

WHAT'S THE POINT OF ORIGINALISM?

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I. EMBRACING ORIGINALISM

As of late, a remarkable array of constitutional theorists have declared themselves originalists of one sort or another,¹ and no one is quite sure why.² Or, perhaps more accurately, everyone is sure, but they all disagree with each other. For some, the originalism command springs directly from the text itself: it is a written Constitution, and the original meaning of the text itself is the law of the land;³ for others, such as Justice Scalia, it is the best (and perhaps only) way to restrain judges from reading

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1. See generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009); see also Jeffrey Shulman, *The Siren Song of History: Originalism and the Religion Clauses*, 27 J.L. & RELIGION 163 (2011) (book review). For a discussion of modern originalism, see Joel Alicea, *Forty Years of Originalism*, 173 POL'Y REV. 69 (2012) and JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

2. See Colby & Smith, *supra* note 1, at 244 ("A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label."); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 708 (2011). For accounts of the rise of originalism, see, for example, Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003), Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 12–41 (Grant Huscroft & Bradley W. Miller eds., 2011), Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–612 (2004). For a history of constitutional originalism, see generally JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

3. See generally, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

their own values and policy preferences into the Constitution;⁴ and, for the philosophically inclined, Paul Grice, Ludwig Wittgenstein, and other modern, usually European, philosophers of language provide scholars with deep and complex insights into how to understand the Constitution;⁵ and so on.⁶ In recent years, various New Originalist arguments have led to the ascendancy of the objective meaning of the text itself over the intentions of its authors, which was the focus of the now much-derided Old Originalism of the “undertheorized” past.⁷ The result is that many scholars now prize the views of an average person, or a hypothetical ratifier with full knowledge of all of the relevant circumstances⁸—someone best described as a time-traveling law professor—in place of the actual intentions of the constitutional Framers.

The idea that the British Paul Grice or Ludwig Wittgenstein, a Viennese philosopher born at the end of the nineteenth century, may have more to say about the meaning of America’s founding document than, say, James Madison, the “Father of

4. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–3 (1971); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456 (1986); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695–96 (1976).

5. On Grice, see, for example, Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 620–22 (2009), Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 13 n.22 (2011). For Wittgenstein, see WHITTINGTON, *supra* note 3, at 59.

6. See, e.g., 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, 751–53 (2009) (propounding “original methods originalism”); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007) (“[I]t is the supermajoritarian genesis of the Constitution that explains both why the Constitution is desirable and why that desirability depends on its being given its original meaning.”); see also Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909, 912 (2005) (“[t]he original meaning adjudication to the Aristotelian tradition”).

7. Originalists focused on intention have not become entirely extinct. See, e.g., Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 2, at 87, 87; Stanley Fish, *The Intentionalist Thesis Once More*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 2, at 99, 100.

8. E.g., Kesavan & Paulsen, *supra* note 2, at 1162.

the Constitution,"⁹ exposes these constitutional theorists to the significant risk that they are cutting themselves off from one of the most important audiences for Supreme Court opinions: the public. This concern over the potential for excessive theorizing arises because the public holds the Framers and their intentions in considerably higher esteem than do the New Originalists. Ignoring what the Framers were actually trying to accomplish when they wrote the constitutional text may not trouble today's New Originalists. Vasani Kesavan and Michael Stokes Paulsen, for example, call the work of the Convention, where the Framers hammered out the final language of the Constitution, "dead words on paper."¹⁰ The public has a different view. A newly commissioned survey shows that over ninety percent of the public thinks that the Constitution's original meaning should play at least some role in the Court's decisions, with a full two-thirds citing the Framers' intentions as the single most important source of that original meaning.¹¹ And the Supreme Court, which keeps its audience in mind, especially in deciding high-profile constitutional cases, will almost certainly make a point of explaining how it reached its understanding of the Constitution in a way that is designed to appeal to the public.

II. WHY DO WE HAVE SUPREME COURT OPINIONS?

Although we have come to expect the Court to explain its rationale in lengthy opinions, it is worth noting that nothing in the Constitution actually obliges the Justices to give reasons for their decisions. The early Supreme Court, which was composed of an impressive collection of Framers and ratifiers, rarely issued formal written opinions (or any opinion at all).¹² In fact, when we now read what looks like the opinions of the Justices from the first decade or so of the Court's decisions, we are gen-

9. Madison was called the "Father of the Constitution" as early as 1827 by Charles J. Ingersoll, whose father had been a delegate at the Constitutional Convention. JEFF BROADWATER, *JAMES MADISON: A SON OF VIRGINIA & A FOUNDER OF THE NATION* 29 (2012).

10. Kesavan & Paulsen, *supra* note 2, at 1137.

11. *See infra* Part III.

12. *See, e.g.*, DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 55 (1985); JULIUS GOEBEL, JR., *1 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 665 (1971).

erally seeing notes taken down by a lawyer such as Alexander Dallas or William Cranch, whose business was to publish and sell copies of the notes to other lawyers.¹³ In many cases, there were no official statements of the Court's reasoning at all,¹⁴ and, where we do have seriatim opinions, they represent each Justice's comments on the case—usually brief ones, as far as we can tell.¹⁵ Only when John Marshall became Chief Justice and, in particular, as he successfully built the Court into a significantly more powerful political entity, did the Court begin issuing formal opinions.¹⁶

Marshall famously announced in *Marbury v. Madison*¹⁷ that it is the duty of the Supreme Court to say what the law is. This case is often considered the beginning of judicial review—that is, the ability to say what the law is includes the power to determine whether the Congress or the President has exceeded its legal authority.¹⁸ Although this judicial interpretative power

13. MORRIS L. COHEN & SHARON HAMBY O'CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 2 (1995). The Court did not have a salaried, official court reporter until 1817. *Id.*; see also Gerald T. Dunne, *The Early Court Reporters*, 1976 SUP. CT. HIST. SOC'Y. Y.B. 43, 44; Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1293–94 (1985).

14. Scholars estimate that “Dallas may have failed to report as many as a third of the decisions during the period of his reports,” which was 1790–1800. COHEN & O'CONNOR, *supra* note 13, at 4, 6.

15. For a discussion of the early Justices and their opinions, see generally SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (Scott Douglas Gerber ed., 1998). These opinions often appeared in the reporters' volumes years after they were handed down. See COHEN & O'CONNOR, *supra* note 13, at 18–19.

16. See CURRIE, *supra* note 12, at 14 n.61 (“This practice of seriatim opinions would persist until the appointment of Marshall, who put an abrupt end to it.”). Marshall ended seriatim opinions in order to augment the “power and prestige” of the Court. See HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 199 (6th ed. 1993). With this practice, the Court “sought and achieved a moral force as great as that obtained by the presidency and the Congress.” LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 414 (1974).

