

# NOTES

## Return of the Skeptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence

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### ABSTRACT

*Throughout history, many scholars have argued that because the Anti-Federalists lost the debate over the Constitution, they should be at best ignored, and at worst denigrated. What possible reason could we have to consult the arguments of the enemies of our revered Constitution? What—if any—role could they possibly play in modern constitutional interpretation?*

*While it is true that the Anti-Federalists will go down in history as dissenters from the Constitution, the unique nature of our ratification process should spare them from the dustbin of history. Because our Constitution is a result of a dialogue, understanding the arguments on both sides is an important prerequisite to understanding the resulting text.*

*In particular, when searching for the original meaning of the Constitution, the Anti-Federalists play an important role: their skepticism led to changes prior to ratification. Because this skepticism influenced the resulting Constitution, the Anti-Federalists remain a key source for originalist inquiries. This paper will (1) consider the historical resurgence of the Anti-Federalists, (2) propose their proper role in modern constitutional jurisprudence, and (3) study the Supreme Court's examination of Anti-Federalist influence on the Constitution when making originalist inquiries.*

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INTRODUCTION

The uniqueness of our Constitution lies in its origin: it is a result of dialogue, not command. Thus, a genuine understanding of the resulting text requires understanding the dialogue itself. While the Founding dialogue expressed multiple positions, historians categorize its participants into two groups: the Federalists and the Anti-Federalists. The Constitution’s unique framing process presents us with a unique question: what role, if any, should those who opposed the Constitution, the Anti-Federalists, play in the modern search for its original meaning?

To answer this question, we must first understand who the Anti-Federalists were, what they wanted, and why they opposed the Constitution. Part I contains two subsections. In Section A, I explore the rehabilitation of the Anti-Federalists in American political discourse by discussing four prominent accounts of the Anti-Federalists in the latter half of the 20th century. In Section B, I offer my own view: the broad movement of Anti-Federalism evinced a hostility and skepticism toward government power. Underlying this skepticism was a belief that government will naturally extend its own power as far as possible.

In Part II, I explore the role of Anti-Federalist thought in modern constitutional jurisprudence. In Section A, I argue that the Anti-Federalists can play several roles in uncovering the original meaning of the Constitution. First, I explore the “dictionary function” of the Anti-Federalists in seeking original public meaning. Next, I discuss originalist contextualism and the role of Founding dialogue in constitutional interpretation. Because the Constitution is the outcome of dialogue and ratification, much of its content<sup>1</sup> and conceptual framing is the result of Anti-Federalist skepticism of centralized government power and the Federalists’ accommodation of such concerns. Thus, to under-

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1. Primarily, the content in the Bill of Rights.

stand the Constitution's meaning, we must examine both Federalism and Anti-Federalism. In Section B, I examine the Supreme Court's use of the dictionary function; the Court's use of originalist contextualism; and Justice Thomas's rule of construction for the use of originalist contextualism. Finally, I conclude with recommendations for the Court to consider when invoking Anti-Federalist ideas.

## I. THE ANTI-FEDERALISTS

### A. *The Historical Rise of the Anti-Federalists*

Our fundamental inquiry is: *What role should the Anti-Federalists play in constitutional history?* The answer for much of the 19th century was—decidedly—*none*. As Saul Cornell explains, “For much of the 200 years following ratification of the Constitution, the Anti-Federalists have suffered the fate usually accorded losers of history’s great struggles: later generations have either ignored or excoriated them.”<sup>2</sup> Cornell tracks the un-enviable history of the Anti-Federalists’ reputation, from the press shunning them at the time of ratification to 19th-century historians dubbing them blasphemers for questioning the “sacred text” of the Constitution.<sup>3</sup> This solidified their reputation as “uneducated and debt-ridden farmers” and scholars ignored their contributions to the Founding.<sup>4</sup> By the turn of the century, many conflated the Anti-Federalists’ dedication to localized rule with the brutality of slavery.<sup>5</sup> Widely regarded as enemies of the Constitution, it seemed as if the Anti-Federalists would fall under the dishonor of *damnatio memoriae*.<sup>6</sup>

