{The Ideology of Legal Interpretation}, 29 WASH. U. J. L. & POL’Y 113, 113 (2009) (asking “when a judge uses ‘originalism’ to interpret the Constitution, does she do so because she truly adheres to that strategy and finds its result determinative, or does she do so as a means to an ideological end?”); Joshua B. Fischman & David S. Law, \textit{What Is Judicial Ideology, and How Should We Measure It?}, 19 WASH. U. J.L. & POL’Y 133, 140 (2009) noting that a justice might choose originalism because of a belief that it “tends to yield conservative results”).
  \item \textsuperscript{393} See TO SECURE THESE RIGHTS, supra note 000, at 4-5 (stressing that “conservatives’ . . . campaign for a jurisprudence of original intention should be seen for what it is: a quest for political results”); Joshua Fischmann, \textit{What Is Judicial Ideology and How Should We Measure It}, 29 WASH. U. J. LAW & POL’Y 133, 139-140 (suggesting that justices may choose originalism because it produces conservative results).
  \item \textsuperscript{394} \textit{The Death of Judicial Conservatism}, supra note 000, at 4-5.
  \item \textsuperscript{395} On the general trend for liberals to use originalist materials, see \textit{Dueling Federalists}, supra note 000, at 85-86 and \textit{Two Cheers for Professor Balkin’s Originalism}, supra note 000, at 664.
\end{itemize}
its relevance. 397 Today’s liberal originalism differs somewhat from the prevailing view about original public meaning. It typically seeks the identification of broader purposes in the original Constitution. Before Balkin, liberal “civic Republicans” argued that the proper originalist interpretation was a more liberal one. 398

The liberal embrace of originalism may be simply strategic. Originalism appears to have some intrinsic public appeal as an interpretive device. Perhaps the liberals have assessed the political terrain and decided that it would be wise to try to co-opt such a rhetorically persuasive argument. Regardless of the motive, however, the relevant fact is that liberals are attempting to use originalism and believe it can be used to support their preferred outcomes. The theory may thus not be innately conservative.399

Rather than being intrinsically conservative, originalism may simply be malleable to whatever end might be desired by a justice.400 In Heller, for example, all the justices relied heavily on originalism, but they split 5-4 along conventional ideological lines, with predictable votes for each of the justices.401 If so, the materials of originalism are ambiguous enough to defend various positions. Christopher Eisgruber maintains that there is “simply too much legitimate disagreement within originalism for it to constrain judges effectively.”402 He maintains that the conservative originalist justices reach conclusions at odds with their political believes “between very rarely and never.”403 Richard Kay suggests that “public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions,” thereby enabling more ideological decisionmaking.404 Scott Gerber warns that originalists “are substituting conservative result-oriented jurisprudence for liberal result-oriented jurisprudence.”405 If so, the modern view of originalism will only exacerbate the potential problem of ideological manipulation of the theory.406

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397 See Original Intention, Enacted Text, and Constitutional Interpretation, supra note 000, at 256 (noting that “even its most forceful academic opponents do not go so far as to reject the relevance of Framers’ intent tout court”).

398 This is described in LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

399 See David Strauss, The Death of Judicial Conservatism, 4 DUKE J. CON. LAW & PUB. POL’Y 1, 4 (2009) (contending that there is “no reason” to view originalism as “a conservative approach to the Constitution”).

400 See ORIGINALISM IN AMERICAN LAW AND POLITICS, supra note 000, at 213 (noting that “The Court may manipulate or ignore the requirements of originalism . . . to achieve ideological ends”).

401 The majority justices’ opinion was said to undermine “the pretense that their originalist methodology truly drives their decision-making rather than merely serving as a convenient way to cloak their conclusions with an air of objectivity.” Allen Rostron, Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 387 (2009). Of course, this conclusion may simply reflect the author’s ideology. But the point is still made that originalism may be ideologically manipulated, as evidenced by the divided votes in Heller.


404 Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 721.

405 TO SECURE THESE RIGHTS, supra note 000, at 4-5.
The ideological manipulation of history is probably an inevitable consequence of the practice of originalism. While reading the same history, liberal originalists find liberal meaning, while conservative originalists find support for conservative positions. Advocates will surely manipulate history. A “historians’ brief” was filed in support of reproductive rights, based on the practice of earlier centuries. Even though this was filed by historians, not lawyers, and for an amicus, not a party, it was tasked with great distortion of the historical record. One suspects that those historians who favored reproductive rights embraced the brief and those who disagreed rejected it. Even the counsel of record in support of the brief conceded that it could be inaccurate due to “tension between truth-telling and advocacy.”

One signer of the brief said he did not “consider the brief to be history,” as it “was a political document.” If expert historians cannot be trusted to honestly assess the record, courts are unlikely to do better.

I above discussed the criticisms of “law office history.” The critics of the Court’s use of history generally do not suggest that the justices are simply incompetent historians, though this forms a portion of the critique. Rather, the critics claim that the justices manipulate history to produce the result they ideologically desire. A legal historian has suggested that the Court pretends “that the dictates of the nation’s history, rather than the mandates of its own will” drive an opinion, and he complained that through “superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer.”