17. 5 U.S. (1 Cranch) 137 (1803).

18. The first case in which the Supreme Court considered the constitutionality of a substantive federal law is actually *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), which occurred well before Marshall joined the Court. See Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of Judicial Review*, 28 J. SUP. CT. HIST. 1, 2 (2003); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 541 (2005); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1276–77 (2009); see also Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1170–81 (2013).

provides a mechanism for restricting other branches of government from contravening the Constitution, the remaining question is: Are there any limits on the Court's interpretive power? With no fixed limits, there is a risk that the Supreme Court could use its constitutional *carte blanche* to usurp the proper constitutional roles of the elected legislative and executive branches. There are various ways to address this issue, from the rarely used impeachment power to the cumbersome process of amending the Constitution.¹⁹ But, for our purposes, the critical practical restriction on the Court's power is that the Justices recognize that they need to persuade people that they are *properly* interpreting the Constitution. As Senator Richard Blumenthal recently said, in connection with the Supreme Court's review of the Affordable Care Act, "The court commands no armies, it has no money; it depends for its power on its credibility."²⁰ Or, as Philip Kurland has put it, "[T]he only power that the court can assert is the power of public opinion."²¹

Chief Justice Marshall was acutely sensitive to this need for the Court to offer good reasons for its decisions. As his Federalist-dominated Court made a series of controversial decisions during Jefferson's administration, he instituted the now-common mechanism by which the Court continually defends its exercise of power by not only saying what the law is, but also by explaining, in a formal written opinion, why the law is the way that it is.²² The opinion writer, usually Marshall him-

19. Congressional proposals to restrict the jurisdiction of the federal courts, for example, also have a lengthy history. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-96 (1984).

20. Sahil Kapur, *Dems Warn Of 'Grave Damage' To SCOTUS If 'Obamacare' Is Struck Down*, TALKING POINTS MEMO, Mar. 28, 2012, <http://tpmdc.talkingpointsmemo.com/2012/03/dems-warn-of-grave-damage-to-scotus-if-obamacare-is-struck-down.php>, [perma.cc/EKY7-FPJX].

21. Philip B. Kurland, *'The Cult of the Robe' And the Jaworski Case*, WASH. POST, June 23, 1974, at C2.

22. Thomas Jefferson begrudged Marshall's innovation: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning." Letter to Thomas Ritchie, Dec. 25, 1820, in 12 THE WORKS OF THOMAS JEFFERSON 175 (Paul Leicester Ford ed., 1905); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 194 (1959) (quoting same). Jefferson wrote a year later: "Another most condemnable practice of the Supreme

self in the early years,²³ would set out the reasons supporting the Court's constitutional interpretation, and Marshall worked to discourage the other Justices from any sign of dissent.²⁴ Under Marshall's leadership, as the Court made a grab for more power and prominence in the young nation,²⁵ the opinion became a tool for self-justification—the Court's way of explaining, or at least claiming, that its growing influence derived from a legitimate and faithful interpretation of the Constitution. Such written opinions would show that the Justices were not motivated by political or partisan interests but by good reasons that could be explained to the public.²⁶

Court to be corrected is that of cooking up a decision in caucus and delivering it by one of their members as the opinion of the court, without the possibility of our knowing how many, who, and for what reasons each member concurred." BAKER, *supra* note 16, at 415 (citation omitted).

23. ZoBell notes, "During the first four years after the advent of Marshall, twenty-six decisions were handed down by the Court. The Chief Justice delivered the opinion of the Court in all of these save two, and in those, the senior Justice present delivered the opinion in the absence of Marshall." ZoBell, *supra* note 22, at 194.

24. ZoBell points out that "seldom were dissents published in more than fifteen or twenty per cent of the cases decided in any one term before the early 1900's." *Id.* at 196. There were certainly dissenters, including Associate Justice Johnson, who confided in Jefferson that dissension was suppressed and that Marshall even wrote opinions "contrary to his [Marshall's] own Judgment and Vote." *Id.* at 193 n.41. Against the view that Marshall singlehandedly dictated all Court opinions, Charles Hobson contends that Marshall would "defer, when necessary, to the superior learning of others If the Court most often spoke through the chief justice, the opinion was the product of collaborative deliberation, carried out in a spirit of mutual concession and accommodation." Charles F. Hobson, *The Marshall Court (1801-1835): Law, Politics, and the Emergence of the Federal Judiciary*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 47, 57 (Christopher Tomlins ed., 2005). Due to the close collegiality among the Justices, "Marshall's path-breaking opinions" were not "exclusively solo performances. Then as now, constitutional decisions were the outcome of the deliberative process, and as such, more or less composite products." Felix Frankfurter, *John Marshall and the Judicial Function*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 142 (1967).

25. By contrast, John Jay, who had previously served as Chief Justice in the early years, declined to be reappointed in 1801, "telling President Adams that he lacked faith that the Court could acquire enough 'energy, weight and dignity' to play an important role in the nation's affairs." GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 15 n.12 (2d ed. 2008).

26. Charles Hobson notes that the Marshall Court's ability to combine constitutional interpretation and written opinions allowed the Chief Justice to present the decisions as a standard legal decision "and thereby persuade the American people to accept such pronouncements not as politics but as so much *law*." Hobson, *supra* note 24, at 71.

The relationship between the range of possible interpretations of the constitutional text and the exercise of political power by the Supreme Court when it renders its decisions is probably best—or at least most famously—described in the work of another European scholar, Oxford mathematician Charles Lutwidge Dodgson: “‘When *I* use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what *I* choose it to mean—neither more nor less.’”²⁷ To this “making it up as he goes along” explanation of meaning, Alice gives a sensible response that might well represent a skeptical public’s point of view: “‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’”²⁸ And Humpty Dumpty answers in a way the Supreme Court could respond, but has elected not to: “‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’”²⁹ In its decisions, the Supreme Court can choose to make the Constitution’s words mean whatever it wants them to mean, but then it must declare itself to be the master. In a government of multiple branches, it is politically astute for the Supreme Court to describe its role not as an oracular font of idiosyncratic meaning, but as a faithful interpreter of the Constitution using—and here is the key point—appropriate methods for doing so. In this way, the “master,” in Humpty Dumpty’s words, is visibly held out to be both the Constitution and the persuasiveness of the Court’s interpretive methodology. That methodology, as described in the Court’s written opinions, represents a public defense of its exercise of power. As three Justices wrote in a 1992 case, the Court’s “power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of

27. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 123 (1897).

