PRE-"ORIGINALISM"

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INTRODUCTION

June 26, 2008 heralded an important new era for the use of historical sources in constitutional interpretation. It was the day the United States Supreme Court announced its opinion in

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District of Columbia v. Heller,[1] the first occasion since the Bill of Rights' ratification in 1791 that the Court had taken to interpret the protections provided in the Second Amendment:[2]

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[3]

The Court was to decide for the first time whether the Amendment protected a private right to possess personal weapons for self-defense or instead protected state militias from federal disarmament. *Heller* was thus a rare case of "constitutional first impression," wherein the Court assumes the responsibility to interpret a discrete text of the federal Constitution—be it an entire amendment, a clause, an identifiable phrase within a clause, or even a single word—for the first time. Such cases are the Halley's Comets of jurisprudence, occurring in modern times perhaps once or twice during a Justice's tenure on the Court. The last such case occurred in 1993, and only four such cases had been decided in the twenty-five years before *Heller*.[4]

Heller is remarkable for much more than its singular rarity, however, or even the excitement that naturally attends any discussion of the topic of firearms. *Heller* is remarkable because of *how* it was decided. Between Justice Scalia's majority opinion and Justice Stevens's dissent, *Heller* contains perhaps the most

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1. 554 U.S. 570 (2008).

2. The Court did consider the Second Amendment's meaning in United States v. Miller, 307 U.S. 174 (1939), but as the Court mentioned in *Heller*, the *Miller* Court failed to determine the character of the Amendment's protection, restricting itself to an analysis of the types of "arms" that would be covered by the Amendment. *Heller*, 554 U.S. at 621–23. Similarly, in Presser v. Illinois, 116 U.S. 252 (1886), Miller v. Texas, 153 U.S. 535 (1894), and United States v. Cruikshank, 92 U.S. 542 (1876), the Court avoided interpretation of the Amendment because the parties challenged state laws, and the Court found that the Second Amendment was not incorporated against the States. Finally, the parties raised Second Amendment arguments in cases like Printz v. United States, 521 U.S. 898 (1997), but the Court was able to resolve those cases without addressing those arguments.

3. U.S. CONST. amend. II.

4. The other cases of constitutional first impression over the past twenty-five years include Nixon v. United States, 506 U.S. 224 (1993) (interpreting the standards for impeachment in U.S. CONST. art. I, § 3, cl. 6); Franklin v. Massachusetts, 505 U.S. 788 (1992) (interpreting the Allocation of Representatives Clause in U.S. CONST. art. I, § 2, cl. 3); INS v. Chadha, 462 U.S. 919 (1983) (interpreting the Presentment of Resolutions Clause in U.S. CONST. art. I, § 7); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (interpreting the Incompatibility Clause in U.S. CONST. art. I, § 6, cl. 2).

extensive and rigorous historical analysis in any constitutional opinion in the Court's history.[5] Never had the Court considered in such depth the question of how historical sources should be used in constitutional interpretation.[6]

Heller's methodological debate is significant because of its context. It had been preceded by thirty years of debate over Originalism—whether and to what extent founding history can appropriately be used in constitutional interpretation. *Heller* thus represents an interesting layer in this meta-discussion—a kind of official recognition and culmination of the debate by the highest legal authority. The discussion over history's relevance thus placed *Heller* at the fulcrum of the debate between adherents to variations on the Originalist theme and those that reject the theory entirely.

The debate begs the question of historical legitimacy. Predictably, all sides in the debate have tried to claim that their preferred method of analysis has a stronger pedigree in the history of the Supreme Court's constitutional jurisprudence. For

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5. In *Heller*, the Justices analyzed a staggering amount of historical evidence, encompassing eight centuries' worth of lawmaking. These sources drew from English history back to the Magna Carta and the English Bill of Rights, the creation of colonial and state constitutions, early firearms statutes, the drafting and ratification of the United States Constitution and Bill of Rights, post-ratification legal developments, and obscure sources never before considered by the Court. *See Heller*, 554 U.S. at 579–619, 626–27.

6. Justice Scalia's majority opinion adopted the method of constitutional interpretation Justice Scalia himself has long espoused, Original Public Meaning Originalism, in which the Second Amendment's meaning would be found in the meaning of its "words and phrases" as they "were used in their normal and ordinary" sense by those of the founding generation. *Id.* at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)). "[S]ecret or technical meanings that would not have been known to ordinary citizens in the Founding generation" would be rejected. *Heller*, 554 U.S. at 576–77. Justice Scalia found that this "ordinary" meaning encompassed the right of private weapons possession that founding-era Americans had enjoyed as English citizens by virtue of the English Bill of Rights. *See id.* at 592–95.

Justice Stevens's dissent, on the other hand, focused not on any particular kind of source, but on the immediacy of the historical evidence—giving greater weight to evidence that focused directly on the meaning of the Amendment from those who had studied it and formed opinions of its meaning than it gave to evidence that depended upon chains of inference to obtain relevance. For example, he gave prominent place to the drafting history of the Amendment, including congressional debates over adoption of the Bill of Rights and proposed amendments by the state conventions during ratification of the original Constitution. *Id.* at 652–62. Such evidence, Justice Stevens argued, demonstrated that the Amenders expected "the right to bear arms" to bear an intrinsic relationship to service in the militia as a citizen army, rather than protect private weapons possession for self-defense as Scalia had held. *See id.* at 637 (Stevens, J., dissenting).

instance, certain non-Originalists have used cases like *Chisholm v. Georgia* to illustrate that the early Court did not adhere to anything like modern-day Originalism.[7] Justice James Wilson, writing *seriatim*, determined that states did not retain sovereign immunity under the Constitution, and could be subjected to suit by individuals from other states.[8] This outcome required the Court to ignore evidence that at least some of the Framers (ironically including even Wilson himself) and Ratifiers intended to preserve state sovereign immunity within the Constitution.[9] Reference to such evidence within the historical record might have prevented Wilson and the Court from permitting Georgia to be subjected to suit.[10] In failing to grapple with this evidence, Wilson did not adhere to modern Originalist methodologies. Certain other Originalists, on the other hand, tend to focus on *Gibbons v. Ogden*, wherein the Marshall Court endorsed something akin to what is now described as "Original Public Meaning," a particular variant of Originalism:

> [T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.[11]

Similarly, scholars from both sides have endlessly debated whether Chief Justice Marshall's famous statement from *McCulloch v. Maryland* that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs," shows that Marshall ei-

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7. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

8. *Id.* at 465–66 (Wilson, J.).

9. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 922 (1985) (laying out the historical evidence that the Court ignored). Whether such sentiment constituted a consensus regarding state sovereign immunity has been hotly debated by Justices when interpreting the Eleventh Amendment. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 32–35 (1989) (Scalia, J., concurring in part and dissenting in part); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 263–80 (1985) (Brennan, J., dissenting). Justice Scalia, in his *Union Gas* opinion, called a truce in admitting the historical evidence regarding the Framers' belief in state sovereign immunity was close to evenly split. 491 U.S. at 34.

10. Of course, *Chisholm*'s aftermath witnessed the quick passage of the Eleventh Amendment by an outraged citizenry and ratification on February 7, 1795. U.S. CONST. amend. XI.

11. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824); see also Raoul Berger, Jack Rakove's Rendition of Original Meaning, 72 IND. L.J. 619, 621–22 (1997); Howard Gillman, The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building, 11 STUD. AM. POL. DEV. 191, 204 (1997).

ther advocated judicial minimalism or some version of Living Constitutionalism.[12]

However, this scholarship has largely been selective—solely serving to support each scholar's preferred method of constitutional inquiry—and episodic, focusing narrowly on a few specific examples, whether from the Court itself, or from other branches' acts of constitutional interpretation. Furthermore, those who have studied anecdotal evidence have largely taken Justices' claims at face value, without discovering whether the Justices' claimed and practiced methodology align. No one to date has engaged in a comprehensive analysis of the Court's entire body of constitutional jurisprudence to discover and compare the claimed versus true constitutional interpretive methodology of the Court.[13] As a result, these efforts have failed to provide any truly satisfactory answers. Indeed, the Marshall Court's ability to be characterized as either Originalist or Living Constitutionalist, depending upon the selective choice of case citations, demonstrates the inadequacy of such endeavors.

Given the faults in previous attempts to examine the topic, the time is ripe to analyze competing claims of historical legitimacy critically and dispassionately—using pre-Roberts Court cases of constitutional first impression as a guide—to determine how the Supreme Court approached the use of history in constitutional interpretation before "Originalism" was applied in more modern cases like *Heller*.

This Article undertakes to analyze the historical pedigree of various modes of constitutional interpretation using a systematized, quantitative, and qualitative analysis of the Supreme Court's cases of constitutional first impression to answer a series of questions: How do the theories of Originalism and Non-

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12. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). For examples of this debate, *compare* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 500 (2002) (arguing that Chief Justice Marshall's statement did not presuppose that the constitution's meaning changed over time), *with* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 4 (2009) (citing Marshall's statement as showing the "genius" of the constitution in that it adapts to changing circumstances), *and* Gillman, *supra* note 11, at 204–05 (rejecting the view that Marshall intended "adaptation" to apply to the original understanding of the powers of government).

13. Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1318 (2008). Samaha did perform a survey of cases in his article, but he focused on the period between when the text was written and adjudicated, which he called "adjudication lag," and disclaimed any intent to provide an "exhaustive inquiry" into Supreme Court methodologies.

Originalism compare to the Supreme Court's pre-*Heller* historicalism? (We use historicalism to mean, in a broad sense, all forms of historical analysis and inquiry in judicial interpretation. In a field where many terms have become toxically pregnant with politicized meaning, we created "historicalism" in an attempt to proffer a neutral vocabulary word for a common practice. Has the Court always been an Originalist Court, or possessed what we would now define as Originalist tendencies? If so, is there a particular strand of Originalism to which it adhered?

To answer these questions in an unbiased manner, we began by neutralizing our own biases. We recognize that our ideologies come from variant political strains (one of us being more conservative, the other more liberal), and we have coauthored this Article in part to build in ideological balance for a topic that has otherwise been highly politicized. Concordantly, we have attempted to give equal play to all methodological theories of historical constitutional interpretation within our analysis. Although we might do otherwise in our personal capacities, we do not intend to advocate any particular theory in this Article.

To produce unbiased, controllable answers, we performed a quantitative, data-driven review of the ninety-six cases of constitutional first impression spanning the Court's nearly 220-year history from 1789 to 2005, taken from *The Heritage Guide to the Constitution* (2005).[14] The Heritage Foundation is a well-respected conservative organization and the *Guide* is not without a political bent. However, we found no indication that the inclusion of cases showed any indication of bias. The bias of the book, if any, comes in the *analysis* of those cases.[15]

For each clause of the Constitution, or narrowly defined subdivision of the text (for example, the Takings or Establishment Clauses), we selected for our study not the cases that received the most ink, but those in which the Supreme Court examined the meaning of the clause in a written opinion for the first time.[16]

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14. THE HERITAGE FOUNDATION, THE HERITAGE GUIDE TO THE CONSTITUTION (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005).

15. If anything, any concern over selection bias is overcome by our results, which point to conclusions at odds with some of the Heritage Foundation's espoused constitutional beliefs.

16. In the early days of the Court's existence, opinions were not always recorded or written, but reported for commercial gain based upon recorders' ability to

This selection of cases served our aim of neutrality well, because by picking cases across such a wide and diverse set of substantive areas and temporal periods, any chance, whether conscious or not, to cherry-pick cases to buttress or undermine a particular theory is avoided. If there is any bias to the set itself, it would be temporal: The data set will quite naturally skew toward inclusion of more cases from earlier periods in the Court's history, by the simple happenstance that the earlier Courts possessed a greater chance to encounter virgin constitutional territory. Otherwise, confining ourselves to study of the cases of constitutional first impression provided us a suitably unbiased, narrowly tailored, and historically comprehensive sample.

Coinciding with our desire to be ideologically neutral, cases of "constitutional first impression," as we define the concept, provide the most natural opportunities for Justices of all ideological and jurisprudential stripes to engage in historical analysis. They present opportunities for the Court and individual Justices to examine the text unvarnished by any of the Court's precedents, and thus do not require having to weigh the advantages of a historical approach against precedent and the rule of law. With a clean jurisprudential slate before them, we hypothesized that Justices of all political and jurisprudential persuasions would be likely to use history in interpretation more frequently, yielding a data set most likely to involve the largest number of Justices, thus encompassing the greatest juridical diversity.

We performed this study based on methods more often used in pure historical or sociological research than in traditional legal scholarship. We reviewed every majority, concurring, and dissenting opinion present in each case within our data set. For the portion of each opinion that dealt explicitly with constitutional interpretation (versus statutory interpretation or any other analysis), we recorded references to historical sources. These references include individual citations to sources (including more general references to historical sources, the Court's own precedent, or lower court decisions), secondary sources, and any commentary on interpretive methodology. The results of this quantitative study may be found in Appendices 1–18.

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capture oral opinions. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at xxiv (Maeva Marcus ed., 1994).

This approach carries with it certain unavoidable risks, however. In analyzing constitutional cases, context is everything. Inferences and some richness of meaning will inevitably be lost whenever data is pulled from a case and placed in isolation within a database. We have attempted at all times to take this risk into account, and remain sensitive to the original context in which each source is used in making the occasional judgment call. Further, the quantity of citations to sources does not precisely translate to the intrinsic quality of the source or its actual role in shaping the Court's decision. One source may have been more important in shaping the Court's decision than others that are cited. And in some instances, a Court might—quite reasonably and legitimately—rest on a single dispositive historical source that directly and authoritatively answers a question. We have tried to account for this by listing each *citation* within an opinion, rather than each *source*, believing that if a source is discussed and therefore relied upon in depth, it will be cited multiple times. This risk of overreliance on one source is further dampened by the fact that it is exceedingly rare that a single source can end all debate on the kinds of difficult, nuanced constitutional questions that tend to dominate the Court's docket.

Our universe of cases is limited. We define "cases of constitutional first impression" as those wherein a particular text of the Constitution was interpreted for the first time, not as applied to new contexts or issues. The latter, of course, could also qualify as cases of constitutional first impression within some definitions. There was, however, no generally accepted criterion for identifying and including these cases; it would have masked interpretative opportunities in deference to precedent, skewing our results. And, as a practical matter, it would have made the size of the resultant universe too large to have permitted comprehensive review and analysis.

In addition, because our study focuses on first attempts at interpretation for a particular text, our study of cases of constitutional first impression will not necessarily capture what are often considered the great moments of constitutional interpretation, or announcements of important interpretive doctrines. Such notable jurisprudential events sometimes occur in cases that involve Supreme Court precedent. For example, as important as it is, *Brown v. Board of Education*[17] does not make the list, given that it is an explicit reexamination of a previous

17. 347 U.S. 483 (1954).

Supreme Court case, *Plessy v. Ferguson*,[18] as does *Dred Scott v. Sandford*.[19] Additionally, our focus on cases of constitutional first impression necessarily excludes many of the "incorporation" cases in which the Court attempted to decide whether to apply constitutional rights that had usually been previously defined in other Court opinions as against the States. This is in spite of the fact that such incorporation cases frequently involve detailed historical analysis in determining which rights are "fundamental to our concept of ordered liberty."[20]

Finally, we may have admittedly lost richness in our review by excluding cases in which the Court revisited with a historical gloss areas covered by previous precedent with a historical gloss. This loss is particularly apparent during the past thirty years, where historical analysis has been much *more* prevalent and cases of constitutional first impression *less* frequent; however, we feel that this loss is overcome by what we gain in objectivity by excluding these cases, especially because such reexaminations are more often undertaken by those who are more heavily invested in Originalism, if not a particular brand of Originalism, than those who are skeptical of the theory.

Despite its limitations, this data-driven approach offers significant advantages over more traditional modes of case study. Traditional case-by-case analysis offers only a snapshot view of particular constitutional doctrines. Individual case studies can be strung together in an attempt to examine trends, but this type of analysis will always remain subject to selectivity bias—one can easily confirm a hypothesis by ignoring cases containing contrary or complicating evidence. But a quantitative analysis of an entire universe of cases (albeit a relatively small one) allows us to examine trends in historical analysis over time in a controlled, manageable, and objective fashion.