This criticism is a common one. Laura Kalman has suggested that the “more ‘law office history has changed,’” the more it has stayed the same.” The “casual and frequently

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406 There are difficulties associate with ascertaining the characteristics of the “reasonable” contemporary interpreter of the Constitution’s language so “it would not be surprising if a judicial interpreter were to hit upon a reasonable speaker who might view the relevant language as supporting a rule that the interpreter thinks a proper constitution ought to have.” Original Intention and Public Meaning in Constitutional Interpretation, supra note 000, at 722.


411 See ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 313 (suggesting that the justices were “naïve” and “incompetent” at the task and “victims of their training as lawyers”).


acontextual use of primary sources can be jarring.” Many historians and legal academics have criticized the manner in which “non-historically-trained judges and legal scholars use history in their analyses.” Judge Posner declared: “Legal professionals are not competent to umpire historical disputes.” If judges are unable to resolve historical controversies, originalism appears to be an invalid tool for interpretation.

In this view, originalism is nothing but a rhetorical tool used to promote an ideological agenda, whether of the left or the right. The study on use of The Federalist in opinions found that the citation “provide a veneer of authority that can insulate the Court, and the justice, from criticism and controversy.” This research found that justices were likely to “cite a Federalist Paper in a strategic fashion to bolster the legitimacy of the court when opinions assert judicial power.” Originalist sources may be nothing more than “eye-catching, judicial wrapping paper.” Reviewing the decision in Heller, Reva Siegel suggested that “[o]riginalism helps [justices] transmute their constitutional politics into constitutional law.”

The view that originalism is a mask for willful judging is often expressed. Leonard Levy claimed that originalists’ “manipulation of the rules of construction achieves whatever result they seek” and that “the intent discovered by the Court is most likely to be determined by the conclusion that the Court wishes to reach.” In the context of reliance on legislative history, Judge Leventhal famously described the practice as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”

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414 When Lawyers Do History, supra note 000, at 391.


417 See ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 373 (suggesting that a “jurisprudence of original intent also has the virtue of giving protective cover to results that might otherwise seem to have been reached on the basis of personal discretion”); The Most Sacred Text, supra note 000, at 99 (concluding after a detailed review of the use of The Federalist, that the source “has been relied on mostly as a means of persuasion”); Applying a Usable Past, supra note 000, at 491 (observing that scholars have recognized that “using history as a means of attaining desired legal results was a problematic reality”); THE WILL OF THE PEOPLE, supra note 000, at 312 (noting that critics have argued that originalism simply “allowed judges interpretive leeway to reach results they found felicitous”).

418 The Supreme Court and Opinion Content, supra note 000, at 329.

419 Id. at 336.

420 The Creation of the Constitution, supra note 000, at 5.

421 Dead or Alive, supra note 000, at 237.

422 ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION, supra note 000, at 384.

423 Id. at 388.

424 Quoted in Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). See also Talking Originalism, supra note 000, at 113 (suggesting that for “most controversial questions, the original meaning of the constitution is ambiguous, so it is easy for judges to find support in the history for whatever position they are
originalist interpretation likewise may simply be a tool for justices to find originalist materials that suit the outcome they prefer. A foremost originalist, Keith Whittington, largely concedes the point, noting that judges make use of originalism “whenever they find it helpful to advancing their position.”

The view that originalism is manipulable is perhaps the most penetrating attack on the theory. Even if the originalist approach to constitutional interpretation were the theoretically correct one, this would not have much practical meaning if it were not sincerely employed by the justices. Originalism supposedly “makes it too easy for people to find, in the law, the answers they are looking for.” Because the historical record is so incomplete and often contradictory, the critics suggest that originalism is a prescription for willful decisionmaking. There is thus a temptation for any originalist to say: “Wow, what do you know? The Framers thought the same thing about this issue that I do. Isn’t that great?” Originalism certainly did not appear to control the ideological influence of the votes of the justices in *Heller*. A prominent defender of the interpretive practice conceded that originalism’s “play-in-the-joints enables judges to succumb to their own biases.”

Such legal realism has an extensive pedigree, and the ideological nature of Supreme Court decisionmaking has seen considerable empirical study. The now classic study which described such ideological decisionmaking as an “attitudinal model,” found that justice votes in search and seizure cases could be predicted 75% of the time based on ideology, a higher predictive percentage than could be produced by differential facts. The predictions of this model were tested against those of legal experts for predicting the outcome of decisions in the

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425 *See The Interpretive Force of the Constitution’s Secret Drafting History, supra* note 000, at 1163-64 (drawing the analogy).

426 *The New Originalism, supra* note 000, at 599. Whittington is concerned with the correct theoretical discussion for academic constitutional theory, so he need not be troubled by such inconsistency. But for practice, the potential abuse of the theory is a very significant issue.


428 *Panel on Originalism and Precedent, supra* note 000, at 221. *See also* Richard Primus, *Limits of Interpretivism*, 32 HARV. J. LAW PUB. POL’Y, 159, 171 (2009) (suggesting that “judges seem to conclude that the relevant original meanings support the same results that we suspect they would reach if they had not consulted original meanings”).