28. *Id.*

29. *Id.* Humpty Dumpty may seem a bit overused in discussions of interpretation. It took a 165-page law review article to summarize the judicial references to this short dialogue. See Parker B. Potter, Jr., *If Humpty Dumpty Had Sat on the Bench . . . : An Eggheaded Approach to Legal Lexicography*, 30 WHITTIER L. REV. 367 (2009). In a discussion of whether a single correct understanding of the original meaning is identifiable, it is especially apt that this scene from *THROUGH THE LOOKING GLASS* has been employed in arguments both for and against the proposition that people such as legislators, judges, parties to contracts, and others can make words mean whatever they want them to mean. *Id.* at 395; see also Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking Glass*, 28 WHITTIER L. REV. 175, 177 (2006).

the Judiciary as fit to determine what the Nation's law means and to declare what it demands."³⁰ The Supreme Court thus does not hold itself out as the ultimate master with arbitrary power over both law and language, but as a constitutional entity bound by the text, on one hand, and by its ability to demonstrate that it has good, publicly disclosable, reasons for its interpretation, on the other.³¹

Interestingly, though Chief Justice Marshall knew that there was considerable public relations value in providing a thoughtful interpretive rationale that included impressive citations to various respected authorities, some of his detailed opinions were crafted well after he reached his decision on the outcome of the cases. The impressive legal authorities we see in those opinions were often supplied by his more learned colleague, Harvard law professor Justice Joseph Story. In the 1870s, another Harvard professor, Theophilus Parsons, in describing Chief Justice Marshall as "the greatest man I ever knew," noted that the eminent Chief Justice "knew very little 'book law' when he was appointed. He had attended but one course of law lectures, and had practiced but three years."³² And so, when "it was [time] for the judges to decide [a case], after thinking for some time, he would write down his decision, and, handing it to Judge Story, say: 'There, Story; that is the law of this case; now go and find the authorities . . .'."³³ Of course, in other cases, the rationale, or at least an outline of its key points, may have come first, and that is undoubtedly how the opinions are meant to be read. Either way, the Court's written opinions

30. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992); see also Vincent James Strickler & Richard Davis, *The Supreme Court and the Press*, in *MEDIA POWER, MEDIA POLITICS* 45, 46 (Mark J. Rozell ed., 2003).

31. See ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, *TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR?* 5 (1998) ("The Court is not completely unconstrained [in making policies through the exercise of its power of judicial review], however. Despite their unelected status and relative unaccountability, the justices rely, in part, on a supportive American public. Unlike Congress, with the power of the purse, and the president, with the power of the sword, the Court has no method of enforcing its decisions. Instead, the Court's legitimacy and ability to perform its functions depend largely on its reputation and perceived legitimacy in the public. It must rely, at times, on the willingness of people to go along with its decisions; it generally cannot force them to do so.").

32. *Distinguished Lawyers: Reminiscences by Professor Parsons*, 2 *ALB. L.J.* 126, 126 (1870). I want to thank Matt Franck for pointing out that Parsons may not be an unbiased observer.

33. *Id.* at 126–27.

were designed to have an important function as an exercise in public relations, even if they did not always provide an accurate chronological record of the judicial thought process.

The after-the-fact search for good reasons and impressive authorities did not end with the Marshall era. Notes taken by various twentieth-century Justices during their otherwise secret judicial conferences show that the careful constitutional analysis appearing in the final opinions can, at times, be only distantly related to the reasons the Justices gave each other for coming to a decision.³⁴ In the opinion that launched nearly a century of Establishment Clause originalism, Justice Wiley Rutledge penned a lengthy, heavily footnoted, Founding Fathers-based opinion in part to disguise his strong sectarian feelings about the case.³⁵ In a memorandum to his brethren on the Court after their conference discussions, Justice Rutledge wrote, "We all know . . . that this [school busing law] is really a fight by the Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale."³⁶ But his published opinion avoided any talk of Catholic aggression, focusing instead on the exploits of James Madison in securing religious liberty in Virginia.³⁷ Shortly after the opinion appeared, Justice Rutledge wrote to an old friend, saying: "I felt pretty strongly about the *Everson* case but tried to keep the tone of what I had to say moderate and also to avoid pointing what I had to say in the direction of any specific sect. *The Virginia history was admirable for the latter purpose.*"³⁸ Unlike Chief Justice Marshall, Justice Rutledge did his own research, but, in both cases, the Justices made up their minds long before the carefully laid out rationale was constructed, and the result was

34. A very useful source of these Supreme Court conference notes can be found in *THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* (Del Dickson ed., 2001).

35. Justice Black's majority opinion in this case, *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947), often gets credited with (or blamed for) inaugurating the Establishment Clause's originalist jurisprudence, but "Black was not the Court's historian-in-chief in *Everson*; in fact, he was reluctantly dragged into eighteenth-century arcana by Justice—and former law professor—Wiley Rutledge." Donald L. Drakeman, *Everson v. Board of Education and the Quest for the Historical Establishment Clause*, 49 AM. J. LEGAL HIST. 119, 121 (2007).

36. DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* 80 (2010).

37. *Everson*, 330 U.S. at 31–43 (Rutledge, J., dissenting).

38. DRAKEMAN, *supra* note 36, at 131 (citation omitted).

an opinion designed primarily to offer reasons that would be appealing to the public.³⁹

For Supreme Court opinions to serve this kind of self-justifying role in the court of public opinion, the Justices need to explain their decisions in a manner that the public will see as reasonable and appropriate.⁴⁰ In this explanatory environment, originalism represents an interpretive method that, based on the survey data, is likely to lead to publicly acceptable good reasons. My goal is to use these survey data to explore in some detail to what extent the public sees originalism as a good way—perhaps even the best way—to interpret the Constitution. And, because it is clear from the data that the public thinks that originalism is indeed a very important interpretive tool, my second goal is to go well beyond the issues addressed in prior surveys to explore the relative value—in the public’s eye—of the various ways to arrive at an original meaning. This analysis sheds considerable light on the public’s point of view in debates between the Old and New Originalists.

39. This focus on crafting an opinion that resonates with the public can be quite self-conscious. According to Lucas Powe, Jr., the opinion in *Brown v. Board of Education* was “a mere eleven pages . . . because [Chief Justice Warren] wanted it that way. A short opinion could be reprinted in full by any newspaper in the country. Warren, the politician, knew the importance of getting his message to as many people as possible.” LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 29 (2000).

40. This is not to say that the public represents the only audience for Supreme Court opinions. The Justices routinely cite academic publications, and Justice Kennedy’s opinion in *Lawrence v. Texas*, for example, indicated that the Justices take the views of legal scholars seriously, although it is not clear whether he was influenced by the academics themselves or by the historical information they had discovered. Justice Kennedy wrote that “[i]n academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the . . . opinions” in the case that *Lawrence* overturned. *Lawrence v. Texas*, 539 U.S. 558, 567–68 (2003). Unlike the public, however, legal academics have nearly boundless opportunities to express their views on how to interpret the Constitution, from general theories of constitutional interpretation to detailed analyses of particular provisions. As of late, there has been something of a bull market in originalism. According to Lexis Nexis, the yearly number of law review articles that include “originalism” or some variation thereof in the title has increased six fold over the last twenty years. To the extent that the Justices want to know what the academy thinks about originalism, that information is not hard to come by.