The initial invocation of Anti-Federalist thought was not by the political right in support of Montesquieu’s theory of local governance, but rather by the populist left in search of historical grounding for their proposed democratic reform.<sup>7</sup> Cornell argues that the initial, albeit modest, restoration of the Anti-Federalists’ reputation was due to Progressive historians’ reevaluation of the Founding era.<sup>8</sup> These revisionist histories included Merrill Jensen’s examination of whether life under the Articles of Confederation was really as anarchic as commonly believed<sup>9</sup> and Charles Beard’s argument that the dividing lines

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2. Saul Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 39 (1989).

3. *Id.* at 42.

4. *Id.* at 43.

5. *Id.* at 45.

6. *See id.* at 39–48 (discussing the early historical fate of the Anti-Federalists and the role of philosophical, cultural, and historical forces in this development).

7. *Id.* at 49 (“The first major reevaluation of Anti-Federalism coincided with the Populist struggles of the late nineteenth century. Many reform-minded scholars began to link the democratic aspects of Populist ideology to ideas first espoused by Anti-Federalists.”).

8. *Id.* at 49–50.

9. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781* (1940).

during the Founding were primarily economic.<sup>10</sup> However, these historians did not grapple with the particulars of Anti-Federalist thought as much as they more closely scrutinized the demigod status of the Founders and the unquestioning veneration of the Constitution that defined the 19th century.<sup>11</sup>

It was not until the latter half of the 20th century that historians and legal scholars began to take a far deeper interest in the thought of the Anti-Federalists. Cecilia Kenyon, Herbert Storing, Saul Cornell, and Paul Finkelman were four scholars whose work brought the Anti-Federalists' ideology and role in the Founding back into the conversation on constitutional thought, and, ultimately, back into constitutional jurisprudence.

In 1955, Cecilia Kenyon offered a rebuttal to Beard's *An Economic Interpretation of the Constitution* by exploring Anti-Federalist thought.<sup>12</sup> In response to Beard's thesis that economic self-interest was paramount in the founding, Kenyon argues that this causal view is overly simplistic. Instead, there was a vital philosophical debate between Federalists and Anti-Federalists.<sup>13</sup> She notes at the outset that the Anti-Federalists' "theory of republican government has never been closely analyzed . . . and a knowledge of their ideas and attitudes is essential to an understanding of American political thought in the formative years of the republic."<sup>14</sup> Thus, Kenyon shifts the conversation to the Anti-Federalists' importance in understanding the Founding before even getting to the specifics of their ideas.

Kenyon begins her analysis with a succinct description of Anti-Federalist thought: underlying their "opposition to increased centralization of power in the national government was the belief that republican government was possible only for a relatively small territory and a relatively small homogeneous population."<sup>15</sup> Kenyon goes on to examine the Anti-Federalists' view of human nature, stating, "[t]hey shared with their opponents many of the assumptions regarding the nature of man characteristic of American thought in the eighteenth century."<sup>16</sup> She points out the "amusing irony" in the Anti-Federalists' habit of charging the "Founding Fathers, who prided themselves on their realism,"<sup>17</sup> with a naïve optimism for believing that, within the scheme of the Constitution,

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10. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); see also Cornell, *supra* note 2, at 49–51.

11. Cornell, *supra* note 2, at 50 ("Although Beard did not champion the Anti-Federalist cause directly, his claims about the conservative thrust of Federalism supported subsequent attempts to restore the credibility of the Anti-Federalists.").

12. Cecilia Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955).

13. Kenyon notes that Beard's theory has a "tendency . . . to dispose of the institutional thought of the men who framed the Constitution as [an] ideological response to economic interests. The present essay offers yet another challenge to this position, not by further examination of the Constitution or its authors, but by analysis of the Anti-Federalist position of 1787-1788." *Id.* at 4.