429 Saikrishna Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST.COMM. 529, 538 (1998). He suggests that “originalism will never constrain judges (or any other interpreter) because no theory can accomplish this hopeless task.” *Id.*

2002 term, and the ideological model beat the experts. The “evidence of an ideological, attitudinal role in judicial decision making is by now enormous.”

An extensive amount of study confirms the claims of ideological voting at the Supreme Court. Indeed, political scientists now consider it the common sense of the discipline that Supreme Court justices should be viewed as promoters of their personal policy preferences rather than as interpreters of law. Research shows that “American courts are political institutions and that the traditional view of courts as somehow distinctive and insulated from the remainder of the political system has little value for empirical or theoretical analysis.” The claim that opinions are the product of dispassionate legal analysis, rather than ideological preferences, has been called a “myth like the medieval fable of St. George and the dragon.” At the Supreme Court level, the justices tend to “reach results first and then find reasons, precedents, and historical support.”

While the evidence of attitudinal ideological decisionmaking at the Court is strong, it is not beyond question. For example, “merely looking at the way the justices voted, without considering the justification for their decisions, was not adequate to understand the complex process of case-by-case decision making.” The attitudinal model predicts how justices vote with some accuracy but is far from perfect. The justices of course dispute such an insincere

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432 Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 187 (2008). This conclusion is “consistent across different areas of the law, using different coding conventions and different case data.” Id.

433 Much of this evidence is summarized in Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 277-278 (1997). See also John Brigham, *The Constitution of the Supreme Court*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 15, 16-17 (1999) (suggesting that the “conventional wisdom is that the judge can do whatever he wants and that only in some unenlightened prior age did people believe the law really mattered”).

434 Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1007 (1996). See also John Brigham, *The Constitution of the Supreme Court*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 15, 16-17 (1999) (suggesting that the “conventional wisdom is that the judge can do whatever he wants and that only in some unenlightened prior age did people believe the law really mattered”).

435 ORIGINAL INTENT AND THE FRAMERS CONSTITUTION, supra note 000, at 299.

436 EILEEN BRAMAN, LAW POLITICS & PERCEPTION 14 (2009).

437 See *What Do Judges Want*, supra note 000, at 203 (urging that the ideological role “should not be exaggerated,” observing that many decisions are unanimous and that “there are a material number of cases in which a conservative would vote liberally while a more liberal justice would cast a more conservative vote”). For a review of some of the other limitations of the model, see, *Political Science and the New Legal Realism*, supra note 000 and *What’s Law Got To Do With It?*, supra note 000.
approach to their decisionmaking. But the ideological hypothesis need not claim that the justices are consciously dishonest and fraudulent. Those who claim that Supreme Court decisions are utterly ideological in their decisions have not argued that this is necessarily intentional. It is plausible that the ideological bias in decisionmaking is entirely subconscious.

The foremost political scientist proponents of ideological attitudinal decisionmaking are agnostic about whether this is a conscious or a subconscious process. A prominent psychological theory, known as motivated reasoning, indicates that people will subconsciously (or unconsciously) find apparently neutral reasoning to support their preferred conclusions. The analysis can occur “so quickly that the judge never consciously considers the reasons for the choice and therefore believes that the decision was compelled by objective, external sources.” Judges simply “perceive information that is consistent with a preferred judgment conclusion . . . as more valid than information that is inconsistent with that conclusion.” This extends to the interpretation of the underlying facts as well. Under this approach, even a justice who sincerely tries to find the legal truth will produce ideologically biased opinions. Yet this motivated reasoning does not necessarily imply the complete absence of objective constraint.

James Gibson’s classic explanation of judicial decisionmaking thus declared that “[j]udges decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.” The tempering is where a commitment to an interpretive methodology, such as originalism, could have real practical effect on decisions and opinions. Role theory suggests that the judicial role of decisionmaking according to law has an authentic influence. Various studies have found an effect of role


441 See THE SUPREME COURT AND THE ATTITUDBINAL MODEL REVISITED, supra note 000, at 433 (describing the attitudinal model’s position on issues such as motivated reasoning as “one of agnosticism”). Indeed, such “behavioral scholars have been incredibly vague about whether judges are acting with volition or whether they are unwittingly influenced by their preferences.” LAW POLITICS & PERCEPTION, supra note 000, at 23.


447 See Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 NW. U. L. REV. 1437, 1480 (2001) (describing how role theory “suggests that the institutional role granted
theory, at least at lower levels of the federal courts. Those “who are associated with particular institutions often come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities,” so that “institutions not only structure one’s ability to act on a set of beliefs; they are also a source of distinctive political purposes, goals, and preferences.” While constraints are less at the Supreme Court level, it still provides “formal rules or informal norms that limit the choices available to political actors.” In conference and oral argument, the “justices often attempt to influence each other by making arguments on the merits,” which suggests that those legal considerations are a salient part of their decision. There are plenty of Supreme Court decisions in which unanimity prevails among ideologically diverse justices and in which the justices engage in “disordered voting,” where votes do not line up as ideologically expected.