III. THE ORIGINALISM 2012 SURVEY

Recent surveys have consistently shown that the American public divides roughly evenly when they are asked to pick between originalism and a “living” or “modern” constitutional interpretation.⁴¹ A new survey specially commissioned for this Article, “Originalism 2012,”⁴² asked several critical follow-up questions that (1) call into question the perception that the ostensibly binary originalism-or-living-constitutionalism debate must be resolved solely in favor of one side or the other, and (2) determine what kind of evidence of original meaning the public finds most persuasive. The answers came from approximately one thousand Americans who were surveyed in July 2012.

The first question, which was based on a question that had previously appeared in a 2010 survey,⁴³ asked the respondents

41. Jamal Greene has summarized these polls as follows:

Today, a substantial portion of the American public reports an affinity for originalism. A 2005 Fox News poll asked the following question of registered voters:

Which of the following comes closest to your view of how the Constitution should be interpreted by the U.S. Supreme Court? Judges should base their rulings on what they believe the Constitution's framers meant when it was originally written. Judges should base their rulings on what they believe the Constitution means in today's world.

Forty-seven percent of respondents chose the ‘Framers’ intent’ option, while only thirty-six percent chose contemporary meaning. In a more polemically worded July 2008 poll conducted by Quinnipiac University, forty percent of respondents reported believing that ‘[i]n making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution.’ Fifty-two percent of respondents favored the proposed alternative, that ‘[i]n making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution.’ This number is in line with identically worded Quinnipiac polls in 2007, 2005, and 2003.

Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 695 (2009). For a more extensive review of originalism-related surveys, see Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 362–70 (2011).

42. The Originalism 2012 survey was conducted over the Internet by YouGov as part of a 1003-person YouGov Omnibus survey of the general population conducted July 20–23, 2012. YouGov calculates the margin of error to be $\pm 3.4\%$.

43. WASH. POST/KAISER FAMILY FOUND./HARVARD UNIV. SURVEY PROJECT, ROLE OF GOVERNMENT SURVEY 14 (2010), <http://www.washingtonpost.com/wp-srv/special/politics/Post-Kaiser-Harvard-Role-of-Government-2010.pdf>, [http://perma.cc/WS8E-ZKDN]. The question and responses for that survey as of 2005 and 2010 were as follows:

to select whether the Supreme Court should rule on constitutional questions based on what the “Constitution meant when it was originally written,” or what it “means in current times.” Earlier surveys have often asked about original *intent* rather than original meaning;⁴⁴ in this case, to avoid pointing in the direction of either Old Originalism’s focus on “original intent,” or the New Originalists’ preference for original public meaning, the language of the question was designed to encompass whatever type of original meaning the respondent had in mind. The responses were:

1. Do you think the U.S. Supreme Court should base its rulings on its understanding of what the U.S. Constitution meant as it was originally written, or should the court base its rulings on its understanding of what the U.S. Constitution means in current times?

| | |
|--|-----|
| As it was originally written. | 60% |
| What the U.S. Constitution means in current times. | 40% |

Some version of question one is often the only originalism-related question in public opinion surveys, and a reasonable reading of the data would be that the many people who choose the “current times” answer have no interest in the original meaning. Question two was designed to see whether that is, in fact, the case. It is not. When the respondents who picked “What the Constitution means in current times” were then asked what relevance, if any, the original meaning should have when the Court is interpreting the Constitution, nearly eighty percent of

Do you think the U.S. Supreme Court should base its rulings (on its understanding of what the U.S. Constitution meant as it was originally written), or should the court base its rulings (on its understanding of what the U.S. Constitution means in current times)?

| | What is [sic] meant as originally written | What it means in current times | Somewhere in between (vol) | No opinion |
|---------|---|--------------------------------|----------------------------|------------|
| 10/3/10 | 50 | 46 | 1 | 3 |
| 7/21/05 | 46 | 50 | 3 | 1 |

Id. (verbiage in parentheses rotated).

44. See, e.g., Greene, *supra* note 41, at 695 (quoting Quinnipiac polls, which ask about “the original intentions of the authors of the Constitution”).

them said that it should be “one of various factors that should be considered,” with only three percent opting to have the Court ignore it completely. The question and the responses are:

2. When the Supreme Court is trying to figure out what the Constitution means in current times, what should it do with evidence of the Constitution's original meaning?

| | |
|---|-----|
| Consider it as historical background but not let it influence the decision. | 18% |
| Consider it as one of various factors that should be considered in making the decision. | 79% |
| Ignore it completely. | 3% |

In total, then, over ninety percent of all respondents believe that original meaning should play at least some role in the Supreme Court's decisionmaking—that is, all of the respondents who selected the original meaning answer in question one (sixty percent of the total), plus the respondents in question two who said that original meaning should be at least one of the factors considered by the Court (seventy-nine percent of the other forty percent, which represents over thirty percent of the total). How much of a role original meaning should play in the Court's decisionmaking process will undoubtedly vary widely among these respondents, but, to the extent that the Justices are seeking to write opinions that will appeal to the public, it may be noteworthy that nine out of ten Americans surveyed in 2012 believe that the original meaning is at least a relevant consideration.⁴⁵

With this degree of public interest in originalism, it would be valuable to ascertain what kinds of evidence are perceived to be the most persuasive, especially because there has been disagreement within academia and on the Court over what constitutes the best evidence of original meaning.⁴⁶ Question three

45. These data are consistent with the results of a 2009 survey in which ninety-two percent of the respondents answered “very” or “somewhat” important to the following question: “How important would you say it is for a good Supreme Court judge to . . . [u]phold the values of those who wrote our constitution two hundred years ago?” See Greene et al., *supra* note 41, at 364–65 (citation omitted).

46. See text accompanying *supra* notes 1–8.

offered respondents several of the likely possibilities. The survey respondents answered as follows:⁴⁷

3. When the Supreme Court is trying to figure out what the Constitution originally meant, which of these sources should it consider?

| | Yes | Maybe | No | No opinion |
|--|-----|-------|-----|------------|
| How the words are defined in dictionaries from the time it was written. | 50% | 29% | 11% | 9% |
| How average American voters at the time of the Constitution understood it. | 36% | 32% | 21% | 11% |
| How a hypothetical reasonably well-informed person who ratified the Constitution would have understood it. | 45% | 29% | 15% | 12% |
| What the Constitution's Framers intended it to mean. | 72% | 17% | 4% | 8% |

Respondents were thus given four potential sources of original meaning. They were asked to indicate how strongly they felt (yes, maybe, no, and no opinion) for each one. The question asked about Old Originalism's Framers' intentions, as well as three approaches to New Originalism's search for original public meaning: One option specified dictionary definitions, a second offered the view of "average American voters" at the time of the founding, and the third included one of the more strongly worded forms of theoretical New Originalism: "How a hypothetical reasonably well-informed person who ratified the Constitution would have understood it."

