

## THE CONSTRAINT OF HISTORY

LORIANNE UPDIKE TOLER & ROBERT CAPODILUPO\*

*Accepted wisdom dictates that history does not constrain the behavior of the Supreme Court. Rather, it is merely a tool used to legitimize legal outcomes predetermined by policy. Recent studies claim to have confirmed this state of play, providing “proof” for the cynic and impelling apologists to fashion new justifications. Yet this study of all cases referencing the Constitutional Convention provides evidence that history can constrain judicial interpretation of the Constitution.*

*As proof of concept, this Article analyzes the extent to which Justices’ use of primary and secondary sources when referencing the Constitutional Convention is associated with casting cross-partisan votes and the ideological outcome of the case more broadly. On average, we find evidence to*

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\* Lorianne Updike Toler, Assistant Professor, Northern Illinois College of Law; Affiliated Faculty Fellow, Information Society Project, Yale Law School. Robert Capodilupo, Yale Law School, J.D. Spring 2023. This study is dedicated to Akhil Reed Amar, who has inspired and guided us both. Although this article’s opinions, words, and especially mistakes are attributable to the authors alone, as James Madison said of the Constitution, it has been the work of “many heads and many hands.” Letter from James Madison to William Cogswell (Mar. 10, 1834), <https://founders.archives.gov/documents/Madison/99-02-02-2952> [<https://perma.cc/T9XF-YQ5K>] (last visited July 31, 2022). We extend heartfelt thanks to Jack Balkin, Stephanie Barclay, Randy Barnett, William Baude, Jack Beerman, Evan Bernick, Lisa Bernstein, Sam Bray, Nicholas Cole, Michael Dorf, Richard Epstein, James Fleming, Lawrence Freidman, Ben Johnson, Shlomo Klapper, James Lindgren, John McGinnis, Steven Sachs, Soren Schmidt, Larry Solum, Lael Weinberger, and Laurin Wessinger for their edits, ideas, and contributions immeasurably improving this article. Thanks also goes (twice) to the Information Society Project fellows’ writing workshop at Yale Law School and to NIU’s writing workshop for their review and comments. We especially thank Brady Earley at Chicago Law School without whom this work would not have been possible, and the technical assistance of John B. Updike.

*suggest that the Justices are more likely to vote against their political priors when using secondary sources—predominantly, historical characterizations of the Convention in previous cases—and more likely to vote along ideological lines when relying only on primary sources. Further, our results suggest a Justice’s ideology alone provides an incomplete picture of judicial behavior.*

*This Article vindicates and challenges the major previous study, nuancing its findings by demonstrating that the constraint of history likely turns on the type of historical source that a Justice relies upon and challenges the assumption that only political preference matters in explaining case outcomes. Further, our evidence indicates that history matters and may even be called our law, though it requires a reckoning of how primary sources have been used and manipulated, calling for more transparent, humble, and deeper engagement with the historical record through expanded tools and training.*

#### INTRODUCTION

In no fewer than three major decisions in the 2021 Term—*Dobbs v. Jackson Women’s Health Organization*, *Kennedy v. Bremerton School District*, and *New York State Rifle & Pistol Association v. Bruen*—the Supreme Court announced that historical considerations are not only relevant, but required in determining constitutional rights relevant to substantive due process, religion, and gun control.<sup>1</sup> Yale Law Professor Scott Shapiro sharply criticized the Court’s use of history in these opinions, tweeting: “Amazing how originalism

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1. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253–54 (2022) (requiring substantive due process rights to be “deeply rooted in the history or tradition of our people” at the time “the Fourteenth Amendment was adopted”); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (rejecting the *Lemon* test in determining Establishment Clause violations in favor of “analysis focused on original meaning and history”); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (rejecting two-step circuit rule determining appropriate government regulation of guns consistent with the Second Amendment in favor of determining whether regulations are “consistent with this Nation’s historical tradition of firearm regulation”).

tracks the political positions of the Republican Party,”<sup>2</sup> and “There is something poignant about debates over originalism, as if it were a real interpretive methodology, and not just a Joker Card for getting the results originalists want.”<sup>3</sup> The Court’s application of historical reasoning in more-recent cases like *SFFA v. Harvard* engendered similar ire from some commentators.<sup>4</sup>

This criticism mirrors decades of scholarship that presumes history incapable of constraining Justices’ political predilections—for either conservatives or liberals.<sup>5</sup> Such criticism was crowned with “proof” in 2013 with Frank Cross’s book *The Failed Promise of Originalism*, which claimed to offer quantitative evidence of a lack of a relationship between the use of historical sources and the Justices varying from expected policy outcomes.<sup>6</sup> The Court has

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2. Scott Shapiro (@scottjshapiro), TWITTER (June 27, 2022, 10:33 AM), <https://twitter.com/scottjshapiro/status/1541429523354378248> [<https://perma.cc/4HE7-XEZ5>].

3. Scott Shapiro (@scottjshapiro), TWITTER (June 28, 2022, 8:16 AM), <https://twitter.com/scottjshapiro/status/1541757509878398976> [<https://perma.cc/3UG5-ASTK>].

4. See, e.g., Mark Graber, “History” and History in *Students for Fair Admissions*, BALKINIZATION (June 30, 2023, 9:19 AM), <https://balkin.blogspot.com/2023/06/history-and-history-in-students-for.html> [<https://perma.cc/6WKM-DTUV>]. Curiously, scholars on both sides of the political spectrum praised the Court’s application of history in other cases from this Term, such as *Moore v. Harper*. See Ilya Somin, *Steve Calabresi on Moore v. Harper*, VOLOKH CONSPIRACY (June 28, 2023, 8:34 PM), <https://reason.com/volokh/2023/06/28/steve-calabresi-on-moore-v-harper> [<https://perma.cc/D2B4-L9N9>] (posted on behalf of Professor Calabresi); Gerald N. Magliocca, *Poor Justice Story*, BALKINIZATION (June 23, 2023, 12:41 PM), <https://balkin.blogspot.com/2023/06/poor-justice-story.html>.

5. See, e.g., Alfred H. Kelly, *Clio & the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* 27 S. TEX. L. REV. 433, 435 (1986) (arguing that originalism is “arrogance cloaked as humility.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554–55 (2006) (“No politically literate person could miss the point that the Reagan Administration’s use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court.”); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

6. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 183–89 (2013).

changed significantly since then,<sup>7</sup> and, with that change, history is not only being used, but now seems to be *required* by the Court in making seismic constitutional decisions, raising its stakes as a method of interpretation. With these shifts, the time is ripe to test Cross's conclusion that history fails to constrain. Can history, in fact, constrain?

This Article's answer is a confident, but nuanced, "yes." In arriving at that answer, this Article conducts two investigations. First, it identifies the entire universe of the Supreme Court's references to the Constitutional Convention since the Court's inception to gain a clearer understanding of which sources the Justices tend to rely on when doing historical analysis.<sup>8</sup> In addition, this study then analyzes the relationship between the use of historical citations and case outcomes across all 201 cases making reference to the Convention between the 1937-2021 Terms.

Our descriptive results show that Justices of all political backgrounds since the Court's inception have used a variety of primary and secondary sources. The top two sources relied upon were Max Farrand's *Records of the Federal Convention of 1787* and previous cases wherein the Court acts as historian, interpreting primary sources directly. Further, the empirical models provide significant evidence that the use of history can in fact, constrain. Specifically, we find that citation to secondary sources bears a strong, positive relationship to the Justices voting against policy preferences.<sup>9</sup> Primary sources, however, seem to have a negative relationship with cross-partisan voting. That is, such sources appear instead to *reinforce* directional voting, with conservatives voting more conservatively, and liberals voting more liberally. This relationship maintained even when a Justice's ideology was held at a constant,

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7. Since the publication of Cross's book in 2013, four Justices have been added to the Supreme Court: Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson.

8. See *infra* Section II.B.

9. See *infra* Section II.C.

indicating that history may better explain judicial behavior beyond what policy preference alone can predict.

Granted, these results are limited only to cases which reference the Constitutional Convention. We hypothesize that the inability of primary sources of the Convention to constrain Justices to vote against their priors may be due, in part, to the thinness of James Madison's notes. Madison acted as the Convention's primary scrivener, and his notes trailed off during the Convention's latter half when they became most legally relevant. Other plausible reasons include Justices' lack of familiarity with primary sources and their manipulability when considered in a vacuum. Secondary sources, on the other hand, are not only more familiar to the legal community, but they aggregate and synthesize primary sources into historical or legal arguments. They, therefore, are less manipulable and can withstand being used in the service of other arguments.

That Justices of all stripes (and across time) are turning to history supports positivist findings which may be explained by a natural instinct to understand and recreate origin stories. Our results also indicate that primary sources are not performing the job assigned them by originalists, vindicating Cross in part and requiring a reckoning by those advocating or requiring the use of history in constitutional interpretation. Because history is now required in at least some areas of constitutional interpretation, these authors advocate the hard work of digging into history so as to increase primary sources' purchase power. To that end, this Article concludes by providing a primer on primary source hierarchy, a new citation format for primary sources, and several proposals for expanding constitutional history tools and training.

This Article proceeds in three Parts. Part I canvasses the role of history in constitutional interpretation and the critique of its constraint, including an overview of Cross's study. Part II presents this study's methodology and results, and Part III explains those results and discusses three major consequences.

## I. THE PRESUMED NON-CONSTRAINT OF HISTORY

To date, the accepted scholarly presumption is that history has no constraining impact on the Supreme Court's constitutional judgments. After 60 years of qualitative scholarship criticizing the Supreme Court's use of history as polemical, a quantitative study published in 2013 apparently "proved" this true, once-and-for-all,<sup>10</sup> and even history's advocates accepted defeat. Before laying out results that both challenge and support this presumption, this Part situates this study within current scholarship on the Court's use of history *qua* history and provides the first publication history of the Constitutional Convention's records.

A. *The Role of History in Constitutional Jurisprudence*

Although Frank Cross targets originalism, the subject of his study and this counterpoint is more properly the Court's use of history writ large. Cross presumes that the *use* of certain sources *is* originalism.<sup>11</sup> Yet as Jack Balkin has so carefully shown, sources can be used in a variety of ways, not all of them originalist.<sup>12</sup> Thus, though this study looks at just one of the sources Cross investigates—the records of the Constitutional Convention (and canvasses it in much more depth)—it does not presume that its use constitutes originalism. Rather, it approaches its use as illustrative of all uses of history, leaving to a future study to parse how that source is being used by the Court.

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10. See CROSS, *supra* note 6, at 173–76.

11. *Id.* at 45–72.

12. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641 (2013); see also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L. J.* 1766, 1800–10 (1997); SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007); Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747 (1999).

With this important distinction in mind, this Section identifies all theories of constitutional interpretation that utilize history in some fashion and then canvasses the scholarly work to date on the constraining impact of history on the Supreme Court. Although three major theories employed by various Justices (originalism, pluralism, and the moral reading) use history, only originalism has been the subject of any qualitative or quantitative study on constraint. This is likely due to originalism's primordial purpose—to cabin the judicial overreach by the Warren and Burger Courts.

1. Constitutional theory and history at the Supreme Court

An exhaustive exposition of constitutional theories is beyond the scope of this Article, and overviews in other works can better serve the purpose.<sup>13</sup> Additionally, a brief overview of originalism's history was provided in this study's prequel.<sup>14</sup> However, as it pertains to the Supreme Court's use of history, a very brief overview of constitutional theory is in order.<sup>15</sup>

The precursors to modern constitutional theory, or the theory that still holds sway among jurists and theorists, can be found in Joseph Story's *Commentaries on the Constitution*<sup>16</sup> and its antecedents—James Kent's *Commentaries*,<sup>17</sup> James Wilson's *Lectures*,<sup>18</sup> William

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13. See, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013).

14. See Lorianne Updike Toler & J. Carl Cecere, *Pre-"Originalism"*, 36 *HARV. J. L. & PUB. POL'Y* 277, 286–298 (2013).

15. As this overview is limited to the theories ostensibly used or developed by the Justices, it will necessarily exclude certain important theories of interpretation, such as the paradigm-case method articulated by Jed Rubenfeld in *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005) and translation interpretive practice as found in LARRY LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE CONSTITUTION* (2019).

16. 1–3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (Hilliard, Gray & Co., 1833).

17. 1–4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (O. Halsted, 1826).

18. JAMES WILSON, *LECTURES ON LAW* (1804).

Blackstone's *Commentaries*,<sup>19</sup> and even Coke's *Institutes*,<sup>20</sup> among others.<sup>21</sup> Yet its more palpable beginnings lay in James Thayer's 1893 *Harvard Law Review* Article wherein he outlined the "rule" of judicial review to be limited to clear cases of constitutional abrogation by the legislature.<sup>22</sup> What came to be known as "Thayerian Deference" was followed assiduously by Justice Frankfurter,<sup>23</sup> which he famously expanded into the political question doctrine in his *Baker v. Carr* dissent.<sup>24</sup>

*Baker v. Carr* and the reapportionment questions it addressed were situated within the great incorporation debates of the Warren Court era, with Justice Hugo Black at its fulcrum. In his *Adamson v. California* dissent, Black argued for total incorporation of Bill of Rights guarantees as against the states under the Fourteenth Amendment.<sup>25</sup> This he based in the historical intent of the framers of both the Bill of Rights and Fourteenth Amendments,<sup>26</sup> presaging originalist theories.

Black was not the only Justice of the Warren Court to hold fast to a theory of Constitutional interpretation. Justice Brennan is associated with the moral-reading theory (or moral or natural-law theory) of constitutional interpretation,<sup>27</sup> most famously theorized by Ronald Dworkin in *Law's Empire* and further developed by James

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19. 1–4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–69).

20. SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND IN FOUR PARTS (1628–1644).

21. See, e.g., HENRY BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (circa 1250); MATTHEW HALE, A HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND (1713).

22. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893).

23. Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 530–531 (2012).

24. See *Baker v. Carr*, 369 U.S. 186, 266–330 (1962) (Frankfurter, J., dissenting).

25. AKHIL REED AMAR, THE LAW OF THE LAND 36, 38–39 (2015).

26. *Id.*

27. James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMPARATIVE L. 515, 521 (2014).



Fleming.<sup>28</sup> Moral reading engages history by espousing fidelity to the Founders' broad purposes, which facilitates the "best reading" of the Constitution as found in a broader array of sources.<sup>29</sup>

The Warren Court and, to a lesser extent, the Burger Court that followed, was marked by great upheavals in the law. Reapportionment, Establishment, Free Speech, and Civil Rights jurisprudence were reimagined.<sup>30</sup> Theorists responded in kind, of which two main threads will be followed here, starting with the originalist thread. In 1977, Raoul Berger "provoked a storm of controversy" by publishing *Government by Judiciary*,<sup>31</sup> arguing that the Supreme Court had interpreted the Fourteenth Amendment contrary to the intent of the Framers.<sup>32</sup> Berger's arguments were rebuffed by Paul Brest in a seminal 1980 Article in the *Boston University Law Review*,<sup>33</sup> which

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28. See RONALD DWORIN, *LAW'S EMPIRE* (1986); SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007); James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335 (1997); see also Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORIN 22, 35-43 (Arthur Ripstein ed., 2007) (surveying the debate between legal positivism and moral jurisprudence).

29. Fleming, *supra* note 28, at 1336 ("Dworkin has argued that commitment to interpretive fidelity requires that we recognize that the Constitution embodies abstract moral principles rather than laying down particular historical conceptions and that interpreting and applying those principles require fresh judgments of political theory about how they are best understood. He now calls this interpretive strategy the 'moral reading' of the Constitution.").

30. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

31. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* xxi (2d ed. 1996).

32. *Id.* at 402-10.

33. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204 (1980).

Ed Meese,<sup>34</sup> Robert Bork,<sup>35</sup> and Antonin Scalia<sup>36</sup> all responded to in turn, transmuted the oft-cited “intent of the Framers” into the ostensibly judicially-constraining theory of originalism. Responding to its many critics,<sup>37</sup> originalism evolved to include ever-increasing bodies of Framers, and “intent” became “understanding,” then “meaning.”<sup>38</sup> The “new originalism” espoused by most current originalist theorists focused squarely on the latter, with the semantic meaning of the text fixed at the time of ratification, constraining judicial interpretation.<sup>39</sup> When semantic meaning ran out, other sources could be considered in the “construction zone” (or space for interpretation not dominated by semantic meaning), yet just what could be considered here—broad purposes, intent, original expected applications, original legal methods, post-enactment

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34. Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985) (“I would like to describe in more detail [that] this administration’s approach . . . [is to pursue a] jurisprudence that seeks to be faithful to our Constitution—a jurisprudence of original intention . . .”), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 72, 76 (Steven G. Calabresi ed., 2007).

35. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA 148–49 (1990) (“If Brest’s point about the impossibility of choosing the level of generality upon neutral criteria is correct, we must either resign ourselves to a Court that is a ‘naked power organ’ or require the Court to stop making ‘constitutional’ decisions. But Brest’s argument seems to me wrong, and I think a judge committed to original understanding can do what Brest says he cannot.”)

36. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 853 (1989); see also Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987) (directing originalists to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”).

37. The literature here is legion, but bookends and telling examples include H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984) (attacking the claim that the Framers themselves intended for posterity to consult their understanding of the Constitution) and Eric Segall, *The Concession that Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33 (2020) (criticizing originalists for abandoning Thayerian deference).

38. See generally Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM 16 (Grant Huscroft & Bradley W. Miller eds., 2011) (providing a history of originalism).

39. *Id.* at 22–23.

history and precedent—is under active, fierce dispute.<sup>40</sup> Many on the Rehnquist and Roberts Courts have espoused originalism to varying degrees.<sup>41</sup>

Pluralism is marked by less in-fighting but also less cohesion. In 1980, a few years after *Government by Judiciary*, John Hart Ely published his defense of the Warren Court's activism in *Democracy and Distrust*.<sup>42</sup> Responding to one of Thayer's puzzles and influenced by the work of Alexander Bickel, Ely outlined a pluralistic theory of representation reinforcement, wherein judges could deviate from Thayerian deference in order to shore up democratic values essential to the Constitution's structure.<sup>43</sup> In 1982, Philip Bobbitt built on the pluralist motif in *Constitutional Fate*, outlining an approach wherein text, history, structure, doctrine (precedent), prudence, and ethical "modes" of arguments served equally in the judicial

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40. See generally Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 1 (2013) ("The concept of constitutional construction is of central importance to originalist theory but is both underdeveloped and controversial among originalists."); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) ("[T]he Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (marrying originalism and living constitutionalism by recognizing thin semantic meaning and a healthy construction zone based on the Constitution's broad purposes and principles); and Segall, *supra* note 37 (arguing that the concession of under-determinate constitutional texts means that "there is no meaningful difference between most modern originalist theory and Living Constitutionalism").

41. See e.g., Elena Kagan Supreme Court Nomination Hearing: Day 2, *Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN, at 10:40 (June 29, 2010), <https://www.c-span.org/video/?294264-2/kagan-confirmation-hearing-day-2-part-1> [<https://perma.cc/M4E6-WLL3>] ("[W]e are all originalists."); *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 84 (1981) ("In analyzing a question the intent of the framers of [the Constitution] is vitally important.").

42. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

43. *Id.*

toolkit.<sup>44</sup> Richard Fallon further developed the theory by arguing that the different modes (which he limited to five) normally pointed to the same result, but when they could not, there was a natural hierarchy among them in which text and history had greatest sway.<sup>45</sup> Justice Benjamin Cardozo espoused a process-based idea of law that could be dubbed proto-pluralism,<sup>46</sup> and among more modern Courts, Justice Steven Breyer best embodies pluralism as a coherent theory, authoring his own take on the theory in *Active Liberty*.<sup>47</sup>

The above lays out a very brief overview of the landscape of interpretive methodologies using history as practiced by the Court. This Section now turns to the literature on whether the history espoused by the various theories constrains.

## 2. Criticisms of the constraining effect of history

Alfred Kelly first addressed the constraint of history in *Clio and the Court: An Illicit Love Affair*.<sup>48</sup> Kelly begins his path-breaking Article by canvassing the Court's then 175-year interpretive permutations, highlighting periods when the Court was criticized for turning to history in some format to justify its judgments. He then narrows in on "the extended essay in constitutional history usually of what I should call the 'law-office' variety," occasionally used in the nineteenth century, and more pervasively and successfully deployed in the twentieth.<sup>49</sup> In a thinly-veiled critique of the Warren Court, Kelly chides that the Court's historical "essays," where used as "precedent-breaking devices" "were very bad history indeed."<sup>50</sup>

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44. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

45. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

46. Edwin W. Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 89 (1939).

47. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006).