Even with the innate tendency of motivated reasoning, motivation does not always prevail. Motivated reasoning suggests that actors have both directional and accuracy goals. The directional goals influence assessments of accuracy but they need not overwhelm them. The accuracy goals provide an “outer limit” on the impact of motivated reasoning. The ability to manipulate reasoning is not “boundless.” Economic research has found that weak arguments judges has the effect of changing their preferences and causing them to value legal model ends”); Edward Rubin & Malcolm Feeley, Creating Legal Doctrine, 69 S. CAL. L. REV. 1989, 2026 (1996) (suggesting that the justices “are likely to take the rule of law quite seriously” because it is “part of their set of role expectations – their institutionally induced believes about the way they should carry out their official functions”). LAW POLITICS & PERCEPTION, supra note 000, at 26-28 (describing the socialization of legal education).


Howard Gillman, The Court as an Idea, Not A Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making, in SUPREME COURT DECISION-MAKING, supra note 000, at 65, 70.

See Paul H. Edelman, David Klein, & Stefanie A. Lindquist, Measuring Deviations from Expected Voting Patterns on Collegial Courts, 5 J.E.L.S. 819 (2008) (identifying such disordered voting cases and suggesting that legal reasoning can explain departures from ideology). The authors found that such disordered voting was relatively common, and present in about half the cases decided in the second half of the Twentieth Century. Id. at 830. Such voting was somewhat less likely in constitutional cases, however. Id. at 841.

LAW POLITICS & PERCEPTION, supra note 000, at 31.

Mechanism of Motivated Reasoning?, supra note 000, at 943.
may be disregarded, notwithstanding a motivation to accept them.\footnote{Shailendra Pratap Jain & Durairaj Maheswaran, Motivated Reasoning: A Depth-of-Processing Perspective, 26 J. CONSUMER RES. 358 (2000) (demonstrating presence of motivated reasoning and also this effect of argument strength). The authors did not find that stronger contrary arguments were more powerful, though, perhaps because they are automatically discounted.} An affirmative preference for accuracy will limit the effect of motivated reasoning.\footnote{Nidhi Agrawal & Durairaj Maheswaran, Motivated Reasoning in Outcome-Bias Effects, 31 J. CONSUMER RES. 798 (2005).} Motivational effects “are constrained by the individual’s ability to justify the ‘reasonableness’ of the conclusion.”\footnote{Lindsley G. Boiney, Jane Kennedy, & Pete Nye, Instrumental Bias in Motivated Reasoning: More When More is Needed, 72 ORG. BEHAV. & HUMAN DECISION PROCESSES 1, 4 (1997).} The justices of the Supreme Court must justify their conclusions, in considerable detail, in published opinions. Justices care about the perception of the quality of their opinion by various audiences.\footnote{For a large number of decisions, judges must explain their outcome with a written opinion that relies on legal materials for justification. See LAW POLITICS & PERCEPTION, supra note 000, at 33 (noting that ‘[h]aving to convince others of their views increases the chance that judges will become aware of the potential role that policy preferences play in their decisional behavior’).} Experimental studies using law students have found both the presence of motivated reasoning and how the law bounds the power of motivations.\footnote{See LAW POLITICS & PERCEPTION, supra note 000, at 100 (describing an experiment in which precedent was more controlling, the more closely analogous it was) and 129 (finding the power of directional motivations weakened in the presence of different, more clearly controlling precedent).} Hence, the realist critique, whatever its measure of accuracy, does not entirely condemn the effort to legally bind the judiciary. The constraining effect of originalism is possible and requires empirical analysis.

It remains open whether originalist interpretation can constrain ideological judging. John Harrison is skeptical. He notes that even in the First Congress, when everyone was so close to originalism, the “interpreters’ positions on constitutional questions overwhelmingly lined up with what they thought were good ideas.”\footnote{John Harrison, On the Hypotheses that Lie at the Foundation of Originalism, 31 HARV. J. L. & PUB. POL’Y 473, 474 (2008).} The more contemporary record of law office history is not encouraging for the claim that originalism is constraining. Thus, there is reason to fear that interpretive originalism may be simply a convenient tool used by the justices to justify their preferred case outcomes. Andy Koppelman has claimed that “[s]ince the conclusions of historical scholarship shift over time and since the judges are not constrained by the fact that a conclusion reached by some scholar at some time has since been refuted, the consequence is to expand the field of judicial discretion by presenting judges with a broad menu of possible interpretations, each of which have sufficient originalist credentials to qualify for citation in the U.S. Reports.”\footnote{Andrew Koppelman, Phony Originalism and the Establishment Clause, 103 NW. U. L. REV. 727, 749 (2009).}
maintain that “without the constraining force of original expected applications, original meaning originalism will not provide the necessary constraint against interpretive changes by unelected judges.” 462 Adrian Vermeule has concluded that the theory that originalism reduces judicial discretion “seems unlikely . . . compared to other approaches.” 463