Perhaps the most interesting insight yielded by the responses to this question is that over two-thirds of the respondents said "yes" or "maybe" to all four of the choices. For the public, the relevant interpretive choice is not between the Convention's "dead words on paper" on the one hand, and its objective public meaning on the other, nor is it focused on the Framers' intentions and nothing else. Rather, the public appears quite in-

47. At this point, the total number of respondents was reduced by the approximately ten percent who had chosen the "current times" meaning but also answered that original meaning either should be ignored or should not influence the decision. All others continued to answer the questions.

terested in hearing about various sources of original meaning, although it is noteworthy that only the Framers' intentions received a sizeable majority of "yes" votes.

This evidentiary ranking issue is clarified further in the next question, where the public was asked which of the four sources is the most important. Here, approximately two-thirds opted for Old Originalism's Framers' intentions, with the remainder divided among the New Originalist sources, as follows:

4. Which one of these sources is the most important?

| | |
|--|-----|
| How the words are defined in dictionaries from the time it was written. | 13% |
| How average American voters at the time of the Constitution understood it. | 8% |
| How a hypothetical reasonably well-informed person who ratified the Constitution would have understood it. | 13% |
| What the Constitution's Framers intended it to mean. | 66% |

When the respondents are broken down into the group who gave the originalism answer to question one and the "just one factor" group, the evidentiary weighting is quite similar, although, as can be seen below, there are some variations. Perhaps the most noteworthy is that, among the sixty percent who chose original meaning in question one, the respondents said "yes" to the Framers' intentions at a significantly higher rate than for the other sources of evidence.

| | "Original Meaning" in Question 1 | "Current Meaning" in Question 1 |
|-----------------------|----------------------------------|---------------------------------|
| Dictionaries | 55.7% yes 23.8% maybe | 39.9% yes 38.4% maybe |
| Average Voter | 39.1% yes 29.0% maybe | 30.4% yes 37.3% maybe |
| Hypothetical Ratifier | 43.7% yes 26.5% maybe | 47.0% yes 32.0% maybe |
| Framers' Intentions | 75.8% yes 11.2% maybe | 63.3% yes 26.6% maybe |

The take-home message from this most recent survey of approximately one thousand Americans is that an impressively large (over ninety percent) portion of the public believes that the Supreme Court should consider the original meaning when it is interpreting the Constitution, and a very substantial majority (sixty-six percent) believe the Framers' intentions are the most important evidence of that meaning.⁴⁸ At the same time, a sizeable percentage of the public is also interested in seeing what the New Originalists' tools have to say—dictionaries, the average voter's understanding, and even the hypothetical ratifier's perspective.⁴⁹ In short, the public seems to want to see a range of evidentiary sources when the original meaning is being determined by the Court, with the Framers' intentions representing the most persuasive single source—by a large margin—in the event that different sources yield competing interpretations.⁵⁰

IV. WHAT DOES THIS MEAN FOR ORIGINALISM SCHOLARSHIP?

Constitutional theorists can, of course, keep reading Grice and Wittgenstein, and arguing about what is, in theory, the most intellectually sound approach to constitutional interpretation. But to the extent that those scholars decide to write books,

48. It is unclear how committed the public would be to these opinions if it turned out that the original meaning led to a very unpopular constitutional outcome. As Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere have observed, in contrasting survey answers about originalism and about specific outcomes, the data "go[] some way toward validating the views of skeptics that, while some 'originalists' in the mass public may cling to the label because it sounds good or coincides with other traditionalist notions, they really do not 'mean it' when confronted with its implications." Greene et al., *supra* note 41, at 369. As discussed more fully below, my goal is not to propose a complete theory of constitutional interpretation but to advance an argument about what form of originalist analysis is most appealing to the public audience for Supreme Court opinions.

49. It may be worth noting, however, that when respondents were asked to select the single most important source, actual Framers outpolled imaginary ones by a margin of more than five to one.

50. We do not know why the public is so interested in what the Framers had in mind, and there may be a variety of reasons. One intriguing insight comes from a debate over whether American-style originalism is found elsewhere in the world. See generally, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); David Fontana, *Response: Comparative Originalism*, 88 TEX. L. REV. 189 (2010). Greene notes that originalism is not prevalent in Canada and Australia, although Fontana counters that "countries whose courts . . . make originalist arguments tend to come from . . . revolutionary constitutional moments; the post-colonial constitutions of African [sic] and Latin America, for instance, foster many originalist arguments." Fontana, *supra*, at 194, 197–98.

articles, or amicus curiae briefs promoting a particular interpretation of the text, or when they send students on to become judicial clerks and judges, it would be helpful for them to consider what kinds of originalist arguments might convince the public (and hence those Justices who may be writing opinions for public consumption) of the appropriateness of a specific interpretation of the constitutional language. In light of the "Originalism 2012" survey data, here are some thoughts about what such a search for original meaning might encompass.

Following the survey's guidance, the basic theme is: collect all the relevant information. Rather than electing a priori either to ignore the Framers or to make them the sole focus of the originalist investigation, the initial effort would gather all of the information provided by the various sources that the public has said are, or may be, relevant to defining original meaning. It is certainly possible that all of the resources will point in the same interpretive direction, in which case the original meaning would be clear. If not, then we also have guidance from "Originalism 2012" as to which source provides the most important evidence in the eyes of the public regarding the original meaning.

A variety of records describe the discussions at the Constitutional Convention,⁵¹ the ratification debates,⁵² and the comments in the First Congress about the proposed Bill of Rights,⁵³ including contemporaneous notes, reports and letters written by various participants, newspaper accounts, and so on. Among other things, the records make it clear that there were

51. Madison's detailed notes were not available for several decades. See 2 THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., Washington, Langtree & O'Sullivan 1840). But information about the Convention debates was available through published essays by other delegates. See Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in 2 THE COMPLETE ANTI-FEDERALIST 19, 27–82 (Herbert J. Storing ed., 1981). Regarding Martin's pamphlet, see Kesavan & Paulsen, *supra* note 2, at 1152 n.143 ("Luther Martin's Letter revealed no small portion of the hitherto secret proceedings of the Philadelphia Convention—including the drafting history (in some detail) of various clauses.").