48. Kelly, *supra* note 5, at 122 n.13.

49. *Id.* at 122–23.

50. *Id.* at 126.

Such were partisan, relying on evidence “wrenched from [] contemporary historical context,” carefully selecting material designed to prove its thesis and “suppressing all data that might impeach the desired historical conclusions.”<sup>51</sup> In his view, this turn to “original meaning” was “an almost perfect excuse for breaking precedent.”<sup>52</sup>

Two infamous instances wherein the Court employed such tactics turned out very bad indeed: *Dred Scott* and the *Income Tax Cases*.<sup>53</sup> The historical essay was renewed and reinvigorated in the mid-nineteenth century by “reform-minded libertarians” such as Justices Black, Douglas, and Rutledge in incorporating the Fifth Amendment in *Adamson v. California*, in reapportionment cases, and in “wall of separation” cases.<sup>54</sup> The Court’s “sudden attack of modesty” in refraining from using the historical essay to break with precedent in *Brown v. Board of Education*, Kelly concludes, is “that the competing [*Brown*] briefs exposed too grossly . . . the entire fallacy of law-office history.”<sup>55</sup>

Kelly’s arguments have been oft repeated, but with different targets. Since the rise of originalism in the 1990s, designed as it was to constrain judges and encourage the rule of law over following the dictates of policy, critics have homed in on conservatives’ use of originalism, claiming it is mere window dressing for policy-based decision-making posing as judicial philosophy.<sup>56</sup> This argument, if true, eviscerates originalism’s purpose and core normative

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51. *Id.*

52. *Id.* at 131–32.

53. *See id.* at 126 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)); *Pollock v. Farmers’ Loan & Trust Co.* (*Income Tax Cases*), 157 U.S. 429 (1885)). It must be noted, however, that while historical reasoning was employed by Justice Taney to justify his decision against Scott, Justice McLean also appealed to history to support his conclusion that Scott was entitled to freedom, remarking that “many [Blacks] . . . were citizens of the New England States, and exercised the rights of suffrage” at the time of the adoption of the Constitution. *Dred Scott*, 60 U.S. (19 How.) at 537 (McLean, J., dissenting).

54. Kelly, *supra* note 5, at 126–42 (discussing *Adamson v. California*, 332 U.S. 46 (1947)).

55. *Id.* at 145 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

56. *See supra* note 5 and accompanying text.

argument. Typical are Scott Shapiro's blunt tweets in the wake of the Supreme Court's June 2022 opinion announcements, that originalism "tracks the political positions of the Republican Party"<sup>57</sup> and mocking the "poignant . . . debates over originalism, as if it were a real interpretive methodology, and not just a Joker Card for getting the results originalists want."<sup>58</sup> Its critics believe that the history used in originalism has no constraining effect. Interestingly, though moral-reading and pluralism theories frequently employ history, no similar arguments have been lodged in those directions.

Most scholarly treatments making such claims are based on qualitative studies of Court opinions. Additionally, there are studies that have described the Court's use of history in discrete cases, many of which focus on use of *The Federalist*.<sup>59</sup> This Article's prequel looked at all sources, historical and otherwise, cited by the Court in each of 96 cases of constitutional first impression before the Rehnquist Court.<sup>60</sup>

Before the instant project, only Cross's study had directly addressed the constraint of history (under the rubric of originalism).<sup>61</sup> Another study, social scientists Michael A. Bailey and Forrest Maltzman's 2011 *The Constrained Court*, looked at the impact of originalism obliquely. There, Bailey and Maltzman determined that specific legal values constrained Justices' political priors.<sup>62</sup> One

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57. Shapiro, *supra* note 2.

58. Shapiro, *supra* note 3.

59. Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL OF RIGHTS J. 243, 246–47 (2005) (identifying three previous studies in addition to his own); Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J. L. & POL. 63 (2011).

60. See Updike Toler & Cecere, *supra* note 14, at 298.

61. There is one study that looks at Supreme Court briefs that review plain meaning and intent in both constitutional cases and statutory interpretation, but its differences from either this or Cross's study is sufficient to discount it as looking at the constraint of history in constitutional interpretation. Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 113–137 (2002).

62. MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT* 65–68 (2011).

such constraining value was strict construction, which they loosely associated with originalism. However, they were unable “to measure the influence of strict constructionism broadly construed” for coding purposes; rather, they measured it only in relation to more easily codable free-speech cases.<sup>63</sup> In *The Failed Promise of Originalism*, as mentioned above, Cross coded the Court’s use of five “originalist” sources—Farrand’s *Records of the Federal Convention of 1787*, *The Federalist*, Elliot’s *Debates*, dictionaries, and the Declaration of Independence—since 1952.<sup>64</sup> He also looked at which Justices used these sources, including any Justice that cited to one of these sources in “at least thirty cases” in the sample, irrespective of political commitments.<sup>65</sup> Cross hypothesized that “[i]f originalism is generally constraining, it should yield decisions that do not consistently conform to the [ideological] preferences of the justices.”<sup>66</sup> Using data from the Spaeth, Epstein, Martin, Segal, Ruger & Benesh Supreme Court database on the ideological direction of a Justice’s vote in a given case,<sup>67</sup> Cross reported descriptive statistics for each “originalist” Justice on how their rate of voting with the “liberal” side in a case changed based on whether the Justice cited to one of the identified “originalist sources.”<sup>68</sup> After eyeballing the outcomes (as addressed in more detail below, no analytical statistics appear), Cross observed that “there is relatively little evidence of much constraint from the reliance on originalist sources,” and concluded that because originalism appeared to be “so manipulable in practice, the debate over its validity could have a theoretical philosophical value but lends little to actual judicial decisionmaking in practice.”<sup>69</sup> As

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63. *Id.* at 13, 67.

64. See CROSS, *supra* note 6 at 47 (identifying sources tracked in his study).

65. *Id.* at 184.

66. *Id.*

67. To access these data, see The Supreme Court Database, WASH UNIV. L. SCH., <http://scdb.wustl.edu/index.php> [<https://perma.cc/59TK-YWVL>] (last visited July 6, 2022).

68. CROSS, *supra* note 6, at 184-85.

69. CROSS, *supra* note 6, at 19.

such, originalism “may be strategically used only for . . . legitimization.”<sup>70</sup> In short, originalism had failed.

Though his methodology lacked statistical rigor,<sup>71</sup> Cross was received as authoritative. His study appeared to confirm the qualitative criticisms of other scholars and jurists that originalism was judicial policymaking by another name. Its publication sent constitutional theorists invested in originalism on a frenzied quest for alternative normative foundations on which to rest the theory.<sup>72</sup> Interestingly, the debate over the constraint of history has centered on originalism; no study has looked at the constraining impact of history *qua* history as contained in *any* interpretive theory. Given the current outcry over originalism and the use of history in recent cases, the time has come to test history’s constraint again—this time, for all theories and Justices that employ this modality.

B. *The Publication of Constitutional Convention Records*

As explained in detail below,<sup>73</sup> we employed a search algorithm to find references to the Constitutional Convention to include in our dataset, but we also searched for all sources of the Convention to ensure we identified each and every use. This required finding all publications of the Convention’s records. In that process, we discovered that, while much has been written on the Constitutional Convention, a complete publication history of its records has never

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70. *Id.* at 185.

71. Other flaws include couching the use of certain sources as originalism, not canvassing the sources completely, including the Declaration of Independence as a source for originalism when it is not a legal document nor frequently used by the Court, and making conclusions about the use of those sources but failing to show voting direction on a discrete level when Justices used history.

72. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

73. See *infra* note 116 and accompanying text.



been published.<sup>74</sup> This made finding them somewhat difficult, as various delegates or their families published their recollections over the course of a century in widely disparate places.

The earliest records are, unsurprisingly, the most difficult to locate. Records and recollections of the Convention by its delegates began to be published almost immediately, beginning with Charles Pinckney's "Observations on the Plan of Government" in the fall of 1787.<sup>75</sup> A few of Robert Yates's notes of the Convention, recorded before his huffy departure on July 10th, were copied by co-delegate John Lansing and published posthumously to discredit Madison. This was done by Citizen Genêt, son-in-law to George Clinton, when Clinton was running against Madison for president in 1808.<sup>76</sup>

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74. Partial publication histories, however, do exist in the literature. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 794–804 (1928); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1 (1986).

75. Charles Pinckney, *Observations on the Plan of Government submitted to the Federal Convention, in Philadelphia, on the 28th of May, 1787 (before Oct. 14, 1787)* (Francis Childs, New York); see also *SOUTH CAROLINA'S STATE GAZETTE* (Oct. 29–Nov. 29, 1787). Pinckney presumably wrote this speech prior to the Convention's convening (though heavily edited it post hoc), and it was ostensibly intended to accompany Pinckney's draft constitution. There is no evidence Pinckney ever delivered the speech in full, and his draft was never discussed or considered until the Committee of Detail convened to draft the Constitution on July 26th. James Wilson, *Outline of the Pinckney Plan, as published in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 128 (Max Farrand ed., (1911)) (3d ed., 1966) [hereinafter Farrand]. The fate of this speech may be indicated by the subtitle of the pamphlet, "Delivered at different Times in the course of their Discussions," in that he referenced and drew from the speech throughout the Convention. Yates records that "Mr. C. Pinckney, a member from South Carolina, added, that he had reduced his ideas of a new system, which he read, and confessed that it was grounded on the same principle as those resolutions [presented by Edmund Randolph]." Yates *Notes of the Constitutional Convention (May 29, 1787)*, as published in 1 Farrand 23. John Franklin Jameson treated the presentation and provenance of Pinckney's draft in full in 1903. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 *AMERICAN HISTORICAL ASSOCIATION ANNUAL REPORT* 110 (1903).

76. *Letter to the Electors of President and Vice President of the United States by a Citizen of New York, Accompanied with an extract of the secret debates of the Federal Convention, held in Philadelphia, in the year 1787, taken by Chief Justice Yates* (New York, Henry C. Southwick,

Both preceded Congress's publication of the sparse *Official Journal* in 1819, containing delegate credentials, motions, and vote records.<sup>77</sup> Two years later, the first speeches of the Convention as recorded by Yates were published as the *Secret Proceedings and Debates of the Convention at Philadelphia, in the year 1787, for the purpose of forming the Constitution of the United States of America*.<sup>78</sup> Later in the decade, in 1828, William Pierce's sketches and notes of the

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1808). Charles Warren attributes the authorship of this pamphlet to E.C. Genêt, or Citizen Genêt, WARREN, *supra* note 74, at 795, and his name was penciled into the copy of the pamphlet reviewed by this author in the College Pamphlets collection at the Benicke Rare Books and Manuscripts Library at Yale. After the "Citizen Genêt" affair, Genêt was pardoned and granted citizenship by Washington and moved to New York, where he married George Clinton's daughter. Publication of this pamphlet, which was not flattering to Madison and the Virginia Plan, together with an article entitled "Madison as a 'French Citizen'" were designed to promote the prospects of his father-in-law for president over that of Madison in 1808. Of Genêt's publication of Yates's notes, Farrand writes:

"[I]n publishing the *Secret Proceedings*, Genet took liberties with Lansing's copy of Yates' notes, liberties that appear to have exceeded those he permitted himself in the anti-Madison polemic in 1909. Lansing's copy of Yates' notes were thought to have been lost until two sheets from July 5, 1787 were discovered recently in Genet's papers at the Library of Congress. By comparing the contents of those sheets—the only ones known to exist—with what Genet actually published as occurring on July 5, 1787, it can be seen that he omitted half of the material on the sheets and altered every sentence that he published."

Hutson, *supra* note 74, at 12.

77. JOURNAL, ACTS AND PROCEEDINGS OF THE CONVENTION, ASSEMBLED IN PHILADELPHIA, MONDAY, MAY 14, AND DISSOLVED MONDAY, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (Thomas B. Wait ed., 1819) [hereinafter OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION].

78. SECRET PROCEEDINGS OF DEBATES OF THE CONVENTION AT PHILADELPHIA, IN THE YEAR OF 1787, FOR THE PURPOSE OF FORMING THE CONSTITUTION OF THE UNITED STATES OF AMERICA. FROM NOTES TAKEN BY THE LATE ROBERT YATES, ESQ., CHIEF JUSTICE OF NEW YORK, AND COPIED BY JOHN LANSING, JUN., ESQ., LATE CHANCELLOR OF THAT STATE, MEMBERS OF THAT CONVENTION. INCLUDING 'THE GENUINE INFORMATION' LAID BEFORE THE LEGISLATURE OF MARYLAND BY LUTHER MARTIN, ESQUIRE, THEN ATTORNEY GENERAL OF THAT STATE AND MEMBER OF THE SAME CONVENTION. ALSO, OTHER HISTORICAL DOCUMENTS RELATIVE TO THE FEDERAL COMPACT OF THE NORTH AMERICAN UNION (Albany, Websters & Skinners, 1821) (1987 reprint).

convention were published exclusively in the *Savannah Georgian* (and therefore enjoyed only limited circulation).<sup>79</sup>

Finally, Madison's extensive notes were published posthumously in the second and third volume of Gilpin's 1840 edited collection of Madison's papers.<sup>80</sup> That same year, Alexander Hamilton's son, John Church Franklin, also published Hamilton's notes in *The Life of Alexander Hamilton*.<sup>81</sup> Thereafter, Jonathan Elliot included Madison's notes in a more user-friendly format that supplanted Gilpin in an 1845 special fifth supplemental volume to *The Debates in the Several State Conventions*, originally published as a four-volume set in 1836 that included the state ratification debates, the Journal of the Convention, Yates's notes, and other documents.<sup>82</sup> Although E. H. Scott republished Madison's notes in 1893,<sup>83</sup> Elliot's fifth volume

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79. William Pierce, *Loose Sketches and Notes Taken in the Convention, SAVANNAH GEORGIAN* (April 19, 21–26, 1828) (also referred to as the *Daily Georgian*).

80. 1–3 THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., 1840). The debates commence on p. 683, vol. 2, and conclude on 1624, vol. 3 (continuously paginated).

81. 1–2 THE LIFE OF ALEXANDER HAMILTON (John Church Hamilton ed., 1840). Although the younger Hamilton lambasted Madison for publishing his notes posthumously, he justified publishing his father's "for the purpose of debate . . . will be only resorted to as far as absolutely necessary for his vindication . . ." 2 *id.* at 467. We are indebted to Lynn Uzzell for alerting to us to this early source.

82. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787. TOGETHER WITH THE JOURNAL OF THE CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99 AND OTHER ILLUSTRATIONS OF THE CONSTITUTION IN FOUR VOLUMES (Jonathan Elliot ed., 1836) ("[P]ublished under the sanction of Congress."); DEBATES OF THE ADOPTION OF THE FEDERAL CONSTITUTION. IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787; WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION AS REPORTED BY JAMES MADISON, A MEMBER, AND DEPUTY FROM VIRGINIA. REVISED AND NEWLY ARRANGED BY JONATHAN ELLIOT. COMPLETE IN ONE VOLUME. 5 *id.* (1845).

83. JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON (E.H. Scott ed., Albert, Scott & Co., 1893) (subtitled "Reprinted from the edition of 1840, which was published under direction of the United States government from the original manuscripts. A complete index specially adapted to this edition is added.).

continued to dominate the landscape until the appearance of Far-rand's volumes, and is still in use (especially by the Court) today.<sup>84</sup>

Immediately prior to the turn of the century, several more collections of Convention records came to light. Publications embraced Rufus King's records,<sup>85</sup> William Pierce's notes (published again, this time more broadly),<sup>86</sup> and William M. Meigs's *Growth of the Constitution*,<sup>87</sup> including the first document published from the Committee of Detail's inter-workings—Edmund Randolph's preliminary sketch of the Constitution. Also during this time, in 1894, the State Department published their four-volume *Documentary History of the Constitution of the United States* "to give a literal print of the documents deposited" with them, including the official journal, relevant letters and papers, and Madison's notes.<sup>88</sup> The State Department collated and printed the papers in the order in which they were archived, often formatting the typeset as the original documents had been organized, including the August 6th report of the

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84. See, e.g., *United States v. Morrison*, 529 U.S. 598, 646 n.14 (2000) (Souter, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

85. King's notes are found in volume 1, covering 1755–94, of a six-volume set edited by his grandson, Charles K. King. 1 *THE LIFE AND CORRESPONDENCE OF RUFUS KING: COMPRISING HIS LETTERS, PRIVATE AND OFFICIAL HIS PUBLIC DOCUMENTS AND HIS SPEECHES* (Charles K. King, ed., 1894–1900).

86. *Notes of Major William Pierce on the Federal Convention of 1787*, 3 *AM. HIST. REV.* 310 (1898).

87. WILLIAM MONTGOMERY MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED: CONTAINING ALSO A FAC-SIMILE OF A HERETOFORE UNPUBLISHED MANUSCRIPT OF THE FIRST DRAFT OF THE INSTRUMENT MADE FOR USE IN THE COMMITTEE OF DETAIL* (J. B. Lippincott ed., c.1900).

88. 1 *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870: DERIVED FROM THE RECORDS, MANUSCRIPTS, AND ROLLS DEPOSITED IN THE BUREAU OF ROLLS AND LIBRARY, OF THE DEPARTMENT OF STATE* iii (U.S. Dept. of State ed., 1894). The *Documentary History* was published again in 1905 and reproduced in 1998 by Rothman Press.

Committee of Detail, on which delegates scrawled handwritten notes.<sup>89</sup>

In the first decade of 1900, James Franklin Jameson published many more Committee of Detail documents, including some of those in James Wilson's hand,<sup>90</sup> the Senate published the *Debates in the Federal Convention of 1787*,<sup>91</sup> Gaillard Hunt edited a nine-volume compilation of Madison's Writings containing the Convention notes in volumes 3-4,<sup>92</sup> and William Patterson,<sup>93</sup> Alexander Hamilton,<sup>94</sup> and James McHenry's notes were all published in the *American Historical Review*.<sup>95</sup>

In 1911, Max Farrand edited and published his seminal *The Records of the Federal Convention of 1787*.<sup>96</sup> This three-volume work compiled and published all extant notes, including the nine Committee of Detail documents for the first time.<sup>97</sup> It also collated each delegates' notes into a more user-friendly format—by day of debate. However, its comprehensiveness and superior organization were offset by its bulk, each volume of the first edition being three inches

89. This varied typeset is most distinctive in setting off the various drafts of the Constitution, including two personal copies of the printed Committee of Detail report, complete with emendations and marginalia. See 1 *id.* at 285-308, 338-85.

90. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 AM. HIST. ASS'N ANNUAL RPT. 110 (1903).

91. DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA, ON THE ELECTION OF SENATORS, COMPILED BY A.P.C. GRIFFIN, CHIEF BIBLIOGRAPHER, LIBRARY OF CONGRESS, S. DOC. No. 57-404 (1st Sess. 1902).

92. 1-9 THE WRITINGS OF JAMES MADISON COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt ed., 1900-1910).

93. William Paterson, *Notes on the Federal Convention*, 9 AM. HIST. REV. 310, 310-40 (1904).

94. Worthington Chauncey Ford, *Alexander Hamilton's Notes in the Federal Convention of 1787*, 10 AM. HIST. REV. 97, 97-109 (1904).

95. *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 595-624 (1906).

96. 1-3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

97. 2 *id.* at 129-75; see also William B. Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 85 PA. MAG. HIST. & BIOGRAPHY 227 (2011) (surveying changes in the Constitution throughout drafting).

thick.<sup>98</sup> Although initial publication records for the 1911 printing are no longer kept by Yale University Press, which published Farrand's *Records*,<sup>99</sup> the volumes' bulk seems to have driven up their price and limited the print run, both impacting accessibility: in the preface to a 1927 Congressional compilation of Convention notes and records, the editor tellingly writes of the 1911 publication, "[t]his important publication was not only quite expensive but is now difficult to acquire at any price."<sup>100</sup> Farrand's hardback volumes were printed again in 1937, this time with a supplement of newly-found papers, but the circulation of these, too, dwindled over the course of the next 25 years, as the editor of yet another compilation indicated that previous editions of Convention records were not only "out of print [and] unavailable for teachers, students, lawyers, journalists, commentators, and 'we the people'" in general.<sup>101</sup> Finally, much thinner cloth hardback and paperback sets were published in 1966,<sup>102</sup> and then James Hutson of the Library of Congress (where Madison's Notes are now preserved once they transitioned there from the State Department<sup>103</sup>) rearranged the 1937 supplemental volume and augmented it for the Constitution's

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98. Authors' physical inspection of the original volumes.