Another significant advantage is that our data set proved properly representative of all ideological positions. Although

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18. 163 U.S. 537 (1896).

19. 60 U.S. (19 How.) 393 (1857).

20. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (right to bear arms); Aguilar v. Texas, 378 U.S. 108 (1964) (warrant requirement); Edwards v. South Carolina, 372 U.S. 229 (1963) (the right to petition); Wolf v. Colorado, 338 U.S. 25 (1949) (unreasonable searches and seizures); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

the *kind* of historicalism the Court engaged in has changed dramatically since the Court's inception, our data shows that historical sources played an important role in a majority of cases of constitutional first impression. Further, it provided interesting and unexpected results. Although, in general, the Court appears to have expressed an adherence to Intentionalism, it has varied widely from that belief and, in fact, did something very different for the entirety of its history.[21]

Part I begins with an overview of the main features of the Originalist debate as it has evolved over the last thirty years, taking into account the generally accepted range of interpretive theories. Part II explains how we applied these modern theories to the Court's cases of constitutional first impression, decided over the past 240 years, to determine which theory or theories had the strongest historical support. We conclude in by submitting that, although our universe of cases is small, because it is controlled, objective, and randomized, our results would hold true for a larger and more comprehensive study.

I. ORIGINALISM AND NON-ORIGINALISM IN THEORY

The literature on Originalism and alternative theories of constitutional interpretation is vast. To provide background and context for the discussion and analysis in Part II, we provide here a brief overview of the theory of Originalism and its variants. For more in-depth literature reviews, we recommend the summary scholarship of Lawrence Solum, Robert Bennett, Mitchell Berman, and Daniel Farber.[22]

A. The Originalists

The origins of the dispute between Justice Scalia and Justice Stevens in *Heller* are found within a larger, multifaceted debate that has dominated the legal academy for the past thirty years, centering on one question: Can history provide authoritative evidence of the Constitution's meaning?

Are there aspects of the historical record that provide legally binding interpretations of the Constitution, forming an authorita-

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21. *See* "Subtotals," app. 11.

22. *See generally* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

tive and, where precedent is lacking, dispositive source of constitutional law? Many answer this question in the affirmative. Loosely collected under the banner of "Originalism," these scholars and jurists rely upon evidence from the Framing generation as the *definitive* source of the Constitution's meaning. Similarly, they look to the documentary history of amending generations to determine correct interpretations of those amendments.

1. Philosophical Origins of Originalism

Although the Court has engaged in historicalism since its inception, the movement towards modern Originalism began in the 1980s.[23] The movement coalesced in reaction to Warren- and Burger-era expansions in the areas of speech,[24] criminal procedure,[25] privacy,[26] congressional power,[27] voting and civil rights,[28]

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23. It is certainly possible to trace the intellectual ancestry of Originalism much further back. Indeed, as will be discussed in Part I.A.1, there are some who have suggested that the Court has always been Originalist and that departure from the practice is merely a modern phenomenon. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990) [hereinafter TEMPTING OF AMERICA]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54 (1989) [hereinafter *The Lesser Evil*]. Those who follow this line of thought cite calls to follow "the Framers' intent" from the time the Constitution itself was formed, as well as throughout the history of the United States Supreme Court. However, as we will also see, this story places an overly simplistic gloss on the Court's history.

In the modern era, Justice Hugo Black clearly espoused the doctrine of following the Constitution's "original meaning," both in his decisions and in his scholarship. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 8 (1968) ("[I]t is language and history that are the crucial factors which influence me in interpreting the Constitution . . . ."); *see also, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 677 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 509–10 (1965) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 89–90 (1947) (Black, J., dissenting). However, Justice Black's philosophy was in the distinct minority and usually stated in dissent. No other Justice on the Court outwardly adopted any version of what could be called Originalism.

Later, in THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962), Alexander Bickel roundly criticized the Warren Court for being overly activist. *Id.* at 77–78. This work provided a seedbed, twenty years later, for Attorney General Edwin Meese, Judge Robert Bork, and Justice William Rehnquist to expound upon, calling for judges to rely upon original intent to restrain themselves and cabin judicial overreach. After that point, a number of influential judges and public figures began to openly espouse Originalism. A detailed version of this history can be found in Johnathan O'Neill's ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005). *See also* Greene, *supra* note 12, at 16; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 674–82 (2009).

24. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

25. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

and religion.[29] The early, prominent Originalists, including Judge Robert Bork, Justice William Rehnquist, and Attorney General Edwin Meese, felt that their contemporaries on the Court were straying too far afield from the Constitution's true meaning.[30]

The early Originalists feared that the Justices on the Warren and Burger Courts, like those on the Court during the earlier *Lochner* era of expansive judicial readings of the Constitution,[31] were treating the general provisions of the text as so boundless and open-ended as to allow the Justices to overrule the will of the people and impose their own political preferences.[32] Fur-

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26. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); *Griswold*, 381 U.S. 479.

27. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

28. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that state legislative districts must be apportioned based on population); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (finding separate public school facilities violate Equal Protection Clause).

29. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

30. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 1–3 (1987) (prepared at Attorney General Edwin Meese's direction); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views."); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 632, 637–39 (1993); Edwin Meese, U.S. Attorney Gen., Speech Before the Am. Bar Ass'n (July 9, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47 (Steven G. Calabresi ed., 2007) [hereinafter Meese ABA Speech] ("[A] drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government."); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 11 (1988); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976) (arguing that judges who do not interpret Constitution according to its language are unjustifiably undermining decisions of legislatures); *The Lesser Evil*, *supra* note 23, at 854.

31. This era is named after Lochner v. New York, 198 U.S. 45 (1905), a case that came to exemplify the period of the Court's history characterized by resistance to President Franklin Roosevelt's social legislation. The *Lochner*-era Court found various economic liberties within the Due Process Clause that would prevent Congress and the States from instituting minimum wage and maximum hour laws, as well as laws protecting employees' right to organize. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating laws that required minimum wages for women and children); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating law protecting the right to organize); Adair v. United States, 208 U.S. 161 (1908) (same); *Lochner*, 198 U.S. at 64 (invalidating a New York state law instituting a ceiling on working hours). In their time, the *Lochner*-era decisions were also the subject of significant criticism by the academy and the public. *See* Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5, 13–15 (1988). Many of the cases were later overruled. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

32. *See* Bork, *supra* note 30, at 7 (asserting that the Court's method "does not protect the judge from the intrusion of his own values"); *see also* Robert H. Bork,

thermore, the early Originalists asserted that the Justices were imposing those values by stamping them in constitutional cement, thereby placing whole swaths of legal decisions beyond the political process and making it virtually impossible for the people to overrule them absent the extraordinary event of a constitutional amendment. Worse still, because members of the judiciary were not elected and enjoyed life tenure, the people could not replace recalcitrant Justices with those more responsive to their wishes.[33] Death or retirement provided the only means of reforming the Court.

The Originalists believed that the predilections of these unelected judges should not control the meaning of the Constitution.[34] Instead, if anyone's subjective preferences were to govern the document, it ought to be those of "We the People," the people of the United States who lived during the Framing era; those who, as the Preamble declared, exercised their sovereign authority when they "establish[ed]" the Constitution and "ordain[ed]" it with the aid of their elected representatives.[35] Because "We the People" created and approved the document, using carefully crafted language that had been extensively reviewed and approved during ratification, the people's interpretations of its meaning ought to have the most authority.[36] For that reason, the Originalists advo-

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Styles in Constitutional Theory, 26 S. TEX. L.J. 383, 387 (1985) (stating anything other than Originalism "must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us"); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83 (2003) ("The early originalists . . . found it impossible to explain what judges had been doing for the preceding twenty or thirty years unless the judges had been making choices that reflected their own views of desirable results and not general, impersonal legal principles."); Rehnquist, *supra* note 30, at 695.

33. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (criticizing the Court as embarking "on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law."); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION] ("[I]t is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.").

34. *See, e.g.*, Bork, *supra* note 30, at 3; *see also* Harrison, *supra* note 32, at 83; Rehnquist, *supra* note 30, at 705–06.

35. U.S. CONST. pmbl.

36. *See, e.g.*, Rehnquist, *supra* note 30, at 696. Justice Rehnquist found this aspect of the Originalist justification at play in Justice Marshall's Marbury v. Madison opinion. 5 U.S. 137 (1803). Rehnquist interpreted Justice Marshall's opinion as reflecting

cated giving interpretive authority to the people of the Founding era, preferring their interpretations to those of any other group, including succeeding generations of Americans.

The desire to preempt subjective modern interpretations of the Constitution by resorting to fixed meanings from the Framing era unites all Originalists. Over time, however, Originalism has evolved, much like the Reformation, in a near-linear ideological succession until, in recent years, it has spawned a myriad of ideological streams. These camps include Intentionalism, first Framers' Intentionalism and then Ratifiers' Intentionalism, and Original Public Meaning—whose variants include Semantic Originalism, Original Expected Application Originalism, and Original Methods Originalism.

2. Variants of Originalism

a. Intentionalism

Intentionalism, and specifically what we will call Framers' Intentionalism, was the first form of Originalism. As its name implies, this movement found authority in the *intent* of those involved in the Constitution's creation.[37] When the philosophy first began to coalesce in the early 1980s, it was advocated by Bork, Meese, and Rehnquist.[38] This theory came under fire from a variety of critics,[39] however, and soon most of the earlier adopters of this theory had changed their positions to some

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the view that "[t]he people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it. They have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually." Rehnquist, *supra* note 30, at 696.

37. *See* BENNETT & SOLUM, *supra* note 22, at 8.

38. *Id.*

39. As we will see, some of these criticisms of Intentionalism came from those who rejected Originalism entirely. Two of the most influential critics were Jefferson Powell and Paul Brest. *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (stating that nonoriginalism is preferable to moderate originalism in constitutional interpretation); Powell, *supra* note 9 (concluding that "modern intentionalism" should not control constitutional interpretation). But others rejected Intentionalism from within the fold. Prominent Originalist criticisms of Intentionalism include: Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1131–32 (2003) (emphasizing that Originalism, in their definition, "is not a theory of anyone's intent or intention"); Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361–62 (1988) (stating that using original intent to interpret the constitution risks subverting the rule of law).

other version of Originalism.[40] Despite this, a few prominent Framers' Intentionalists remain. Raoul Berger, one of Intentionalism's earliest adherents, defended Framers' Intentionalism against later theories.[41] He has been joined by influential law professors with a linguistic bent, such as Larry Alexander, who posit that the meaning of any text cannot be discerned without resort to the people who actually framed the language.[42] There are also a great many judges who yet maintain that Framers' intent is the most directly relevant evidence of the Constitution's meaning.[43]

Ratifiers' Understanding, or Ratifiers' Intentionalism, represents the next stage of Originalism evolution, developed in large part as a response to scholarship criticizing Framers' Intentionalism as being too narrowly focused on the fifty-five delegates in Philadelphia.[44] This theory is based on the assumption that constitutionalism is different from ordinary legislating and that those who participated in the accepted process by which the Constitution became a legal instrument—those at the state ratifying conventions and the people they represented—

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40. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 719–21 (2011).

41. Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353 (1988) (arguing that the "essence of communication" is for "the writer to explain what his words mean," and that the writer's interpretation stands up even against the reader's). At times, however, Berger's adherence to Intentionalism did appear to waiver. *See* Berger, *supra* note 11, at 640–41 (1997) (arguing that although the drafters' intentions and understandings are usually dispositive, they are so only when in accord with those of the Ratifiers).

42. *See, e.g.*, Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 361 (Andrei Marmor ed., 1995) ("Take away the author's intentions, and you fail to have a text."); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?": Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 977 (2004) ("'Texts' without authors and intended meaning are not texts; and texts *with* intended meanings are texts *only with respect to the intended meanings*.").

43. We analyze some recent Supreme Court cases in detail in Part II, *infra*. For a few recent examples from lower courts, see *In re* Hood, 319 F.3d 756, 761–62, 767 (6th Cir. 2003) (attempting to determine whether Congress could abrogate state sovereign immunity through its Bankruptcy Clause powers by determining "the plan of the Convention" through "evidence of the Framers' intentions"); Skaggs v. Carle, 110 F.3d 831, 837 (D.C. Cir. 1997) (Edwards, C.J., dissenting) (arguing that certain House Rules imposing supermajority requirements violated the requirement in U.S. CONST. art. I, § 7, as understood from the "intent of the Framers of the Constitution," that all bills *pass* the House of Representatives).

44. *See generally* Interpreting the Constitution: The Debate over Original Intent (Jack N. Rakove ed., 1990); Jack N. Rakove, Original Meanings (1996).

are more legally relevant to the Constitution's interpretation.[45] This school thus believes that the meanings attributed to the Constitution by the members of the state ratification conventions (and, concordantly, state legislators for amendments) are those that matter.[46] Scholars such as Charles Lofgren and Robert Natelson are prominent proponents of Ratifiers' Intentionalism, also claiming that it has the strongest historical pedigree as among non-Originalist theories and other forms of Originalism.[47] Further, a great many judges also use Ratifiers' intent, alone or together with Framers' Intentionalism, in interpretation.[48] Justice Stevens, while generally regarded as an Originalism skeptic, made at least some use of both Framers' and Ratifiers' Intentionalism in his *Heller* dissent,[49] just as he did in his opinion in *Citizens' United v. Federal Election Commission*, where he concurred in part and dissented in part.[50]

b. Original Public Meaning

Intentionalism, whether that of the Framers, Ratifiers, or both, was widely criticized as too difficult a science: A successful interpreter must enter the minds of the fifty-five in Philadelphia or the many hundreds of state ratifiers involved in the Constitution's adoption.[51] As a circuit judge, Antonin Scalia heralded the

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45. *See* U.S. CONST. art. VII. (requiring ratification of the Constitution for its establishment).

46. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1317 (2006) (defining Originalism as "the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning."); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988) (discussing "ratifier intent"); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (same).

47. *See* Lofgren, *supra* note 46, at 511.

48. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.132 (1981) (listing cases in which judges claim to use "original intent"). Professor Monaghan explained the term "original intent" by saying that although "the intention of the ratifiers, not the Framers, is in principle decisive, 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." *Id.* at n.130.

49. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) (asserting that neither the Ratifiers nor the Framers of the Amendment evidenced intent to limit ability to regulate private use of firearms).

50. 130 S. Ct. 876, 948–52 (2010) (Stevens, J., concurring in part and dissenting in part) (citing the Framers' narrower conception of free speech and views about corporations as counter-evidence to the majority).

51. The classic treatment of this criticism comes from Paul Brest. *See* Brest, *supra* note 39, at 217; *see also* Jack N. Rakove, Comment, 47 MD. L. REV. 226, 229 (1987)

next stage of Originalism development with a speech-turned-book, *A Matter of Interpretation*.[52] There, he espoused what has come to be known as Original Public Understanding, Original Public Meaning Originalism, or, simply, the "new" Originalism. This theory has been more popular than Intentionalism and attracted prominent scholars from across the political spectrum, including Akhil Amar, Jack Balkin, Randy Barnett, Steven Calabresi, Lawrence Solum, and Keith Whittington.[53]

This theory, and its adherents, posits that the meaning of the words—and the words alone—in the Constitution, as measured from the perspective of the reasonable person at the time of enactment, should control interpretation.[54] In rejecting Intentionalism, Original Public Meaning adherents maintain that the actual intentions of the Framers and Ratifiers are not only nearly impossible to discern, but also were not enacted in the text of the Constitution.[55] The only thing that "the People"[56] adopted was the text, necessitating, where the text is vague or ambigu-

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("Intentions and understandings are states of mind, and 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."); Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1595 (1997) (noting that "the task of disaggregating a collective intention to ratify the Constitution into original understandings of particular clauses is one of the thorniest problems that serious Originalism faces").

52. Scalia, *supra* note 33.

53. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xii–xiii (1998); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty xiii–xiv (2004); Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 27–28 (2000); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 15 (2008); *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 292–93 (2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 620–21 (1999); Lawrence B. Solum, *Semantic Originalism* 2 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

54. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.").

55. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 554 (1994); Kesavan & Paulsen, *supra* note 39, at 1135 ("[W]ith the benefit of more than twenty years of academic and judicial debate over both constitutional and statutory interpretation theory, some of the criticisms of intentionalism seem fairly obvious. For example: How does one determine a collective intent? Isn't any such construct inherently artificial?").

56. U.S. CONST. pmbl.

ous, a careful semantical analysis of the objective use of the adopted words within contexts contemporary with the text's enactment.[57]

Although it will not play a role in our analysis of the Court's practice, there is another important division within the Public Meaning school that bears mentioning. The division centers on the connotation imputed to "meaning" and includes two main variants, "Semantic Originalism" and "Original Expected Application Originalism." Semantic Originalism adherents focus on the objective linguistic meaning of the words in the Constitution, as they would have been understood by a reasonable observer of the Founding period.[58] The term "Semantic Originalism" originated with Ronald Dworkin.[59]

Others believe that Original Public Meaning should be broader, and ought to include, in addition to a contemporary linguistic study, the "Original Expected Application" of the text, which asks how people living at the time the text was adopted would have expected it to be applied.[60] For instance, Expectations Originalists would find it relevant to the meaning of "equal protection"[61] that the Fourteenth Amendment Congress also enacted numerous "affirmative action" measures for the benefit of African Americans specifically, and would argue that the term "equal protection" was expected to reflect a color-conscious, rather than color-blind, concept of "equality." Semantic Originalists, on the other hand, would reject such expected applications, instead restricting their interpretation to the question of how the

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57. *See* Kesavan & Paulsen, *supra* note 39, at 1144–45 (2003) ("[The original meaning/understanding approach] asks not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they 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."); *see also* Scalia, *supra* note 33, at 38 (1997) ("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.").

58. *See* Balkin, *supra* note 53, at 292; Barnett, *Originalism for Nonoriginalists*, *supra* note 55, at 622; Solum, *supra* note 53, at 2, 64–65, 172; *see also* Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669 (2009) ("What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law."). For a discussion of constitutional implicature, see Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 621–22 (2009).

59. *See* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 33, at 119.

60. *See* Balkin, *supra* note 53, at 291, 296.

61. U.S. CONST. amend. XIV, § 1.

phrase "equal protection" itself would have been understood during the Reconstruction Era. Because Expectations Originalism focuses more heavily on the meaning imputed to a text by its creators, this strand is vulnerable to criticism that it is more truly Intentionalism than Public Meaning.

Another recent and important variant of Originalism, Original Methods Originalism, focuses less on how those of the Framing era would have understood the words in the Constitution, and more on *the rules* that those of the Framing era would have used to interpret a legal text like the Constitution. Original Methods Originalism, as advocated by John McGinnis and Michael Rappaport, suggests that we can best understand the original meaning of the Constitution by considering how those of the Framing era would have approached the very idea of constitutional interpretation. To them, determining the original meaning of the Constitution "requires that the Constitution be interpreted in accordance with the original interpretative rules" of the Framing era.[62]

There is a great deal of inherent tension between the different variants of Originalism as it has evolved since the 1980s. Public Meaning theories have especially proliferated with accelerating frequency in recent years. Each new iteration attempts to create a new enclave of interpretative methodology, blurring the distinctions between Semantic and Expectations variants and even the distinctions between Intentionalism and Public Meaning.

As the field has not yet settled on one set of categories of Originalism, and to simplify what could otherwise be an unmanageable inquiry, this Article will focus on the traditional categories of Intentionalism and Public Meaning. We leave to future authors to analyze our data set against distinctions between variants.

B. The Non-Originalists

On the other side of this historical debate is a more loosely connected group of theorists who, for various reasons, reject the absolute authority of historical evidence in constitutional

62. 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, 752 (2009).

interpretation.[63] For convenience, we will call these scholars the "Non-Originalists."

For most Non-Originalists, history remains an important, but non-determinative, tool in constitutional interpretation. Unlike Originalists, Non-Originalists view history and historical interpretation as one of many devices within a larger suite of potentially relevant sources of constitutional meaning, including precedent, structure, tradition, and practical consequences.[64]

Important distinctions divide the Non-Originalist camp as well. Some Non-Originalists are merely skeptical of arguments that rely on historical evidence, and thus refuse to give our forbearers' meaning authoritative treatment because of their lack of faith.[65] Others would rather emphasize certain other sources or themes in constitutional interpretation over history, such as adhering to precedent,[66] facilitating democratic participation,[67] or attempting judicial "minimalism."[68] Some specifically adopt

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63. There are various ways of describing the alternatives to Originalism. We find common cause here with those who use the term broadly, to refer here to anyone who does not accept historical evidence as authoritative of constitutional meaning. *See* Farber, *supra* note 22, at 1086.

64. STEVEN BREYER, ACTIVE LIBERTY 8 (2005); *see also* Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 569–70 (1985).

65. *See, e.g.*, Berman, *supra* note 22, at 24 ("Non-originalism is simply the denial of strong originalism [meaning using historical sources in a dispositive way]; it is *not* the denial of all forms of originalism.") (emphasis added); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1632 (2006) (expressing skepticism about Originalism because of its tendency to provide results consistent with the judge's own preferences).

66. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 6 (2009) (arguing that judicial discretion is effectively restrained by adherence to precedent, process constraints, and internalized norms); DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010).

67. Justice Breyer argues for a "theme" that suggests the Constitution should be interpreted in the light that best fosters democratic participation. *See generally* BREYER, *supra* note 64, at 5 ("My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret Constitutional and statutory texts."). A similar theory was advanced by John Hart Ely in his seminal work. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 87 (1980) (arguing for a "participation-oriented, representation-reinforcing approach to judicial review" that reflects the fact that, in the Constitution, "the selection and accommodation of substantive values is left almost exclusively to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large.").

68. Cass Sunstein is an advocate of "minimalism," a mode of decisionmaking that avoids taking stands on socially divisive constitutional issues and instead

Originalists' desire to cabin the discretion of judges by developing their own means of bounding constitutional inquiry, using factors other than history.[69] Still others, known as "Living Constitutionalists," such as Bruce Ackerman, argue that the historical meaning at the time of creation can—indeed, for some, *must*—be disregarded in favor of other historical sources. Living Constitutionalists maintain this position because, as they argue, the meaning of the Constitution changes over time, through what Ackerman calls "constitutional transformations," resulting from major supermajoritarian political shifts like the Civil Rights Movement rather than by amendment under Article VII.[70] Finally, scholars like Ronald Dworkin, in his "moral reading" of the Constitution, argue that instead of trying to find theories that cabin judges' discretion, we must instead embrace that discretion, because judges have a responsibility to enforce and give meaning to the abstract moral principles in the Constitution to ensure that basic justice is done.[71]

No consensus has emerged among Non-Originalists on a viable alternative to the authority of history. Non-Originalists generally remain susceptible to the criticisms that the Originalists first advanced in the 1980s. Originalists still feel that alternatives do not provide sufficient means to constrain judicial discretion, or feel other forms of interpretation are simply illegitimate.[72]

A much more refined study of Originalism could certainly be undertaken that would reveal an even wider variety of thought on particulars than we have outlined. However, to make our task of contrasting modern theories of interpretation with the Supreme Court's historical practice manageable and meaning-

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narrowly decide cases. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA xii–xiii (2005).

69. David Strauss, for example, argues that the norms of common law decision-making can be enough to prevent judges from injecting their own policy preferences into constitutional decision-making. *See* STRAUSS, *supra* note 66, at 3.

70. For instance, in his Storrs Lectures, Bruce Ackerman outlined a theory positing that the Constitution has been amended by certain "constitutional moments"—the Founding, Reconstruction, and the New Deal. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

71. Dworkin has collected a series of his essays on this point in his seminal work. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996). David Strauss provides an insightful article about how Dworkin's theory finds support in a diverse set of scholars and judges, including Henry Hart, Alexander Bickel, Justice Felix Frankfurter, and even Herbert Wechsler. *See* David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 376–78 (1997) (reviewing DWORKIN, *supra*).

72. *See* Berman, *supra* note 22, at 6.

ful, we have simplified all methods of constitutional interpretation to three main strains: Intentionalism, which includes both Framers' and Ratifiers' Intent; Public Meaning, which includes Semantic, Expectations, and all recent Public Meaning variants; and Living Constitutionalism, the only Non-Originalist theory for which data could be easily quantified.

II. ORIGINALISM AND NON-ORIGINALISM IN PRACTICE

Now we turn to our comparison of the Supreme Court's use of historical sources with contemporary modes of constitutional interpretation. It was important to approach the Court's historical use of interpretive methodologies with a great deal of skepticism. Although it is certainly possible to trace the roots of historical interpretation back through the history of the Court, the imposition of today's developments in Originalist methodologies on the past carries the serious risk of ahistoricism and anachronism. The study of modern Originalism has some similarities to Justice Black's Intentionalist-like theory of total incorporation of the Bill of Rights in the 1950s,[73] but it has developed in present form, as was shown in the last Part, only over the past thirty years. Moreover, it is very difficult to pin down language for any Non-Originalist theory other than Living Constitutionalism: The concept can easily be cloaked in statements suggesting structural, purposive, or other modes of interpretation, or merely expressing skepticism of particular historical analysis.

Nevertheless, it is still possible to evaluate the ninety-six cases of constitutional first impression in terms that the Supreme Court has used to describe its own methods.[74] We sought to compare the methodologies of the historical Court with three of today's most-discussed and generalized theoretical interpretive categories: Intentionalism, Public Meaning, and Living

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73. *See* note 23, *supra*, discussing Black's jurisprudence. Jefferson Powell traces the nascent ideological roots of modern Originalism as far back as the Republican consensus initiated by Thomas Jefferson and James Madison in the Virginia and Kentucky Resolutions, Powell, *supra* note 9, at 927, while Randy Barnett would trace the origins of Intentionalism, and Original Public Meaning to a response to an Intentionalist reading of the Constitution that supported slavery, back to the slavery cases of *Prigg v. Pennsylvania* 41 U.S. (16 Pet.) 539, 661–62 (1842) and *Dred Scott v. Sandford*, 60 U.S. (9 How.) 393, 407–12 (1857). E-mail from Randy Barnett, Professor of Legal Theory, Georgetown Univ. Law Ctr., to author (Nov. 10, 2011, 2:46 p.m. EST) (on file with author).

74. "Language Study of Stated Judicial Interpretive Philosophy," app. 18, *available at* http://www.harvard-jlpp.com/references/.

Constitutionalism. As part of our quantitative composition of Court-tracking data, we collected the Court's own assessment of its methodology—how each Court claimed it was interpreting the Constitution. These we portioned off into language that is today associated with the three methodologies and is available for review by the reader in Appendix 18.

In doing so, and as the reader may detect, we looked for words and phrases that would imply the writer found the intent of the Constitution or its creators—whether Framers in Philadelphia, delegates to state ratification conventions, or the document's amenders—as authoritative in his interpretation of the Constitution.[75] These we classified loosely as "Intentionalist."[76]

Original Public Meaning proved more difficult. Portions of opinions that discussed the original or historical meaning of words or phrases, especially where dictionaries were used, or the general public's understanding of the language was referenced, we classified as Original Public Meaning. We also found a more comprehensive approach was necessary, given that it was often difficult to spot discrete language that would indicate such a specific interpretive approach.[77] For that reason, we also included the Court's use of the phrases "public," "mean-

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75. This included words such as "Framers" coupled with "intention," "object," "purpose," "meant," "considered," or some similar derivative. These words are often associated with separate canons of construction, and while we were aware of these distinctions, we simplified them for our purposes without compromising the meaningfulness of the data.

76. For instance, Justice Samuel Chase wrote in his 1796 Hylton v. United States opinion that the "great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government," and "[i]f the framers of the Constitution did not contemplate *other* taxes than *direct* taxes, and *duties*, *imposts*, and *excises*, there is great inaccuracy in their language." 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.). We classified these comments as Intentionalist, along with Justice Paterson's unmistakable language that "It was . . . obviously the intention of the framers of the Constitution . . . ." *Id.* at 176 (Paterson, J.). We also rejected distinguishing, as discussed *supra*, in the text leading up to notes 60 and 61, between Semantic and Expectations Intentionalism, as the latter category may be conflated with Intentionalism.

77. For example, we included in this category Justice Samuel Chase's 1798 Calder v. Bull language that, "The expressions '*ex post facto laws*,' are *technical*, they had been in use long before the Revolution . . . by *Legislators*, *Lawyers*, and *Authors*." 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.). We have also included Chief Justice John Marshall's 1824 Gibbons v. Ogden language, "The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning . . . ." 22 U.S. (9 Wheat.) 1, 193 (1824). Yet identifying Public Meaning language was not always as straightforward, and the reader may wish to consult Appendix 18 to consult the language we selected for this category, *available at* http://www.harvard-jlpp.com/references/.

ing," and "understand" when used to designate support for a particular constitutional argument.

Finally, we tracked language that expressed the desire to allow the Constitution to grow over time according to people's needs, and to be interpreted according to today's understanding. This approach was labeled "Living Constitutionalism." Similar to Public Meaning, this categorization required a more holistic approach. Accordingly, we included in this category Chief Justice John Marshall's 1821 *Cohens v. Virginia* language that "a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it," which gives only debatable support to Living Constitutionalism.[78]

We admit as a facial matter that our method of encoding was not without its defects, as is inherent in any method requiring such broad categorization. Were this analysis repeated, it might yield different results, although none that would fall substantially outside a generalized margin of error.[79]

Our analysis produced interesting and often surprising results. Although the universe of ninety-six cases was small enough to yield low data levels for various categories, it was possible to identify overall trends for subsets of data and over certain periods of time. Interestingly, these trends roughly correlated to the first and second centuries of the Court's history, with the Waite Court, 1874–88, as a rough turning point in the kind, number, and uses of historical sources.[80] Our analysis of the language that the Justices used in commenting on their use of and reliance on historical sources allowed us to make a provocative comparative study to today's classifications of interpretive methodologies. We were also able to identify, with clarity, which sources were used most often, and which sources, often surprisingly, were less popular.

The results of our study show that the Court's methodological practice tells a different, far more complex story than has previously been painted. Upon close examination of the

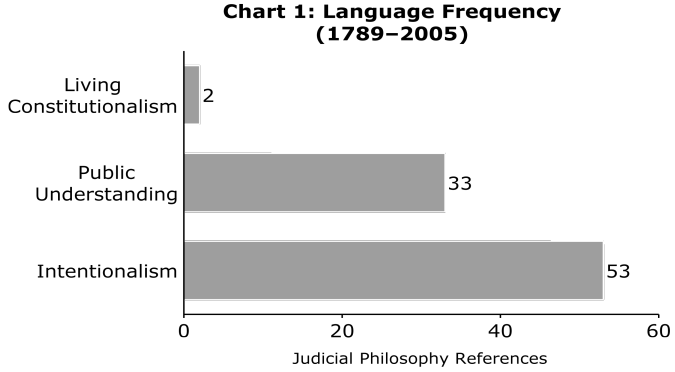
78. 19 U.S. (6 Wheat.) 264, 387 (1821).

79. To enable replication and lay bare any and all questions of judgment as to our holistic encoding for any of the three categories, we have included the language study in Appendix 18, *available at* http://www.harvard-jlpp.com/references/.

80. "Stated Judicial Interpretive Philosophy," app. 17. It is difficult to identify with precision the cause for this dividing line, but it coincides with the rise of U.S. history as a serious profession, rather than just a gentleman's profession. *See generally* JOHN HIGHAM, HISTORY: PROFESSIONAL SCHOLARSHIP IN AMERICA 150–70 (1965).

Court's use of historical sources, the gulf between constitutional theory and practice, both as compared to today's categories and as compared to yesteryear's more loosely defined interpretive theories, seems particularly deep and wide.