52. See, e.g., 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976).

53. See, e.g., 2 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (Joseph Gales ed., Washington, Gales & Seaton 1834). These sources are not always ideal. For a discussion of their limitations, see generally Marion Tinsling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519 (1961), and James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

numerous opinions among the Framers about many, if not all, of the important constitutional provisions. From the range of points of view expressed, we can see that when the Framers arrived at the Constitutional Convention, the ratifying conventions, and the First Congress (in the case of the Bill of Rights), they hoped for a number of different, and often conflicting, constitutional outcomes.⁵⁴ At the beginning of the process, then, we can find a sizeable collection of individual Framers' intentions. Some of those viewpoints originated in a Framer's personal beliefs about how governments should be structured, while others resulted from instructions from their home states (or towns in the case of ratification). In the end, however, the final form of the Constitution was the result of a series of compromises made by the delegates who negotiated its provisions and framed its language, and the search for evidence of those constitutional compromises may be a sensible place to begin the quest for an identifiable original meaning.⁵⁵ As Keith Whittington has pointed out:

The process of negotiation and compromise that marked the framing process indicates that the authors of the Constitution were making efforts to unite behind a single text

This is not to contend that all were satisfied with those changes but that such negotiated amendments create a presumption that all understood the language being used.⁵⁶

Or, at least they may have shared a view of what the language was being used *for*.⁵⁷

54. See generally WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007); RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* (2006); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010); DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* (2007).

55. Moreover, because it is the Framers' constitutional intentions that are being sought, it would be reasonable to concentrate on the records relating to their conversations about the federal Constitution itself, rather than on reports of their views on how similar issues may have been treated in their states or in connection with British rule.

56. WHITTINGTON, *supra* note 3, at 97.

57. For example, it is likely that members of the First Congress had different ideas of exactly what constituted an ecclesiastical "establishment," but there is considerable evidence to suggest that they understood the Establishment Clause to mean that there would be a prohibition on Congress's establishing a national church along the lines of the Church of England. See DRAKEMAN, *supra* note 36, *passim*.

This what's-the-final-deal approach is exactly how the early Supreme Court interpreted the taxation clauses in Article I in the first substantive case involving the constitutionality of a federal law, *Hylton v. United States*.⁵⁸ This case involved the constitutionality of a federal tax on the ownership of carriages. As a recent article has shown, the parties to the litigation made a series of New Originalist-style arguments about the textual meaning of the taxation clauses, and they relied on dictionaries, commentaries, and the like to come to two entirely plausible but contradictory results.⁵⁹ In reviewing these materials, Justice Paterson pointed out that “[t]he [semantic] argument”—essentially the New Originalism approach—“on both sides turns in a circle.”⁶⁰ In fact, he observed that “the natural and common, or technical and appropriate, meaning of the words . . . is not easy to ascertain.”⁶¹ He decided that, because “[d]ifferent persons will annex different significations to the terms,” he would focus on what was “obviously the intention” of his fellow Framers: “that Congress should possess full power over every species of taxable property, except exports.”⁶²

Justice Paterson further explained his approach to focusing on the Framers’ intentions by pointing out that “[t]he Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise,” but such compromise was “radically wrong; it cannot be supported by any solid reasoning.”⁶³ He nevertheless upheld it. Justice Paterson was thus clearly unhappy with the final deal struck by the Convention, but he was willing to stick with it, especially where the usual textual sources were unable to identify a single objective public meaning.

The focus of this initial originalist inquiry, as set out by Justice Paterson, relates directly to the nature of the final compromise that was reached in light of the negotiating positions that had been established by various Framers. Not only does such a broad review help satisfy the public’s quest for information about the Framers, but it also clarifies for the public that, for

58. 3 U.S. (3 Dall.) 171 (1796).

59. Alicea & Drakeman, *supra* note 18, at 1163–64, 1169.

60. *Hylton*, 3 U.S. (3 Dall.) at 176.

61. *Id.*

62. *Id.*

63. *Id.* at 177–78.

many key provisions, the Framers were hardly of one mind at the outset of their debates; rather, they needed to reach compromises to achieve agreement on constitutional language. When there is a dispute over the meaning of such a heavily debated provision, litigants on both sides of a case will undoubtedly seek to highlight those Framers whose *initial* positions align with their own interests. The goal for the Court, however, is to determine what the Framers as a group sought to achieve in reaching the final constitutional compromise. Ultimately, from the perspective of persuading the public that the Framers are being adequately consulted and understood, showing how the Framers' early disagreements eventually led to negotiations and resolution in the form of the agreed-upon language has the potential to lead to a powerful presentation of the Constitution's original meaning.

Focusing the initial inquiry on identifying the way that the Framers coalesced around the Constitution's post-negotiation final provisions will also help the Justices steer clear of the twin intentionalist perils identified by New Originalists: the Scylla-like summing problem⁶⁴ and the Charybdis of teleology. As with the multi-headed mythological sea monster, the summing problem argues that two or more heads are not better than one when it comes to identifying intentions.⁶⁵ With various materials de-

64. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980). This issue is shared by statutory and constitutional interpretation. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small."); see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684 (1997). "[E]xactly the same" is a very high standard, but there may be a significant amount of evidence as to what the group of Framers or ratifiers thought the words meant when they were voting on them. *Id.* at 684 n.46. Whether that evidence exists is an issue of fact to be determined by research into the relevant documents.

65. The summing problem is widespread in originalism debates, and it even applies to the New Originalists' favorite philosophers. Although modern thinkers frequently are cited, philosophers have been arguing about meaning for millennia. Grice has done so in a way that appeals to a number of New Originalist scholars, and his work may provide the authority of the deep-thinking field of philosophy to support the New Originalists' search for the objective meaning of the constitutional text. Yet it is far from clear that the entire field of philosophy has declared that Grice represents the last word on words. See Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 297 n.9 (2011) ("Philosopher Paul Grice's work has been cited by some new originalists. . . . It is important to recognize the divisions

scribing how the Framers disagreed on important issues when they entered the debates, and with no good records of the views of numerous others, how can we seize upon a unitary Framers' intention? This is a very good question, and its solution—identifying what the Framers as a group were trying to accomplish with the final language after they completed their debates and negotiations—ought to represent the crux of the initial originalist inquiry. The answer will be determined on a provision-by-provision basis, and, in some cases, the inquiry into a single identifiable intention of the Framers will be defeated. That is not so much a criticism of originalism *per se*⁶⁶ as it is, practically speaking, a reasonably likely outcome of many originalist inquiries (irrespective of whether the methodology is based on Old or New Originalism).⁶⁷ The Court will need to consider what to do if there is no clear originally intended meaning. Nevertheless, there may well be cases where it is possible to find persuasive evidence of such an intended meaning; if so, the public certainly believes that this inquiry is a very important, and perhaps decisive, element of constitutional interpretation.