14. *Id.* at 5.

15. *Id.* at 6.

16. *Id.* at 13.

17. *Id.* at 14.

virtuous men would be elected and that the Anti-Federalists' fear of distant, power-hungry elites was unfounded.<sup>18</sup>

Kenyon portrays the Anti-Federalists as simultaneously Rousseauian idealists<sup>19</sup> and "men of little faith."<sup>20</sup> She argues that Anti-Federalists were beholden to the prevailing political theory of the past, and were unwilling to step forward into what they perceived to be a Madisonian brave new world.<sup>21</sup> For Kenyon, the Anti-Federalist viewpoint "was a natural stage in the development of representative government, but it contained several weaknesses, and was . . . already obsolete in the late eighteenth-century America."<sup>22</sup> In response to Beard, she argues that the Anti-Federalists were not majoritarian democrats; instead, "they distrusted majority rule," and "the last thing in the world they wanted was a national democracy which would permit Congressional majorities to operate freely and without restraint."<sup>23</sup> She argues that, "their philosophy was primarily one of limitations of power, and if they had had their way, the Constitution would have contained more checks and balances, not fewer."<sup>24</sup> According to Kenyon, the progressive historians such as Beard seeking to revitalize the Anti-Federalists as champions of mass democracy are "unrealistic and unhistorical."<sup>25</sup> Rather, the Anti-Federalists were localists who were unceasingly skeptical of centralized power, and "lacked both the faith and the vision to extend their principles nation-wide."<sup>26</sup>

Thus, Kenyon's overarching conclusion concerns the role of ideology. That is, Kenyon concludes that Beard incorrectly viewed economics as the fundamental determining factor in the Founding of our country.<sup>27</sup> Ideas mattered, the ideas of the Federalists and Anti-Federalists alike.

Herbert Storing also emphasized the importance of the Anti-Federalists in the Founding, and sought to capture the essence of their thought in a 1981 series

18. *Id.*

19. *See id.* at 38 ("For the Anti-Federalists were not only localists, but localists in a way strongly reminiscent of the city-state theory of Rousseau's *Social Contract*. According to that theory, a society capable of being governed in accordance with the General Will had to be limited in size, population, and diversity."); *id.* at 39 ("This Rousseauistic vision of a small, simple, and homogeneous democracy may have been a fine ideal, but it *was* an ideal even then.")

20. *Id.* at 43 ("[The Anti-Federalists] lacked both the faith and vision to extend their principles nation-wide.")

21. *Id.*

22. *Id.* at 39. Kenyon's support for this assertion does not adequately consider the strongest arguments in favor of localized governance. For a more substantial explication of these arguments made by the Anti-Federalists, expressed in the framework of Public Choice Theory, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design* 54 U. CHI. L. REV. 1484 (1987).

23. Kenyon, *supra* note 12, at 42–43.

24. *Id.* at 43; *see also id.* at 23–26 (discussing how the Anti-Federalists wanted more checks and balances than provided).

25. *Id.* at 43.

26. *Id.*

27. *Id.* at 3–4 ("[T]he thrust of *An Economic Interpretation of the Constitution* and the effects of its thesis as applied have frequently been those of simple and uncritical commitment to a theory of economic determinism.")

entitled *The Complete Anti-Federalist*.<sup>28</sup> Along with this robust compilation of Anti-Federalist documents, he wrote *What the Anti-Federalists Were For*, an introduction to Anti-Federalist thought that sought “to make clear in what sense they too deserve to be counted among the Founding Fathers.”<sup>29</sup>

Storing argues that because the Constitution “was a product of deliberation . . . those who opposed [it] must be seen as playing an indispensable if subordinate part in the founding process.”<sup>30</sup> Furthermore, he notes, Anti-Federalist thought should play an ongoing role in the ongoing process of constitutional interpretation.<sup>31</sup> Because of this deliberative nature of American constitutional theory, and because the Anti-Federalists did, in fact, oppose the Constitution largely on the grounds of political philosophy, their arguments and role in the deliberation should inform our understanding of our own political culture today. Storing saw in Anti-Federalist thought “a set of principles that is a good deal clearer and more coherent, and also more relevant to an understanding of the American Founding and the American polity, than has usually been supposed.”<sup>32</sup>