The results of our language study, pictured in Chart 1, below, show that the Court appeared to perceive itself as overwhelmingly Intentionalist throughout time—especially during the Marshall Court.[81] Of the eighty-eight statements made by the Court regarding its interpretative method, fifty-three, or 60%, contained Intentionalist-sounding language. Living Constitutionalism, at least based on clear-statement objectives, was the apparent loser, explicitly utilized only twice.[82] The Supreme Court appeared, by and large, to have used language that, if the Court's practice conformed to stated theory, would land it in an ideological camp that could be best described as unabashedly Intentionalist.



The language the Court often used is telling. For example, in *Cohens*, the Court said, "[t]he framers of the constitution would naturally examine,"[83] and in *Prigg v. Pennsylvania*, Justice John McClean noted, "It would show an inexperience and folly in

81. "Language Study of Stated Judicial Interpretive Philosophy,"app. 18, *available at* http://www.harvard-jlpp.com/references/.

82. Both of these cases come from the Marshall Court. *See* McCullough v. Maryland, 17 U.S. 316, 415 (1819) ("This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."); *Cohens*, 19 U.S. at 387 ("But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.").

83. *Cohens*, 19 U.S. at 416.

the venerable framers of the Constitution, from which, of all public bodies that ever assembled, they were, perhaps, most exempt."[84] The Court used such language time and again, providing at least the impression that it placed the weight of authority on what the Framers intended the Constitution to mean—that is, they were claiming to practice what today we would call Intentionalism.

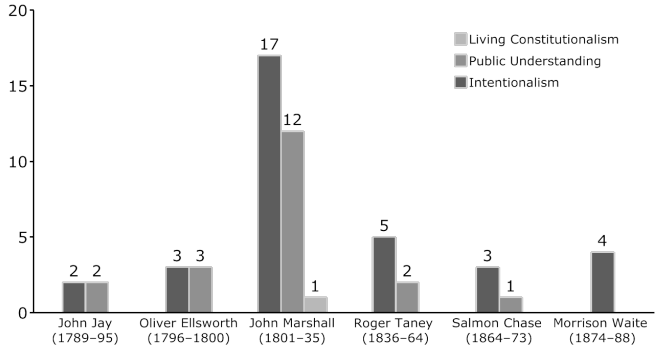
A closer look, however, reveals that the Justices may have been doing something other than actually relying on the intention of the Constitution's creators. In comparing the Court's stated theory with the ways in which it used historical sources, it became evident that the Court did not always conform to its stated Intentionalist-sounding rhetoric. Exactly what the Court was doing instead, and why, changed dramatically over the Court's history. The close of the Waite Court in 1888 acts as a dividing line between two eras that we will call the Court's first and second centuries. We discuss what happened in each era and the reasons we have delineated them as such below.

A. The Court's Non-Intentionalism: The First Hundred Years

Although something akin to Intentionalism seemed to be the Court's first choice of interpretive methodology during the first hundred years (see Chart 2, below), Intentionalist language was often coupled (or even tripled) with language that more closely parallels Public Meaning or Living Constitutionalism. This fluidity makes a definitive categorization of the Court's presumed methodology extremely difficult.

84. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 661 (1842) (McClean, J., concurring).

Chart 2: Language Use (1789–1888)



In some opinions, the Justices evoked language from multiple methodological perspectives. Opinions that in one breath would seem to advocate an Intentionalist-like approach would, in the next, advocate something like Original Public Meaning. Justice Samuel Chase, signer of the Declaration of Independence and member of the first Supreme Court, used language that supported both Intentionalist *and* Public Meaning-like interpretive approaches. For instance, the phrase "if the Framers of the Constitution did not contemplate *other* taxes than *direct* taxes, and *duties*, *imposts*, and *excises*, there is great inaccuracy in their language"[85] appears to be classifiable as both Intentionalist language (referring to what the Framers contemplated) and apparent Public Meaning language (discussing linguistic meaning and context). In like manner, one passage from *Calder v. Bull* seems to relate to Public Understanding—"The expressions '*ex post facto laws*,' are *technical*, they had been in use long before the Revolution . . . by *Legislators*, *Lawyers*, and *Authors*"—while another passage seems to relate to Intentionalism—"The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property."[86] Such crossover in apparent approaches—placing weight on *both* the intentions of the Framers *and* the understanding of the age—was typical and prevalent.[87]

85. Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.).

86. 3 U.S. (3 Dall.) 386, at 391, 394 (1798) (Chase, J.).

87. "Language Study of Stated Judicial Interpretive Philosophy," app. 18, *available at* http://www.harvard-jlpp.com/references/.

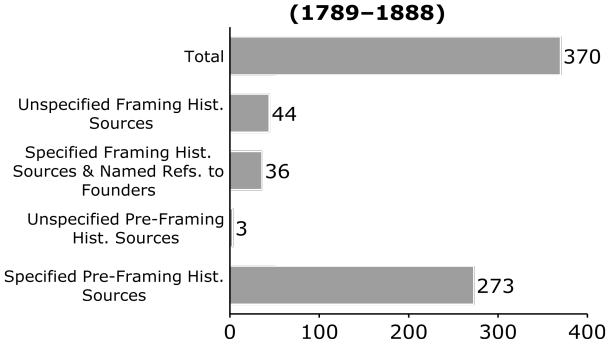
Often, a Justice would advocate various methodologies across different opinions, making it impossible to develop a coherent picture of a single Justice's analytical approach. Consider Chief Justice John Marshall's language from *Gibbons v. Ogden*: "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[88] Here Marshall refers to both the Framers and the public (although using the word "public" obscures whether he is referring to the people proper, those who participated in the ratifying conventions, or whether he is referring to the ratifying convention delegates as representative of the people). He also refers to understanding "words in their natural sense," clear Public Meaning language, and uses the word "intended," quintessential Intentionalist language. Further undermining any concrete obedience to whatever method he would later use in *Gibbons*, Marshall advocates in *Cohens* what some suggest to be a Living Constitutionalist approach: "[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."[89] In light of Marshall's dalliance with all three approaches and Samuel Chase's experimentation with two, it is apparent that earlier Courts took a more fluid approach to constitutional interpretation than advocates of today's Originalism. The nonexclusivity of the Justices in identifying a preferred methodology suggests either that relying on the individualized intent of the Framers they referenced was not very important to them or that "intention" connoted an entirely different meaning than the one contemplated today.

Another clue that the Court was *not* relying as heavily on the intentions of the Framers as it claimed is that it referenced primary historical sources from the Framing period—defined as the beginning of the Constitutional Convention, May 25, 1787, through the ratification of the Bill of Rights, December 15, 1791—quite infrequently during its first century. As illustrated in Chart 3, although there were 370 references to historical sources in cases of constitutional first impression during the Court's first century, only thirty-six of them were to the specific sources most often associated with Intentionalism, including

88. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).
89. 19 U.S. (6 Wheat.) at 387.

Constitutional Convention records, state ratifying conventions, individual Framers, and the *Federalist Papers*.[90]

Chart 3: Pre-Enactment Historical Sources (1789–1888)



Of these Framing sources, the Court referenced the records of the Constitutional Convention (when references to Framers, discussed above, are excluded) the most during its first century, but still in comparatively small numbers. To demonstrate, the Court's sixteen references to the Constitutional Convention records in the one hundred years between 1789 and 1888 paled in comparison to the eighteen references by the Warren Court (1953-69), during the Court's second century.[91] This number is particularly small in light of the fact that the Court decided many more cases of constitutional first impression during its first century (fifty-six) than during Warren Court (six). The next most-referenced Framing source during the Court's first one hundred years was the *Federalist Papers*, which was referenced twelve times, with eight of those coming from the Marshall Court.[92] Other categories of Framing sources demonstrate even more paltry showings: six from the state ratification debates, and no Founders other than Madison (twice), Washington (twice), and Jefferson (thrice) received any more than a single citation.[93] In sum, the low number of references to Framing sources during the Court's first century (illustrated in Chart 4, below) undermines its claim that it relied on Framing intent, at least as intent is understood today.

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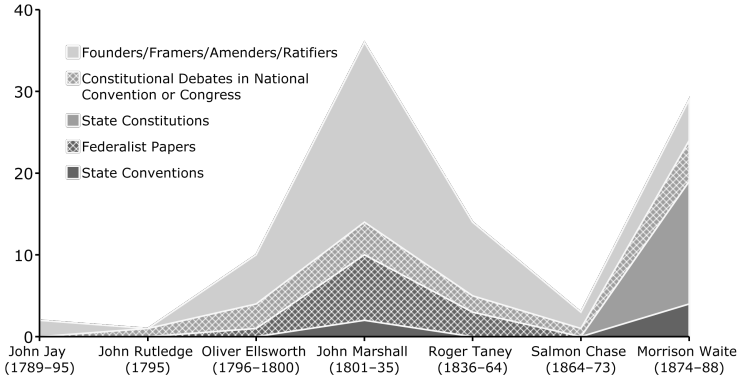
90. "Subtotals, Specific Pre-Enactment Sources Total," app. 11.
91. "Constitutional Debates in National Convention or Congress," app. 7.
92. "Federalist Papers," app. 10.
93. "State Conventions," app. 8; "Founders/Framers/Amenders/Ratifiers," app. 9.

Chart 4: Framing Sources (1789–1888)



The infrequent references before 1888 to primary sources from the Framing era may not be explained satisfactorily by reference to the relative dearth of printed, circulating primary sources in the early days of the American Republic. The *Federalist Papers* were first printed in 1788;[94] at least some documents from the Constitutional Convention (particularly the Virginia and New Jersey Plans) were printed and widely circulating in some form as early as 1819; and Madison's Convention notes were published by Congress in 1840.[95] Further, state ratification debate reports were available almost from their inception in newspapers, which were quickly published in a compilation by Jonathan Elliot (albeit, as it turns out, not a very reliable one) in four volumes between 1827 and 1830.[96]

In terms of access to these printed volumes, the Supreme Court had access to the best libraries in the country from the hearing of its first case in 1792. From 1791–1800, Philadelphia acted as the national capital. The Supreme Court, housed in City Hall on the corner of 5th and Chestnut, sat across the street from the Library Company of Philadelphia, which had

94. The first volume containing the initial thirty-six essays was published in March of 1788; the second volume followed almost immediately upon publication of the last essay in New York newspapers in May 1788. Charles R. Kesler, *Introduction* to THE FEDERALIST PAPERS vii, xiii (Clinton Rossiter, ed., 1999).

95. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986).

96. *Id.* at 13.

become "the public library of the University and City."[97] The Library Company was also the *de facto* "Library of Congress" from 1774, when it was housed upstairs from the Continental Congress in Carpenter's Hall, to 1800, when the Library of Congress was officially authorized.[98] With roughly 5,500 volumes in 1789 and the addition of 3,953 volumes from the Loganian library in 1792,[99] the Library Company was, as earlier described by Benjamin Franklin, "the mother of all North American [public] libraries."[100] It contained "virtually every significant work on political theory, history, law, and statecraft (and much else besides)."[101] Upon relocating the new capital to Washington, DC, in 1800, one of Congress's first acts was to establish the Library of Congress.[102] The Library and the Supreme Court were both housed within the Capitol until 1897, when the Jefferson Building of the Library of Congress first opened its doors.[103] From 1861 to 1897, the law library for both the Supreme Court and Congress was housed in the Court's old chambers in the basement of the Capitol.[104] Primary sources were therefore available to the Court from a very early date, allowing the first Courts ample opportunity to conform practice to stated theory.[105] Moreover, the Court, particularly the Marshall Court, demonstrated that it could use primary sources from the Framing when it chose to do so, thereby proving that it had access to these sources.[106] Finally, although the

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97. EDWIN WOLF, AT THE INSTANCE OF BENJAMIN FRANKLIN: A BRIEF HISTORY OF THE LIBRARY COMPANY OF PHILADELPHIA, 1731–1976, at 14 (2d ed., 1976) (quoting the Reverend Manasseh Cutler) (internal quotation marks omitted).

98. *Id.* at 13.

99. 2 LIBRARY COMPANY OF PHILADELPHIA, A CATALOGUE OF BOOKS pt. 1, at 6 (Philadelphia, Thomas T. Stiles 1813).

100. BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 95 (Cambridge, The Riverside Press 1888) (1791).

101. WOLF, *supra* note 97, at 22.

102. *History*, LIBRARY OF CONGRESS, http://www.loc.gov/about/history.html (last visited Nov. 21, 2012).

103. *Id.*

104. *Home of the Court*, THE SUPREME COURT HISTORICAL SOCIETY, http://www.supremecourthistory.org/history-of-the-court/home-of-the-court/ (last visited Nov. 21, 2012).

105. The Library of Congress was created in 1800, burned by the British in the sacking of the Capitol in 1814, and reinstituted with the donation and acceptance of Jefferson's library including "everything which related to America." *History*, LIBRARY OF CONGRESS, *supra* note 102.

106. *See generally* Appendices 7–12 for a review of the Marshall Court's use of specified and unspecified sources.

Federalist Papers did not have a great initial impact on ratification debates in New York or the country generally, the *Federalist Papers* were so quickly published and widely available that they soon assumed the influence they were presumed to have from the beginning.[107] In sum, the infrequent reference to Framing sources during the Court's first hundred years cannot be explained by a lack of published resources, as most Framing-era sources were available in some format fairly early on. The lack of reference to Framing sources by the early Court directly contradicts its claim that it looked to the intentions of the Framers for guidance, and a tenable explanation for the Court's claim must be found elsewhere.

Not only were Framing sources infrequently used, the references made to them were often without specific citations, illustrated generally in Chart 5, below. In cases of constitutional first impression, the Court cited to the specific sources from the Framing a mere twenty-one times in the first hundred years of its existence.[108] References to "Framers" litter the Court's first century of opinions, especially those of the Marshall Court.[109] Yet references to individual Framers were made on only four occasions—specifically, to Madison twice and Washington twice.[110] Even then, Madison and Washington were not cited in their "Framing" capacities as members of the Constitutional Convention or (for Madison) of the Virginia State Ratification Convention, but in their capacities as private citizens.[111]

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107. *See* Kesler, *supra* note 94, at ix.

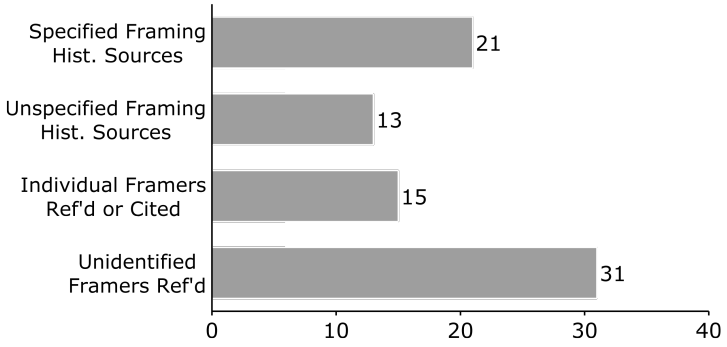
108. "Subtotals, Specific Framing Hist. Sources," app. 11.

109. The Marshall Court made reference to unspecified Framers fifty-two percent of the time, or thirteen out of twenty-five cases of constitutional first impression heard during Marshall's tenure. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833); Craig v. Missouri, 29 U.S. (4 Pet.) 410, 442 (1830) (Johnson, J., dissenting); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 434 (1830); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 438, 440 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 101, 184 (1824); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 757, 764, 819, 851–52, 873, 886 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 316, 379–80, 383, 387, 390, 416, 423 (1821); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 7, 21 (1820); United States v. Smith, 18 U.S. (5 Wheat.) 153, 171 (1820) (Livingston, J., dissenting); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324, 355, 362, 373, 385, 407–08, 420 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 332, 374 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130, 137 (1810); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 349 (1809); s*ee also* Founders/Framers/Amenders/Ratifiers," app. 9.

110. "Founders/Framers/Amenders/Ratifiers," app. 9.

111. *Id.*

Chart 5: Unspecified v. Specified Framing Sources (1789–1888)



All other specific references to individuals were to persons who did not participate in the creation of the Constitution: Thomas Jefferson, John Adams, John Jay, and others.[112] Rather than citing to the Framers it seemed most eager to rely upon, the Court cited eighteen times those who played a less conspicuous role in the founding of the country by signing the Declaration of Independence, preaching political sermons, fighting in the Revolutionary War, and setting up state institutions.