There remains a strong contrary position, that originalism may restrain ideological preferences of the justices. 464 Robert Bork argued that there was no way, other than originalism, “to confine courts to a defined sphere of authority.” 465 Indeed, this is the core of Justice Scalia’s case for use of originalism, that the practice constrains judicial discretion. 466 He concedes that there is an “inevitable tendency of judges to think that the law is what they would like it to be,” but maintains that originalism moderates this tendency better than any alternatives. 467 Originalism is said to constrain judges “by making their job a matter of discovery rather than invention.” 468 There are plausible reasons why this could be the case. A justice would prefer to write a logical, plausible legal opinion, and it may be that some ideological outcomes simply “won’t write” from an originalist perspective. 469 Psychological entrenchment may produce a commitment to an interpretive method, even when it produced ideologically unappealing results. 470

Such constraint would only apply to a universal originalist, however. Originalist materials are deployed in a relatively small percentage of constitutional opinions. The originalist theory would have no constraint if it were avoided whenever it imposed an inconvenient constraint. When the originalist materials are unavoidably liberal, for example, an originalist conservative might simply find different grounding for his or her decision. But this story may

462 Original Meaning and Constitutional Redemption, supra note 000, at 453.
464 Indeed, this has been said to be the “key originalist premise . . . that (neutral) principle is possible only within the interpretive paradigm of originalism.” THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 25. The argument is that “[w]ithout a grounding in the original understanding, the meaning of the Constitution loses any character of objectivity and becomes nothing more than each reader’s interpretation of it over time.” THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, supra note 000, at 119.

465 THE TEMPTING OF AMERICA, supra note 000, at 155.
467 Originalism: The Lesser Evil, supra note 000, at 863-864.
469 See Choosing Interpretive Methods, supra note 000, at 792-794 (explaining how this plausibility effect may constrain judges).
470 Id. at 832-835. The new originalism, though, places “less emphasis on the capacity of originalism to limit the discretion of the judge.” The New Originalism, supra note 000, at 608.
also be too simple. Some cases may call out for originalist interpretations; the parties’ briefs may be flush with originalist materials. In such a case, there could be plausibility costs to writing a non-originalist opinion, if a justice is known as a strong originalist.

Often invoked as evidence of this constraining effect of originalism are Justice Scalia’s and other originalists’ opinions in various criminal defendants’ rights cases, involving the confrontation clause and jury trial rights. This is not necessarily “convincing evidence,” though, insofar as it relies on a guess about the true preferences of the justices. The pattern is surely some evidence, though, as Justice Scalia has not shown a strong ideological inclination to criminal defendants on some other issues. It may well be that he has little ideological concern about these particular matters, though, so the votes truly are not opposite his ideology. Only a study considering more issues with more rigorous methods could assess this possibility.

If the Court has to justify its decision and opinion using originalist materials, the originalism proponents contend, the justices will be unable to produce the results they would otherwise reach on preferred ideological grounds. To the contrary, though, is the claim that originalism makes things worse, causing “people to hide the ball, to avoid admitting, perhaps even to themselves, what is really affecting their decisions.” This reflects Judge Posner’s view of judicial decisionmaking, which is that the ability to “hide” behind the claims of legalism makes judges more ideologically biased. Reliance on history is said to encourage “extreme political activism, involving extensive judicial intervention in contemporary political problems.” But Justice Scalia, by contrast, contends that reliance on history will lead to a “more moderate rather than a more extreme result.” Once again, the conflicting hypotheses require empirical testing. If Justice Scalia were correct, one would expect greater originalism to moderate ideological extremes.

Thus, there is a considerable debate over the constraining effect of originalism. Although this debate can only be resolved empirically, there is a paucity of empirical analysis of

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471 This argument is set out in Rachel E. Barkow, Originalists, Politics, and Criminal Law on the Rehnquist Court, 74 GEO. WASH. L. REV. 1043 (2006). She suggests that the cases illustrate how “originalists will often feel constrained by their methodology to vote a certain way, even if that means a vote in favor of criminal defendants with far-reaching consequences that they otherwise do not support.” Id. at 1073-74.

472 Choosing Interpretive Methods, supra note 000, at 788. Indeed, the results in some of these cases may not truly have been dictated by originalism. See, e.g., Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 GEO. L.J. 183 (2005).

473 Justice Scalia thus makes the more modest claim not that originalism will eliminate ideological judicial decisionmaking but simply that it may sometimes counteract it and at least does not encourage it. See discussion of Scalia’s philosophy in DANIEL A FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 38-42 (2002).

474 Why Conservatives Shouldn’t Be Originalists, supra note 000, at 970.

475 See RICHARD A. POSNER, HOW JUDGES THINK 252 (2008) (suggesting that when judges purport to be driven by external factors, be it formalism or originalism, they are more likely to be “drunk with power” than when they acknowledge their discretion and responsibility for the consequences of their decision).

476 Clio and the Court, supra note 000, at 125.

originalism’s effects. Many efforts to date have been merely anecdotal. There are those who have cited Scalia’s opinions as evidence of his ideological deployment of originalism. Justices Scalia, though, points to his defendants’ rights positions in *Crawford* and *Apprendi* as evidence disproving the claim that “originalism is nothing more than a device to further conservative views.”