99. Interview with Amy Schock, Sales Pub. Assistant, Yale Univ. Press (July 30, 2020).

100. 1 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, n.39 (Charles C. Tansill ed., 1927).

101. *Adrienne Koch, Introduction, in NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON*, at vii (Adrienne Koch ed., 1966).

102. A total of 800 cloth and 5,000 paperback for volume one, 2,000 cloth and 4,500 paperback for volume two, and 2,500 cloth and 3,000 paperback for volume three has sold to date. All cloth versions are out of print, and the paperback versions are back-listed. Email from Amy Schock, Sales Pub. Assistant, Yale Univ. Press, to Author (July 31, 2020) (on file with the author).

103. The State Department transferred an initial lot of more than 8,600 manuscripts in 1905, with those relating to the Convention following in 1922. DOROTHY S. EATON, *PROVENANCE OF THE JAMES MADISON PAPERS, INDEX TO THE JAMES MADISON PAPERS* (1965), <https://www.loc.gov/collections/james-madison-papers/articles-and-essays/provenance> [<https://perma.cc/G72J-YTDN>].

bicentennial in 1987.<sup>104</sup> Despite its comprehensiveness, hegemony<sup>105</sup> and successive printings, Farrand's *Records* remain in short supply and are expensive, even now.<sup>106</sup>

In addition to Farrand's volumes, several more compilations have been published in the intervening century, including edited volumes of Madison's *Notes* by Hunt and Scott in 1920,<sup>107</sup> the U.S. House in 1927,<sup>108</sup> John Lansing's notes in 1939 by Princeton University Press,<sup>109</sup> Arthur Taylor's rearrangement of Madison's notes by provisions of the Constitution in 1941,<sup>110</sup> a volume by the Ohio University Press in 1966,<sup>111</sup> and another edited by Winton Solberg in 1990.<sup>112</sup> To celebrate the Bicentennial, Wilbourn E. Benton edited a two-volume set of Convention records organized by section of the

104. SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson, ed., 1987). Despite the addition of this volume, the entire set was not republished at this time.

105. Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1120 (2003) (Calling Farrand's *Records* "the most complete compendium of the Philadelphia Convention proceedings").

106. As of September 25, 2019, a used set of the four volumes on Amazon sold for \$250. As of August 2020, individual volumes sell for \$38-58 each. There are still volumes left of the 5,000 1966 print run (4,982 total have sold since 1966), with 97 copies being sold to date this year in the US, and 23 copies out of YUP's London office. Schock, *supra* note 99.

107. THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., 1920).

108. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Charles C. Tansill ed., 1927).

109. THE DELEGATE FROM NEW YORK: OR, PROCEEDINGS OF THE FEDERAL CONVENTION OF 1787 FROM THE NOTES OF JOHN LANSING, JR. (Joseph Reese Strayer ed., 1939).

110. DRAFTING THE FEDERAL CONSTITUTION (Arthur Taylor Prescott ed., 1941).

111. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., 1966). A second, indexed edition was printed in 1984. The latter volume also placed emphasis on the various constitutional proposals of Edmund Randolph, William Patterson, and Alexander Hamilton, indicating that Madison's report of these proposals was not reliable, and therefore the proposals had been reconstructed. *Id.* at vi.

112. THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION (Winton U. Solberg, ed., 1990).

Constitution.<sup>113</sup> Most recently, in 2011, Bill Ewald and the lead author re-transcribed Committee of Detail documents, published alongside facsimiles of the originals in a publication marking the centenary of Farrand's great accomplishment.<sup>114</sup>

In all, in the 235 years since the Convention, there have been 26 publications of various notes and documents, averaging just over one per decade, with a concentration of publications around the turn of the century. Since the 1966 paperback publication of Farrand, it remains the most authoritative and widely cited publication on the Convention.<sup>115</sup> Indeed, as shall be seen, it is the Supreme Court's most-cited Convention records.

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The Convention's publication historiography, the summary of the Supreme Court's theories employing history, and the short list of studies analyzing their use of history outlined above lays the groundwork for understanding how the records of the Convention have been employed by the Court, and whether such has constrained. As will be discussed in much more depth in the next section, the short answer to this question is that the Court has not been constrained by the records themselves. It is to this study, including its methodology and results, to which we now turn.

## II. EMPIRICAL ASSESSMENT

This Part presents an empirical analysis of the Supreme Court's use of Convention records since the Founding. After providing an overview of the study's methodology in Section II.A, the categories and frequencies of the different sources that have been used to support the Court's assessment of the Convention for all cases since 1790 are described in Section II.B. Then, Section II.C analyzes how the use of historical sources is associated with constraint, using

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113. 1-2 1787: DRAFTING THE U.S. CONSTITUTION (Wilbourn E. Benton, ed., 1986).

114. Ewald & Updike Toler, *supra* note 97.

115. *See infra* Figure 2 and accompanying text.



available data from all Supreme Court cases that cite to the Convention over the period of 1937-2021.

A. *Study Design*

This Article seeks to do two things: (1) identify all sources the Supreme Court has used when referencing the Constitutional Convention throughout its history; and (2) analyze whether there is a relationship between constrained voting behavior and the Court's use of such source materials to support historical references.

To answer these questions, we began by identifying every instance where a Supreme Court opinion references the Federal Constitutional Convention.<sup>116</sup> After finding the relevant cases, we then tracked each opinion within a given case where a Justice discussed the Constitutional Convention, and whether that discussion, or a footnote to it, was supported by a citation to a primary or secondary source. Since 1790, 356 unique opinions across 315 cases have referenced the Convention.

The sources referenced were then categorized as either "primary" or "secondary" sources. Under these definitions, primary sources consisted of any historical source, including contemporaneous accounts of the Convention, the *Federalist*, antiquarian books written prior to 1830, statutes, English cases, accounts of the ratification

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116. To identify these cases, we ran a capacious search on LexisNexis: (federal OR constitutional OR Philadelphia OR 1787 OR founding OR federalist OR Farrand) /p convention). We also searched for the 26 publications of the Convention's records. See *supra* Section I.B. We then read through each case to ensure that the opinion discussed the 1787 Philadelphia Convention, rather than only state constitutional conventions or ratification conventions. We also excluded cases where discussion of the Convention was included only in the counsel arguments, rather than any opinion written by a Justice. Lastly, we excluded opinions in cases dealing with acceptance or denial of a writ of certiorari. After identifying the cases where an opinion actually referenced the Federal Constitutional Convention, we were left with a population of 315 cases and 356 different opinions. See *Opinion-Level Reference Counts, 1790-2021*, in REPLICATION DATA FOR "THE CONSTRAINT OF HISTORY," available at [https://docs.google.com/spreadsheets/d/1OAgqiY8\\_8IGFdtaxEskQSGoNN4ECmqmHoEVJ5wyvCMU/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1OAgqiY8_8IGFdtaxEskQSGoNN4ECmqmHoEVJ5wyvCMU/edit?usp=sharing) [<https://perma.cc/GNF2-GRP4>].

debates and other historical sources like letters and speeches. Secondary sources referred only to previous U.S. cases, scholarly books written after 1830, and academic articles. These sources represent the entire population of materials cited by the Justices when discussing the Convention.<sup>117</sup> However, reporting on which sources the Court most commonly uses is only half of this project. We also aim to find whether the use of such sources bears on the Justices' decisionmaking.

Most crucial for answering this question was to determine a way to capture the extent to which a Justice was "constrained" by history. According to Bailey & Maltzman, the Justices are constrained when they do not "simply base their decisions on the policy preferences they bring to the bench."<sup>118</sup> Under this connotation, if some other factor besides partisan preference works to explain a Justice's voting behavior, that Justice should be considered constrained by that variable. Within the relevant literature, several factors appear to have a constraining relationship with judicial behavior. For instance, Bailey & Maltzman note that legal principles such as stare decisis and judicial deference significantly impact votes, thus constraining many Justices from voting solely for ideological grounds.<sup>119</sup> Other studies have found a constraining effect of many other factors, including public opinion on the issue,<sup>120</sup> the fear of the

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117. For a breakdown on the extent to which each source has been used by the Court since the Founding, see *infra* Section II.B.

118. See BAILEY & MALTZMAN, *supra* note 62, at ix.

119. See *id.* at 64–69.

120. See, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). *But see* Ben Johnson & Logan Strother, *TRENDS: The Supreme Court's (Surprising?) Indifference to Public Opinion*, 74 POL. RSCH. Q. 18, 30 (2021) ("Our empirical analyses—in contrast to decades of published studies—reveal no statistically significant relationship between public mood and Court outputs.").

decision being ignored by the political branches,<sup>121</sup> jurisprudential regimes,<sup>122</sup> and the perception of the Court's institutional legitimacy.<sup>123</sup>

This definition of “constraint”—that something other than raw politics bears on the Justices' votes—differs subtly from how Cross conceived of the term in *The Failed Promise of Originalism*. To Cross, constraint implicitly required that “decisions . . . do not consistently conform to the ideological preferences of the Justices.”<sup>124</sup> But this understanding is too narrow. While a greater share of cross-partisan votes may be evidence of constraint, it is not necessary for a Justice to happen to vote against her political priors in order for that vote to have been influenced, at least in part, by history. For example, in *Perpich v. Department of Defense*,<sup>125</sup> a unanimous Rehnquist Court held that the federal government retained the power to call state militias into overseas service without declaring a national emergency. Writing for the Court, Justice Stevens referenced the Constitutional Convention to support the proposition that Congress retained significant authority over the militia, since at the Founding “there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.”<sup>126</sup> Under Cross's conception, only those Justices casting a cross-partisan vote—here, Justices White,

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121. See Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 353 (2014).

122. See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–06 (2002) (“Jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors . . .”).

123. See Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 102 (2011).

124. CROSS, *supra* note 6, at 184.

125. 496 U.S. 334 (1990).

126. *Id.* at 340.

Kennedy, O'Connor, and Scalia—would be considered to be “constrained” by history. But just because the other Justices may have reached an outcome favorable to their political preferences does not necessarily mean that their engagement with historical sources did not also bear on their vote. The unanimous Court very well may have followed where the history led, suggesting a constraining effect of history independent from ideological outcomes.

*The Failed Promise of Originalism* is also woefully lacking in the use of any rigorous empirical methods. While some have heralded Cross's work for “using quantitative evidence to demolish popular myths concerning originalism[],”<sup>127</sup> Cross's methods never graduate beyond mere descriptive statistics and inferential eyeballing. Cross is content to conclude that observed differences between a Justice's ratio of casting a liberal vote when historical sources are cited and when they are not simply is the product of “random variation,” without conducting any inferential statistical analysis or even showing his work.<sup>128</sup>

As detailed below, our study design differs from that of Cross's book in several ways. First, in addition to employing models that measure the relationship between the use of historical sources and the probability of a Justice casting a cross-partisan vote, we also estimate the probabilities of the Justices casting a conservative or liberal vote when historical sources are used regardless of their political priors. By examining the extent to which historical citations are associated with the direction of all Justices' votes, while holding ideology constant, we can begin to isolate the influence of history from that of mere politics.

Second, this study does not set out to be an evaluation of originalism. Such an endeavor would lack precision and is not possible in

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127. John W. Compton, *What is Originalism Good For?*, 50 TULSA L. REV. 427, 435 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)); see CROSS, *supra* note 6; MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM (2013)).

128. See CROSS, *supra* note 6, at 185.

any event given the nature of our data. Cross himself notes that originalism “remains of unclear meaning,” resigning his study to capaciously define the term as “any reliance on evidence from the framing era . . . whether in pursuance of original meaning, original intention, or some other theory.”<sup>129</sup> But originalism is not the only method of constitutional interpretation that finds historical evidence relevant.<sup>130</sup> In practice, Cross retreats from his ambitious endeavor of evaluating “originalism” to simply evaluating the use of the historical modality,<sup>131</sup> equating “historical sources” with “originalist sources.”<sup>132</sup> As such, Cross anachronistically labels as “originalist” Justices who left the bench years before the term was first used by Paul Brest in 1980.<sup>133</sup> While we may be “all originalists” now,<sup>134</sup> it is far from obvious that they were all originalists then, even if the Justices relied on historical sources from time to time.

Though Cross may be faulted for playing fast-and-loose with his research question, he cannot be criticized for failing to limit his study to the platonic idea of originalist Justices—we recognize the virtual impossibility of such a project. Therefore, we would like to be explicit in noting that our research question seeks only to evaluate the use of historical sources per se and does not attempt to delineate between how these sources are used by different interpretive methodologies.

Lastly, this Article’s exploration of the use of historical sources is limited only to those used in support of a reference to the Constitutional Convention. In this sense, our universe of sources is both

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129. *Id.* at 44.

130. *See supra* Section I.A.

131. *See* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 (1990).

132. *See, e.g.,* CROSS, *supra* note 6, at 143.

133. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980); *see also* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 13 (Grant Huscroft & Bradley W. Miller eds., 2011) (surveying the origins of originalism).

134. Elena Kagan Supreme Court Nomination Hearing: Day 2, *supra* note 41..

broader and narrower than that analyzed in Cross's book. His study looks at each time an "originalist source" is cited to by the Supreme Court, regardless of context. However, Cross limits his sources-of-interest only to *The Federalist*, *Elliot's Debates*, Farrand's *The Records of the Federal Convention of 1787*, The Declaration of Independence, and historical dictionaries.<sup>135</sup> By looking at all primary sources of the Convention—and counting all other sources used to support a legal or historical point about the lessons of the Convention<sup>136</sup>—this Article provides a more capacious account of the historical sources used by the Court, though in a more limited context.

### 1. Cross-Partisan Vote Models

For our first set of models, we define constraint as Cross does—that a Justice is constrained by a historical source where she casts a vote in a case contrary to her ideological preference.<sup>137</sup> To derive this outcome variable, we employed data from the Martin-Quinn Scores on Justice ideology and the Spaeth, Epstein, Martin, Segal, Ruger & Benesh Supreme Court Database on the political disposition of votes in a case.

Martin-Quinn Scores present an estimate of every Supreme Court Justice's ideological disposition for each Term over the period of 1937-2021.<sup>138</sup> We chose to use the posterior mean Martin-Quinn Scores as our metric for judicial ideology over other comparable measures in the literature<sup>139</sup> because they cover the largest time series, measure all issue areas, and dynamically change for each Term

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135. See CROSS, *supra* note 6, at 177.

136. See *supra* notes 116-117 and accompanying text.

137. See CROSS, *supra* note 6, at 184. To access the data used in our models for replication, see *Regression Data*, in REPLICATION DATA FOR "THE CONSTRAINT OF HISTORY," *supra* note 116.

138. See Martin-Quinn Scores, UNIV. OF MICH., <https://mqscores.lsa.umich.edu/> [<https://perma.cc/6Z3B-N2QP>] (last visited July 6, 2022); The Supreme Court Database, *supra* note 141.

139. See, e.g., Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

as “the worldviews, and thus the policy positions, of [J]ustices evolve through the course of their careers.”<sup>140</sup> Martin-Quinn Scores are notated on a continuous scale, with negative numbers representing “liberal” preferences and positive numbers representing “conservative” preferences. The greater the absolute value of a Justice’s score, the more partisan that Justice was in a given Term. For example, Justice Douglas’s 1975 score of -7.923 represents the most liberal preference for any Justice in the set, while then-Justice Rehnquist’s 1979 score of 4.511 represents the most conservative preference.

The Supreme Court Database provides information on whether the outcome of each Justice’s vote in a given case reflects a “conservative” or “liberal” preference for all cases between the 1937 and 2021 Terms. “Liberal” outcomes represent those that support, for example, criminal defendants, civil liberties, “underdog[s],” economic equity, federal power, and judicial activism.<sup>141</sup> “Conservative” outcomes represent the “reverse” of these.<sup>142</sup> In cases where “no convention exists as to which is the liberal side and which is

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140. Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J. L. ECON. & ORG. 303, 303 (2007).

141. The Supreme Court Database, *Decision Direction*, WASH. UNIV. L. SCH., <http://supremecourtdatabase.org/documentation.php?var=decisionDirection> [<https://perma.cc/4AKD-WQBH>] (last visited July 5, 2022). For the individual vote-direction data used in these models, see The Supreme Court Database, *Direction of the Individual Justice’s Votes*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=direction> [<https://perma.cc/5TRE-AH27>] (last visited March 19, 2023).

142. These definitions, of course, fail to perfectly capture ideological nuance in every case. For instance, the Court’s holding in *Trump v. Vance*, 140 S. Ct. 2412 (2020), that the Manhattan District Attorney could lawfully subpoena President Trump’s tax records in furtherance of a criminal investigation, is coded in the database as a “conservative” outcome because it rules against the rights of a criminal defendant and increases the power of states vis-à-vis the federal government. As such, Justice Alito and Justice Thomas’s dissenting votes in that case are considered cross-partisan votes, as are Justice Breyer, Justice Ginsburg, Justice Kagan, and Justice Sotomayor’s votes with the majority. Still, as Cross himself acknowledges, this database “remains the best resource for research in this area, and the constitutional cases . . . tend to be more ideologically plain.” CROSS, *supra* note 6, at 177.

the conservative side” or where “the issue does not lend itself to a liberal or conservative description,” the Supreme Court Database does not assign a decision direction. All votes from these cases are thus excluded from our regression models.<sup>143</sup>

Using these data, we were able to define whether a Justice was “constrained,” or voted against her political preference, in a given case. A Justice was considered “constrained” in her vote if (1) that Justice had a negative (liberal) Martin-Quinn Score for that term and voted for the “conservative” outcome in the case; or (2) that Justice had a positive (conservative) Martin-Quinn Score for that Term and voted for the “liberal” outcome.<sup>144</sup>

Using this outcome variable, we devised four logistic regression models to estimate the statistical association between historical analysis of the Convention and the odds of a Justice casting a cross-

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143. Such cases most often dealt with issues of federalism or executive power. The cases that referenced the Convention but were excluded from the model due to their lack of a decision direction were *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Will*, 449 U.S. 200 (1980); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989); *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). References to Convention sources in these cases were still tallied for purposes of reporting their use in Section II.B, *infra*.

144. Because a Justice’s Martin-Quinn Score itself is based on the ideological valence of her votes in a given Term, issues of circularity may arise as “the measures for the independent and dependent variables are identical.” Lee Epstein & Carol Mershon, 40 *AM. J. POL. SCI.* 261, 263 (1996); see Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimates be Used as Explanatory Variables?*, at 2 (Oct. 8, 2005) (unpublished manuscript), <https://mqscores.lsa.umich.edu/media/resnote.pdf> [<https://perma.cc/3Y7J-PP6Z>]. Still, Martin-Quinn scores “do not measure ideology with reference to any particular kind of concrete outcome; rather, they measure ideology purely in terms of voting alignments.” Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 *WASH. U. J.L. & POL’Y* 133, 162 (2009). Despite this concern, Martin-Quinn scores are commonly used as explanatory variables in the relevant literature. See, e.g., Oleg Smirnov & Charles Anthony Smith, *Drift, Draft, or Drag: How U.S. Supreme Court Justices React to New Members*, 34 *JUSTICE SYS. J.* 228 (2013); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 *J. EMPIRICAL LEGAL STUDS.* 485 (2009).



partisan vote. The standard errors for each model are calculated using heteroskedasticity-consistent standard errors to improve robustness.<sup>145</sup>

Model 1 presents the most basic specification,<sup>146</sup> regressing whether a cross-partisan vote was cast in an opinion on the total number of primary and secondary citations to the Convention in that opinion. For each vote in the dataset, we code the outcome variable as 1 for cases where the Justice casts a cross-partisan vote, and 0 where she does not. The log-odds of a Justice casting a cross-partisan vote is thus defined as:

$$(1) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 TotalPrimary_i + \beta_2 TotalSecondary_i + \varepsilon_i,$$

where *TotalPrimary* and *TotalSecondary* represent the total number of citations to a primary or secondary Convention source, respectively, in an opinion.<sup>147</sup> Only unique citations were included in

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145. See J. Scott Long & Laurie H. Ervin, *Using Heteroscedasticity Consistent Standard Errors in the Linear Regression Model*, 54 AM. STAT. 217 (2000).