This inconsistency is not simply a matter of the changing meaning of the term "Framer." Indeed, Noah Webster's 1828 definition of "Frame" seems to comport with modern-day definitions of "Framers" as limited to those who helped to create or ratify the text of the Constitution: "Form; scheme; structure; constitution; system, as a *frame* of government."[113] It would seem that instead of relying on the intentions of the "Framers," the early Court in reality relied on the broader category—that of the country's "Founders."

Moreover, the remaining references to "Framers" are not linked to any specific individual;[114] nor are dozens of other references to the Framing period during the Court's first hundred

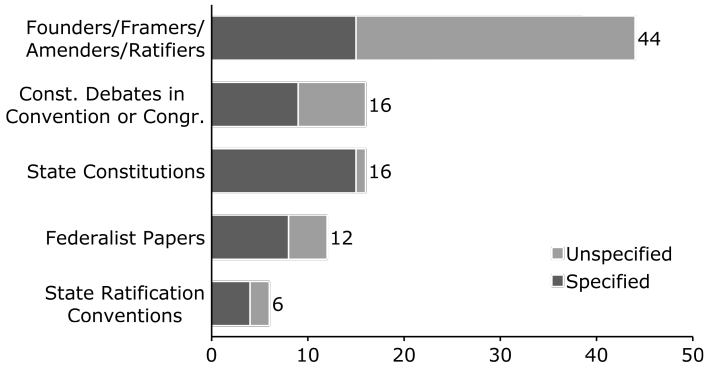
112. *Id.*

113. 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (giving eighth definition of "frame") (not paginated); *see also Frame Definition* MERRIAM WEBSTER'S LEARNER'S ONLINE DICTIONARY, http://www.learnersdictionary.com/search/frame (last visited Oct. 17, 2012) ("[T]he *framers* of the U.S. Constitution [=the people who wrote the Constitution]"); Black's Law Dictionary defines "frame" as, "To plan, shape, or construct; esp., to draft or otherwise draw up (a document)." BLACK'S LAW DICTIONARY 728 (9th ed. 2009) (giving definition of "frame").

114. "Founders/Framers/Amenders/Ratifiers," app. 9.

years. For instance, as demonstrated in Chart 6 below, the Court claimed to be citing the ratification conventions six times, but twice did not bother to cite specific state conventions, let alone individual Ratifiers. The remaining four citations all stem from a single decision by the Waite Court, *Reynolds v. United States*.[115] Furthermore, of the sixteen references to Constitutional Convention records between 1789–1888, almost half were without specific citation. All told, the infrequent specific references to the Framing would seem, under a modern lens, to undercut the Court's claimed loyalty to the intentions of the Framers. Of those eighty references to Framing sources in our data set during the Court's first century, only thirty-six were specific citations of actual primary sources from the Framing, including Constitutional Convention records, state ratifying conventions, statements by individual Framers, and the *Federalist Papers*.[116] The remaining forty-four references were merely that—broad references to the "Framers" without supportive citations. Such scant reference to Framing sources does not an "Intentionalist" Court make.

Chart 6: Specified v. Unspecified Framing Sources (1789–1888)



It is unclear why the Court so often made unspecified references to unmentioned Framing sources. One explanation is that the Justices *did* research the sources available to them, but chose not to cite them. This seems strained, however, because in the instance of *Marbury v. Madison*, Chief Justice Marshall makes a *tour de force* of primary and historical sources in the

115. *Reynolds v. United States*, 98 U.S. 145, 163–65 (1878).

116. "Subtotals, Framing Hist. Sources plus Individual Founder/Framer/Ratifier/Amender," app. 11. *See generally* apps. 7–11.

portion of the opinion where the Constitution is *not* interpreted,[117] demonstrating that early jurists on the Court certainly knew how to cite primary sources they had read when it suited them. Alternatively, it may have been simple laziness—the desire of the Court to appear authoritative without actually doing the work. Alternatively, it may have reflected the fact that the Court, especially in its earliest phases, relied on personal perception of what it believed to be the consensus of men who had immediately preceded them. Some on the Court, like Wilson and Ellsworth, *were* Framers themselves, participating in the Constitutional Convention or state ratification debates, and many others were well enough acquainted with the drafting and ratification of the Constitution to be imbued with a sense of its meaning through personal experience. Of course, a fourth, and more pernicious explanation also exists—that the agnomen "Framer" was used when a Justice wanted to disguise the fact that he was not relying on any authority at all. Whatever the reason, the use of general references to "Framers" with so few specific citations makes it nearly impossible to determine how the Justices were actually interpreting the Constitution, let alone align them with a particular kind of methodology like Intentionalism.[118]

Nor does this data support a "Public Meaning" methodology. An adherent to the Public Meaning school of thought might argue that specific references were not necessary for the early Court because it shared a common sense of the English language with those of the Founding era. Thus, the Justices would not need to consult external sources to determine that meaning. Public Meaning adherents claim interpretation—and, by extension, interpretive sources—are not required unless meanings change, such as in the case of "domestic violence" or "cruel and unusual punishment." In contrast, "two Senators" will always mean "two Senators" and thus interpretation is not always necessary. However, changed meaning is not the only scenario requiring interpretation. The examples cited, "domestic violence" and "two Senators," provide two extremes on a certainty spectrum of words and phrases in the Constitution—one with a clear, changed meaning, and another with an absolute, fixed meaning. In fact, the Constitution's text provides a range of linguistic meanings, the clarity of which resemble something

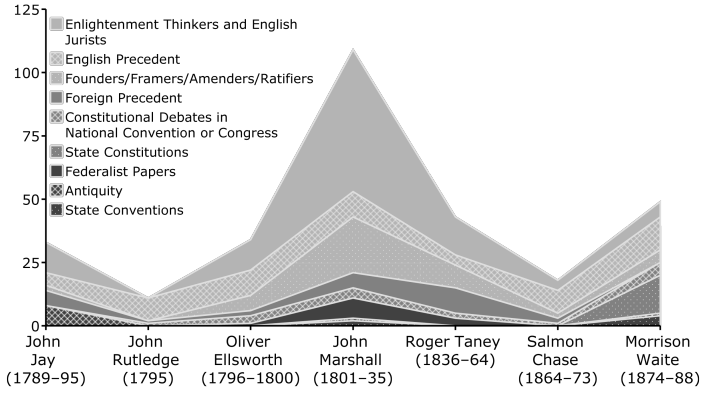
117. 5 U.S. (1 Cranch) 137, 163–65 (1803).

118. "Stated Judicial Interpretive Philosophy," app. 17.

akin to a bell curve, with the majority of phrases falling into the vague middle. Such vague terms include words and phrases such as "due process," "speech," "religion," and "necessary and proper." These words and phrases often require interpretation, but not because their meanings have changed over time or because their meanings have been lost. Rather, the terms themselves are vague or ambiguous as applied, and their ambiguity is one of the reasons the terms require litigation rising to the level of the Supreme Court.

Another trend in the early Court's jurisprudence tends to undermine the legitimacy of any assertion that it had Intentionalist (much less Public Meaning) tendencies. Although the Court often claimed to be placing authoritative weight on the Framers during its first century, it actually pulled from a wide body of sources that bore only a tenuous relationship to the Framing period, much less the Framers themselves. For instance, the Court in *Chisholm* utilized sources dating back to antiquity, including Cicero, Isocrates, and Homer.[119] References to Enlightenment sources, English jurists, the Magna Carta, and colonial precedents and thinkers also dot the charts for the first hundred years as illustrated below, accounting for 276 of 370 historical sources relied upon in first time constitutional interpretation pre-1888.[120]

Chart 7: Sources by Category (1789–1888)



119. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455, 459, 463 (1793); s*ee also* "Antiquity," app. 1.

120. "Antiquity," app. 1.

In other words, non-Framing sources accounted for seventy-five percent of the primary source authority for constitutional interpretation during the Court's first hundred years. Chief Justice John Marshall's approach in *United States v. Wilson* is typical for the era:

> As this [pardon] power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[121]

These sources are not inherently valid as evidence of the Framers' intent (or contemporary Public Meaning). Certainly, there are natural associations connecting them as elements of a classical and legal education common to the men at the Philadelphia Convention.[122] These associations, however, are not patently obvious, and no Justice from the Court's first century made an explicit attempt to demonstrate the logical means of connection to the Framers' actual intentions. Thus, while the pre-1888 Court may have claimed to rely on the intention of the Framers, that reliance cannot be said to be anything close to exclusive. Their use of sources from the hundreds and thousands of years predating the Framing demonstrates otherwise.

In fact, one of the things that most separates the Court's Intentionalist-sounding claims from today's Intentionalism is that its method was broadly incorporative, rather than restrictive. Constitutional methodologies are defined by what they *exclude*, not what they allow. For instance, both sides of the Court in *District of Columbia v. Heller*[123] rigidly applied different methodologies to individual sources to determine their relevance.[124] In contrast, the early Courts were far more cavalier in admitting historical evidence as relevant to the "Framers' intent." In all of the constitutional cases of first impression wherein the Court used Intentionalist-like language, the Court—with one possible

121. 32 U.S. (7 Pet.) 150, 160 (1833).

122. *See* Carl Richard, The Founders and the Classics 12–13 (1994).

123. 554 U.S. 570 (2008).

124. *Id.* at 582, 590, 603, 605, 614, 623–24, 632; *id.* at 662–66, 670 (Stevens, J., dissenting).

exception[125]—never excluded any historical evidence in interpreting the Constitution on the basis that it did not comport with its Intentionalist-like method.

If anything, this broadly incorporative method most strongly supports the view, advanced by some scholars, that the Court did not follow anything like the modern Intentionalist method during its first one hundred years.[126] Instead, it seems to suggest that the Court from its earliest days applied something far more akin to the common law construction and interpretation of statutes, which allowed the use of all historical antecedents in an undifferentiated mass to determine the objectively obtainable "intent" of the document.[127] This practice then was adopted by later generations of Justices during the Court's first century, who relied heavily on the early Court, especially the Marshall Court, as a guide to conducting constitutional inquiry.[128]

One scholar who forwarded the concept that early American jurists, lawyers, and scholars of the Founding and later early periods engaged in such common law constitutionalism, or interpreting the text's intent as "against the background of the common law," was Jefferson Powell.[129] Such common law context, according to Powell's reading of the Framing, was not necessarily considered extrinsic evidence, but rather part and parcel of legal notions embodied in the text. Powell posits that this common law interpretation is one of two streams that impacted interpretation of the Constitution.[130]

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125. The one possible exception here was found when Justice Iredell rejected an interpretation of the Supremacy Clause by Congress because "Congress were not exercising a judicial power." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 276 (1796). Iredell may have rejected this evidence because he felt the First Congress was irrelevant to questions of intention (having not been the creators of the Clause) in addition to not being in a constitutionally recognized position to interpret the Clause as he was, or because he did not want to examine intent at all.

126. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 907–08 (2008) ("For most of the nineteenth and early twentieth centuries, even as the problem of interpretation emerged, the main controversy concerned how much deference courts should give to legislatures. The debate was about *who* should interpret, not *how* to interpret. When it came to the question of how to interpret the Constitution, there was general agreement on a kind of conventional approach that mixed different arguments without much systemization—something very much like the mix of arguments lawyers use when interpreting statutes or common law.").

127. *Id.*

128. "Judicial Opinions, Supreme Court," app. 15.

129. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 898 (1985).

130. *Id.* at 889.

Yet Powell's second stream offered even less support for an exclusive focus on "Framers' intent." This approach was the "*sola Scriptura*," or Scripture only, interpretive approach inherited from the Protestant Reformation.[131] This approach found that the objective "intent" of the legislature or Constitutional Convention was revealed solely through the words it chose, necessarily excluding the private or public thoughts or statements of its members.[132] According to Powell, references to extrinsic historical evidence not indicative of common law context were limited and invoked only by minorities.[133] It would only be later, beginning in Washington's second term with the introduction of Jefferson and Madison's constructed Republican consensus, that certain other kinds of extrinsic historical evidence—evidence that demonstrated understood, public meaning at the time of the States' adoption—was admitted as relevant to the interpretive process and demonstrative of common law "intent"—akin to Public Meaning theory.[134]

Within the second stream of Powell's framework, references to "Framing Intent" without specific citations would be unproblematic because such references would be synonymous with the text of the Constitution and the publicly available meaning of its words. Pinpoint citations would be rendered not only unnecessary, but also irrelevant or subversive of this publicly accepted, and technical, legal meaning.

It is certainly possible that some of these references can be explained using the second strand of Powell's thesis; however, whether Powell's method was *actually* being used on any particular occasion is impossible to prove or disprove, because the Justices of the Court's first century did not often provide pinpoint citations (let alone *any* citations on occasion) or explain their interpretive style. We cannot assume from this silence that any specific reference fit within Powell's conception of "Framers' intent," much less that the Court and its Justices *always* referred to this meaning when they used the term or phrase. The refusal to speak prevents us from accepting all of Powell's thesis.

Even if the second stream of Powell's thesis could be proven, we stop short of using it to conclude that the Court was engag-

131. *Id.*
132. *Id.* at 903.
133. *Id.* at 918–22.
134. *Id.* at 931–34.

ing in nascent Public Meaning Originalism, rather than Intentionalism. Our Intentionalist versus Public Meaning language study data do not support that positive assertion, and the Court fails to specifically cite Framing era *context* (versus long trains of common law legal history) or explain their interpretive style. Moreover, as discussed above, the problem of changed versus ambiguous meaning remains. In sum, concluding that our results prove the early Court engaged in Public Meaning Originalism would strain to find meaning in silence and turn a deaf ear to the loud protests of contrary evidence.

An advocate of Original Methods Originalism might use the first part of Powell's theory—that the Framers practiced common law interpretation—to assert that our results favor a finding that the early Justices practiced their variant of Originalism. We abstain from endorsing this assertion based only on our findings. It is true that our data support a finding that the Justices were engaging in common law interpretation. However, not only do we not know that they did this deliberately, they also do not express any deliberateness in using that method *because* it was used by the Framers. While McGinnis and Rappaport admit to their theory being ostensibly method-neutral (although they assert that the method of the Framers *was* generally Originalist, without restricting themselves to Intentionalism or Public Meaning),[135] if it is a theory at all, it must require the interpreter to select a method *because* it was used by the Framers. We cannot infer that such was the case from the Justices' silence.

With further research, however, it may be possible to use our findings to support a claim that the Justices' practice was something akin to Original Methods Originalism. Our results demonstrate a strong proclivity by the Justices for the opinions of Justice Marshall and his Court, with four of the top eight most-cited opinions coming from the Marshall Court.[136] Although it would take further research to prove reliably, the Justices might have looked to the interpretive practice of John Marshall as a model because they believed him to be steeped in the legal practice and interpretative rules of the Founding era. Regardless of the accuracy of this belief, if it were so held by the first century Justices, it

135. McGinnis & Rappaport, *supra* note 62, at 752.

136. "Judicial Opinions, Supreme Court," app. 15 (these opinions include *McCulloch v. Maryland* (#1), *Marbury v. Madison* (#3), *Gibbons v. Ogden* (#4), and *Martin v. Hunter's Lessee* (#8)).

could be possible to show that they did indeed engage in something similar to Original Methods Originalism.

In addition to the explanation that the Justices were likely employing a common law interpretive method as Powell asserts, it is also possible that the Court's fuzzy practice of incorporating broad swaths of legal history reflected the Justices' ideas of history itself. Many early Americans adopted a viewpoint that has famously become known as the "Whiggish view of history."[137] This view subscribed to the questionable logic that history was an unbroken and undifferentiated progression given to successive generations, yielding one set of universal answers understood by all.[138] Under a Whiggish view, there would be but one "true" understanding of the Constitution to which all sources would inevitably point. Therefore it may have been the case that Justices of the Court's first century, especially the Marshall Court, found no reason to connect particular sources to the Framers or to demonstrate influence and reception because, in their view, the Framers would have intrinsically understood and incorporated everything that came before them. This view of history may also help to explain why successive Courts relied so heavily on the Marshall Court. It was considered reasonably close enough to the Founding to have imbibed the same state of understanding and progress, making it a credible substitute for sources documenting Framing intent or understanding—part of the same inevitable and infallible stream of historical progression.