Some very limited empirical scholarship has been brought to bear in the question. One study compared the use of constitutional “intentionalism” in the decisions of Justices Rehnquist and Brennan and concluded that each used the approach to reach results consistent with their preferred policy outcomes. The study of the use of *The Federalist* similarly found that it was used primarily for results consistent with judicial ideology. Research on the Seventh Circuit has suggested that liberals selectively deploy originalism to produce liberal results, but conservative judges show this effect less. An experimental study questioning law clerks found that conservatives were more inclined to originalist interpretation in the abstract but that both liberals and conservatives would abandon their inclinations when necessary to suit their desired outcomes. A study of voting on the Rehnquist Court suggested that voting patterns were not explained by the originalism of the justices. Perhaps the best study to date of the practice examined the originalist content of briefs filed by the parties over an eight year period and found that the effect of these arguments on the justices was largely conditioned by their ideological orientations.

There is an argument that reliance on originalism could actually aggravate the ideological biases of judging. Perhaps “the history invoked in originalist opinions gives an insidious veneer of objectivity and passivity to judicial decisions that are in reality the product of political choices, unconscious or deliberate.” Without such originalist rhetoric, “the result might actually be a more cautious Court,” as the possible judicial biases would be less hidden. This is analogous to Judge Posner’s suggestion that strict legalism, such as textualism, will enhance

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478 See *supra* at _____.


481 *The Supreme Court and Opinion Content, supra* note 000, at 339.

482 *The Ideology of Legal Interpretation, supra* note 000, at 131.

483 See generally *Behind the Mask of Method, supra* note 000.


486 *Talking Originalism, supra* note 000, at 113.

487 Id.
the role of ideology in judicial decisionmaking rather than moderating its impact. Motivated reasoning arguably supports this position.

An originalist justice might display ideological bias by selectively picking evidence from the historical record that supports his or her preferred position.\footnote{See Sources of Federalism, supra note 000, at 5-7, finding that the conservative justices emphasized the statements of the anti-Federalists about federalism, while the more liberal justices placed greater weight on the nationalistic statements of Federalists.} The relative weaknesses of the reliability of the historical evidence surely make such selective use of originalism possible. Alternatively, the justice might simply choose to ignore persuasive originalist evidence that conflicted with his or her ideological preference. The originalist source would not be distinguished, or surmounted by presentation of greater contrary originalist evidence, it would simply go unmentioned. The following section attempts to test whether such manipulation of the originalist record is undertaken by the justices.

B. Evaluation of Votes by Ideology and Originalism

I first examine the association of references to originalist sources with ideological outcomes. If originalism were intrinsically conservative, one would expect to find an association between reliance on originalist materials and conservative outcomes. To identify the ideological direction of the outcome, I relied upon the commonly used Supreme Court database.\footnote{See Harold J. Spaeth, The Supreme Court Database, available at http://scdb.wustl.edu/index.php.} This data only exists from 1952 on, so the study is limited to that time period.

To evaluate the association between originalist source reliance and ideological outcomes, I ran simple analysis of variance (ANOVA) on the association of use (or nonuse) of the source and the ideological direction of justice votes. The following table reports the results. A positive coefficient means an association with liberal outcomes, a negative coefficient an association with conservative outcomes. The p-value is in parentheses following the coefficient, and the number of reliances (N) and \( R^2 \) terms are also reported. Table 4 reports the results.

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<td>Dictionaries</td>
<td>-.30 (.00)</td>
<td>144</td>
<td>.083</td>
</tr>
<tr>
<td>Farrand</td>
<td>-.19 (.00)</td>
<td>515</td>
<td>.031</td>
</tr>
<tr>
<td>Framer Letters</td>
<td>.11 (.24)</td>
<td>593</td>
<td>.003</td>
</tr>
<tr>
<td>Declaration</td>
<td>.32 (.00)</td>
<td>196</td>
<td>.102</td>
</tr>
</tbody>
</table>

Originalist sources are associated with different ideological valences. Usage of The Federalist, Farrand, and especially the use of dictionaries is associated with conservative outcomes. The strongest association for any originalist resource is that of reliance on the Declaration of Independence with liberal outcomes. The findings are very weak associations, though, given the \( R^2 \) terms. Reliance on the Declaration explained about ten percent of the directional difference in
votes, which is not great, and use of *The Federalist* and Elliots Debates explained much less than one percent of the difference in ideological outcomes. While there is a slight tendency of some originalist sources to have ideological direction, the purportedly strong association of originalism and conservatism is not borne out by the results. The use of these sources has been fundamentally ideologically neutral in practice.

To illustrate the limits of this intrinsic ideological effect, consider the relative use of *The Federalist* by the justices. The following table displays the number of justice-reliances on this source by opinions reaching conservative and liberal outcomes. The cases are those in which at least one justice relied on this source.