Storing concludes that the Anti-Federalists questioned the Constitution they saw before them not due to “a mere failure of will or lack of courage.”<sup>33</sup> Rather, they had a set of political principles that they perceived as under siege. “They had *reasons*, and the reasons have weight.”<sup>34</sup> While Storing gives a marketplace-of-ideas explanation for the Anti-Federalists’ failure by asserting that they lost “because they had weaker arguments,”<sup>35</sup> he undoubtedly sees them as a group that espoused a political ideology that played a role in shaping our nation and the ongoing interpretation of our Constitution.

In *The Other Founders*,<sup>36</sup> Cornell takes perhaps the deepest dive into the Anti-Federalists’ mindset of the scholars discussed here. Particularly of note is his effort to break Anti-Federalist thought into subgroups of the elite, the middling, and the plebeian.<sup>37</sup> By acknowledging these different strains of thought within the broad group of those opposing the Constitution, Cornell avoids the trap of casting the Anti-Federalists as a highly uniform group of thinkers. Even so, Cornell notes that the Anti-Federalists “provid[ed] a shared language and common sets of criticisms.”<sup>38</sup> He puts forth nine recurring issues

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28. THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

29. Muray Dry, *Preface* to HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION*, at vii (1981).

30. *Id.* at 3.

31. *Id.*

32. *Id.* at 6.

33. *Id.*

34. *Id.*

35. *Id.* at 71.

36. SAUL A. CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999).

37. *See id.* at 51 (discussing elite Anti-Federalist political and constitutional thought); *id.* at 81 (discussing popular Anti-Federalist political and constitutional thought).

38. *Id.* at 28.

brought up by elite, middling, and plebeian Anti-Federalists alike,<sup>39</sup> and finds that, “what is remarkable about the ratification is the consistency with which these arguments recur.”<sup>40</sup>

Ultimately, Cornell notes the spirit of the Anti-Federalist dissent present in American political and constitutional discourse. While Progressives initially revived Anti-Federalists’ thought as they sought support for new, democratic institutions, conservatives have more recently embraced the Anti-Federalists’ localism and hostility toward powerful, centralized government. The use of the Anti-Federalists by those across the political spectrum demonstrates the continuing significance of Anti-Federalist thought in the American subconscious. For Cornell, the debate between the Federalists and Anti-Federalists remains an ongoing and contemporary dialogue in which the “Other Founders” should be acknowledged for their role.<sup>41</sup>

In two law review articles, Paul Finkelman reviews Storing’s *The Complete Anti-Federalist*<sup>42</sup> and Cornell’s *The Other Founders*,<sup>43</sup> respectively. He provides his own insights into Anti-Federalist thought along the way. Of particular note is the drastic shift in Finkelman’s views on the Anti-Federalists between 1984 and 2001, seemingly against the historical tide.

In Finkelman’s review of Storing’s *The Complete Anti-Federalist*, he notes that “the recurrent theme of the antifederalists is fear: fear that the national government would usurp the rights of the people; fear that without a Bill of Rights all liberty would be destroyed; fear that the presidency and Senate would lead to an aristocracy.”<sup>44</sup> These fears, however, “helped define the nature of the American Constitution,” and “the arguments of the losers are just as important as those of the winners.”<sup>45</sup>

Finkelman’s piece makes two primary points: (1) that many of the Anti-Federalist fears are relevant to today’s political climate, and (2) that the Anti-Federalists were the realists of the period rather than Kenyon’s “men of little faith.” He notes the “eerie modernity to these antifederalist concerns.”<sup>46</sup> In particular he points out that the Anti-Federalists feared a President with King-like powers, and that the modern executive has substantiated such concerns. In the 20th century, presidents have exercised seemingly unlimited foreign policy

39. The recurring issues that Cornell puts forth are consolidation, aristocracy, representation, separation of powers, judicial tyranny, absence of a bill of rights, taxes, standing armies, and executive power. *Id.* at 30–31.