146. See Johnson & Strother, *supra* note 120, at 23 (“If there is a real and meaningful relationship between [our explanatory variables] and Supreme Court outputs, it should be evident before we begin to add [covariates] to the right-hand side of the equation.”).

147. As an exception to this rule, references to the Convention were not necessarily counted where an opinion uses the metonym “the plan of the Convention” to refer to the Constitution, a common practice in cases dealing with the abrogation of sovereign immunity. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (“[A] State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the ‘plan of the convention.’”). Consistent with our decision not to include the Constitution itself as a Convention source, uses of this phrase would only be counted as references to the Convention where that phrase is included within a discussion of the Convention itself, and not simply its output. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964)) (“After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, ‘a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature.’ In adopting that plan, the Framers envisioned a uniform national system . . .”).

these counts.<sup>148</sup> The constant  $\alpha_0$  represents the intercept term, and  $\varepsilon_i$  the error term for this model. This model pools all Justices and all votes in the cases in the observation period in which at least one opinion made reference to the Convention, yielding a sample size of 1755 individual votes.

Model 2 builds upon Model 1 by adding a series of vote-level, case-level, and Justice-level controls as explanatory variables. Under this specification, the log-odds of a Justice casting a cross-partisan vote equals:

$$(2) \log \left( \frac{Y_i}{1-Y_i} \right) = \alpha_0 + \beta_1 TotalPrimary_i + \beta_2 TotalSecondary_i + \beta_k \delta_i + \beta_m \varphi_i + \beta_n \gamma_i + \varepsilon_i$$

Here,  $\delta_i$  represents a matrix of vote-level variables. First, the binary variable *Author* is assigned a 1 if the Justice is the author of the opinion and a 0 if she joins the opinion. Second, the binary variable *OpCourt* is coded as 1 where the Justice either authors or signs on to the opinion of the Court. Where the Justice authors a concurrence or concurrence-in-part, but still signs on to the majority opinion, the *OpCourt* variable remains at 1, unless the Justice's separate opinion contains a reference to the Convention. Concurrences in the judgment and dissents are given a value of 0 for this variable. Third, a value of 1 for the binary *Reference Only* variable captures instances where the opinion for which the Justice votes refers to the Convention but does support that reference with any citation.<sup>149</sup>

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148. That is, a reference to a source containing multiple page numbers (e.g., 3 Farrand, *Records of the Constitutional Convention* 478, 574) would count as only one primary-source reference. In contrast, multiple citations to the same source, separated by a semicolon (e.g., 2 Farrand, *Records of the Constitutional Convention* 478; *id.* at 574) would count as two primary-source references. This uniform system worked to standardize counting of sources when Justices referenced ranges of multiple pages of a source in a citation.

149. Common to the Court, especially in its earliest days, was the practice of including quotations from the Framers without citing them. For instance, in *Dred Scott v.*

This variable takes a 0 either where the Justice's opinion supports its reference to the Convention with a citation or does not reference the Convention at all. Fourth, a value of 1 for the binary *Little There* variable denotes that the Justice's opinion explicitly notes that the Convention records provide little useful material on the relevant issue.<sup>150</sup>

Next,  $\varphi_i$  represents a matrix of covariates from the Supreme Court Database that vary across cases but do not change based on an individual Justice's vote in the case. This model includes 10 treatment-coded variables, each representing the issue area of a case.<sup>151</sup> The binary variable *Precedent* notes whether that case formally altered a past precedent.<sup>152</sup> The variables *FedUC* and *StateUC*

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*Sandford*, Justice Campbell writes that "in the Federal Convention . . . Mr. Madison observed, 'that the States were divided into different interests not by their difference of size...but by other circumstances'" but cites no source to support either the quotation or the proposition. 60 U.S. (19 How.) 393, 498 (1856) (Campbell, J., concurring). While this reference to the Convention provides a clear quotation from some source, it is impossible from the opinion alone to discern the source material and its source-type, especially since multiple publications of Convention records were in print at the time.

150. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) ("The first sentence of the Full Faith and Credit Clause was not much discussed at either the Constitutional Convention or the state ratifying conventions.").

151. These issue areas are criminal procedure, civil rights, First Amendment, due process, privacy, unions, economic activity, judicial power, federalism, and federal taxation. See The Supreme Court Database, *Issue Area*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=issueArea> [https://perma.cc/8568-K5Y4] (last visited Mar. 18, 2022). To avoid singularities, the miscellaneous issue is dropped as the baseline. Therefore, a case is only coded a 1 for one issue area at most. See T. Florian Jaeger, *Categorical Data Analysis: Away from ANOVAs (Transformation or Not) and Towards Logit Mixed Models*, 59 J. MEM. LANG. 434, 436 (2008).

152. See The Supreme Court Database, *Formal Alteration of Precedent*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=precedentAlteration> [https://perma.cc/N8MS-YTZ2] (last visited Mar. 18, 2022) (noting that this variable takes the value of a 1 where a majority opinion explicitly says a precedent of the Court has been overruled by that case, a dissent "clearly and persuasively [states] that precedents have been formally altered," the majority characterizes a case as being overruled in a subsequent opinion, or the majority "states that a precedent of the Supreme Court has been 'disapproved,' or is 'no longer good law.'"). Where the Court merely

respectively note if the Court held a federal or state law to be unconstitutional in the case.<sup>153</sup>

Finally,  $\gamma_i$  represents the matrix of Justice-level controls that distinguish each Justice from the others in the dataset. Because these data are fully pooled,<sup>154</sup> we include several covariates to account for the Justices' differing backgrounds and ideologies. To capture a Justice's education background, the variables *HLS*, *YLS*, and *OtherLS* are assigned a 1 if the Justice attended Harvard Law School, the Yale Law School, or any other law school, respectively.<sup>155</sup> Similarly, the variables *Private*, *Judge*, *Academic*, and *Public*, respectively note whether a given Justice worked as an attorney in the private sector, as a judge on another court, as an academic, or as government attorney before being elevated to the Supreme Court. To control for the political partisanship of a given Justice, this model also includes the binary variable *GOPPres*, noting whether the Justice was appointed by a Republican President. Model 2 also includes

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distinguishes the case at bar from precedent, or where alteration of precedent in no way occurs, the variable is given a 0. *See id.*

153. *See* The Supreme Court Database, *Declaration of Unconstitutionality*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=declarationUncon> [<https://perma.cc/XT53-9P3V>] (last visited Mar. 18, 2022). Municipal ordinances are considered state laws for the purpose of the *StateUC* variable. Cases that declare unconstitutional neither a state nor federal law are given a 0.

154. *See* Denise Kerkhoff & Fridtjof W. Nussbeck, *The Influence of Sample Size on Parameter Estimates in Three-Level Random-Effects Models*, 10 *FRONTIERS PSYCH.* 1067, at 3–5 (2019) (explaining the difficulties of fixed-effects regression with small group-level samples). To see this technique applied to a comparable research question, see, for example, Aníbal Pérez-Liñán & Ignacio Arana Araya, *Strategic Retirement in Comparative Perspective: Supreme Court Justices in Presidential Regimes*, 5 *J.L. & COURTS* 173, 179 (2017).

155. Biographical information on the Justices was gathered from *Justices*, OYEZ, <https://www.oyez.org/justices> [<https://perma.cc/YL5Z-L7MN>] (last visited July 5, 2022); *Lawyers, Judges & Jurists*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/browse/Lawyers-Judges> [<https://perma.cc/LB8K-BMWT>] (last visited July 5, 2022); and *Biographies of the Justices*, SCOTUSBLOG <https://www.scotusblog.com/biographies-of-the-justices/> [<https://perma.cc/S42D-NY7G>] (last visited July 5, 2022). The only Justice to be assigned a 1 value in more than one of these categories was Justice Sherman Minton, who received his LLB from Indiana University Maurer School of Law and his LLM from the Yale Law School. *See* OYEZ, *supra*.

the *MQ-Score* variable reporting the Justice's ideology score for that Term.<sup>156</sup>

To further explore the intricacies of these hypothesized relationships, we devised two additional models that bifurcate the votes in the sample based on the ideological leaning of the casting Justice for that term.<sup>157</sup> As such, Model 3 replicates the specification of Model 2 only for votes cast by a Justice with a positive, or conservative-leaning, Martin-Quinn Score, and Model 4 replicates that specification for the Justices with a negative, or liberal-leaning Martin-Quinn Score. As these models include only subsets of the data, Model 3 contains 960 observations, representing the number of votes cast by conservative-leaning Justices, and Model 4 observes

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156. Given the shifting policy preferences of the Republican Party over this period, see generally Brian D. Feinstein & Eric Schickler, *Platforms and Partners: The Civil Rights Realignment Reconsidered*, 22 *STUDS. AM. POL. DEV.* 1, 1–2 (2008) (outlining the evolution of America's political parties over the twentieth century), we thought it appropriate to include both variables to more closely proxy a Justice's ideological preferences, as appointment by a Republican President alone does not consistently reflect conservative ideological preferences. For example, Chief Justice Warren, Justice Stevens, and Justice Souter were all appointed by Republican Presidents and yet consistently reported liberal Martin-Quinn scores for a majority of their Terms on the Court. Because a Justice's Martin-Quinn Score itself is based on the ideological valence of her votes in a given Term, issues of circularity may arise as "the measures for the independent and dependent variables are identical." Lee Epstein & Carol Mershon, 40 *AM. J. POL. SCI.* 261, 263 (1996); see Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimates be Used as Explanatory Variables?*, at 2 (Oct. 8, 2005) (unpublished manuscript), <https://mqscores.lsa.umich.edu/media/resnote.pdf> [<https://perma.cc/3Y7J-PP6Z>]. Still, Martin-Quinn scores "do not measure ideology with reference to any particular kind of concrete outcome; rather, they measure ideology purely in terms of voting alignments." Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 *WASH. U. J.L. & POL'Y* 133, 162 (2009). Despite this concern, Martin-Quinn scores are commonly used as explanatory variables in the relevant literature. See, e.g., Oleg Smirnov & Charles Anthony Smith, *Drift, Draft, or Drag: How U.S. Supreme Court Justices React to New Members*, 34 *JUSTICE SYS. J.* 228 (2013); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 *J. EMPIRICAL LEGAL STUDS.* 485 (2009).

157. For a recent commentary on the methods of sample-bifurcated multivariate logistic regressions, see Jacob James Rich & Roberto A. Sussman, *Gaiha et al. Response*, 68 *J. ADOLESCENT HEALTH* 215, 215–16 (2021).

the 795 votes cast by the liberal leaning Justices. Besides this change in specification, all other variables are identical to those defined in Model 2.

## 2. Vote-Direction Models

Moving away from the stricter conception that constraint is necessarily evidenced by a Justice voting against her ideology, the subsequent models instead seek to measure the extent to which other factors besides ideology bear on vote outcomes. In this sense, we find evidence that a Justice may be constrained by another factor if we observe a relationship between the Justice's vote direction and that factor, holding ideology constant.

In these models, our outcome variable is *Conservative Vote*, noting whether the Justice's vote in a case was in the conservative direction. The four explanatory variables of interest relating to the use of Convention records are *Conservative Primary*, *Conservative Secondary*, *Liberal Primary*, and *Liberal Secondary*. Each of these continuous variables total the number of primary and secondary source-types used across all opinions of the same ideological outcome in a case.<sup>158</sup> As these are case-level variables, they do not vary across the individual opinions or votes of the Justices in that case. Model 5 is defined as:

$$(5) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 \text{ConPrimary}_i + \beta_2 \text{ConSecondary}_i + \beta_3 \text{LibPrimary}_i + \beta_4 \text{LibSecondary}_i + \varepsilon_i,$$

where the outcome variable measures whether the Justice votes for

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158. Crucially, what determines the category that a reference falls in is the direction of the Justice's vote, see The Supreme Court Database, *Direction of the Individual Justice's Votes*, *supra* note 141, and not the casting Justice's ideological preference as determined by the Martin-Quinn Scores. Thus, for example, where a Justice with a conservative Martin-Quinn score uses a secondary source to support a reference to the Convention in an opinion with a liberal outcome, that reference would count towards the *Liberal Secondary* total for that case.

the conservative outcome in the case. This model pools all Justice votes over the observation period and includes 1755 total observations.

But while this basic specification may allow us to detect a relationship between references and the ideological direction of a case, it does not control for Justice ideology per se, undermining its power to evaluating any constraining connection of these sources. Therefore, Model 6 adds the aforementioned control matrices, including the *MQ-Score* variable, as explanatory variables, and is defined as:

$$(6) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 \text{ConPrimary}_i + \beta_2 \text{ConSecondary}_i + \beta_3 \text{LibPrimary}_i + \beta_4 \text{LibSecondary}_i + \beta_j \delta_i + \beta_k \varphi_i + \beta_l \gamma_i + \varepsilon_i,$$

where  $y_i$  equals the probability that a Justice votes for the conservative outcome and the matrices  $\delta_i$ ,  $\varphi_i$ , and  $\gamma_i$  are the same as previously defined. Because these models control for ideology, finding a statistically reliable association between the odds of voting conservative and any of the historical-source variables would allow us to reject the hypothesis that there is no relationship between the use of historical sources and case outcomes once Justice ideology is accounted for.

Finally, we once again bifurcated these models by Martin-Quinn score to analyze this question for subsets of conservative-leaning and liberal-leaning Justices once at a time. Model 7, which includes 960 observations, includes all votes cast by Justices with conservative-leaning Martin-Quinn Scores, regardless of the ideological direction of the vote in that case. Model 8, conversely, includes the 795 votes cast by a Justice with a liberal-leaning Martin-Quinn Score across these cases.

With these analytical models, we can begin to observe the extent of the controversial relationship between the Supreme Court's use of historical sources in elucidating the lessons of the Constitutional

Convention and its rulings in a case. By looking at the outcomes of cross-partisan votes and of absolute vote directions, these models set out to evaluate history's role in constraining judicial behavior beyond the consideration of political allegiance alone.

B. *The Supreme Court's Use of Convention Sources, 1790-2021*

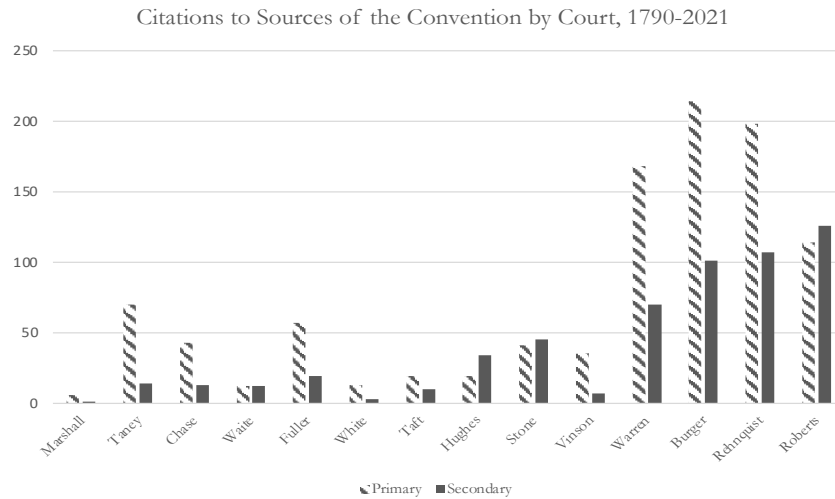
Before analyzing our empirical models, we will briefly turn back to the Supreme Court's inception to survey the trends in historical citation practices across the Court's longevity. While the Supreme Court held its first sitting in 1790, it actually was not until 1816 that the Court directly invoked the Convention in an opinion. In *Martin v. Hunter's Lessee*, Justice Story supported his opinion defending the Supreme Court's appellate jurisdiction over state court decisions by arguing that concerns over the "public mischiefs" arising from differing interpretations of federal law "could [not] have escaped the enlightened convention which formed the Constitution."<sup>159</sup> Consistent with the practices of the time, Justice Story did not support this assertion with any citation to a historical source.

Since then, the number of references to the Convention in Supreme Court opinions steadily grew over time. Figure 1 below depicts the frequency of citations to primary and secondary sources by each Court—as defined by the sitting Chief Justice—over the period of 1790-2021. While the Marshall Court only made 7 citations to support its discussions of the Convention, the Rehnquist Court made 305 citations to the Convention—198 of which were to primary sources. In fact, the Warren and Burger Courts alone had more source-supported citations to the Convention (553 citations) than all previous Courts combined (473 citations).

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159. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342, 348 (1816).



**Figure 1**

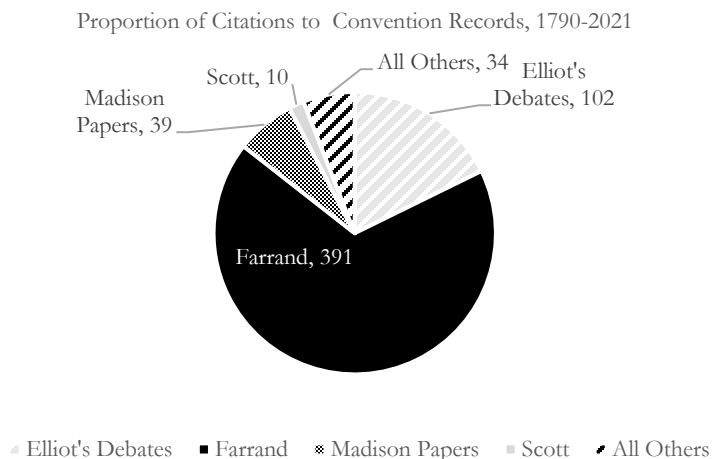
When looking at this period together, the Court made a total of 1,572 citations to sources describing the Convention. Of these, 1,006—roughly two-thirds—were to primary sources and 566 were to secondary sources such as previous cases, academic articles, and contemporary books.

Of all sources, Farrand's *Records of the Federal Convention* was the Court's clear favorite and was cited 391 times, as shown below in Figure 2. When citing to the actual Convention records, the Justices chose Farrand's volumes 68% of the time. The second most popular volume of Convention records was *Elliot's Debates*, cited 18% of the time, followed by the Madison Papers and Scott. Of the remaining versions of the Convention records,<sup>160</sup> only eleven of these have ever been cited to by the Court for a combined number of 34 times.<sup>161</sup>

160. See *supra* Section I.B.

161. These sources are 1787: DRAFTING THE U.S. CONSTITUTION (Wilbourn E. Benton ed., 1986) (cited twice); 1 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION

Figure 2



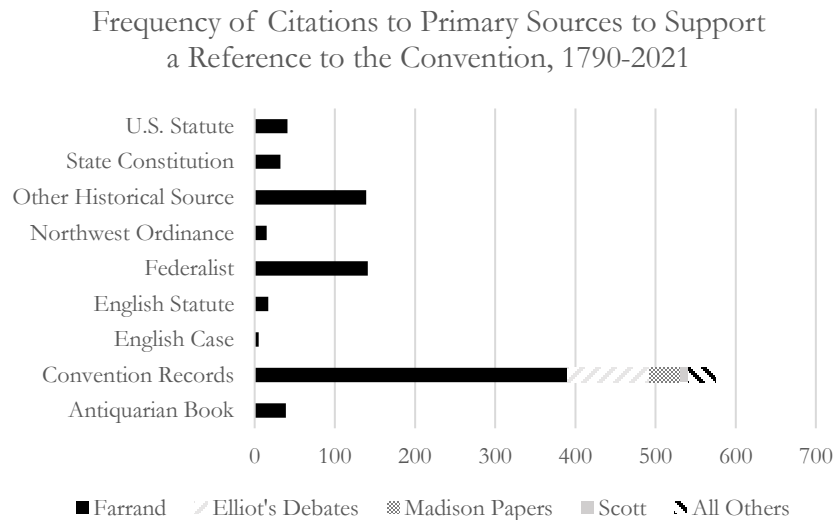
Beyond the Convention records, the most frequently cited primary source is *The Federalist*, which has been referenced 141 times

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OF THE AMERICAN STATES (Charles C. Tansill ed., 1927) (cited twice); THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION (Winton U. Solberg ed., 1990) (cited once); THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & J. Scott eds., 1920) (cited four times); *Documentary History of the Ratification of the Constitution*, UNIV. OF WISC. CTR. STUD. AM. CONST. (cited once); 1-9 THE WRITINGS OF JAMES MADISON COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt ed., 1900-10) (cited four times); DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA, ON THE ELECTION OF SENATORS, COMPILED BY A.P.C. GRIFFIN, CHIEF BIBLIOPHAGER, LIBRARY OF CONGRESS, S. DOC. No. 57-404 (1st Sess. 1902) (cited once); WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED: CONTAINING ALSO A FAC-SIMILE OF A HERETOFORE UNPUBLISHED MANUSCRIPT OF THE FIRST DRAFT OF THE INSTRUMENT MADE FOR USE IN THE COMMITTEE OF DETAIL (J. B. Lippincott, 1900) (cited six times); OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 77 (cited five times); NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., 1966) (cited three times); and DRAFTING THE FEDERAL CONSTITUTION (Arthur Taylor Prescott ed., 1941) (cited three times).

in Supreme Court opinions discussing the Convention. The Court has referenced U.S. statutes 41 times, antiquarian books 39 times (18 of which are to Blackstone's *Commentaries*), state constitutions 32 times, English statutes 17 times, the Northwest Ordinance 15 times, and English cases 5 times in this context. Additionally, the Court cited to other historical sources, such as letters, pamphlets, editorials, and speeches, 139 times when discussing the Convention. These figures are reported below in Figure 3.