Regardless of the merits of this possible explanation for the use of the undifferentiated past, it may safely be said that claims that the Court has "always" followed anything like the modern idea of Originalist philosophy (with the lone possible exception of Original Methods Originalism), are not consistent with the evidence at hand. The same might also be said of subsequent Courts, but for different reasons.

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137. *See generally* Herbert Butterfield, The Whig Interpretation of History (1931).

138. *See* Dorothy Ross, *Historical Consciousness in Nineteenth-Century America*, 89 AM. HIST. REV. 909, 917–18 (1984). Although apparently discarded with the advent of U.S. history as a profession during the Progressive Era, this presentist viewpoint of history has been associated with Marxism and, later, Critical Legal Studies. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102–03 (1984); Adrian Wilson & T.G. Ashplant, *Whig History and Present-Centred History*, 31 HIST. J. 1, 5 (1988).

B. The Non-Intentionalist Court: The Second Hundred Years

Fast-forward one hundred years to 1993. Seismic shifts—including industrialization, the *Lochner* era and its expansionist response to the Progressive Era, two world wars, anti-McCarthyism, Vietnam, Watergate, stagflation, the constitutional "stretch" of the Burger and Warren Courts triggering the birth of Originalism, and the First Gulf War—impacted American culture, economics, and politics. During this period, the Supreme Court also heard the remaining forty of the ninety-six cases of constitutional first impression under study.

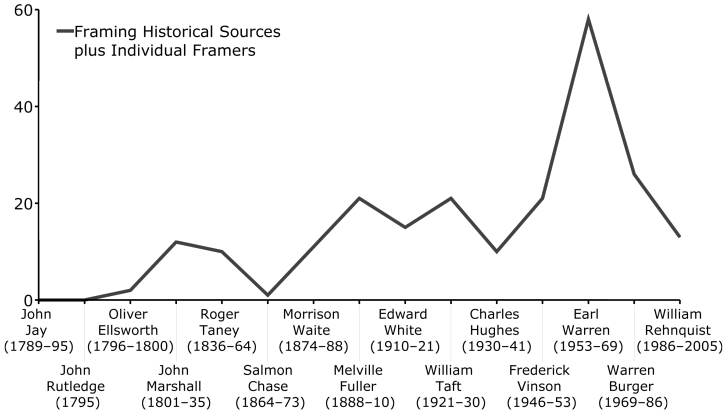
In these forty cases, as illustrated in Chart 8 below, the Court continued to maintain its facial commitment to "Intentionalism," including, and especially, during the Warren and Burger Courts.[139]

Chart 8: Claimed Judicial Philosophy (1888–2005)

Additionally, the Court became increasingly more sophisticated in its historical analysis and use of sources (demonstrated in Chart 9, below), particularly during the Warren and Burger Courts.[140]

139. "Stated Judicial Interpretive Philosophy," app. 17.
140. *Id.*

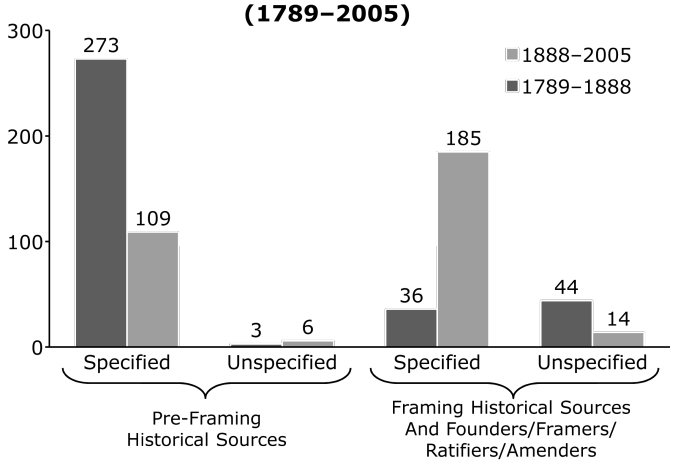
Chart 9: Framing Historical Sources (1789–2005)



Yet the reasons why the Court also *failed* to live up to the Framers' intentions changed and became even more complex.

As Chart 10 illustrates, the practice of reliance on undifferentiated history, regardless of its actual or imputed influence on the Framing, became less frequent in the Court's second century, as did reference to unspecified sources.[141] Simultaneously, the Court shifted its focus from Enlightenment and Antiquity sources to primary sources from the Framing.[142]

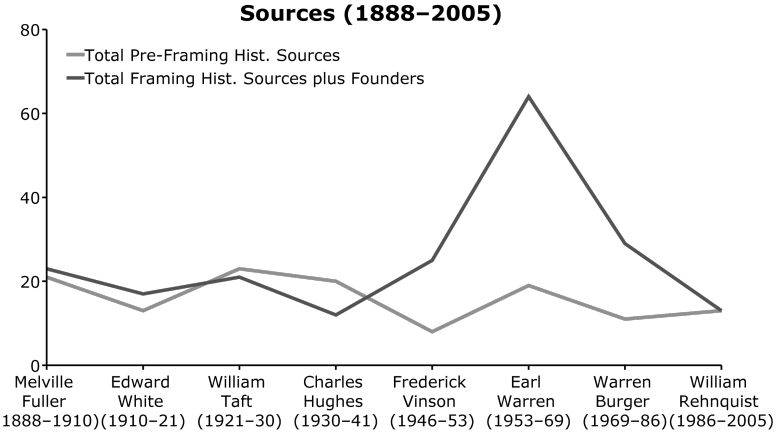
Chart 10: Pre-Framing v. Framing; Specified v. Unspecified Sources (1789–2005)



141. Apps. 1–11.
142. *Id.*

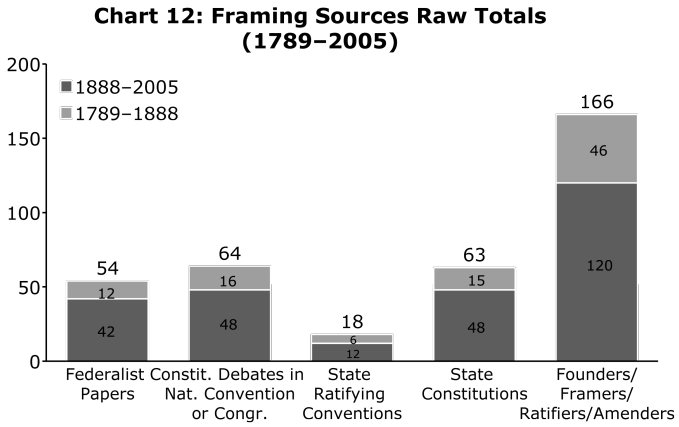
The practice of focusing on Framing era historical sources over pre-Framing historical sources peaked during the Warren Court and tapered off during the Burger and Rehnquist Courts (in part because they entertained fewer cases of constitutional first impression), demonstrated in Chart 11.[143]

Chart 11: Pre-Framing v. Framing Sources (1888–2005)



As can be seen in Chart 12, the Court referenced the Constitutional Convention debates (or congressional records of amendment debates) forty-eight times, state ratifying conventions twelve times, specific Framers, Amenders, or Ratifiers one hundred twenty times, and the *Federalist Papers* forty-two times.[144] Indeed, despite criticisms by contemporary scholars and public figures that the Court had become unmoored from the opinions of the Founding generation,[145] the Court in its second century became much *more* adept at citing to historical sources, and sources from the Framing, than in its previous century of existence.

143. *Id.*
144. Apps. 6–9.
145. *See supra*, notes 23, 31.



A particularly good example of the Court's increased use of sources in its second century is found in *Myers v. United States*.[146] In this case alone, the majority opinion made specific reference to nine Framers, several different accounts of the Constitutional Convention, the *Federalist Paper* No. 77, the Articles of Confederation, the Pennsylvania Constitution, and several other historical sources.[147] Two of the three dissenting opinions used similar historical sources from the Framing in interpreting the removal power of the President.[148] All told, the Court in this case makes more specific references to historical sources from the Framing than it does during its entire first one hundred years.[149] Other examples of the increased specific citations during the Court's second century can be found in *Youngstown Sheet & Tube Co. v. Sawyer*[150] and *INS v. Chadha*.[151] A famous use of primary sources not included in our data set of constitutional first impression cases can be found in Justice Black's dissent in *Adamson v. California*, wherein he attached in an appendix to his opinion the legislative history of the Fourteenth Amendment to demonstrate that the full protections afforded in the Bill of Rights should be applied to the States.[152]

One might roughly credit the Court's improved citation to specific historical source materials (and those which pertained

146. 272 U.S. 52 (1926).

147. *See id.* at 109–10, 116, 184.

148. *Id.* at 178–234 (McReynolds, J., dissenting); *id.* at 240–44 (Brandeis, J., dissenting).

149. "Subtotals," app. 11.

150. 343 U.S. 579 (1952).

151. 462 U.S. 919 (1983).

152. 332 U.S. 46, 92–111 (1946) (Black, J., dissenting).

to the Framing) to the rise of a professionalized, standardized U.S. history.[153] "Gentleman's history" dominated historical literature and publications of primary sources before 1880.[154] However, with the advent of Frederick Jackson Turner and his "Progressive" school, more professional and critical histories were written with the aid of increasingly professional archiving and documentary editing standards.[155] Jonathan Elliot's compilation of the state ratification debates were reissued for the last time in 1896, and in 1911, Max Farrand published his four-volume documentary masterpiece cataloguing and reprinting almost all of the records of the Constitutional Convention, a feat never again attempted.[156] More rigorous historical standards might have trickled onto the Court, resulting in greater rigor in historical practice.

Yet this improved use of historical sources during the Court's second century, particularly from the Framing, is only part of the picture. The use of all sources—primary *and* secondary—improved generally from 1880 onward. This seems to reflect a general trend toward better research and detail in judicial interpretation in general (perhaps aided by the proliferation and professionalization of the supporting staff at the Court) rather than an increase in any Intentionalist leanings. As shown in Chart 13, beginning with the Waite Court, the use of secondary sources (in which we generally include post-enactment history) grew in fits and spurts until a trend emerged with the Vinson and Warren Courts, when the use of secondary sources such as citations to legal treatises, histories, and judicial opinions approximately matched the use of primary historical sources.[157]

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153. *See* Peter Novick, That Noble Dream: the "Objectivity Question" and the American Historical Profession 33–39 (1988); Higham, *supra* note 83, at 150–82.

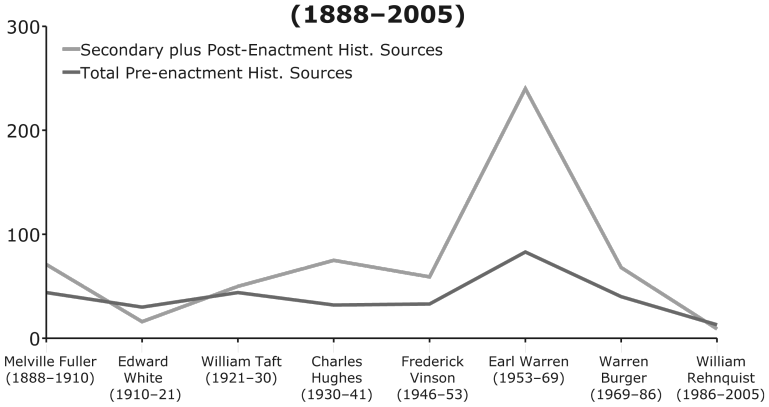
154. HIGHAM, *supra* note 83, at 150–57.

155. *Id.* at 174–79.

156. 2 The Debates In The Several State Conventions, On The Adoption Of The Federal Constitution, As Recommended By The General Convention At Philadelphia, In 1787 (Jonathan Elliot ed., Washington, Jonathan Eliot 2d ed. 1836); 2 The Records of the Federal Convention of 1787 (Max Farand ed., 1911). These were wonderfully supplemented by James Hutson, Chief of the Library of Congress's Manuscripts Division, for the Bicentenntial of the Constitution in 1987.

157. *See* "Subtotals, Specific Pre-Enactment Sources Total," app. 11; "Subtotals, Secondary plus Post-Enactment Hist. Sources Total," app. 11.

Chart 13: Historical v. Secondary Sources (1888–2005)



Proportionately, the pre-1888 Court relied *more* heavily on historical sources (albeit non-Framing historical sources) than did the post-1888 Court. Thus, the Court's increased use of Framing historical sources during its second century does not necessarily make its claim to relying on the intentions of the Framers any more viable than it was in its first century; rather, the increased citations to the Framing is more reflective of an overall jurisprudential trend toward citing to more sources, both primary *and* secondary.

A good example of a case that relied heavily on both primary and secondary sources is *INS v. Chadha*.[158] While primary sources from the Framing feature prominently in all three opinions—Burger's majority, Powell's concurrence, and White's dissent—the Justices also presume that earlier Courts understood the mind and will of the Framing, citing *Myers*, *Youngstown Sheet & Tube Co.*, and *United States v. Nixon*[159] instead of Marshall-era cases.[160]

Exception may be taken to our finding here—that the Court was not an Intentionalist or even an Originalist Court in the twentieth century—by pointing to the increased use of "historical" secondary sources which post-dated the Framing but which were "close enough." These secondary materials include Joseph Story's *Commentaries on the Constitution* and opinions

158. 462 U.S. 919 (1983).

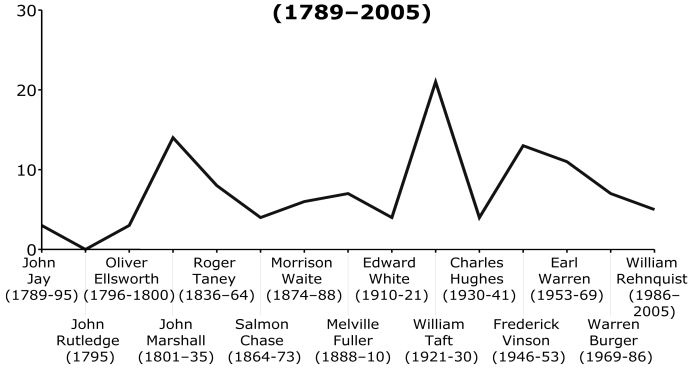
159. 418 U.S. 683 (1974).

160. *Chadha*, 462 U.S. at 948, 962–63, 999 (Powell, J., concurring).

from the Marshall Court.[161] As tempting as it might be to construe Story's *Commentaries* and Marshall Court opinions as good indicia of Framing thought conforming to strict Intentionalism, doing so is better classified as a vestige of common law interpretation and Whiggish historical thinking; no evidence exists that the Court was robustly "Intentionalist" in its second century.

Another trend that undercuts the Court's claims of relying on Framing intent was the growing use of a particular kind of secondary source, the post-hoc or "post-enactment" source. As demonstrated by Chart 14, the overall frequency (with a notable deviation during the Marshall Court) of citations to post-hoc sources increased after 1888, including congressional debates on specific bills, federal statutes, state practice, Attorney General statements, and Presidential practice and opinion.[162] Although not technically categorized as "post-enactment," a source that complements this trend was the use of congressional acquiescence.[163]

Chart 14: Post-Enactment History Citations (1789–2005)



Most of these sources indicate increased reliance by the Court on the way in which other entities have interpreted the Constitution, especially other branches, and even other semi-sovereign entities, such as states. In particular, a specific area where the Court has consistently relied upon more modern history instead of referring to the Framing era is in its Eighth Amendment jurisprudence. In 1958, the Court determined that

161. "Secondary Sources," app. 12; "U.S. Supreme Court Opinions," app. 16.

162. *Id.*

163. "Post-Enactment Sources," app. 13.

the proscription against cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[164] This approach has been upheld through the years, and it is endorsed by the Roberts Court.[165]

The increase in references to post-enactment (and congressional acquiescence) sources provides support not for Intentionalism or Originalism but, rather, Living Constitutionalism, or at the very least a stronger reliance upon the current (or at least more recent) understanding of the Constitution. Relying on the "gloss" of post-ratification history by non-Supreme Court entities is not necessarily the same thing as Living Constitutionalism, but it approaches it more closely than any kind of Originalism. It also undercuts the claim that the greater reliance on Framing-era primary sources post-1888 renders the Court more Intentionalist-like during its second century.