40. *Id.* at 31.

41. *Id.* at 1 (“Indeed, the struggle between the Federalist Founders and the dissenting voices of the Anti-Federalists, the Other Founders of the American constitutional tradition, continues to define the nature of political life.”).

42. Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 CORNELL L. REV. 182 (1984).

43. Paul Finkelman, *Turning Losers into Winners: What Can We Learn, if Anything, from the Antifederalists?*, 79 TEX. L. REV. 849 (2001).

44. Finkelman, *supra* note 42, at 183.

45. *Id.*

46. *Id.* at 195.

powers, interned nearly 100,000 American citizens of Japanese descent, and suppressed veteran protesting with federal troops.<sup>47</sup> Furthermore, Finkelman analogizes modern concerns regarding “fear of secrecy in government,”<sup>48</sup> and the Senate being a “millionaire’s club”<sup>49</sup> that does not genuinely represent the people, to Anti-Federalist concerns in the Founding Era. Ultimately, Finkelman goes so far as to correlate these contemporary realities with a lack of reverence for Anti-Federalist ideology in American politics:

If there are few such instances of this type of behavior in our nation’s early history, it may be because the fears of the antifederalists remained alive until the Civil War. If there are more instances in recent years, it may be because a less well-read and less historically aware America has forgotten the warnings of antifederalists.<sup>50</sup>

Finkelman concludes that the Anti-Federalists were not “men of little faith.” There is no question they feared the impending government and genuinely felt it may lead to tyranny, yet “they were willing to risk this experiment in government provided that the Constitution protected a free press, jury trials, and due process.”<sup>51</sup> If not for the Anti-Federalists, Finkelman states, “the republic might not have survived to celebrate its two hundredth birthday.” Thus, we can thank the “great realists of the period”—the Anti-Federalists—for raising such concerns.<sup>52</sup>

In his review of Storing, Finkelman joins the growing numbers of constitutional scholars and historians who acknowledge the Anti-Federalists’ integral role in the Founding. Thus, it is peculiar to witness Finkelman’s dramatic shift in views in his review of Saul Cornell’s *The Other Founders* seventeen years later. Despite praising the depths of Cornell’s research, Finkelman adopts the 19th century conception of the Anti-Federalists as “people with little faith, limited vision, and to a great extent, horrifying notions of how society ought to work and government ought to operate.”<sup>53</sup> Rather than the Anti-Federalists representing varying degrees of skepticism, Finkelman refers to them as “inchoate, amorphous collections of politicians and anti-politicians who agreed with each other on almost nothing, except that they did not like the proposed Constitution.”<sup>54</sup>

It is worth noting the almost shocking change in both tone and substance in Finkelman’s article—a change made without grappling with, or even acknowledging, his earlier arguments. For example, Finkelman never attempts to recon-

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47. *Id.* at 195–96.

48. *Id.* at 196.

49. *Id.* at 197.

50. *Id.* at 196.

51. *Id.* at 202.

52. *Id.*

53. Finkelman, *supra* note 43, at 856.

54. *Id.* at 850.



cile his claims of the Anti-Federalists' "limited vision" with his earlier assertion of the modern relevance of Anti-Federalist concerns. Despite his earlier observation that most Anti-Federalists were driven by genuine concern for their freedoms, Finkelman newly asserts that the Anti-Federalists merely "wanted a constitution that would let them do what they wanted and prevent their opponents from doing what they wanted."<sup>55</sup>