The critical methodological point that helps avoid defeat at the many hands of the summing problem is, therefore, to focus on the negotiated conclusion rather than on the hopes, desires, and preferences of the individual Framers. At the same time, this what's-the-final-deal approach will minimize the other major concern that textualists such as Justice Scalia have perceived in Old Originalism's focus on intentions—that is, that a judge will conduct Founding Fathers research with the sole goal of reaching a preferred outcome, ultimately concluding that the Framers with the most desirable views is somehow representa-

among philosophers of language regarding Grice."). Even in the unlikely event that modern philosophy would unite behind a particular approach to language and meaning, there is no evidence to suggest that any relevant audience for a judicial opinion, and especially the general public, would agree that academic philosophers should have the authority to trump the Framers' intentions in establishing the definitive metes and bounds of constitutional meaning.

66. See WHITTINGTON, *supra* note 3, at 96 ("Analytically, the concept of collective intent creates no difficulties. . . . The real difficulty of collective intent is in its empirical discovery, not in its conceptual viability.").

67. See Alicea & Drakeman, *supra* note 18, at 1213 n.319 (arguing that, for at least some provisions, it may be impossible to identify a single objective public meaning using the techniques of the New Originalists).

tive of all the others.⁶⁸ Caught in the Charybdis-like whirlpool of their own policy preferences, Supreme Court Justices will thus be tempted to give their favorite Framers a starring role in a teleological search for just the right intentions. Such an approach is especially tempting with famous Framers who may have written interesting and expansive statements of their views on topics that are similar to those addressed in the Constitution, perhaps in connection with the Framers' involvement in the development of state laws and constitutions. Such an approach is exactly how Justice Rutledge ended up making James Madison's anonymously written Memorial and Remonstrance against proposed religion taxes in Virginia the centerpiece of his ostensibly originalist interpretation of the Establishment Clause.⁶⁹ Yet, no matter how interesting individual Framers' views may be as a matter of political philosophy, it would seem sensible, in the search for the original meaning of the *constitutional* text, to focus on the Framers' *constitutional* intentions.⁷⁰ As noted above in connection with the summing problem, if there is no evidence of such intentions, the conclusion is that the Court is unable to determine the originally intended meaning from an analysis of the records of the Framers' debate. The answer is simply, "We don't know."

As interesting as the Framers' intentions may be to the public,⁷¹ the "Originalism 2012" survey showed that the public would also like the Court to explore a variety of types of evidence to determine original meaning. Accordingly, irrespective of whether a final-deal intention is manifested in the documentary record, the next step is to see how a broader collection of

68. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

69. See *supra* notes 35–38 and accompanying text.

70. It is possible, of course, that the Framers, in adopting the constitutional text, could have meant to incorporate in that language everything that Madison or Hamilton may have written about similar topics in other settings. Whether that is the case can be determined by examining the record for evidence that the Framers agreed to do so.

71. A third critique of originalism is that the Framers did not intend for their intentions to be used to interpret the Constitution. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889–94 (1985). Because Justice Paterson was a Framers and he employed an original intent analysis in the *Hylton* case, this criticism may be open to challenge on factual grounds. See Alicea & Drakeman, *supra* note 18, at 1214. Even if it is a valid criticism, however, it seems not to have had much of an effect on public opinion.

Americans may have understood the provision. One potential source of such information is the ratification debates as well as contemporary published and private correspondence. These materials will inevitably be incomplete, and possibly contradictory, but they might be able to provide potentially valuable additional insights. It will be useful to supplement these sources with a review of the relevant dictionaries and commentaries, subject to all the important caveats, including that both commentary and dictionary writers often have their own strongly held—and sometimes controversial—points of view on both language use and public policy. As a result their volumes may not necessarily be an accurate and objective, or even comprehensive, description of how words or legal terms were used at the time of ratification. These types of sources also have a summing problem and it is difficult to say, in the abstract, why, for example, a dictionary written by Samuel Johnson in England many years before the Constitution, or one by American Noah Webster, published decades after, is the best evidence of the meaning of the constitutional terms at the time they were written.⁷² Nor are these early dictionary writers—or their commentary-writing contemporaries such as Blackstone or St. George Tucker—necessarily seen by the public today as the “master,” in Humpty Dumpty’s terms, of constitutional meaning that has the power to trump evidence of the Framers’ intended meaning.

Finally, a considerable number of important constitutional provisions were the subject of governmental action while those who framed the provisions were directly involved in pursuing, or challenging, the activity. It would seem reasonable to look at how these Framers interpreted the words that they had participated in drafting. At this point, we may find that even though various Framers had agreed upon the language of certain provisions, they actually had different interpretations in mind. Perhaps the text was left deliberately vague, or, in some cases, regional word usage may have inadvertently prevented a true meeting of the minds when the Constitution was adopted. Alternatively, evidence of the consistent application and interpretation of a provi-

72. NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1829); SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS* (6th ed. 1785).

sion by the people who participated in framing it may provide good supportive evidence of how the Framers are likely to have understood it before, during, and after its enactment.

In all these analyses, the basic inquiry is: In looking at the complete documentary record (such as it exists), to what extent does a fair reading of all of the evidence show an understanding of the original meaning of the provision, especially in light of what the Framers were trying to accomplish when they adopted the constitutional text? This is a potentially achievable goal for many provisions, and, where it does exist, such a reading would seem to carry great weight with the public. In some cases, however, there may be conflicting and contradictory evidence, or simply not enough of a documentary record to reach a clear conclusion. At this point, it may be practically impossible to determine what the Framers' intentions were, or even to arrive at an objective public meaning, and, in this instance, originalism per se may have run its course. That is, as a result of "Originalism 2012," we have a fairly clear view of the importance the public places on the role of originalism in constitutional decisionmaking, but that is premised on there being an identifiable original meaning. When neither the Framers' intentions nor the other tools of original meaning provide a clear reading of the text, perhaps another survey, or further theoretical analysis, can tell us what role the Court should play in deciding a constitutional dispute. That topic, including, as it does, complex issues of the limits of judicial review and other jurisprudential questions, will require further study.⁷³ But, for interpretive purposes, it may be worth remembering that not all

73. New Originalist Michael Stokes Paulsen, for example, argues that the "enterprise of constitutional interpretation . . . consists of giving to the Constitution's words and phrases the meaning they would have had, in context, to informed readers of the language at the time of their adoption as law, within the relevant political community." Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2056 (2006). With no clear meaning, the Court has no power to strike down a law, and Paulsen thus concludes that "a decision invalidating political action where the constitutional text is vague or ambiguous . . . is simply an incorrect constitutional decision." Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296 n.18 (2005). John Manning has similarly discussed the potential conflicts between a constitutional provision's apparent purpose and the precise wording of the text. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004).

modern constitutional questions will necessarily find answers in the text's original meaning.