<table>
<thead>
<tr>
<th>Reliance on <em>The Federalist</em></th>
<th>Conservative Outcome</th>
<th>Liberal Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>No use of <em>The Federalist</em></td>
<td>361</td>
<td>398</td>
</tr>
<tr>
<td>Use of <em>The Federalist</em></td>
<td>578</td>
<td>512</td>
</tr>
</tbody>
</table>

One can see that reliance on *The Federalist* is somewhat more associated with conservative outcomes, but 47% of the time the use of this source yielded liberal outcomes. The ideological difference is not great, and it could be easily explained by the slightly greater affinity of relatively conservative justices for use of this source, which is explored below.

The association of *The Federalist* with ideological outcomes cannot explain the true basis for judicial decisionmaking without a study of particular justices, with their own established ideological associations in decisionmaking. Suppose that there is an overlap between belief in conservative outcomes and reliance on a source such as *The Federalist*. An association between the two could then be spurious. It would not be reliance on *The Federalist* that produced conservative results, it would be the coincidence of ideological preferences and interpretive preferences.

The key test for the effect of originalism on ideology is a measure of the association of reliance on an originalist source and outcome ideology for individual justices. If originalism is a disciplined interpretive method, one might expect that there should be no particular association with the justice’s ideology. Thus, a liberal, preferring a liberal case outcome but who was devoted to originalist interpretation, should vote in a conservative direction when the originalist sources so dictated.

The following table reports the percentage of votes for the more liberal party for each justice in three sets of cases – those in which any justice cited one of the materials of originalism, those in which the particular justice cited one of the originalist sources, and the overall votes in all cases. The sample is limited to justices with at least thirty votes in cases where some justice cited an originalist source.

| Justice | % Liberal/AnyOriginalism | % Liberal/Justice | % Liberal/Overall |

There is very little evidence from this data that originalist voting constrains the ideological impulses of the justices. When originalist sources were in play, Justice Thomas was a couple of percentage points more liberal than in his full body of decisions but still quite conservative in his opinions. Justice Scalia was a couple of percentage points more conservative when originalist sources were used by some justice. The presence of originalist sources in play in a case may have slightly reduced the liberal voting outcomes of some Warren Court stalwarts, such as Justices Brennan, Douglas, and Marshall, but they remained quite liberal in their votes in cases where originalism was in play.

The second column shows the ideological pattern of voting when the justice joined an opinion that relied on one of my originalist sources. A difference between this and the first column could be instructive. If the ideological significance of the first column were substantially different from the first column, it would show a tendency for justices to ignore originalist sources when they were ideologically inconvenient. By contrast, strong ideological results in the second column would tend to suggest that the originalist sources were more ideologically manipulable, due to their indeterminacy.

The differences between the two columns tend to be trivial. The justices appear equally able to ignore or manipulate originalist sources. The biggest exception is Justice Douglas, who was much more liberal when he cited an originalist source. It seems unlikely that originalism drove him to issue so many more liberal opinions and more likely that he used the sources for persuasive purposes, or the difference may be only stochastic variation. The numbers

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491 One possibility is that justices manipulate originalist sources when they can but, when they cannot, they simply ignore them.
suggest that the use of originalist sources (whether by the justice or by some other justice) had no apparent effect on the decisions of any justices.

Consider the record of Justice Thomas who appears to be the most originalist of the justices considered in this research and his dedication to dictionaries of the time, a direct source for original meaning. In the cases where he joined an opinion using the originalist dictionaries I studied, he reached a conservative decision 91% of the time. In the only case in which another justice relied on one of the dictionaries, but he did not, he also reached a conservative outcome. This is a small sample, and the vast majority of decisions did not use a dictionary, but it does not provide evidence for originalism’s constraint.

Whether this congruence of ideological preferences and originalism is conscious or not cannot be determined. It may be motivated reasoning. But it is surely significant that originalist justices “sometimes selectively choose not to employ originalism at all.”492 There are numerous cases in which one or more justices employed originalist sources, in a dissenting opinion, and those sources were ignored by purported originalists writing for the majority. Additional cases (such as Heller) see dueling originalism claims, which intrinsically shows the method’s lack of constraining effect. This may be possible because of the limits of the historical record, or disputes over the level of generality of meaning, or the different types of originalism.493 In any event, there is a suspicious correlation between a justice’s ideological position and his or her views of what originalism dictates.

V. Conclusion

The evaluation of originalism in actual practice cries out for empirical analysis, and this article provides a first step in that direction. However persuasive the purely theoretical case may be for originalist interpretation of the Constitution, the theory offers little without formal realizability. For constitutional law to be more than simply jurisprudence, the practice must be considered. Such consideration is rare, and this preliminary study steps into the breach. Much of this debate, though, has presumed that originalism will be sincerely and accurately applied, with adverse consequences for the law.

Ultimately, this may be where the dispute over originalism lies, a fear that its use will produce bad legal consequences. The critique of originalism sometimes contains a “parade of horribles,” listing undesirable judicial outcomes that would be produced by a true originalist interpretation of the Constitution. Thus, Cass Sunstein has set forth widely accepted legal rules that he claimed were incompatible with originalism.494 These include the constitutionalization of federal government race and sex discrimination, the elimination of any constitutional right to privacy, elimination of the requirement that the states’ actions comply with the Bill of Rights, in any event, there is a suspicious correlation between a justice’s ideological position and his or her views of what originalism dictates.