Finkelman also asserts that, because the Anti-Federalists failed in their pursuit of structural amendments to the Constitution, they can hardly be seen as winners in regards to the Bill of Rights.<sup>56</sup> Long gone are his propositions that by "putting the Bill of Rights on the national political agenda,"<sup>57</sup> the Anti-Federalists likely saved the nation from an abusive federal government. Instead, he argues that the pursuit of a Bill of Rights was not admirable, for it was part of a larger scheme to undermine the new Constitution at any cost.<sup>58</sup> Finally, in direct contradiction to his praise of the Anti-Federalists as "the great realists of the period," willing to settle on a modest Bill of Rights and work within the system, he concludes, even more forcefully than Kenyon, that "they lacked faith in the ability of their fellow citizens to create and to govern a great nation. They feared almost everything, but mostly the future. And because of this, they are the first identifiable class of losers in American political history."<sup>59</sup>

So, what are we to make of Finkelman's drastic and unreconciled shift in opinion? Finkelman notes his dissent from Cornell's assertion that "we must listen to the antifederalists because they were the 'other founders' and that their voices are especially important for a modern originalist interpretation of the

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55. *Id.* at 860. To support this claim, Finkelman argues that the Anti-Federalists stifled local religious minorities in several states. On religion, like the Federalists, Anti-Federalists were far from uniform in their thinking. Cornell notes that while many Anti-Federalists wished for a government that would play a prominent role in civic, and thereby, religious affairs, "at the same time there were many Anti-Federalists who opposed any action that smacked of government meddling in affairs of conscience." Cornell, *supra* note 2, at 69. The Address of the Minority of the Pennsylvania Convention, when expressing their grievances with the Constitution, stated that, "[t]he right of conscience shall be held inviolable; and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in the matters of religion." *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787), reprinted in *THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION* 201, 206 (Herbert J. Storing ed., Univ. of Chicago Press abr. ed. 1985) [hereinafter *Minority of the Convention*].

56. Finkelman, *supra* note 43, at 855.

57. *Id.*

58. Finkelman differentiates between "honest" and "not honest" Anti-Federalists, without expanding much on who was which or providing any evidence of any widespread existence of such men. Instead he cites Madison (the political opposition) stating that, "the demand for amendments was merely a stalking horse for the real goal of the hardcore antifederalist leadership, which was to 'strike at the essence of the System,' and either return to the government of the old Confederation 'or to a partition of the Union into several Confederacies.' They hoped that their scare tactics about the lack of a bill of rights would succeed in defeating the Constitution." *Id.* at 880 (footnote omitted).

59. *Id.* at 892.

Constitution.”<sup>60</sup> Finkelman argues that citing the Anti-Federalists makes little sense due to their loser status in both the Convention and ratifying debates, and notes that any use of the Anti-Federalists will be in the form of crude “law-office history” that “is a function of late-twentieth-century conservative policy goals.”<sup>61</sup> He points out the plethora of references to the Anti-Federalists by the conservative justices, most of which occurred after he wrote his review of Storing’s book. Finkelman suggests that these justices are invoking the Anti-Federalists incorrectly and inaccurately “to bolster conservative, reactionary, and discriminatory ideological viewpoints.”<sup>62</sup>

One potential explanation for Finkelman’s change of heart is that he wishes to undermine what he sees as the misuse of history by the right side of the Court.<sup>63</sup> Perhaps he believes the Anti-Federalists should not be looked upon as favorably when invoked by conservative judges as when they were seen as champions of progressive populism. This politically motivated historical analysis would explain why he does not grapple with the arguments he made in his review of Storing years earlier. Either way, Finkelman’s scholarship is integral to understanding the use—and misuse—of the Anti-Federalists in constitutional thought.