V. CONSTITUTIONAL THEORY?

This Article is not, in the first instance, a theory of constitutional interpretation or construction. It is, rather, a theory (if "theory" is the right word) of constitutional explication. Its goal is to highlight certain types of arguments and evidence that the public believes should be considered when the Supreme Court interprets the Constitution. Its premise is that the Supreme Court has, to this point, frequently sought to explain its decisions and interpretive methodologies in a way that appeals to (or is at least seen as appropriate by) the public, and that the Court will continue to do so in the future.⁷⁴ It would undoubtedly be possible to develop a normative theory to the effect that judicial decisions, to achieve public legitimacy in a country founded upon the concept of popular sovereignty, should employ publicly available and comprehensible reasons. But, in this case, two hundred years of practice demonstrates that doing so is simply normal, and, for as long as it remains the norm, a normative rationale is perhaps less urgently needed.⁷⁵ As Irving R. Kaufman, former Chief Judge of the United States Court of Appeals for the Second Circuit, has said:

In the final analysis, the authority of judges depends on their ability to articulate their pronouncements in comprehensible terms. Communication with the public is the very lifeblood of the 'third branch' of government When a society is as impregnated as ours with the idea of law, it is essential that

74. As noted above, I am not arguing that the Court *should* try to convince the public of the appropriateness of its decisionmaking approach; rather, I am making an observation that the Court has consistently done so for a very long time. Nor am I arguing that the public *should* be as interested in the Framers and the Constitution's original meaning as it is. I am merely pointing out that the public currently has such an interest, and that a Court seeking to obtain the public's favor would do well to keep that fact in mind. That there may be persuasive normative arguments for (or against) doing so is a subject for another day.

75. Originalist theorist Lawrence Solum asks, "Even if originalism is a good idea in theory, can it work in practice?" Lawrence B. Solum, *We Are All Originalists Now*, in BENNETT & SOLUM, *supra* note 5, at 50. I am proposing that we think about it exactly the other way around: Whether or not originalism is a good idea in theory, it has considerable appeal in practice. That distinguished theorists see originalism as a good idea, theoretically speaking, is an added attraction.

courts, advocates, and legal scholars be in intimate communion with public opinion.⁷⁶

For this theory of constitutional *explication* to morph into a theory of constitutional *interpretation*, a separate normative link must be made. That is, it is necessary to assert that when the Supreme Court gives reasons for reaching a particular constitutional conclusion, they should closely match those that convinced a majority of the Court to adopt the decision. In short, the Justices should say what they mean, and mean what they say. Although law review articles often appear to assume that the Justices' beliefs are accurately reflected in their opinions, a growing body of social science literature proposes various other sources of judicial motivation.⁷⁷ There are, to be sure, cases in which it has become clear that an opinion's analysis was an after-the-fact rationalization designed specifically for public consumption,⁷⁸ and some scholars have even recommended that nonoriginalist Justices employ originalist arguments primarily as a judicial tactic for convincing the public to go along with an otherwise controversial decision.⁷⁹

76. Irving R. Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, 63 A.B.A. J. 1567, 1567 (1977).

77. See, e.g., EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 7 (2009) (noting that "the dominant assumption in social science literature [is] that judges are primarily motivated by policy"). Braman instead proposes "an alternative characterization of motives based on the idea that those who are trained in the legal tradition come to internalize legal norms and 'accuracy' goals consistent with idealized notions of decision making." *Id.* See generally MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011). It is perhaps worth noting that advances in neuroscience experimentation have cast doubt on the entire concept of free will. See, e.g., Kerri Smith, *Neuroscience vs. Philosophy: Taking Aim at Free Will*, 477 NATURE 23 (2011). If free will does not, in fact, exist, the questions of judicial motivation, not to mention many other normative theories, would likely become moot.

78. See *supra* note 35 for a discussion of Justice Rutledge's opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947).

79. For example, Christopher Eisgruber does not favor originalism as a way of interpreting the Constitution, but he suggests that it can be used to explain an otherwise unpopular decision, as follows: "When the judge's decision flies in the face of national electoral majorities, the task of reconciling justice and American public opinion will be especially challenging. Here historical argument may play a special role. By appealing to history, judges may attach a popular pedigree to unpopular decisions." CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 126-27 (2001).

Once again, there is a pragmatic answer to this question that may help cut through this thicket of normative issues. The underlying premise of the theory of constitutional explication described in this Article is that the Court wants its opinions—or at least the methodology behind the opinions—to be acceptable to the public. These opinions routinely include language suggesting that the Justices do, in fact, agree with what is in them. Hence the use of phrases such as “we believe,” “we find,” or “we are persuaded that” rather than, say, “We don’t believe this, but we hope you will.”⁸⁰ If the Justices give the impression that they do not actually believe what is in their opinions, they are likely to lose credibility if the public actually thinks the opinions are all for show. And because public acceptance is precisely what the Justices sought when they wrote the opinions in the first place, from a purely tactical perspective, the Court is more likely to accomplish its goal of public credibility if its opinions are reasonably good reflections of the Justices’ thinking.⁸¹ Even taking very seriously the Court’s penchant for intramural secrecy, there will be a practical limit to the extent to which the Justices can routinely fabricate originalist arguments as a public relations device designed solely to fool a gullible public.⁸²

In sum, then, there are good pragmatic reasons why the Court might treat this theory of constitutional explication as

80. Chief Justice Roberts’ opinion for the Court in the recent Affordable Care Act case, for example, uses the phrase “We are not persuaded . . .” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595 n.7 (2012). For other examples, see *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 617 (2009), and about 1400 other federal court opinions identified by Google Scholar (accessed September 22, 2012) that employ the phrase “we are persuaded.”

81. Beyond these pragmatic concerns, there is a scholarly literature regarding the role of sincerity in Supreme Court opinions. See generally, e.g., Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

82. The increasing interest in the internal workings of the Supreme Court in both popular literature and scholarly works will make a fabrication strategy difficult to sustain. See generally, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); IN CHAMBERS: *STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* (Todd C. Peppers & Artemus Ward eds., 2012); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008); JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* (2012); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

one of interpretation as well. It is not, of course, a comprehensive theory: It stops at the limits of the documentary record. But, for the vast majority of the public, that record is highly relevant to constitutional decisionmaking, and it is seen as definitive by many. Much further thinking can be done about the (likely large number of) cases in which the record is not clear, or not determinative. But the message from the public is that, when the Supreme Court sets out to interpret the Constitution, the place to start is with the Framers, and specifically with what the Framers intended to accomplish with the final form of the Constitution's language. For over ninety percent of Americans, the search for original meaning is thus not one of the competing approaches to constitutional interpretation, but an essential part of the enterprise itself.