**Figure 3**



The three traditional secondary sources the Court relied on were previous decisions by the Court, modern books, and law review articles. Figure 4 below depicts the frequency of these citations. Previous cases constituted the large majority of citations here, which the Court cited 313 times when discussing the Convention.

Often, the Court would rely on its previous interpretation of the Constitution and the Convention in citing to previous cases. It did this in *Michelin Tire v. Wages*, wherein Justice Brennan, writing for

the Court, synthesized his reading of Convention debates regarding tariffs, imports, and foreign commerce before citing to three cases, four papers from *The Federalist*, Farrand, and a letter from James Madison to a Professor Davis, in that order.<sup>162</sup> For all primary and secondary sources, the Court cited to previous cases second most after Farrand, the vast majority of which referenced the Court interpreting primary records in a previous case, or acting itself as historian. Thus, the second most used authority on the Convention was the Court itself.

The next most relied upon secondary sources thereafter were modern books, which were cited to 175 times. Lastly, the Court has cited to 79 academic articles when discussing the Convention, all but one of which—an article in a political science journal<sup>163</sup>—were law review articles, though many contained detailed legal histories. For the modern and antiquated books the Court references, 48% covered law or legal history. When looking for commentary and context on the Convention, the Court clearly prefers to rely on legal sources.

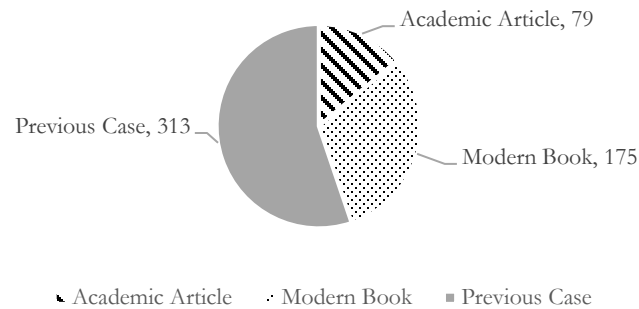
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162. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 n.4 (1976).

163. See *United States v. Will*, 449 U.S. 200, 220 n.22 (1980) (citing Arthur P. Scott, *The Constitutional Aspects of the "Parson's Cause"*, 31 POL. SCI. Q. 558 (1916)).

**Figure 4**

Citations to Secondary Sources to Support a Reference to the Convention, 1790-2021



As demonstrated by the figures above, the Supreme Court has grown in its reliance on historical sources to understand the Convention over time, with this trend peaking during the Burger Court and continuing strong since. But though these figures may elucidate how the Court uses history, nose counting alone provides little insight into these sources' potential constraining relationship with case outcomes. We now turn to take up that question.

*C. The Relationship between Citations to the Convention and Constraint, 1937-2021*

After identifying the sources that the Supreme Court has used since the Founding to support its characterization of the Constitutional Convention, we now focus on the period between 1937 to the present in considering how use of these sources bears on voting outcomes. Our investigation here is limited to these dates, as reliable data on Justice ideology only extends back to the solidification of modern political parties in 1937.<sup>164</sup> Too, that year heralds the start

164. See Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010) (noting that around this time "the field of statistics was just maturing into a modern discipline[; t]he year 1936 was a wake-up call for measurement").

of the New Deal Court, which ushered in the modern era of American constitution law.<sup>165</sup> Thus, this year poses as a suitable place to begin our investigation of modern Supreme Court practice. Our sample includes all votes in the 201 cases with available data that referenced the Convention over this period.

**Table 1** below reports descriptive statistics for the outcome variables and explanatory variables of interest included in our logistic regression models. Panel 1 displays the sample size, mean value, and standard deviation of these variables when all Justices are pooled together. Panels 2 and 3, respectively, report these values for only the subset of Justices that had a conservative or liberal Martin-Quinn Score at the time of a given case.

**Table 1**

| VARIABLE            | (1)<br>ALL JUSTICES |           |      | (2)<br>CON. JUSTICES |           |      | (3)<br>LIB. JUSTICES |           |      |
|---------------------|---------------------|-----------|------|----------------------|-----------|------|----------------------|-----------|------|
|                     | N                   | $\bar{x}$ | SD   | N                    | $\bar{x}$ | SD   | N                    | $\bar{x}$ | SD   |
| Reference           | 1755                | 0.50      | 0.50 | 960                  | 0.54      | 0.50 | 795                  | 0.45      | 0.50 |
| Cross-Partisan Vote | 1755                | 0.33      | 0.47 | 960                  | 0.38      | 0.49 | 795                  | 0.28      | 0.45 |
| Con. Vote           | 1755                | 0.46      | 0.50 | 960                  | 0.62      | 0.49 | 795                  | 0.28      | 0.45 |
| Total PS            | 1755                | 1.72      | 5.10 | 960                  | 1.67      | 4.22 | 795                  | 1.77      | 5.98 |
| Total SS            | 1755                | 1.11      | 3.41 | 960                  | 0.99      | 2.98 | 795                  | 1.26      | 3.87 |
| Ref. Only           | 1755                | 0.02      | 0.16 | 960                  | 0.03      | 0.17 | 795                  | 0.03      | 0.16 |
| Little There        | 1755                | 0.06      | 0.25 | 960                  | 0.06      | 0.24 | 795                  | 0.07      | 0.25 |
| Con. PS             | 1755                | 1.74      | 3.41 | 960                  | 1.74      | 3.41 | 795                  | 1.74      | 3.41 |
| Con. SS             | 1755                | 0.80      | 1.70 | 960                  | 0.80      | 1.70 | 795                  | 0.79      | 1.70 |
| Lib. PS             | 1755                | 1.87      | 6.02 | 960                  | 1.81      | 5.86 | 795                  | 1.95      | 6.22 |
| Lib. SS             | 1755                | 1.47      | 4.33 | 960                  | 1.43      | 4.19 | 795                  | 1.52      | 4.48 |
| MQ-Score            | 1755                | -0.09     | 2.25 | 960                  | 1.49      | 1.15 | 795                  | -2.00     | 1.70 |

165. See e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457–58 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437–44 (1987).

As a preliminary matter, the sample data appear to be well-balanced between votes for opinions that reference the Convention and votes for those that do not, as demonstrated by the 0.50 mean of the *Reference* variable when all Justices are observed. This makes sense, as all opinions in a case were included in the models regardless of whether they referenced the Convention if at least one opinion in that case did so.

Much can be learned about the Justices' use of Convention sources from observing these descriptive data alone. Looking at all the Justices together, the mean of the *Cross-Partisan Vote* outcome variable notes the Justices voted against their ideology's side 33% in the observed cases. Among the Justices with a conservative ideology score, this average rises to 38% of the time and falls to 28% for those with a liberal score. Across all Justices, their votes aligned with the conservative outcome 46% of the time, as shown by the proportion of the *Conservative Vote* outcome variable. When broken down by ideology, conservative-leaning Justices reached the conservative outcome in 62% of their votes in these cases and liberal justices did so in 28%, mirroring their proportion of cross-partisan votes.

The average vote is for an opinion citing 1.72 primary sources and 1.12 secondary sources overall. By ideology, conservative Justices sign on to opinions that reference the Convention more frequently than liberal justices. The conservative Justices referenced the Convention *without* a citation to any source only slightly more frequently than the liberals, doing so about 2% of the time. Further, the Justices explicitly noted that Convention Records provided little helpful information, as indicated by the *Little There* variable, approximately 6.5% of the time. This figure does not appear to significantly differ based on ideology. Lastly, the average ideology of observed Justices, captured by the *MQ-Score* variable, leans slightly liberal at -0.09. The average conservative Justices has an ideology score of 1.49, while the average liberal Justice falls slightly more partisan with a score of approximately -2.0.

Turning now to our analytical models, **Table 2** below displays the results for the variables of interest in our models estimating the relationship between a Justice's use of primary or secondary sources to support a reference to the Convention and her probability of casting a vote contrary to her political ideology. Coefficients are reported as log-odds and levels of significance were calculated using heteroskedasticity-consistent standard errors.

**Table 2**

|                   | <i>Dependent variable:</i> |                      |                      |                     |
|-------------------|----------------------------|----------------------|----------------------|---------------------|
|                   | Cross-Partisan Vote        |                      |                      |                     |
|                   | (1)                        | (2)                  | (3)                  | (4)                 |
| Total Primary     | -0.039**<br>(0.016)        | -0.040**<br>(0.017)  | -0.084***<br>(0.027) | 0.009<br>(0.026)    |
| Total Secondary   | 0.052**<br>(0.023)         | 0.068***<br>(0.024)  | 0.225***<br>(0.045)  | -0.097**<br>(0.045) |
| Reference Only    |                            | -0.696<br>(0.426)    | -0.225<br>(0.495)    | -1.806<br>(1.399)   |
| Little There      |                            | -0.893***<br>(0.285) | -2.226***<br>(0.364) | 0.319<br>(0.558)    |
| MQ-Score          |                            | 0.084***<br>(0.031)  | -0.284***<br>(0.085) | 0.216***<br>(0.070) |
| Constant          | -0.693***<br>(0.054)       | 1.457***<br>(0.557)  | 1.601**<br>(0.801)   | 1.589<br>(1.107)    |
| Observations      | 1,755                      | 1,755                | 960                  | 795                 |
| Log Likelihood    | -1,112.541                 | -1,058.364           | -556.177             | -402.046            |
| Akaike Inf. Crit. | 2,231.082                  | 2,174.727            | 1,170.355            | 862.093             |

*Note:*

\*p<0.1; \*\*p<0.05; \*\*\*p<0.01



Under this definition of “constraint,” Cross’s work would predict that we find “relatively little evidence of much constraint from the reliance on [historical] sources.”<sup>166</sup> These results, however, appear to tell a much more nuanced story. Rather than observing that historical citations have no association with the probability of constraint, we find statistically reliable evidence of a relationship on this outcome for both primary and secondary sources when all Justices are pooled. However, this relationship goes in the opposite direction depending on the type of source cited—primary sources appear to be linked to a decrease in the probability of a cross-partisan vote, while secondary sources appear to be linked to an increase in this outcome.

As suggested by the coefficients of the *Total Primary* variable in Models 1 and 2,<sup>167</sup> one additional citation to a primary source across all Justices and cases referencing the Convention—all else equal—is associated with a 3.8-3.9% approximate decrease in the odds that a Justice will vote against her political priors.<sup>168</sup> Looking at the entire subset pooled together, however, fails to tell the whole story. When broken up by ideological preferences, only those Justices with conservative ideology scores display this negative relationship between citing to primary sources and casting a cross-partisan vote.

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166. CROSS, *supra* note 6, at 184.

167. Model 1 reports the outcome of our minimum-specification model, which solely measures the relationship between the counts of primary and secondary sources cited in an opinion in reference to the Convention and the probability to a cross-partisan vote for all Justices. Model 2 measures this same relationship, but includes the aforementioned Justice-level, opinion-level, and case-level controls to account for confounding variables. See *supra* Section II.A.1. The R script used is available at <https://drive.google.com/file/d/1uOiQsZ2LwBcs4zVVRE3h4G3TvKEUCeTq/view?usp=sharing> [<https://perma.cc/M8US-WMKK>].

168. A keen observer may notice that these figures are not explicitly reported in Table 3. That is because logistic regression models do not report the odds but rather the log-odds that an event will occur. See ANDREW GELMAN & JENNIFER HILL, *DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS* 79-80 (Cambridge Univ. Press 2006). To calculate the change in odds, all else equal, we employed the formula:  $y_i = e^{\beta_i}$ . This formula will be applied to report changes in the respective odds of all subsequent coefficients discussed.

All else equal, an additional primary source citation is associated with about an 8.1% decrease in the odds that a conservative Justice will vote across the aisle. Contrastingly, the citing to primary sources appears to bear no relationship in either direction on the liberal Justices' being constrained.

Observed in a vacuum, these findings not only fail to upset the conclusion that reliance on history fails to "cause ideology to dissipate,"<sup>169</sup> but suggest that citations to primary sources further amplify the likelihood that a conservative Justice's vote will match her ideological preferences. In this sense alone, Cross may be correct—but Cross's study is incomplete. By looking only at the use of primary sources, *The Failed Promise of Originalism* in itself fails to account for the plethora of secondary sources—previous cases, books, and scholarly articles—used by the Justices to inform their understanding of the Convention.

When secondary sources are included, the use of history begins to paint a different picture. As reported in Models 1 and 2, citing to a secondary source characterizing the Convention is associated with a 5.3-6.9% increase in the odds that any Justice will cast a cross-partisan vote, all else equal. And while conservative Justices may be bolstered in keeping the party line when relying on primary sources, Model 3 suggests that a conservative Justice citing to a secondary source bears 25.2% increased odds of reaching the liberal outcome in a case. In contrast, the liberal Justices are slightly less likely to vote across the aisle when citing to a secondary source, as reported in Model 4.

The absence of a deep record of relevant Convention history or only cursory engagement with these sources also appears to undermine a Justice's departing from her political preferences. Across the literature, commentators have criticized a strong reliance on history alone, as "the fragmentariness and contestability of the historical record . . . [grants] substantial discretion" to a judge, who may then

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169. CROSS, *supra* note 6, at 184.

fall back on political preferences to fill in the gaps.<sup>170</sup> Our results appear to support this point. Where a Justice's opinion explicitly notes that records of the Convention provide an ambiguous or unhelpful account, as captured by the *Little There* variable, the odds of her voting against her ideological bloc decreases by 59.1%, and by nearly 90% if she is a conservative. Similarly, we find some evidence suggesting that where a Justice makes reference to the Convention without supporting her discussion with a citation, her average odds of voting for the cross-partisan outcome is cut in half, though this finding is not statistically significant at the 0.05 level.

Nevertheless, the record is not always sparse, and the investigation of historical sources does not always appear to be futile. Across all opinions in cases that discuss the Convention, the Justices note that Convention history provides little useful material to work with only about 6% of the time. If anything, the fact that the Justices are far more likely to vote with their ideological side in these cases suggests that absence of historical sources implies the absence of constraint. Therefore, these results should not be seen as an indictment of historical methods per se, but of evidence of the decreased likelihood of constraint where the Court does not—or cannot—engage in rigorous historical reasoning.

And when the Justices do engage in historical reasoning, it appears to be linked across the board to increased odds of voting against their political preferences, especially for conservative-leaning Justices. But whether it “constrains” them, at least according to Cross's conception of the term, largely depends on the type of

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170. Berman, *supra* note 5, at 89; see also Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 835 (2004) (noting that, in the context of federal courts, “[t]here is a large universe of practices for which the historical record provides no definitive guidance one way or the other”). Although not included in Table 2, *supra*, the coefficient for the control variable for cases involving the judicial power of Article III courts in Model 2 bears a statistically reliable, negative association with the probability of constraint, providing evidence for William's assertion that the paucity of the historical records renders historical reasoning an unhelpful guide in this context.

source on which the Justice relies. As we observe in the models described above, the average Justice's reliance on primary sources is related to a decrease in her probability of constraint, but citations to secondary sources increase this probability, all else equal. Thus, broad criticism that history "may not be the best tool to constrain the wayward judge" fails to appreciate the nuance of the observed relationship between different historical source-types and constraint.<sup>171</sup>

To further explore these relationships, we now will relax the requirement that a Justice casting a cross-partisan vote is a necessary condition of constraint. Rather, under this definition, a Justice is considered constrained where some other factor besides pure ideology contributes to explaining variances in her voting behavior.<sup>172</sup> If decisions on the merits present the Justices with "unconstrained choice" driven only by policy attitudes,<sup>173</sup> we would expect to see little relationship between case outcomes and other possible factors, such as historical citations. On the contrary, the models reported in Table 3 below present evidence that the Justices' use of historical sources is relevant for understanding the reasons for their votes in a case.

Models 5 and 6 measure the relationship between the count of references to primary or secondary sources of the Convention cited across all conservative- or liberal-direction opinions in a case, and the probability that the average Justice will reach the conservative outcome. As the results of these models indicate, additional citations to primary and secondary sources in opinions reaching the conservative outcome appear to be associated with an increase in the probability that any Justice will vote in the conservative direction, all else equal. Likewise, additional citations to either source-

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171. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223 (2018).

172. See BAILEY & MALTZMAN, *supra* note 62, at 1.

173. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 96 (2002).

type in the liberal opinions relates to a decrease in the probability a Justice will reach the conservative outcome (and thus, an increase in the probability of her voting for the liberal side).

**Table 3**

|                        | <i>Dependent variable:</i> |                     |                      |                      |
|------------------------|----------------------------|---------------------|----------------------|----------------------|
|                        | Conservative Vote          |                     |                      |                      |
|                        | (5)                        | (6)                 | (7)                  | (8)                  |
| Conservative Primary   | 0.043**<br>(0.019)         | 0.055***<br>(0.020) | 0.137***<br>(0.044)  | -0.003<br>(0.031)    |
| Conservative Secondary | 0.153***<br>(0.039)        | 0.167***<br>(0.045) | 0.073<br>(0.066)     | 0.306***<br>(0.062)  |
| Liberal Primary        | -0.034**<br>(0.014)        | -0.034**<br>(0.016) | -0.008<br>(0.022)    | -0.067***<br>(0.022) |
| Liberal Secondary      | -0.042*<br>(0.023)         | -0.057*<br>(0.030)  | -0.113***<br>(0.040) | 0.023<br>(0.053)     |
| MQ-Score               |                            | 0.393***<br>(0.040) | 0.293***<br>(0.086)  | 0.241***<br>(0.073)  |
| Reference Only         |                            | -0.109<br>(0.326)   | 0.472<br>(0.490)     | -1.652<br>(1.379)    |
| Little There           |                            | 0.970***<br>(0.237) | 2.187***<br>(0.376)  | 0.003<br>(0.646)     |
| Constant               | -0.223***<br>(0.057)       | -0.231<br>(0.583)   | -1.793**<br>(0.781)  | 1.553<br>(1.134)     |
| Observations           | 1,755                      | 1,755               | 960                  | 795                  |
| Log Likelihood         | -1,183.124                 | -1,011.385          | -539.938             | -390.993             |
| Akaike Inf. Crit.      | 2,376.247                  | 2,084.771           | 1,141.877            | 843.986              |

*Note:*

\*p<0.1; \*\*p<0.05; \*\*\*p<0.01

These relationships hold in Model 6, even when the controls—including the *MQ-Score* variable measuring Justice ideology—are

added into the calculation. The positive relationship between this variable, which reflects a stronger conservative ideology the greater its value, and the outcome of a conservative vote expectedly suggests that the more conservative in ideology a Justice is, the greater the probability of her voting for the conservative side.<sup>174</sup> As such, a Justice's political ideology likely matters in influencing the outcome of her vote—but it is not the *only* factor that matters. The statistically reliable coefficients for both source types suggest that these factors regarding the use of history are also relevant in explaining voting behavior, independent of ideological preference alone.