In sum, the historical Court claimed to rely on the intention of the Framers in their interpretation of the Constitution, yet our qualitative and quantitative data undermine this claim for different reasons in the first and second centuries of the Court's existence. In the first century, the Court claimed to—but did not actually—rely upon Framing intent as it is currently understood. This may be explained broadly because it was using a common law method of interpretation or because it had adopted a "Whiggish" view of the Constitution. In the second century, the Court *did* rely more upon specific primary Framing-era sources. It also relied more upon secondary sources, particularly those that demonstrate a trend toward Living Constitutionalism in that the Court accepted the constitutional interpretation of non-Court entities, especially Congress and the President.

CONCLUSION

Those who maintain that the Supreme Court historically was an Originalist Court prior to the Warren and Burger Courts

164. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

165. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (holding that whether the Eighth Amendment proscription against cruel and unusual punishments applies "is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'") (alteration in original) (internal citations omitted).

have either looked at data sets that paint a very different picture than that we have compiled, or, more likely, have relied upon anecdotal information and taken the Justices' statements at face value. Based on our quantitative and qualitative analyses of cases of constitutional first impression, we believe this conclusion to be wrong. With further research showing that the Justices deliberately applied a common law interpretive method patterned, for example, on the interpretive method of Justice Marshall *because* they believed him to be a good model of applying Founding legal rules and practices, it could be possible to say the Court practiced something akin to Original Methods Originalism during its first century. Regardless, it is not possible to say that the Court engaged in *substantive* Originalism *until* the Warren and Burger Courts. Throughout its entire history, the Court has made consistent and repeated facial commitments to interpret according to the intention of the Framers, yet it was not until the Warren and Burger Courts that the Court began to honor its commitment by citing consistently to the Framers and their documents.

For the first hundred years of its existence and in fifty-six cases of constitutional first impression, the Court relied upon a thin layer of much earlier sources from Antiquity, the Enlightenment, and early colonial and Founding period sources that long preceded the creation of the Constitution. It also increasingly relied upon early Court precedents by analogy, particularly cases from the Marshall Court. The explanation for this phenomenon of claimed reliance upon Framing intent yet true reliance upon much earlier sources may be attributed to a common law or Whiggish interpretation of history, wherein history represents conscious, continual, and forward progress that the Framers would have been assumed to know, and have enshrined in their thinking.

During the second hundred years of the Court's history and the last forty pre-*Heller* cases of constitutional first impression, the Court continued its shallow commitment to Intentionalist-like rhetoric. Although the number of cited Framing sources increased, so too did the proportional weight of the sources derived from secondary sources and, increasingly, previous cases interpreting other areas of the Constitution. Until *Heller* in 2008, an anomaly for its prodigious historical rigor, the numerical use of sources climaxed during the Warren and Burger Courts.

Although our study has focused only on cases of constitutional first impression, because it constitutes on unbiased, in-

clusive, and representative sample of the Court's constitutional interpretive methodology over the course of its history, we maintain that our findings may be generalized. The same study repeated by different individuals, or a larger study incorporating a larger universe of cases would yield the same result. Based on the Court's own statements prior to *Heller*, it seems that the Court saw itself as an Intentionalist Court. Yet it was not. As we have described it here, it would be more accurate to christen it as a "Historicalistic" Court.

APPENDICES

Appendix 1: Antiquity

Antiquity	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot.
Atlas	1															1
Cicero	1															1
Demosthenes	1															1
Homer	1															1
Iliad	1															1
Isocrates	1															1
Justinian				1												1
Roman Law							1									1
The Ephri of Sparta	1															1
Troy	1															1
Unspecified								1			1	1				3
Subtotal	8	0	0	1	0	0	1	1	0	0	1	1	0	0	0	13

Appendix 2: English Precedent

English Precedent	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot.
Common and Chancery Law	1	3	4	3	1	3	6			1	1	1	1			25
Acts of Parliament		5	1	1	1								1			9
Magna Carta			1	3	1	1	2									8
Administrative Practice						2	1					1	1			5
Constitutional Law	1			1	1	1	1									5
English History							1			1			2			4
English Declaration of Right												1	1			2
Anglo-Saxon Law	1															1
Royal Decrees	1															1
Unspecified	1	1	4	2		2	2				1	1				14
Subtotal	5	9	10	10	4	9	13	0	0	2	2	4	6	0	0	74

Appendix 3: Enlightenment Thinkers and English Jurists

Enlightenment Thinkers/ English Jurists	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Blackstone	2		4	6	3	3	1	2	1	1	1		1			25
Lord Coke			1	2	4		1	1			1					10
Emerich de Vattel	1		1	3	2			1	1							9
Francis Bacon				3			1	1								5
Chitty				2	1											3
Comyns	1			2												3
Cornelis van Bynkershoek				3												3
Hale				1	2											3
Montesquieu				1						1				1		3
Adam Smith			1			1										2
Azuni				2												2
Bracton	1			1												2
Burlamaqui				2												2
Fleta				1	1											2
Grotius				2												2
Hawkins				2												2
Sir James Mackintosh				1			1									2
Thomas Ruth-erforth				2												2
Beawes				1												1
Bonnemont				1												1
Bouchart				1												1
Calvinus				1												1
Camillus				1												1
Casaregis				1												1
Co. Litt.			1													1
Coke	1															1
Dr. Brown				1												1
Edmund Burke							1									1
Emerigon				1												1
Emmanuel Kant													1			1
Fearnes Con. Rem.			1													1
Ferrier				1												1
Ferriere				1												1
Finch	1															1
Hottoman	1															1
John Locke										1						1
John Milton								1								1
Kendall							1									1
Littleton								1								1

Enlightenment Thinkers/ English Jurists	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Lord Hardwicke								1								1
Martens				1												1
Molloy				1												1
Powell			1													1
Price					1											1
Samuel von Puffendorf				1												1
Santerna				1												1
Shepphard	1															1
Stamford (Staundfort)	1															1
Stephens								1								1
Straccha				1												1
Targa				1												1
Targa				1												1
Theolall	1															1
Thomas Reid	1															1
Tidd					1											1
Valin				1												1
Viner				1												1
Woodeson				1												1
Wynne								1								1
Unspecified			2													2
Subtotal	12	0	12	56	15	4	6	10	2	3	2	0	2	1	0	125

Appendix 4: Foreign Precedent

Foreign Precedent	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Law of Nations	1		1	5	6			1	1							15
Laws of War					2											2
Bible													1			1
Christopher Columbus	1															1
European History	1															1
Natural Law					1											1
Specified Pre-Text Foreign Precedent	3	1		1	1	2						1				9
Unspecified Pre-Text Foreign Precedent			1							1		1				3
Subtotal	6	1	2	6	10	2	0	1	1	1	0	2	1	0	0	33

Appendix 5: American Pre-Constitution and Amendment Precedent

	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Articles of Confederation	5		1	3	2	1	1	2	1	2			1	2		21
Pre-Federal Constitution Political Structure or Practice	1			3	2	2	1		1			2	2	3		17
State statutes			3	6	1		1	1					1			13
Preamble	2		1	2			1									6
Declaration of Independence	1					1	1							2		5
State Cases/ Incorporation of English Common Law	2			1	1		1									5
Continental Congressional Statutes/ Pre-Amendment Statutes	1						1			1						3
Northwest Ordinance					1					1				1		3
Misc. (Rebellion, Citizen Petitions)					1					1						2
Rights					1	1										2
Failed Amendments								1								1
Memorial and Remonstrance							1									1
Virginia Bill for Establishing Religious Freedom							1									1
Subtotal	12	0	5	15	9	5	9	4	2	5	0	2	4	8	0	80

Appendix 6: State Constitutions

	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
PA							1		1	2	1		1	1		7
VA							1		1	1	1		2	1		7
MA							2	1	1	1	1					6
NH							1	1	1	1	1					5
NJ							1	1		2	1					5
NY							1		1	2	1					5
GA							1		1		2					4
CT							2				1					3
DE							1		1		1					3
MD							1			1	1					3
NC							1			1	1					3
SC							1				1		1			3
RI							1				1					2
VT									1							1
Colonial Charters										1	1					2
Constitution Drafts										1						1
Unspecified				1				1					2			4
Subtotal	0	0	0	1	0	0	15	4	8	13	15	0	6	2	0	64

Appendix 7: Constitutional Debates in National Convention or Congress

Const. Debates in National Convention or Congress	**JJ**	**JR**	**OE**	**JM**	**RT**	**SC**	**MW**	**MF**	**EW1**	**WT**	**CH**	**FV**	**EW2**	**WB**	**WR**	**Tot**
Farrand Madison's Notes									2			4	6			12
Congr. Records of Amendment Debates					2						1	5	1			9
Misc. Farrand Records (King, Pierce, Convention Journal, Committee on Style)									3			1	4			8
Elliot specific citation							2					2	1			5
Committee of Style												2	2			4

Const. Debates in National Convention or Congress	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Misc. Records Other Publishers (State Department, Maclay)							3		1							4
VA Plan			1						2				1			4
Committee of Detail									2			1				3
NJ Plan			1						1							2
Unspecified		1	1	4		1		1	1		1		3			13
Subtotal	0	1	3	4	2	1	5	1	12	0	2	15	18	0	0	64

Appendix 8: State Conventions

State Conventions	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Elliot's																
MA													1			1
NC							1									1
NH							1									1
NY							1						1		1	3
VA							1						1			2
Unspecified				2				1						1		4
Rat. Of other amendments																
GA											1					1
NC											1					1
NJ											2					2
OH											1					1
SC											1					1
Sub-total	0	0	0	2	0	0	4	1	0	0	6	0	3	1	1	18

Appendix 9: Founders/Framers/Amenders/Ratifiers

	Founders/ Framers/ Amenders/ Ratifiers	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
FOUNDERS	Jefferson					2		1	1		1		1	1	1	1	9
	Adams					1			1		1		1				4
	Jay					1							1				2
	Washington					1	1										2
	Boudinot										1						1
	Madison				1			1									2
	Witherspoon				1												1
	Monroe				1												1
	Spaight				1												1
	Houston				1												1
	Vining										1						1
	Bland										1						1
	Wm. Smith										1						1
	Johnson				1												1
	King				1												1
FRAMERS	Madison								1	1	2	1	1	4	3	2	15
	Hamilton								1		3	1	1	3	2	3	14
	Wilson								3		2			3	1		9
	G. Morris								1		2				1		4
	Gerry								1		2			1			4
	Sherman								1		3						4
	Washington									1	2						3
	Randolph										1			1	1		3
	Pinkney								1		1						2
	Paterson										2						2
	Gorham										1			1			2
	Benson										1						1
	Vining										1						1
	Baldwon										1						1
	Clymer										1						1
	Stone										1						1
	Dickinson													1			1
	Mason														1		1
	Ellsworth								1								1
	L. Martin								1								1
AMENDERS	Madison													4			4
	Sanford								1								1
	Dickerson								1								1
	Macon								1								1
	Benton								1								1
	Van Buren								1								1
	McDuffie								1								1

	Founders/ Framers/ Amenders/ Ratifiers	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
	Morton								1								1
	Howard													1			1
RATIFIERS	Monroe									1		1					2
	Madison													3			3
	King													2			2
	Hamilton													1		1	2
	Livingston													2			2
	Nicholas													2			2
UNSPECIFIED	unspecified framer	2		6	14	4	1	3				1		2	2		35
	unspecified founder												4				4
	unspecified ratifier				1												1
	unspecified amender													1			1
	Subtotal	2	0	6	22	9	2	5	20	3	32	4	9	33	12	7	166

Appendix 10: Federalist Papers

Federalist Papers	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
No. 22 (H)										1				1		2
No. 27 (H)				1												1
No. 29 (H)				2	1											3
No. 32 (H)										1						1
No. 36 (H)													1			1
No. 37 (M)				1												1
No. 42 (M)					1											1
No. 43 (M)					1					1						2
No. 46 (M)														2		2
No. 47 (M)										1			1	2		4
No. 48 (M)														1		1
No. 50 (M)														1		1
No. 51 (M)													1			1
No. 52 (M)													2			2
No. 54 (M)													1			1
No. 56 (M)													1			1
No. 60 (H)													1	1		2

Federalist Papers	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
No. 62 (M)														1		1
No. 64 (J)															1	1
No. 65 (H)														1	1	2
No. 66 (H)								1				1	1			3
No. 68 (H)														2		2
No. 73 (H)										1						1
No. 74 (H)														1		1
No. 75 (H)										1				1		2
No. 76 (H)										2						2
No. 77 (H)										1					1	2
No. 78 (M)														1	1	2
No. 79 (H)															1	1
No. 81 (H)				1												1
No. 82 (H)													1			1
No. 84 (H)																0
Unspecified			1	3					1							5
Subtotal	0	0	1	8	3	0	0	1	1	9	0	1	10	15	5	54

Appendix 11: Subtotals

Subtotals	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Specific Pre-Framing Hist. Sources	43	10	29	89	38	20	44	19	13	23	19	7	17	11	0	382
Specific Framing Hist. Sources	0	0	2	5	5	0	9	1	12	9	7	16	28	16	6	116
Individual Founder/ Framer/ Ratifier/ Amender Ref'd or Cited	0	0	0	7	5	1	2	20	3	12	3	5	30	10	7	105
Framing Hist. Sources plus Individual Founder/ Framer/ Ratifier/ Amender	0	0	2	12	10	1	11	21	15	21	10	21	58	26	13	221
Specific Pre-Enactment Sources Total	43	10	33	113	58	22	66	61	43	65	39	49	133	63	26	824
Secondary Sources	5	0	0	5	4	2	15	28	4	15	11	16	74	24	7	210
Post-Enactment Hist. Sources	0	0	1	26	23	24	44	43	12	35	64	43	166	44	2	527
Secondary plus Post-Enactment Hist. Sources Total	5	0	1	31	27	26	59	71	16	50	75	59	240	68	9	737

Appendix 12: Secondary Sources

Secondary Sources	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Story				1			3	6	1	3	2		4	1	1	22
Kent					1	1	1	1		2				1		7
Hutchinson				3			2									5
Cooley							1			1	2					4
Gipson					1								1	1		3
Thorpe									1		1		1			3
Abourezk														2		2
Bryce											1	1				2

Secondary Sources	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
C.Warren										1			1			2
Carpenter													1	1		2
Fish										2						2
Javitz & Klein														2		2
Merriam												1	1			2
Patterson													2			2
Rawle							1	1								2
Stanwood								1				1				2
Tanner													2			2
Taswell-Langmeat													2			2
Wheaton					1			1								2
Adams								1								1
Ames											1					1
Appleton								1								1
Aumann													1			1
Baker													1			1
Beaney													1			1
Beardsley & Goats													1			1
Benton								1								1
Berger															1	1
Berman & Oberst													1			1
Beveridge															1	1
Biddle										1						1
Black													1			1
Bond														1		1
Bone													1			1
Bower								1								1
Bradf.								1								1
Brandeis													1			1
Brecht												1				1
Butler													1			1
Byrne											1					1
Campbell												1				1
Cannon's													1			1
Carr.							1									1
Carter														1		1
Cavendish													1			1
Cella													1			1
Celler													1			1

Secondary Sources	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Churchill												1				1
Clarke													1			1
Clemence															1	1
Curtis										1						1
Cushing								1								1
Dauer & Kelsay													1			1
Dillon								1								1
Documentary History of US								1								1
Dowell											1					1
Durfee													1			1
Eckhardt													1			1
Encyclopedie des Sciences				1												1
Fairman													1			1
Fieldman													1			1
Flack													1			1
Ford & Em-ery													1			1
Frantz													1			1
Fredric of Prussia	1															1
Fuchs														1		1
G.F.	1															1
Ginnae														1		1
Gosnell													1			1
Grazia													1			1
Greenfield													1			1
Griffith													1			1
Griswold													1			1
Hadwiger													1			1
Hamilton													1			1
Hand													1			1
Harris													1			1
Hart												1				1
Harvey													1			1
Hatsell													1			1
Henault	1															1
Hild								1								1
Hind's													1			1
Historical Report (no author spec.)									1							1
Hoffer & Hull															1	1
Hogan													1			1