492 Living Originalism, supra note 000, at 291. See also PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 101 (1991) (suggesting that Robert Bork “insists on 100% original understanding, 20% of the time”).

493 See Living Originalism, supra note 000, at 297-302 (suggesting that there are now multiple approaches to originalism which explain different votes by the justices).

and vastly limit federal regulatory authority under the Commerce Clause. There is good originalist authority for the position that the First Amendment was meant to protect only Christians, not Jews or followers of other religions, a position that would seem quite extreme today. 495

Steven Calabresi has taken on Sunstein’s specific parade of horribles and disputed that many of them would result from originalist interpretation. 496 In a number of cases, he concedes Sunstein’s specific argument but contends that the same result would be produced by a correct originalist interpretation of other constitutional provisions. Thus, the 19th Century Court limits on the federal governments enumerated powers and the privileges and immunities clause should be re-interpreted, he argues, to prevent some of the parade of horribles. Yet this is Steven Calabresi’s originalism, not that of the Court, which has not adopted those legal positions. 497 Even if Calabresi were exactly right in his originalist views, that fact would promise little if the justices of the Supreme Court didn’t adopt those views. And he offers little basis for assurance that they would.

Perhaps a more intriguing aspect of Calabresi’s response is where he disagrees with Sunstein’s originalist interpretations. He believes that originalism would produce more state authority, and more executive authority, and eliminate abortion rights, and restore prayer to public schools. 498 He also suggests that we “would be better off if criminals never got out of jail because of the idiocy of the exclusionary rule.” 499 In short, Calabresi, a conservative, believes that originalism would produce the precise conservative policies that he prefers but no more extreme conservative policies that he finds incompatible with his preferences. This report does not dispel concerns about the ideological bias of originalism (either intrinsically or as applied by commentators).

The opinion in Dred Scott offered something of a paean to originalism in interpretation. 500 Today’s originalists unsurprisingly have rejected its reasoning as incorrect. 501 Yet the Supreme Court actually reached its decision in that case in express reliance on originalist


496 See A Critical Introduction to the Originalism Debate, supra note 000, at 32-40.

497 See THE WILL OF THE PEOPLE, supra note 000, at 311 (observing that “originalism somehow magically invalidated decisions conservatives wanted to eliminate, but not those they felt the need to keep”).

498 Id. at 39.

499 Id. at 40.

500 Chief Justice Taney stressed that the words of the Constitution should be given the meaning “they were intended to bear when the instrument was framed and adopted.” Dred Scott v. Sandford, 60 U.S. 393, 426 (1857). Cass Sunstein described the opinion as the “Court’s clearest embrace of originalism, in its first century.” Cass R. Sunstein, Second Amendment Minimalism: Heller as Griswold, 122 HARV. L. REV. 246, 250 n.32 (2008).

principles. If it was incorrect, the opinion would seem to show how originalism is difficult to operationalize accurately or honestly. Justice Scalia acknowledged that originalism’s “greatest defect . . . is the difficulty of applying it correctly.” This challenge is the foundation for my study.

The results of this research indicate that originalism is ideologically malleable, much like precedent or other legal resources. In practice, reliance on originalist sources from the Founding era appears to have little influence on judicial decisionmaking. This is not to demean legal researchers studying originalism or arguing that it is the proper standard for constitutional decisionmaking as a theoretical matter. It is fair for commentators to criticize particular opinions as incorrect by an originalist standard (though one suspects that those commentators’ opinions may sometimes be shaped by their own ideological biases). When commentators argue that the justices should use originalism, however, they seem engaged in a futile precatory argument. The justices have shown that they are willing able to either manipulate originalist resources or to ignore them when ideologically inconvenient. Of course, this also dispels the Sunsteinian concern that originalism will produce inferior outcomes, as originalism does not appear to influence outcomes.

The amount of legal research on the use of originalism in constitutional interpretation is enormous. This research may be “academic” in all senses of the word, including the notion of being trivial, impractical and unaware of the outside world. While my analysis is but one study and cannot be conclusive, the evidence suggests that the practice of originalism in the Supreme Court has little or no impact on case outcomes. Originalist sources are typically employed (or not) in support of ideologically convenient outcomes for each of the justices, as is evidenced in *Heller* itself.

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502 The opinion may simply have used “the trope of originalism to enforce contemporary political views in the guise of fidelity to the constitution.” Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 71 (2007). If so, originalism is not constraining and not a meaningful interpretive choice. *See also* CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS, supra note 000, at 113 (suggesting that the *Dred Scott* opinion was a reflection of contemporary opinion on the question).

503 *Originalism: The Lesser Evil*, supra note 000, at 856.

504 Outcomes are but one measure of the Court’s output, and it is possible that greater use of originalism would influence the legal interpretations and rules set out by the Court in its opinion even without influencing the direction of the outcome. Given the findings on outcomes, though, this should be evidenced and not assumed.