By looking at these outcomes for the subsets of only the conservative or liberal Justices, we can observe further evidence of how Justices of differing ideologies may be constrained by these citations. Model 7 observes this relationship for only Justices with a conservative-leaning, or positive, Martin-Quinn Score. These outcomes indicate that the additional citation to a primary source in conservative opinions is linked to a 14.5% increase in the odds that a conservative Justice votes with the conservative side, holding all other variables—including ideology—constant. Not only is this finding consistent with Model 3's finding of a negative relationship between conservatives citing to primary sources and cross-partisan votes, but also evidence of such sources bearing a relationship to voting outcomes that cannot be described by mere politics. Similarly, just as Model 3 found evidence of a positive relationship between secondary sources and a conservative casting a cross-partisan vote, Model 7 estimates that an additional citation to a secondary source in a liberal opinion is related to a 10.7% decrease in the odds that a conservative Justice will vote for her ideological side. Lastly, we do not find any reliable evidence of any relationship between citations to secondary sources in conservative opinions, or to

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174. The opposite is also true in that the lower a Justice's Martin-Quinn Score, and thus the more liberal the Justice's ideology, the less probable it is that she will cast a conservative vote.

primary sources in liberal opinions, and the direction of a conservative Justice's vote.

With respect to secondary sources, the inverse appears to be true for the liberal Justices. As shown in Model 8, a conservative opinion's additional use of a secondary source is linked to a 35.8% increase in the odds of garnering a liberal Justice's vote. And like Model 7's finding of a positive relationship between citations to primary sources in the conservative opinions and conservative Justices casting conservative votes, Model 8 suggests that primary sources in liberal opinions bear a positive relationship on liberal Justices casting liberal votes.

Taken together, all these models suggest that determining the relationship between citations to the Convention and vote directions may depend on the type of source used and the ideological valence of the opinion in which it is cited. When viewing the Justices all together, it appears that both types of sources matter across opinion directions of both ideologies. In this sense, history—beyond unbridled politics—could be constraining on at least some of the Justices, some of the time. But when one focuses in on each ideological subset of Justice's, one observes a more nuanced relationship—same-ideology citations to primary sources are associated with greater odds of voting with the outcome of one's ideology, and cross-ideology citations to secondary sources are associated with lesser odds. This finding holds true for both conservative and liberal Justices and is generally congruous to Models 1-4's results with respect to cross-partisan votes.

The foregoing analysis provides us with evidence to challenge the conclusion that “[h]istory cannot serve its desired goal of constraining judges.”<sup>175</sup> At least in the context of the Constitutional Convention, such an absolutist assertion neglects the nuance of the relationship between history and constraint, and its variation

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175. Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 902 (1993).

depending on the type of source used and the ideology of the Justice using it.

### III. HISTORY THAT CONSTRAINS

Our empirical results provide evidence for the claim that historical sources may, in fact, constrain—although it appears to be an unexpected type of historical source. Secondary, not primary sources, bear a strong, positive relationship to the average probability of constraint according to the pooled regression models. Whether in casting a cross-partisan vote or choosing to vote with the opinion because of its historical citations, the secondary sources appear to persuade, stay, and cabin judicial discretion. The reasons why primary sources are not doing the work may lie in the thinness of legally relevant Convention material, but more likely derive from a discomfort with primary sources or, more concerning, motivated reasoning. In this vein, secondary sources may be harder to manipulate.

In this Part, we examine three implications of these findings. First, our results provide evidence for the belief that history indeed matters and vindicates its use and consideration as our law. This being the case, our study requires an accounting of two things: why the distinction between the constraining impact of secondary versus primary sources, and why history. As to the former, historical reasoning is not just some “neutral principle” that can direct judges to “transcend any immediate result that is involved”<sup>176</sup>—in fact, our results suggest that, at least when primary sources are used, that is not always the case. As to the latter, the Court’s use of historical sources to guide its rulings suggests that there is certainly a positivistic impulse here. But acknowledging that does not answer the previous question of why Justices feel the impulse to turn to history. This turning, as with other turnings to mythical origin stories,

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176. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).



exhibits an intrinsic and deeply rooted desire in the American constitutional ethos to establish a profound and enduring connection with the Founders.<sup>177</sup>

Second, our results demonstrate that primary sources are not king of the realm. In this sense, Cross is vindicated. Primary sources fail to have any significant pull—and may actually be dangerous in diminishing constraint as judged by cross-partisan voting. However, considering that history is now required as a matter of course in at least some areas of constitutional interpretation,<sup>178</sup> these results should prompt the bench and bar to engage more deeply in primary sources, not less. If indeed their lack of staying power is due to unfamiliarity, efforts should be made to enhance familiarity through the development and expansion of specific training and tools, enabling primary sources to effectively constrain.

Finally, these results indicate that history's relationship with case outcomes is most pronounced when it overlaps with *stare decisis* or, more precisely, when the Court cites to a prior Court's historical analysis. This highlights the potency of history in shaping legal decisions when it is woven into the fabric of precedent and the continuity of judicial reasoning.

With the ascendance of "history and tradition" to the forefront of constitutional interpretation, understanding the use and ramifications of historical analysis has become all the more pressing.<sup>179</sup> By identifying the strengths and shortcomings of past Courts in their applications of the historical modality, we hope to illuminate how judges can learn from past uses of past sources to refine and enhance their own use of history in legal decision making.

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177. See AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840*, at 676 (2021).

178. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253–54 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

179. See *Bruen*, 142 S. Ct. 2111, 2128.

A. *Why History Constrains*

We now turn to the study's mechanism, or our theory of why we obtained our results before detailing five of its major consequences.

1. Why primary sources display no evidence of cross-partisan constraint

Three possible explanations present for the negative relationship between Justices' use of primary sources and cross-partisan votes observed in our results: the paucity of useful information in Madison's Notes, the Justices' lack of training in using historical sources, and the use of historical sources as a means to reinforce partisan ends. We evaluate each hypothesis in turn.

a. The thinness of Madison's notes

One fairly simple reason why primary sources do not correlate with Justices voting across party lines is the nature of the underlying source: Madison's notes contain little legally relevant interpretive material. Thus, these results may be fairly limited to these particular primary sources.

Although many delegates took notes, the main recorder of the Convention was James Madison. He was young, unmarried, and had yet to inherit the family estate, his father still being alive.<sup>180</sup> He therefore had time on his hands to act as scrivener. Madison also came to the Convention with an agenda. His pet priorities included a legislative veto over state laws and popular representation in both

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180. See JOHN KAMINSKI, *JAMES MADISON: CHAMPION OF LIBERTY AND JUSTICE* 21-24 (2017). Kaminski comments that, on arrival to Congress in 1781, Madison was unfettered by marriage, managing the plantation, or money concerns. *Id.* These circumstances continued until 1794, when his brother died in 1793, Madison married Dolley Payne Todd in 1794, and, finally, in 1801 when James Madison Sr. died. *Id.* at 84, 86. Madison was not the youngest delegate of the Convention who, at thirty-six was older than Alexander Hamilton (32), Gouverneur Morris (35) and Virginia Governor Edmund Randolph (34), but he was in the youngest third of the delegates. See Meet the Framers of the Constitution, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/UXQ6-8A9G>] (last visited June 13, 2023).

houses of Congress.<sup>181</sup> Yet neither of these provisions made it into the final Constitution. When popular representation failed in the Senate mid-Convention with the vote of July 16 solidifying the Great Compromise<sup>182</sup> and the legislative veto died the next day,<sup>183</sup> Madison felt the sting. These disappointments, coupled with failing to gain a seat on the prestigious five-member Committee of Detail tasked to draft the Constitution—Governor Randolph was chosen from Virginia rather than him<sup>184</sup>—seems to be a turning point for Madison. Thereafter, Madison writes darkly to Jefferson in Paris about the Constitution’s “embarrassment[s].”<sup>185</sup> After July 17, Madison’s notes thin per proposal.<sup>186</sup> Scholars have attributed this to Madison being sick,<sup>187</sup> tired,<sup>188</sup> and overworked with committee assignments.<sup>189</sup> It might also have been that Madison was depressed,

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181. Before the Convention, Madison wrote to Edmund Randolph about seven objectives, Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 2 THE WRITINGS OF JAMES MADISON 336–40 (G. Hunt ed., 1901) and recorded his most prized proposal—a Congressional veto on state legislation—in what was meant as an introduction to his notes on the Constitutional Convention. *Id.* at 391–412. These pet provisions made it into the fifteen resolutions presented as part of Edmund Randolph’s Virginia Plan. *Madison’s Notes* (May 29, 1787), in 1 FARRAND, *supra* note 96, at 20–22.

182. *Madison’s Notes* (July 16, 1787), in 2 FARRAND, *supra* note 96, at 15–16.

183. *Madison’s Notes* (July 17, 1787), in 2 FARRAND, *supra* note 96, 28.

184. *Madison’s Notes* (July 24, 1787), in 2 FARRAND, *supra* note 96, at 106.

185. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 PAPERS OF JAMES MADISON, *supra* note 181, at 163–64; Letter from James Madison to Thomas Jefferson (24 Oct. 1787), in 10 *id.* at 214–15; *cf.* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 190, 232 (1995) (discussing these correspondences).

186. The volume of notes produced between August 6, 1787 when the Committee of Detail reports and September 17, 1787 when the Convention adjourns, covering 37% of the Convention’s summer, constitutes only a small fraction of the notes Madison took.

187. MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION, 141–42 (2015); *see* Letter from James Madison to Thomas Jefferson (July 18, 1787), in 3 FARRAND, *supra* note 96, at 60; Letter from James Madison to James McClurg (c. Aug. 25, 1787) in 10 THE PAPERS OF JAMES MADISON, *supra* note 181, at 157; Letter from James McClurg to James Madison (Sep. 5, 1787), in 5 *id.* at 162.

188. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 82 (1997).

189. BILDER, *supra* note 187, at 142–44.

especially given his apparent failures to find permanent place for his most cherished ideas and solidify his reputation within the body he had worked to establish and preserve for posterity.<sup>190</sup> Regardless, his work product suffered from this point on. This is unfortunate, as it is only after a draft is produced by the Committee of Detail on August 6th that the Convention was able to debate the legally significant text of the Constitution, or what would become its clauses. For the Supreme Court, there is simply not much there in the Convention's most comprehensive records to grasp and parse.

In fact, the Court has taken notice of the paucity of legally relevant material in Convention records. Time and again, opinion writers would look to Convention records and note how little was there. This happened with enough frequency that we decided to record the phenomenon. We recorded *Little There* each time a Justice made a comment on how thin the record was from which they could draw any meaning for a particular clause. In roughly 10% of opinions, or 35 times within our complete dataset from 1790 to 2021, a Justice looked at Convention records and made a comment about how unavailing they were for the legal question before them. The first instance was Justice Campbell's dissent in *Jackson v. The Magnolia* in 1857,<sup>191</sup> and the most recent was in Justice Kennedy's

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190. See *Notes on Ancient & Modern Confederacies*, in 9 THE PAPERS OF JAMES MADISON, *supra* note 181 (“[Madison] was keenly disappointed when [his Congressional veto] was rejected by his colleagues at Philadelphia and was fearful that the plan adopted there would be short-lived.”); see also KAMINSKI, *supra* note 180, at 49 (“Madison was sorely disappointed in the final product. Actually, he believed he had failed.”)

191. *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 332 (1868) (Campbell, J., dissenting) (“The clause ‘all cases of admiralty and maritime jurisdiction’ appears in the draught of the Constitution imputed to Charles Pinckney, and submitted at a very early stage of the session of the Convention. It was reported by the committee of detail in their first report, and was adopted without debate. In one of the sittings, in an incidental discussion, Mr. Wilson, of Pennsylvania, remarked: ‘That the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of a particular state, and to a [scene] in which controversy with foreigners would be most likely to happen.’”).

majority opinion in *Zivotofsky v. Kerry* in 2015.<sup>192</sup> Although the number of instances where the Justices commented on the record's thinness was slight, it is a persistent, consistent comment within our dataset, and a testament to the lack of legal depth in the Constitutional Convention's records.

The thinness of Madison's later notes also renders them less legally relevant. With rare exceptions,<sup>193</sup> Justices are therefore not able to rely on the Constitutional Convention's records to illuminate the Constitution. Frank Cross noticed the consequences of the record's thinness in his data: "Farrand is a relatively important originalist source but not one that clearly commands the Court's devotion. It has a remarkably high percentage of its citations in concurrence or dissent."<sup>194</sup> In all, the thinness of Madison's notes makes them unreliable as a source of meaning for the Constitution.

That there is little legally relevant material in Madison's notes does not fatally undermine the Convention's significance, however. Finding little in the record worthy of emulation, the Justices frequently imported legally relevant content from *The Federalist* and other sources authored by Convention delegates. That a little under half of all historical primary sources used in discussing the Convention were *not* Convention records (430/1006) is telling. Justices wanted to use the Convention but, finding its primary record sparse, would extract legal significance from what they considered the next

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192. *Zivotofsky v. Kerry*, 576 U.S. 1, 12 (2015) ("As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention.").

193. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (resting on "the intention of the Framers" as derived from Madison's *Notes* and "an examination of the basic principles of our democratic system"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 (1995) ("Given the Framers' wariness over the potential for state abuse, we must conclude that the specification of fixed qualifications in the constitutional text was intended to prescribe uniform rules that would preclude modification by either Congress or the States.").

194. CROSS, *supra* note 6, at 149 (italicization of Farrand omitted).

best thing, *The Federalist*.<sup>195</sup> Justices leaned on Convention delegates who spoke in state ratification debates or elsewhere about the Convention. Such occurred in the *Legal Tender Cases*, where Maryland delegate Luther Martin's later recollections about Convention dealings was quoted at length to shore up the dissent's interpretation of Congress' power to "emit Bills of Credit."<sup>196</sup> Justices, looking to derive Constitutional meaning from the Convention's inner workings, imported that meaning from non-Convention historical records.

The second half of the Convention did not go as Madison planned, and his dashed hopes possibly contributed to his *Notes* of the Convention thinning out near the end when they would have been the most legally relevant. The thinness of his notes has been remarked upon repeatedly by the Court, who have chosen not to rely on them for the Constitution's meaning, looking instead to other historical sources to supply the record's lack.

b. Lack of expertise

If the results here replicate beyond the specific tested source, another potential, benign reason for the perceived counterproductive use of primary sources may lay in the Justices' lack of expertise as historians. Although some Justices have studied history at some level,<sup>197</sup> no current or former Justice has ever become a professional historian, nor has the Court ever employed a professional

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195. See, e.g., *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("While the debates on the [Copyright Clause] at the Constitutional Convention were extremely limited, its purpose was described by James Madison in the *Federalist*").

196. U.S. CONST. art. I, § 10; see also *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 544 (1870) ("It was said there can be no question of the power of this government to emit bills of credit.").

197. For example, Justices Kagan, Kennedy, Scalia were all undergraduate history majors. See Carol Symes., *Famous History Majors*, U. ILL. DEP'T OF HIST., <https://history.illinois.edu/resources/careers/famous-history-majors> [https://perma.cc/78HZ-DV49] (last visited May, 5, 2023).

historian.<sup>198</sup> The resultant lack of familiarity with primary historical sources may lead to a lack of respect for the weight of history.

Primary sources are the currency of professional history. The hallmark of a good historian is time spent in archives culling through manuscripts. In the months and years preceding archive trips, historians learn the relevant language, including the pedestrian vernacular and signs and symbols unique to the era, and how to read the handwriting of their subject. Experienced historians know which archives hold relevant materials, and how to review holdings beforehand in order to plan research trips. They understand the mechanics of archival research—how to time meals to maximize research time, what resources to bring, and how and what documents to canvass in a given sitting.

Beyond knowing how to traverse physical manuscripts, historians are also familiar with digital collections and documentary editions relevant to their subject. They are intimately familiar with their subject in all ways, and literate in the surrounding primary and secondary sources such to place relevant facts in correct context. They understand source hierarchy according to time lapsed from an event and the indicia of source integrity, including the reliability of an event's scribes. They also understand the relevant secondary literature, which is most reliable, and which can provide the best primary source leads for their subject.

Historians are also aware of history's many holes. They know that in many areas, the historical record fails, leading to knowledge gaps. Or it can contradict itself, particularly where various sources record the same event differently. Historians know how to synthesize and transparently engage, acknowledge, and, where appropriate, resolve such gaps and inconsistencies.

Because no Justice has ever had professional historical training, it is fair to say that they do not know how to do most of the above

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198. The person who has come closest to being the Court's historian is Maeva Marcus. See *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (Maeva Marcus ed., Columbia University Press 1992).

things. More, while there are standards and theories for dealing with analogous legal problems, none have been imported from history to adequately deal with history's failings. In short, it is fair to say that Justices do not have the tools or training to engage in history in the way historians can and do.

This lack of expertise and the adjacent gap in standards and tools may translate into a lack of legal respect for the weight of history. Without serious engagement, including time spent in archives culling through relevant materials, Justices and those who support them may not appreciate history's depth nor difficulty. Casual, armchair historianship may lead a Justice, clerk or librarian to fail to appreciate the difficulty of the historical question at play, including the complexity of the relevant historical record.

This problem is reflected in our results for "references without citation." Whereas Cross's study included only citations to primary sources, we recorded references to the Constitutional Convention and corresponding citations information. This allowed us to capture those references to the Convention which had no corresponding citations. For this category of opinions, a Justice appeared to be less likely to cast a cross-partisan vote. This meant that Justices who did not emerge from their armchairs to do any historical work to support their reference were more or as likely to vote with their political priors, and provided evidence that no engagement with history had, perhaps unsurprisingly, negligible impact. It is quite possible that this result has a corollary in the impotence of primary source constraint. Casual engagement with history may lead to less understanding, appreciation, and respect for history, which in turn may correlate to its inability to constrain, explaining our results.

c. Motivated or reinforced reasoning

The more sinister explanation for primary sources not doing the work of cross-partisan constraint is that the Justices are doing law-office history à la Alfred Kelly. According to this explanation, such historical usage provides pretty window-dressing for decisions



motivated by political ideology, not law. As Justice Scalia has famously written, such selective, politically motivated use of sources is comparable to “look[ing] over the heads of the crowd and pick[ing] out your friends.”<sup>199</sup>

To be clear, it is the view of these authors that such an exercise of judicial will rather than judgment displays the judiciary at its worst. It runs contrary to the design of the Constitution, wherein the “least dangerous” branch was to have “no influence over either the sword or the purse” but “merely judgment.”<sup>200</sup> It is the emphatic duty of the nine Justices of the Supreme Court to “say what the law is,”<sup>201</sup> not sit as a policy-making supra-legislature. Such a role is antithetical to the rule of law and cannot be justified under the current constitutional order.

If this poor practice holds true and law-office history is the best explanatory mechanism for our results, it is not the province of only one side of the Court. Our results demonstrate that more citations to primary sources is linked to conservatives voting more conservatively *and* liberals to vote more liberally. If one side of the Court is guilty of the sin of using history instrumentally to accomplish political ends, both are. There can be no unilateral finger-wagging here.

Yet perhaps we should not be so quick to judge. As Bailey and Maltzman have carefully illustrated (as referenced above), Justices may appear to be voting with their political priors when in fact they have arrived at the same decision for other reasons, including legal reasons. “The first implication of our results is that we should be cautious about over-imputing policy motivations from Supreme Court cases that divide along ideological lines. An ideologically divided vote on the Court does not rule out the logical possibility that

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199. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

200. *THE FEDERALIST NO. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

201. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

justices were substantially influenced by legal factors.”<sup>202</sup> Bailey and Maltzman’s results then prove this logical possibility true.<sup>203</sup>

Our results show that something analogous is happening here. Yet instead of providing for an alternative explanation for votes along ideological lines, our results indicate that history is an additional, reinforcing impetus to vote along ideological lines. In our opinion-level models, the opinions that used the most primary sources garnered the most votes, and significantly so. Conservatives tended to vote more conservatively, and liberals tended to vote more liberally. But not to extremes. As shown by what happens in the absence of historically relevant material by the *Little There* statistic, Justices tend to vote even more with their priors. These results show that recourse to history can reinforce Justices’ political priors up to a point. Under the definition of constraint as a force other than policy that impacts a vote, our results could also be interpreted as the Justices being constrained by history in ways that correspond to their political priors. In this way, history can provide Justices with reinforcement for policy leanings rather than motivation to vote against them.