Secondary Sources	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Holdsworth													1			1
Howlson							1									1
Hurst													1			1
Jaffe														1		1
Jameson											1					1
Josephy														1		1
Kaiser														1		1
Kelsey													1			1
Lalor								1								1
Levi														1		1
Lewis													1			1
Lieber													1			1
Lincoln										1						1
Luce													1			1
M. Clarke & D. Hall															1	1
Mackenzie													1			1
MacNeil													1			1
Malone														1		1
Mansfield														1		1
Martin														1		1
Mather & Ray													1			1
May								1								1
McMaster								1								1
Miller								1								1
Monahghan														1		1
Mueller													1			1
Neale													1			1
Niles								1								1
Ogg													1			1
Penniman												1				1
Ploscowe													1			1
Plumber								1								1
Porrit													1			1
Randall												1				1
Redf.							1									1
Redlich													1			1
Reeves							1									1
Rehnquist															1	1
Richardson												1				1
Rogers										1						1

Secondary Sources	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Rossiter												1				1
S. Warren													1			1
S.Doc.												1				1
Salmon										1						1
Scalia														1		1
Scharf								1								1
Schouler								1								1
Scott														1		1
Semple							1									1
Seymore													1			1
Shephard										1						1
Short													1			1
Shull													1			1
Sid.	1															1
Silva												1				1
Som.	1															1
Stevens							1									1
Stewart														1		1
Taft												1				1
Taper													1			1
ten-Broek													1			1
Thompson								1								1
Upton									1							1
Walter													1			1
Watson														1		1
Willburn												1				1
Willoughby											1					1
Wilson												1				1
Wittke													1			1
Worchester							1									1
Yankwich													1			1
Unspecified					1	1										2
Subtotal	5	0	0	5	4	2	15	28	4	15	11	16	74	24	7	210

Appendix 13: Post-Enactment Sources

Post-hoc Citations	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Acquiescence	1		1	1	3	1	1			2	1	4	1	1		17
Federal Statute	2			4	2		2	1	1	2	1	2				17
First Congress, or Contemporary to Amend.			1	7	1	2	2			2				1		16
Presidential Practice & Opinion									1	4		3	1	1		10
American History and Practice				1		1		1	1	1	1	1	1		1	9
State Statutes							1	1		1	1	1	3			8
Attorney General Opinions								1		2		1		2		6
Congressional Debate										4		1		1		6
State Practice					2			2							1	5
Dictionaries			1						1						1	3
Parliamentary Principles & Rules				1				1		1						3
Rules of House and Senate													2	1		3
Census															2	2
Statements of Individual Politicians (Not Creators)										2						2
Gallup Poll													1			1
Studies on Apportionment													1			1
Times													1			1
Subtotal	3	0	3	14	8	4	6	7	4	21	4	13	11	7	5	110

Appendix 14: Post-Enactment Constitutions

Post-hoc Constitutions	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
IL								1		1						2
AL											1					1
FL										1						1
ID								1								1
MA													1			1
MD													1			1
ME										1						1
OH								1								1
VA													1			1
Subtotal	0	0	0	0	0	0	0	3	0	3	1	0	3	0	0	10

Appendix 15: Judicial Opinions

Judicial Opinions	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
State Cases & Court Practice			1	6	2	2	2	4	1	1	3	1	3			26
Lower Federal				1	1	2		3		1	2	3		4	2	19
Supreme Court				19	20	20	42	33	11	30	58	39	160	40		472
Subtotal	0	0	1	26	23	24	44	40	12	32	63	43	163	44	2	517

Appendix 16: U.S. Supreme Court Opinions

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
McCullough v. Maryland (Marshall)				1	1	2	1		1			2	1	1		10
Myers v. United States										1	1	3	1	3		9
Marbury v. Madison (Marshall)				2						3			3			8
Gibbons v. Ogden (Marshall)				2	2	1				1				1		7
Wolf v. Colorado													7			7
Poe v. Ullman													6			6
Gitlow v. New York											4		1			5

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Martin v. Hunter's Lessee (Marshall)				2	1			1		1						5
Slaughterhouse Cases							1	2	1		1					5
Boyd v. United States													4			4
Chirac v. Chirac				1	1			2								4
McLaughlin v. Florida													4			4
Meyer v. Nebraska													4			4
NAACP v. Button													4			4
Sturgess v. Towingfield					4											4
Weeks v. United States													4			4
Williamson v. Lee Optical													4			4
Adamson v. California													3			3
Ashwander v. Tennessee Valley Authority												1	1	1		3
Bank of Augusta v. Earle						1	2									3
Buckley v. Valeo														3		3
Dred Scott						1	1				1					3
Elkins v. United States													3			3
Ex parte Virginia							2				1					3
Frank v. Maryland													3			3
Gideon v. Wainwright													3			3
Houston v. Moore				1	2											3
Humphrey's Executor v. United States												1		2		3
Hurtado v. California										1	1	1				3
Lochner v. New York													3			3
MacDougal v. Green													3			3
Minor v. Happersett								1			2					3
NAACP v. Alabama													3			3
New York v.					2	1										3

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Miln																
Palko v. Connecticut													3			3
Paul v. Virginia						1	2									3
Powell v. McCormack														3		3
Rea v. United States													3			3
Shelter v. Tucker													3			3
Skinner v. Oklahoma													3			3
United States v. Cruikshank							1	1	1							3
United States v. Reece							2	1								3
Ward v. Maryland						2	1									3
Whitney v. California											3					3
Youngstown Sheet & Tube v. Sawyer														3		3
Aptheker v. Secretary of State													2			2
Bank of United States v. Deveaux				2												2
Barron v. Baltimore					1	1										2
Bolling v. Sharpe													2			2
Brown v. United States					1	1										2
Calder v. Bull													2			2
Child Labor Tax Case											2					2
Cohen v. V irginia								1		1						2
Corfield v. Coryell							1				1					2
Davis v. Massachusetts											2					2
De Jonge v. Oregon											1		1			2
Dobbins v. Commissioners of Erie County					1	1										2
Eiske v. Kansas											2					2
Ex parte Merryman												2				2
Ex parte											1		1			2

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Yarborough																
Feldman v. United States													2			2
Fletcher v. Peck													1	1		2
Hill v. Wallace											2					2
Hirabayshi v. United States												2				2
In re Green								1				1				2
In re Kemmler								1			1					2
INS v. Chadha														2		2
Kilbourn v. Thompson													2			2
La Abra Silver Mining Co v. United States										1		1				2
Lassiter v. Northampton													2			2
Linder v. United States											2					2
McCallister v. United States										2						2
McGowan v. Maryland													2			2
McPherson v. Blacker											1	1				2
Missouri Pac. Ry. Co. v. Kansas									1	1						2
Murray's Lessee v. Hoboken Land & Imp. Co.							1				1					2
New York Times Co. v. Sullivan													2			2
Olmstead v. United States													2			2
Pierce v. Society of Sisters													2			2
Prigg v. Pennsylvania							1			1						2
Prince v. Massachusetts													2			2
Reynolds v. Sims													2			2
Rochin v. United States													2			2
Schneider v. New Jersey													2			2
Schware v. Board of Bar Examiners													2			2
Shurtleff v. United States										2						2
Snyder v.													2			2

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Massachusetts																
Stefanelli v. Minard													2			2
Stromberg v. California											2					2
The Passenger Cases							1		1							2
United States v. Constantine											2					2
United States v. Curtiss-Wright Export Co.												2				2
United States v. Hamilton				2												2
United States v. Nixon														2		2
United States v. Russell												2				2
Wallace v. United States										2						2
Yick Wo v. Hopkins													2			2
Adams v. New York													1			1
Adkins v. Children's Hospital													1			1
Agnello v. United States												1				1
Ayers v. Watson								1								1
Baker v. Carr													1			1
Barenblatt v. United States													1			1
Bates v. City of Little Rock													1			1
Belknap v. United States														1		1
Board of Trustees of Univ. of Illinois v. United States											1					1
Bram v. United States													1			1
Brown v. District of Columbia								1								1
Brown v. Maryland					1											1
Bulford's Case				1												1
Burnap v. United States										1						1
Burroughts v. United States												1				1
Buttfield v. Stranahan									1							1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Buxton v. Ullman													1			1
Byars v. United States													1			1
Cantwell v. Connecticut													1			1
Chy Lung v. Freeman							1									1
Coe v. Errol							1									1
Colgrove v. Barrett													1			1
Conrad v. Griffey								1								1
Cox v. Louisiana													1			1
Cunningham v. Neale										1						1
Davidson v. New Orleans							1									1
Department of Commerce v. Montana														1		1
Dillon v. Gloss											1					1
Dombrowski v. Eastland													1			1
Douglas v. New York											1					1
Ducat v. Chicago							1									1
Duncan v. Kahanamoku												1				1
Duncan v. Missouri											1					1
Edwards v. South Carolina													1			1
Embry v. United States										1						1
Enst & Ernst v. Hochfelder														1		1
Evans v. Gore														1		1
Ex parte Bollman												1				1
Ex parte Milligan												1				1
Ex parte Wall							1									1
Express Co. v. Kountz							1									1
Fairbault v. Misener											1					1
Ferguson v. Skrupa													1			1
Field v. Clark									1							1
Fiske v. Kansas											1					1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Gomilion v. Lightfoot													1			1
Gouled v. United States												1				1
Griffin v. California													1			1
Griffin v. Illinois													1			1
Hampton v. United States														1		1
Hauenstein v. Lynham								1								1
Hawke v. Smith									1							1
Head Money Cases											1					1
Henderson v. New York							1									1
Holden v. Hardy											1					1
Hollingsworth v. Virginia														1		1
Homes v. Jennison										1						1
Hyde v. Cogan								1								1
Hylton v. United States											1					1
In re Debs												1				1
In re Neagle												1				1
In re Quarles								1								1
Indiana v. Kentucky								1								1
Irvine v. California													1			1
Jackman v. Rosenbaum													1			1
Jones v. United States													1			1
Kendall v. United States										1						1
Kennard v. Louisiana							1									1
Korematsu v. United States												1				1
Kovacs v. Cooper													1			1
Lake Country v. Rollins									1							1
Lane v. Ogden						1										1
Legal Tender Cases								1								1
Leser v. Garnett											1					1
Lewis v. Broadwell				1												1
Little v. Barreme												1				1
Livingston v.						1										1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Moore																
Lovell v. Griffin											1					1
Lowe v. Kansas											1					1
Mackenzie v. Hare												1				1
Mapp v. Ohio													1			1
Martin v. Walton													1			1
Mathews v. Eldridge														1		1
Maxwell v. Dow											1					1
McNabb v. United States													1			1
Miller v. United States													1			1
Milling Co v. Pennsylvania								1								1
Minnesota Rate Case											1					1
Missouri v. Lewis							1									1
Mistretta v. United States														1		1
Monroe v. Pape													1			1
Morgan Rlwy Co v. Artyer								1								1
Morgan v. Tennessee Valley Authority												1				1
Morrison v. Olson														1		1
National Safe Deposit Co. v. Stead													1			1
Near v. Minnesota											1					1
Nielson v. Oregon									1							1
Ohio and Mississippi Rlwy v. Wheeler							1									1
O'Malley v. Woodrough														1		1
Pace v. Burgess							1									1
Packet Co. v. Keokuk							1									1
Parsons v. Armor				1												1
Parsons v. United States										1						1
Parsons v. United States										1						1
Payne v. Hook							1									1
Penhallow v.						1										1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Doane's Adms.																
People v. Compagnie							1									1
Pervean v. Commonwealth						1										1
PIM v. City of St. Louis							1									1
Pocket Veto Case														1		1
Pointer v. Texas													1			1
Powell v. Alabama													1			1
Prize Cases												1				1
Prout v. Starr										1						1
Prudential Ins. Co v. Cheek											1					1
Railroad Co. v. Lowe								1								1
Railway Co. v. Whitton							1									1
Reynolds v. United States													1			1
Rhode Island v. Massachusetts								1								1
Rios v. United States													1			1
Rogers v. Richmond													1			1
Roschen v. Ward													1			1
Schnell v. Davis												1				1
Schwartz v. Texas													1			1
Seeberger v. Cahn								1								1
Selective Draft Cases											1					1
Semier v. Oregon State Board of Dental Examiners													1			1
Short v. Maryland											1					1
Shreveport Rate Case											1					1
Sibbach v. Wilson														1		1
Silverthorne Lumber Co. v. United States													1			1
Smith v. Alwright												1				1
Smith v.						1										1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Maryland																
South v. Peters													1			1
Springer v. Government of Philippine Islands												1				1
State Freight Tax Case											1					1
States v. Sims				1												1
Strauder v. West Virginia							1									1
Sweezy v. New Hampshire													1			1
Taylor v. Sandford								1								1
Tennesee v. Whitworth										1						1
Tennessee Valley Authority v. Hill														1		1
Tenney v. Brandhove													1			1
Tenny v. Brandlove													1			1
The Antelope								1								1
The Chinese Exclusion Case								1								1
The Moses Taylor							1									1
Trubek v. Ullman													1			1
Twin City Nat. Bank of New Brighton v. Nebecker								1								1
Twining v. New Jersey											1					1
Twitchell v. Commonwealth						1										1
United Public Workers v. Mitchell													1			1
United States v. Brown														1		1
United States v. Chouteau								1								1
United States v. Classic												1				1
United States v. DeWitt						1										1
United States v. Dickerson														1		1
United States v. Ferriera					1											1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
United States v. Fisher							1									1
United States v. Guthrie										1						1
United States v. Guyhtir										1						1
United States v. Harris							1									1
United States v. Hartwell							1									1
United States v. Johnson													1			1
United States v. Kemmler											1					1
United States v. Klein														1		1
United States v. Lefkowitz												1				1
United States v. Midwest Oil Co.												1				1
United States v. Mitchell														1		1
United States v. Moore				1												1
United States v. Morris								1								1
United States v. Perkins										1						1
United States v. Reisingre								1								1
United States v. Stone								1								1
United States v. United Mine Workers												1				1
Vance v. Vandercook											1					1
Veazie Bank v. Fenno							1									1
Virginia v. Reeves							1									1
Vowles v. Mercer							1									1
Walker v. Sauvinet							1									1
Ware v. Hylton								1								1
Webster v. Cooper				1												1
Wedding v. Meyler									1							1
Weston v. Charleston						1										1
Whitfield v. Ohio											1					1

Judicial Opinions-Supreme Court	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Williams v. United States										1						1
Wilson v. Blackbird Creek Marsh Co.					1											1
Workers v. McElroy														1		1
Zemel v. Rusk													1			1
Subtotals	0	0	0	19	19	20	42	33	11	30	58	39	160	40	0	471

Appendix 17: Stated Judicial Interpretive Philosophy

Stated Judicial Interp. Philosophy	JJ	JR	OE	JM	RT	SC	MW	MF	EW1	WT	CH	FV	EW2	WB	WR	Tot
Intentionalism	2		3	17	5	3	4	1	1	1	2	3	4	4	3	53
Public Understanding	2		3	12	2	1		2	2	2	1	1	4		1	33
Living Constitutionalism				1								1				2

LEGEND

JJ = John Jay (1789–95)
JR = John Rutledge (1795)
OE = Oliver Ellsworth (1796–1800)
JM = John Marshall (1801–35)
RT = Roger Taney (1836–64)
SC = Salmon Chase (1864–73)
MW = Morrison Waite (1874–88)
MF = Melville Fuller (1888-1910)
EW1 = Edward White (1910–21)
WT = William Taft (1921–30)
CH = Charles Hughes (1930–41)
FV = Frederick Vinson (1946–53)
EW2 = Earl Warren (1953–69)
WB = Warren Burger (1969–86)
WR = William Rehnquist (1986–2005)