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In reality, the most likely explanation is all of the above. In predicting cross-party voting, perhaps the thinness of Madison’s *Notes* makes them particularly less constraining. Justices have no professional training in history and therefore may misunderstand the complexity and power of primary sources, and perhaps Justices are influenced by *both* policy and history when interpreting the Constitution. It is not only history that is complex, but the Justices’ rationales. All of the above factors play into the mix in explaining the impotence of primary sources, especially those of the Constitutional Convention.

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202. BAILEY & MALTZMAN, *supra* note 62 at 62.

203. *Id.* at 64–79.

2. Why secondary sources are associated with cross-partisan constraint

While primary sources were *not* positively correlated with cross-partisan votes, secondary sources were. Secondary sources thus prove an unaccounted, lurking variable in Cross's study, and correspondingly provide strong evidence of history's potential constraining influence.

Yet why would secondary but not primary sources constrain? Symmetrical reasons to those presented above are likely at play. First, secondary sources are accessible in every sense of the word: they generally require no translation nor transcription, they are written in modern prose and thus are more readable, and can be easily found in libraries or, if a legal journal article, in one or two databases. Justices, clerks, and librarians are trained in accessing such databases and libraries. Considering that most secondary sources in this study are legal in nature, the Court is clearly leaning into the physical and digital libraries and databases with which they have ready access. Because there is greater familiarity, it may be easier for the Justices to understand these sources and therefore be swayed by them.

Second, the familiarity of secondary sources, particularly the category of secondary sources most heavily used by the Court, may lend them greater influence. Whether it be article, book, or a former Court acting as historian (as they did in about 87% of all previous cases cited by the Court when referencing the Convention), Justices are accustomed to using these types of sources. Greater familiarity lends itself to understanding, and understanding to persuasion.

This is particularly true when the Court cites to a former Court acting as historian of the Convention. Not only is the Court familiar with itself and it is therefore more easily persuaded: here is a secondary source that also has precedential value. In this situation, the clarion call of this secondary sources is almost irresistible, as the historical value of the former interpretation is reiterated and

strengthened by its precedential value. This category of sources is the most prevalent in our study because it is the most influential.

Finally, the aggregate quality of secondary sources makes them harder to manipulate. Good historical work requires pooling dozens if not hundreds of primary sources together (painstakingly found in archives or digital or published equivalents) to synthesize a coherent story. Secondary sources arrive ready-made off-the-shelf products that can present facts and context together with little to no heavy lifting.

Such monoliths are hard to manipulate. They present a completed story or theory of history. Primary sources provide pieces of the greater whole. Standing alone, they are easier to sift, sort, and use in service to a variety of legal arguments. When pooled, they more readily stand on their own and cannot be swayed or bent in support of legal claims.

### 3. Why history

Our results suggest a turn to history. That secondary sources seem to constrain Justices to vote across party lines and that more primary sources predict majority wins both evince this. This turn is also witnessed in our descriptive results by the persistent, consistent *Little There* statistic referenced above. As reflected in this statistic, Justices cite to, but do not rely on, the Convention, essentially showing their historical work. Why show their work at all? Why the turn to history?<sup>204</sup>

The inclination toward history partakes of a natural human instinct that transcends the nine Justices now (or previously) serving on the Supreme Court, and even the legal profession itself. The quest for origin stories is made manifest in a variety of cultures, practices, and peoples throughout time. Indeed, the turn to history

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204. It is important to note at this point that this question is separate and distinct from the normative value of history in constitutional interpretation, which has been canvassed by other authors. The question raised by our results is not *whether* history should be used, but *why* it is being used.

is of Biblical proportions, wherein the hearts of children instinctively turn to the fathers.<sup>205</sup> Witness genealogical work, wherein individuals seek to understand where they came from by researching their forefathers. Since it became democratized in the 1990s when databases went online, genealogy has become the second most popular hobby in the United States.<sup>206</sup> Before the age of the Internet, the Chinese have long been able to trace their lineage to an “honored ancestor,” and ancestor worship features prominently in that culture. One of five pillars of Islam is the *hajj*, or pilgrimage which re-enacts the journey of Hajar to find water for Ishmael and later followed by the prophet Muhammad. In an analogous vein, Jews find identity and purpose in their origin story of deliverance, exodus, and covenant through sacred rituals and celebrations. This is reminiscent of the Hebrew tradition of *zakhor*, wherein historical memory is a fixation on “primeval beginnings and paradigmatic first acts . . . [T]hrough the repetition of a ritual or the recitation or re-enactment of a myth, historical time is periodically shattered and one can experience again, if only briefly, the true time of the origins and the archetypes.”<sup>207</sup> For Poles, despite the disintegration of Poland’s political borders and autonomous government through partition in the late-eighteenth century, their 1791 constitution provided a political origin story that helped forge them as a people until they could reclaim their independence and national identity more than a century later.<sup>208</sup> The British are similarly obsessive

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205. *Malachi* 4:6.

206. Gregory Rodriguez, *How Genealogy Became as Popular as Porn*, TIME MAGAZINE (May 30, 2014), <https://time.com/133811/how-genealogy-became-almost-as-popular-as-porn/> [<https://perma.cc/DQ55-S9FY>]; Alan Farnham, *Who’s Your Daddy? Genealogy Becomes \$1.6B Hobby*, ABC NEWS (Oct. 24, 2012), <https://abcnews.go.com/Business/genealogy-hot-hobby-worth-16b-mormons/story?id=17544242> [<https://perma.cc/994Z-TKAE>].

207. YOSEF HAYIM YERUSHALMI, ZAKOR: JEWISH HISTORY AND JEWISH MEMORY 6–7 (1982).

208. Poles still celebrate May 3 as “Constitution Day.”

about their origin stories, found in the tales of King Arthur, William the Conqueror, and the Great Charter.

In many ways, the turn to the Constitution's primordial history is nothing more than a fulfillment of the instinctual search for origins. Reaching for the history of the Constitution's creation is a turn to political fathers and America's founding scripture or covenant.<sup>209</sup> This impulse is captured in part by Michael Dorf's "ancestral originalism," wherein current generations "look to the Founding for the genesis of a political philosophy that continues to influence us."<sup>210</sup> We seek to understand the legal past so that we can understand the legal present.

And yet it is more than instinct and understanding. The Justices are turning to history because they recognize the validity of the Framing contract and seek to re-enact the paradigmatic first act. The validity of the Constitution as fundamental law did not come about through ordinary politics.<sup>211</sup> Its legitimizing procedure began with the extra-legal Convention but then made recourse to original constituents through ratification and gained the imprimatur of existing structures, as the Confederation Congress and state legislatures all played rolls in calling for state ratifying conventions.<sup>212</sup> Consider Hamilton's framing in *Federalist* 78: "A constitution is, in fact, and must be regarded by judges as, a fundamental law....the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."<sup>213</sup> Justices recognize the validity of this framing pageant and the fundamental law it produced when they make recourse to its history. But more, like *zakhor* or a *hajj*, Justices not only recognize the Constitution as fundamental law, but, in a sense, seek to participate in America's founding

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209. Cf. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1998).

210. Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1803 (1997).

211. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 230-65 (1991).

212. PAULINE MAIER, *RATIFICATION* (2010).

213. *THE FEDERALIST NO. 78*, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ritual and become part of it by making a pilgrimage to the past. In this way, the Justices' history-seeking is a repetition of that history in the quintessentially human quest to participate, reify, and even sanctify our collective political memory.

*B. The Consequences of History that Constrains*

Now that possible mechanisms for our results have been set forth, this Section will now canvass three consequences of history that constrains. The first is that our results support a positivist view of history as an interpretive method—for all Justices on the Supreme Court sitting now and since the Warren and Burger Courts. The second is that primary sources are not the coin of the realm, and don't seem to do the job assigned them by originalists. In this sense, Cross is vindicated, but only in part. This may be due to the missing, lurking variable in his study of secondary sources and the fact that primary sources seem to impact both sides of the Court by reinforcing their political priors. This should act as a clarion call for legal historians to work to provide the kind of secondary sources that do constrain. Additionally, considering these results for primary history and that such is now required constitutional reading for bench and bar, both should scale up their historical credentials. Finally, our results suggest that history is most potent when it overlaps with stare decisis, or when the Court acts as historian, making history and stare decisis in this regard mutually reinforcing rather than exclusive.

1. History matters

The first consequence of this study is that history matters in constitutional interpretation. Not only are the Justices doing it, but it impacts their decision-making. This undergirds a positivist view of history as a modality of constitutional interpretation. As a starting position, this conclusion can only be true if our results are generalizable. Though we focus on the Convention, our results are not limited to its records. Primary sources captured in our data embrace

*The Federalist*, state ratification debates, Congressional Debates, letters and other historical material. Secondary sources include books, articles, and previous cases discussing history. Thus, at least those sources bearing on Justices' votes extend far beyond the Convention. Although its prequel did not contain any regression analysis, *Pre-"Originalism"'s* descriptive findings also demonstrated the Court's use of a broad range of sources over time.<sup>214</sup> Also, because the Convention is disfavored by most forms of new originalism (as a source of Intentionalism rather than Original Public Meaning),<sup>215</sup> and originalism constitutes one of the Court's main interpretive theories employing history, it is possible that other primary sources would have a more constraining relationship.

In the context of the Convention, our results underscore history as "our law."<sup>216</sup> In contrast to William Baude, we do not specify that *originalism* is our law, since, as discussed above, historical sources can be used by any interpretive theory that employs history.<sup>217</sup> Yet our results certainly show that interpreting the Constitution through the lens of history is an accepted, possibly even preferred modality of the Court.<sup>218</sup> This is more than genuflection, or Barnett's "gravitational force,"<sup>219</sup> but a genuine, earnest engagement by the Court in the practice of history.

And history is not the law of only one side of the Court. Our results make clear that the use of secondary historical sources is highly correlated with cross-party voting for *both* liberal and conservative wings of the Court. The use of primary sources appears to reinforce partisan voting for both sides as well. Although the current political-party orientation did not coalesce until the 1930s, citation to sources of the Convention has never been the exclusive

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214. See Updike Toler & Cecere, *supra* note 14.

215. Dorf, *supra* note 210, at 1800.

216. Cf. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

217. *Id.*

218. Cf. Jamal Greene, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011).

219. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 431 (2013).



province of one particular political strain or viewpoint.<sup>220</sup> This fact holds in the modern era. Justices from all political orientations have cited to the Convention throughout the Court's history, and, since the development of the current two-party system, the constraining relationship has held. History is therefore not merely a conservative endeavor.

More, this study further clarifies that the use of constitutional history did not begin with the Rehnquist Court. Far from it. The descriptive results of this study show that the Court has made use of the Constitutional Convention in interpreting the Constitution almost from its inception. The first reference to the Constitutional Convention was in 1816 in *Martin v. Hunter's Lessee* prior to the publication of any records.<sup>221</sup> Although the *Official Journal* was published thereafter in 1819,<sup>222</sup> the Court did not cite to any specific records until 1843 after Madison published his notes.<sup>223</sup> Citations to both primary and secondary sources for the next 110 years averaged just over 50 citations for each Court.<sup>224</sup> Bringing up this average were the Taney and Stone Courts, which cited to primary and

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220. Cf. *id.* at 147.

221. 14 U.S. (1 Wheat.) 304, 347–48 (1816) (“This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States might differently interpret a statute, or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.”).

222. OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 77.

223. See *Nelson v. Carland*, 42 U.S. 265, 271–72 (1843) (Catron, J., dissenting).

224. See *supra* Figure 7 and accompanying text.

secondary sources when discussing the Convention in excess of 80 times each.

This study confirms that the increased use of history pre-dates the rise of originalism. Beginning with the Warren Court, the Justices began using the Convention at a much higher rate. In fact, the regular rate increased by 4x, or 2x of the Taney and Stone Courts. Beginning with Chief Justice Warren's appointment, the Justices used more than 200 sources per Court when discussing the Convention. Combined citations for primary and secondary sources topped more than 550 during the Burger and Rehnquist Courts, and primary citations reached their peak at over 100 citations during the Burger Court. These findings are supported by *Pre-“Originalism,”* which showed high uses of all constitutional sources beginning with the Warren and Burger Courts,<sup>225</sup> and by other studies, including Cross's book.<sup>226</sup>

These studies show that history is our law, and its use in constitutional interpretation has been continual and unattached to any political party on the Supreme Court since its inception. This historical usage cannot be called originalism, as it predated originalism's conception by Edwin Meese and its deployment by the Rehnquist and especially Roberts Court.<sup>227</sup> This finding, supported by other studies, reorients our understanding of originalism's provenance. Although originalism was designed as a means to cabin the activism of the Warren and Burger Courts, they used history first. Thus, originalism used the tools of activism to promote restraint.<sup>228</sup>

## 2. Primary sources are not doing the work

The second consequence of this study is that it does not appear that primary sources are not doing the job assigned to them by

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225. Updike Toler & Cecere, *supra* note 14, at 319–20.

226. CROSS, *supra* note 6, at 142–51.

227. DAVID STRAUSS, THE LIVING CONSTITUTION 31 (2010).

228. A follow-on study analyzing the Warren and Burger Courts' use of constitutional history in full is anticipated by the lead Author on this Article.

originalists. Our evidence suggests that the use of primary sources, in fact, is associated with a decrease in the probability of cross-partisan constraint. In this, Cross is vindicated, as originalism has failed to deliver on its original promise.

At least in part. Secondary historical sources proved Cross's lurking variable. Their use by Justices did bear a significant relationship to cross-partisan constraint, and thus those theories using history should take stock. In particular, this finding bears on the importance of the constitutional history cottage industry increasingly found in top law reviews.

Yet as primary sources are required reading in at least some areas of constitutional law,<sup>229</sup> for all those calling for such, these results require a reckoning. Bench and bar must do better. To permit primary sources the same purchasing power as secondary sources, the legal profession and especially the Supreme Court must roll up their sleeves and engage in the hard work of history.

And they can. Primary sources are the bread and butter of legal scholarship. Indeed, one could say that reading law is reading history. Lawyers are accustomed to immersing themselves in primary legal sources when a new question is posed, so much so that they can understand and defend the nuances, intricacies, and contradictions of that area of law as well as the hierarchy and appropriate weighting of the various sources of law. The process is not so very different when engaging questions of history. As Max Radin said, "[i]t is quite true that lawyers are for the most part extremely bad historians."<sup>230</sup> Still, "[t]oday's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an ever-growing body of scholarship."<sup>231</sup> If a lawyer (or

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229. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253–54 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

230. MAX RADIN, *LAW AS LOGIC AND EXPERIENCE* 138 (1940).

231. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 304 (2013).

judge) can apply the same skillset she uses when answering legal questions to historical questions, history—and the law—will be well served. So long as the level of immersion is equal, she can succeed.

That said, new tools and trainings are needed such that bench and bar may become more fluent in primary sources. This will enable them to understand and respect them, rather than use them in service of other ends.

The remainder of this Section makes specific, practical recommendations for improving the federal judiciary's historical methodology. These include short surveys of where to find primary sources from the Framing, a proposed format for transparent historical citations in legal publications, and four other practical measures: the need for legal and historical academia to produce more secondary legal history monographs on point, a call for more judicially relevant indexing, a proposal for constitutional history clinics at top law schools, and a brief overview of various judicial trainings and resources and their gaps.

a. Finding primary sources

Whereas legal databases are largely comprehensive and have long pedigrees, when a lawyer turns to historical research, there are no equivalent tools at hand. This is in part because historical sources are more varied and vast, and more broad and specific, than their legal counterparts. Forms include those materials familiar to the lawyer—cases, statutes, contracts, deeds, orders, and treaties—and those less familiar, such as voting and legislative records and other multi-member body debates, census records, newspaper articles, immigration records, bills of lading, transportation timetables, photographs and paintings, birth, baptism, marriage and death certificates, landmarks, maps, letters, journals, and ephemera.<sup>232</sup> There is also less money to collect, organize, collate,

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232. For an exhaustive, delightfully alliterative list of primary-source formats, see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 51 (2012).

catalogue, transcribe, publish, index, and digitize historical sources—not to mention the ongoing and painstaking task of preservation and restoration. Constitutional historical sources may be found in thousands of private and public archives across the United States and even into Western Europe. Almost all towns, universities, and states within the original 13 colonies have historical societies or archival departments with special collections. To these are added the thousands if not hundreds of thousands of private collections, auction houses, and the like. Superseding all in size and volume of materials are the National Archives and Records Administration as well as the Manuscript Division at the Library of Congress. Each depository's catalogue (not to mention digitized or search-friendly papers) is in various stages of completion. That the Historical Society of Philadelphia, whose Founding Era holdings are "unparalleled outside of the Library of Congress," was quite proud of having catalogued 25% of its 22 million holdings in 2005 demonstrates the state of play for the field.<sup>233</sup>

That said, barriers to entry are lowering. Accessing constitutional history will not, for the average legal question, require crossing archival thresholds and blowing dust off old documents. Beyond the usual suspects—the records of the Constitutional Convention and *The Federalist*, both eminently available—primary sources from the Framing are increasingly being neatly pre-packaged in consumer-friendly formats. The herculean, multi-decade effort of the largely unsung army of documentary editors begun in the 1950s publishing the papers of various Founders in documentary editions is quietly, slowly coming to a close.<sup>234</sup> It is impossible to underestimate

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233. Email from David Moltke-Hansen, Pres. of the Hist. Soc. of Pa. (Dec. 6–11, 2019) (on file with the Author).

234. Finished projects include (in order of completion) Alexander Hamilton's Papers, the First Supreme Court Papers Project, and the First Federal Congress Papers Project by Johns Hopkins University. See *The Papers of Alexander Hamilton*, UNIV. OF VA. PRESS ROTUNDA, <https://rotunda.upress.virginia.edu/founders/ARHN> [<https://perma.cc/3D3Q-Q9U2>] (last visited July 31, 2022); *The First Federal Congress*

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*Project*, GEO. WASH. UNIV., <https://www2.gwu.edu/~ffcp/publications.html> [<https://perma.cc/TU2Q-WXQF>] (last visited July 31, 2022); Linda Greenhouse, *After 30 Years, Supreme Court History Project Turns a Final Page*, N.Y. TIMES (Dec. 30, 2006), <https://www.nytimes.com/2006/12/30/washington/30scotus.html> [<https://perma.cc/RQ2V-YKWZ>]. Although they have begun another project on the Bill of Rights, only two index volumes remain to be published after all 29 volumes of The Documentary History of the Ratification of the Constitution by the University of Wisconsin have been published. For a listing of completed and planned volumes, see *Documentary History of the Ratification of the Constitution*, UNIV. OF WISC. CTR. STUD. AM. CONST., <https://csac.history.wisc.edu/publications-2/dhrc/> [<https://perma.cc/2UTH-86NH>] (last visited July 31, 2022). Only four volumes of forty-seven remain to be published by and the Benjamin Franklin Papers at Yale. See *The Papers of Benjamin Franklin*, YALE UNIV., <https://franklinpapers.yale.edu/about-project> [<https://perma.cc/6WYY-CQ7X>] (last visited July 31, 2022). The George Washington Papers Project out of the University of Virginia is relatively close behind, with only two of seven series—the Revolutionary War Series and the Presidential Series—still in progress. See *The Papers of George Washington*, UNIV. OF VA., <http://gwpapers.virginia.edu/editions/letterpress/> [<https://perma.cc/TV92-DT9T>] (last visited July 31, 2022). One of four series comprehended within the James Madison Papers Project is completed, with a projected eleven more volumes to go out of fifty-two. See *Papers of James Madison*, UNIV. OF VA., <http://pjm.as.virginia.edu/editions> [<https://perma.cc/2KSY-K2YE>] (last visited July 31, 2022). The Adams Papers Project at the Massachusetts Historical Association, a project for three generations of Adamses published by Harvard University Press, has published an impressive fifty volumes to date in four editorial series since its creation in 1954, but only the Diaries series appears to be complete. See *The Adams Papers Volumes Published*, MASS. HIST. SOC'Y, [https://www.masshist.org/adams\\_editorial/volumes](https://www.masshist.org/adams_editorial/volumes) [<https://perma.cc/PNU5-Z6EQ>] (last visited July 31, 2022). The Papers of Thomas Jefferson are split between Princeton, which published the first volume of any Founding Father Paper Project in 1950, and the Thomas Jefferson Foundation at Monticello. Princeton has published its 44th volume up through 1805, with the four years of Jefferson's presidency remaining. See *The Papers of Thomas Jefferson*, PRINCETON UNIV., <https://jeffersonpapers.princeton.edu/all-volumes> [<https://perma.cc/H26V-YM5E>] (last visited July 31, 2022). Monticello, focusing on Jefferson's retirement, has published fifteen volumes of material through 1820, with six years of Jefferson's life remaining. See *Completed Volumes*, MONTICELLO, <https://www.monticello.org/research-education/for-scholars/papers-of-thomas-jefferson/completed-volumes/> [<https://perma.cc/79XV-9TTN>] (last visited July 31, 2022). Another project of selected papers for John Jay through Columbia and UVA has published four of seven volumes. See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019). A project for James Wilson has been started by Bill Ewald at the University of Pennsylvania Law School. Email from Bill Ewald (Feb. 7, 2019) (on file with the author).

the expanse of materials these projects canvass, nor the universe of new research they make possible, especially in relation to the Constitution.

Though there is no Westlaw or LexisNexis for historical sources, relevant databases, many of them free, have revolutionized access to the space and the volumes listed above. Free databases include the Avalon Project at Yale for seventeenth- and eighteenth-century sources and many works of the Enlightenment,<sup>235</sup> the Founders Online for six founders' papers through the National Archives (in conjunction with UVA),<sup>236</sup> ConSource for various collections related and indexed to the Constitution (many with images),<sup>237</sup> and Quill for reading and dynamically analyzing the Constitutional Convention, the Bill of Rights, and the Reconstruction Era Amendments.<sup>238</sup> Paid sites include the Electronic Enlightenment,<sup>239</sup> Readex's Early American Imprints Evans Series for materials printed between 1639-1800,<sup>240</sup> and UVA's Rotunda Project for almost all Founding Father Paper Projects, including the Ratification, First Supreme Court, and First Federal Congress Projects (neither of which are not in Founders Online).<sup>241</sup>

The documentary editions and databases listed above relate only to the Framing: each era of constitution-making will have its own

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235 . See *The Avalon Project*, YALE L. SCH., <https://avalon.law.yale.edu> [<https://perma.cc/WWN8-8PSN>] (last visited July 31, 2022).

236 . See *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov> [<https://perma.cc/954Q-EQ9F>] (last visited July 31, 2022).

237 . See *ConSource*, QUILL PROJECT, <https://www.consource.org> [<https://perma.cc/H9JH-ZHDF>] (last visited July 31, 2022).

238. See QUILL PROJECT, <https://www.quillproject.net> [<https://perma.cc/DD47-54B8>] (last visited July 31, 2022).

239. See *Electronic Enlightenment*, OXFORD UNIV. PRESS, <https://www.e-enlightenment.com> [<https://perma.cc/8CFG-LT87>] (last visited July 31, 2022).

240. See *Early American Imprints, Series I*, READEX, <https://www.readex.com/content/early-american-imprints-series-i-evans-1639-1800> [<https://perma.cc/EL9N-7CTX>] (last visited July 31, 2022).

241. Rotunda is missing only the Benjamin Franklin Papers. See UNIV. OF VA. PRESS ROTUNDA, *supra* note 234.

set of sources and materials, and it is especially important to know and become familiar with sources from the Reconstruction Era, as so many constitutional cases implicate amendments emanating from this period.<sup>242</sup> The list is also non-exhaustive—providing an appropriate overview and annotated bibliography of various primary sources would require its own book. Although such a full-length primer does not exist, one is currently contemplated and on the research agenda for the lead author, and William Baude and Jud Campbell have compiled an eminently useful (and periodically updated) primer of early American primary sources with hyperlinks.<sup>243</sup> In the meantime, interested persons should reference the excellent Yale Law School Guide to Research in American Legal History.<sup>244</sup>

It is not enough to simply cite to primary sources: one must know which are the *right* sources. Knowing source hierarchy, which sources to use for which events, and the inherent constraints of the sources will help the earnest advocate. Just as there is a hierarchy of controlling legal sources for each question of law, there is also a hierarchy of primary historical sources for each question of history. Lawyers should be familiar with this hierarchy, and cite to the *right* primary sources. Handwritten manuscripts or original set type formats for printed material are at the top of the food chain.<sup>245</sup>

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242. As of this writing, the Quill Project, with its excellent tools for quantitatively analyzing multi-party constitutional negotiations and resulting texts, has finished editing the debates surrounding the Thirteenth Amendment. They are in the process of adding debates for the Fourteenth Amendment and will publish both sets of debates together. The Fifteenth will follow thereafter.

243. William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (Mar. 13, 2023) (unpublished manuscript), <https://ssrn.com/abstract=2718777> [<https://perma.cc/BAU7-EKPR>].

244. JOHN B. NANN & MORRIS L. COHEN, *THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY* (2018).

245. RICHARD J. EVANS, *IN DEFENSE OF HISTORY* 94 (2000) (“[H]istorical knowledge[ ] relate[s] in the first place to the extent to which it is possible to reconstruct the past from the remains it has left behind—or, in other words, to historical research based on primary sources.”).



Although citing to manuscripts would certainly be impressive and will occasionally reveal new insights,<sup>246</sup> it is not expected of advocates or even necessary where printed versions of the same materials are plentiful.

Yet even among printed material, there is also a relevant and important hierarchy. A general rule of thumb for printed materials is that the most recent publication of a set of documents is better than previous renditions. This is certainly true for the documentary editions since the 1950s. Though editing standards for each paper project and even within a paper project over its years of publication varies widely,<sup>247</sup> these volumes are generally considered infinitely better in terms of historical integrity, transparency, comprehensiveness, annotations, and readability than any preceding publication.<sup>248</sup> This means that advocates should use the “*Papers of*” projects for individual framers and institutions, and not the preceding “*Writings of*” compilations. The exceptions here are *The Federalist* and records of the Constitutional Convention. Among renditions of *The Federalist*, Jacob Cooke’s edition is an excellent resource for helping the reader understand *The Federalist* as a history, but finding one with a good index, particularly one based on the Constitution’s clauses such as is provided in Clinton Rossiter’s edition,<sup>249</sup> will be particularly helpful for the advocate. Other than usefulness, however, any compilation of *The Federalist* is generally considered as good as any other—perhaps the index for each rendition is most important, but as these were very early bound together in a two volume set (the first collected edition being published in March 1788 while the second half of the series were being published in New York City newspapers, with the second to follow in May 1788

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246. See, e.g., BILDER, *supra* note 187.

247. See EDITING DOCUMENTS AND TEXTS (Beth Luey, ed., 1990).

248. See MICHAEL E. STEVENS & STEVEN B. BURG, EDITING HISTORICAL DOCUMENTS: A HANDBOOK OF PRACTICE (1997).

249. THE FEDERALIST *vii* (Clinton Rossiter ed., 1961).

before numbers 78-85 appeared),<sup>250</sup> republications are generally equally good, and, often, citing to the primary document alone suffices.<sup>251</sup> For Convention records, though it predates (and prefigures) modern documentary standards and is succeeded by more recent compilations,<sup>252</sup> as shown by the results of our study, the most authoritative and oft-cited publication of the records continues to be Max Farrand's *The Records of the Federal Convention* for good reason.

As with the law, it is important to cite to the most relevant source for the issue or event at hand. All else being equal, for history, the more contemporaneous the source is to the historical event, the more weight that source is given.<sup>253</sup> Thus, even if comments about the Convention were made in *The Federalist*, the state ratification debates, or debates in the First Congress, these sources are removed in time and therefore accorded less weight by the historian than, say, Madison's *Notes*, ostensibly recorded extemporaneously in shorthand format and then written out in long-hand versions the same night.<sup>254</sup> In the same vein, if the historical event at play is not discussed by the author of a primary record, it is bad form to use non-contemporaneous sources as evidence of that event: one does not reference the other, and therefore should not be used for support. Though this normative historical method may seem obvious, as our results show (with Justices regularly using sources removed in time and topic from a historical event), it occurs altogether too frequently in constitutional advocacy and interpretation.

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250. *Id.*

251. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, § 15.7 (b) (17th ed. 2000) ("Cite an entire *Federalist Paper* without indicating a specific edition, and include the author's name parenthetically.").

252. *See supra*, Section II.A.

253. *See* MARTHA C. HOWELL & PREVENIER WALTER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 61, 70-71 (2001).

254. James Madison, *Introduction to the Debates in the Convention*, reproduced in 2 THE PAPERS OF JAMES MADISON 716-17 (1840).

Finally, advocates should be aware of the limits of the sources. For instance, Madison revised his *Notes* later in life, which fact is not made clear in his preface. It is contended (and hotly disputed) that Madison's later political views may have impacted his judgment about how to report on the Convention.<sup>255</sup> Such a claim, if true, would presumably impact the reliability of the *Notes*, shifting our focus and giving greater weight to other sources of the Convention. While the reliability of Madison's *Notes* is a subject of heated academic debate (with entire camps of historians dividing along its fault line), it is generally accepted that the reporting of the state ratification debates was compromised by the pro-Federalist sympathies of the reporters.<sup>256</sup> Marshall, for instance, is said to have read speeches reported in the Virginia ratifying convention that he never gave.<sup>257</sup> Such a speech or even sets of compromised notes should be accorded less weight, and the sources' limitations and reliability should be documented in the footnotes when using them as one would the unfavorable subsequent procedural history of a case or contrary authority. The more recent documentary editions such as *The Documentary History of the Ratification of the Constitution* have accounted for and dealt as best as possible with such documentary integrity issues, providing yet another reason to prefer them over other published sources such as the oft-used Elliot's *Debates*.<sup>258</sup>

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255. BILDER, *supra* note 187.

256. Hutson, *supra* note 74, at 12–24.

257. *Id.* at 24.

258. For instance, editors of the *Documentary History of the Ratification of the Constitution* acknowledge John Marshall's declamation of the reported speech he claims never to have given but points out that Marshall comments favorably on the accounts of other delegates' speeches, potentially undermining his own declamation. IX DOCUMENTARY HISTORY OF THE RATIFICATION 905 (John P. Kaminski et al. eds., 1990). Additionally, they note that an oft-quoted speech Elliot records as given around July 2, 1788 by Thomas Treadwell was never delivered. Finally, editors noted the several inaccuracies as originally reported in the North Carolina debates.

b. Recommended primary source citation format

With few exceptions, current legal citation manuals do not account for citations to primary sources in a thorough or satisfying way.<sup>259</sup> This has resulted in advocates and Justices citing to primary sources as if they were any other secondary source. The research therefore becomes more difficult to replicate. For instance, if only the volume and page of Farrand is cited, those looking at the Convention records on ConSource (or the 1960 Ohio University publication of the records) would have a difficult time finding the particular day of debate being referenced. Also, a certain quantum of transparency is lost through this method of citation; one does not know what day or even the original cited source, be it Yates's Notes, the Committee of Detail drafts, the *Official Journal*, or Madison's Notes, all of which are included in Farrand. If the reader was concerned about the authenticity of Madison (or Yates's) notes given their real or apparent biases, it would be important to provide this information.

We recommend a citation format that blends historical and legal methods, wherein the primary and secondary sources are clearly identified in conformance with *Bluebook* citation guidelines. This could appear as follows:

James Madison, *Notes of the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION 21 (Max Farrand ed., 1911) (1966).

Such a format will provide needed clarity and transparency and signify a large step towards reconciling legal and historical methodologies, symbolically blending the two disciplines.

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259. Exceptions include Blackstone's *Commentaries*, constitutions, and *The Federalist*. BLUEBOOK, *supra* note 251, at §§ 15.4(d), 15.7(b), and 11. Otherwise, the Bluebook directs the writer to cite to scholarly editions for works published before 1900, *id.* at § 15.4(c), but has no specific rule regarding unpublished manuscripts from that era.

c. Improving the federal judiciary's constitutional history

There are four ways of supporting the federal judiciary in doing better history. The first approach speaks to the Justices' preference for and constraint by secondary sources: scholars can produce more historical work bearing on constitutional issues as has been suggested by Akhil Amar.<sup>260</sup> Relatedly, as the Justices prefer legal over historical journals, historians can consider publishing their articles in prominent law reviews, which will require a sensitivity to the demands of the profession, knowing that in the end, judgment must be rendered. While this approach is the most feasible at present, it still requires much to bridge the gap between scholarship and the Court. Justices must be aware of relevant historical articles and books—not to mention finding the time to read and process these often very lengthy treatises. Thankfully, a database of constitutional historical articles organized by clause or section of the Constitution for easy judicial reference was launched in October 2022 by Georgetown's Center for the Constitution.<sup>261</sup>

A second means of improvement can be accomplished by documentary editors, digital archivists, and librarians, who can develop constitutional indices based on a deconstruction of the Constitution into interpretable parts: the clauses of the Constitution. In part because they are frequently indexed in this manner,<sup>262</sup> *The Federalist* has become the most-cited source from the Founding.<sup>263</sup> To

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260. Amar commends law professors to a careful study of the Constitution's text, history and structure, and suggests that law professors and students "can play useful roles in helping our fellow citizens learn things" about the Constitution and its history in his *Harvard Law Review* Foreword to the 1999 Supreme Court Term. Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–28, 133–34 (2000).

261. The Originalist's Constitution, Georgetown Center for the Constitution, <https://www.law.georgetown.edu/constitution-center/constitution/> [https://perma.cc/ZSX4-JYVE].

262. See, e.g., the text of the Constitution collated to *The Federalist*. THE FEDERALIST 542–56 (Clinton Rossiter ed., 1961).

263. CROSS, *supra* note 6, at 135–40 (collecting statistics); Durchslag, *supra* note 59.

encourage contextualization of the documentary record, such indices, particularly those created digitally, can include a layer of secondary commentary by historians, linking to relevant articles and treatises. Thus far, only ConSource includes such an index, but it requires much work and does not include any secondary contextualization.

Another means of improving the Court's history is to serve Justices with history in a format with which they are most familiar: amicus briefs. However, other than two amicus briefs filed by this author with the help of her constitutional history students in the Federal<sup>264</sup> and Second Circuit,<sup>265</sup> originalist amici to date are generally partisan, and thus partake of the limits of general advocacy, including the ills of "law-office history."<sup>266</sup> Briefs by historians are also usually partisan and even overtly political.<sup>267</sup> The Justices need true friends of the Court writing neutral historical amici that favor neither party. They need briefs that can bear and present all of the complexities, gaps, and discrepancies good history yields and allow the Justices to make informed judgments. Such briefs could be supplied by constitutional history clinics at top law schools wherein students work with academics, appellate practitioners and

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264. See Brief for Professor Lorianne Updike Toler as Amicus Curiae Supporting Neither Party, *Gorge Design Group LLC v. Xuansheng*, 2023 WL 2808069 (Fed. Cir. Apr. 6, 2023) (No. 21-1695), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4307938](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4307938) [<https://perma.cc/B7SH-U35U>].

265. See Brief for Lorianne Updike Toler as Amicus Curiae Supporting Neither Party, *Soule v. Conn. Ass'n of Schs.*, No. 22-2332 (2d Cir. May 19, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4429519](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4429519) [<https://perma.cc/P4SR-SACL>].

266. *But see, e.g.*, Brief for Const. Accountability Ctr. as Amicus Curiae Supporting Petitioner, *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022) (No. 20-603) (amicus briefs filed by the left-leaning Constitutional Accountability Center using historical arguments).

267. See Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J. L. & HUMS. 359 (2013); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 770 (2000) ("[Statistics showed] that the Court tended to favor liberal positions [filed by amicus curiae].").

historians to produce the kind of amici recommended above. Clinics could then be called upon to serve as special Court-appointed counsel in constitutional cases, especially those heard *en banc*. Not only would such clinics supply a need especially felt on the federal circuits, but it would double as valuable training for would-be appellate clerks and the next generation of appellate and Supreme Court advocates.

The fourth and final means of supplying better history for the federal judiciary is to be found in developing constitutional history training. Such trainings should address where to find sources as discussed above, better citations, and how to apply the various theories which call for constitutional history. These should be provided to various audiences within the federal judiciary: judges, clerks, and librarians. Training for judges is currently provided by Georgetown Law School's Center for the Constitution and by the lead author through the Judicial Education Initiative as part of its corpus linguistics trainings,<sup>268</sup> but more should be developed, particularly by liberal-leaning institutions such as the Constitution Accountability Center and the neutral Federal Judicial Center and the Administrative Office of the U.S. Courts.

3. History is most potent when reinforced by stare decisis

These results demonstrate that history has the greatest pull when the Court itself acts as historian. Justices' use of secondary sources in either of our models had the most significant directional correlation to cross-partisan constraint. The most frequently used secondary source were previous cases, and in 206 of these 238 cases (86%), the Court interpreted primary sources directly. Thus, when the Court itself acted as a historian, later Courts saw that initial

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268. Judicial Education Initiative currently runs a series of judicial trainings on corpus linguistics, which features one session on doing effective constitutional history research by the lead Author, but is hoping to develop dedicated constitutional history trainings in 2024.

interpretation as dispositive. Citing to previous Courts acting as historian would frequently cause liberals to vote conservative and conservatives to vote liberally. It appears then that history is at its strongest when overlaid with precedent, indicating that history and precedent can be mutually reinforcing rather than mutually exclusive.

This is an interesting finding for originalists. For strict originalists, *stare decisis* can prove an enigmatic puzzle. If the historical answer to a constitutional question is different from previous decisions, can a Court vary from *stare decisis*? Theoretical purists' answer tends in the affirmative, but Justices called upon to do the hard work of interpreting and living with the results in practice may hesitate. Indeed, in the Court's *Dobbs* decision, Justice Alito felt compelled to spell out a rubric for when *stare decisis* should give way to history.<sup>269</sup> While in academia, Justice Barrett spent some time grappling with the problem as well.<sup>270</sup>

Yet here, it appears that Justices may be largely constrained by how their predecessors interpreted historical events. History was important as understood by former colleagues, as evidenced by the fact that the more previous cases cited, the stronger the positive relationship with cross-partisan constraint. These results indicate the possibility of a different relationship between history and *stare decisis* than is suggested by received wisdom. Perhaps they are not at so great odds, after all, and can, at times, be mutually reinforcing.

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This Part has provided possible rationales for our results that secondary but not primary sources bear a positive, significant correlation with cross-partisan constraint because the latter are more familiar and aggregate primary sources together such to be less manipulable. It also provides an explanation for why the Court does

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269. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

270. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).



history at all—it is a natural turn to political forefathers as the Justices seek to understand the present by reconnecting and even recreating the country’s origin story. Finally, three consequences of our results have been presented: although Cross is vindicated in part, they show that history is our law, primary source results require a reckoning and re-tooling of the way bench and bar does history, and that history has the strongest pull on the Justices when it is reinforced by precedent, or when previous Courts act as historians.

#### CONCLUSION

History seems to have a constraining impact on the Supreme Court’s decision-making. That said, Cross’s conclusions regarding the impact of primary source history, however inelegantly or unscientifically arrived, are vindicated. Originalism has failed in its primary purpose to constrain Justices’ discretion. At least in part: Cross did not account for two indicia of constraint which we find here. First, the increased use of primary sources seems to reinforce but have an impact independent of ideology, thus showing evidence of “constraint” by different measures. We also find that *secondary* historical sources have a significant relationship with Justices casting cross-partisan votes, providing strong evidence of Constraint, at least when Justices reference the Constitutional Convention. Reasons for these results may lie in the fact that secondary sources, as an aggregate of primary sources, are more familiar and thus harder to manipulate. This study shores up positivists’ claims about the Court’s turn to history, but requires a reckoning for those advocating its use. To increase the probability of primary source constraint, and especially in light of the Court’s recent requirements that lower courts use history when interpreting the Constitution, we provide a primer on framing primary source hierarchy and where to find them, introduce a more transparent legal citation

format for historical sources, and propose an expansion of current historical tools and training for bench and bar.