### *B. The Anti-Federalists: American Skeptics*

I now put forth my own conception of Anti-Federalist thought as derived from the sources above and the Anti-Federalists’ writings. As Cornell explains, it is important to note the different strands of thought among Anti-Federalists. Still, the Anti-Federalists shared a broad political viewpoint built upon the premise that government will seek to extend its power as far as possible. Thus, they thought, when structuring a government with the end goal of protecting individual liberty and civic virtue, the Framers should do so not on the assumption that their rulers will be good and virtuous, but that their rulers would stretch their power to its limits.<sup>64</sup>

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60. *Id.* at 877. Cornell’s support for use of the Anti-Federalists in ascertaining original meaning seems to be limited to ascertaining original *intent*, rather than original public meaning. See CORNELL, *supra* note 36, at 3–4; Cornell, *supra* note 2, at 65–68. Cornell has subsequently been critical of public meaning originalism, or “New Originalism.” See Saul Cornell, *The People’s Constitution vs. The Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *Yale J. L. & Human.* 295, 335 (2011) (“In contrast to intentionalist models of Originalism which focus on the meanings of identifiable groups within the Founding Era, either Framers or Ratifiers, New Originalism’s focus on public meaning provides an invitation to cherry-pick quotes and manipulate evidence: it is an open invitation to writing law-office history on a grand scale.”).

61. Finkelman, *supra* note 43, at 877.

62. *Id.* at 860.

63. *Id.* at 878. (“Supreme Court Justices imposing the ‘new federalism’ may find an antifederalist text here and there to support a particular point, but the driving force behind this jurisprudence is a function of late-twentieth-century conservative policy goals . . .”).

64. Political groups on both the right and left have championed Anti-Federalist ideology because skepticism of central power forms the core of Anti-Federalist thought. “At the margins of American political culture,” explains Cornell, “both the left and the right have more in common than one might

Despite the Anti-Federalists' geographic, social, and at times ideological disparities, the defining characteristic of their political thought was the belief that if government gained the opportunity to consolidate power and oppress the people, it would. Thus, the Anti-Federalists' conception of politics derives from their view of human nature. This view is best expressed by Brutus' maxim, while examining the Judiciary, that "[t]he just way of investigating any power given to a government, is to examine its operation supposing it to be put in exercise. If upon enquiry, it appears that the power, if exercised, would be prejudicial, it ought not to be given."<sup>65</sup> Cornell, likewise, noted "the essentially pessimistic view of human nature" of the elite Anti-Federalists, quoting Richard Henry Lee's letter to a friend:

If all men were wise and good there would be no necessity of government or law—But the folly and the vice of human nature renders government and laws necessary for the Many, and restraints indispensable to prevent oppression from those who are entrusted with the administration of the one and the dispensation of the other.<sup>66</sup>

Patrick Henry also warned against placing faith in man governing others: "If they can stand the temptations of human nature, you are safe. If you have a good President, Senators and Representatives, there is no danger. —But can this be expected from human nature?"<sup>67</sup> The Anti-Federalists suspected any distant government, whether monarchical, aristocratic, or majoritarian, would abuse its power given the opportunity.

Storing likewise notes that "[t]he prudence of granting power cautiously was a common Anti-Federal refrain."<sup>68</sup> Federal Farmer, a prominent middling Anti-Federalist, expanded on this principle, stating that "men who govern, will, in doubtful cases, construe laws and constitutions most favourably for increasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers

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suppose at first glance. The hostility to large concentrations of power that lay at the core of the left- and right-wing variants of Populism is a bequest from an older Whig heritage; Anti-Federalism was merely an earlier expression of the same ideological hostility toward centralized power." Cornell, *supra* note 2, at 64.

65. *Brutus No. XIV* (1788), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 103, 182. For a general discussion of the aristocratic tendencies of the new government and Brutus' attack on the judicial powers, see *STORING*, *supra* note 29, at 48–52. Brutus' identity has been debated, however some modern scholars believe he was Melancton Smith, or someone close to him. See *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE* (Michael P. Zuckert & Derek A. Webb eds., 2009).

66. CORNELL, *supra* note 36, at 68–69.

67. *Speeches of Patrick Henry in the Ratifying Convention* (June 9, 1788), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 293, 319 [hereinafter *Speeches of Patrick Henry*].

68. *STORING*, *supra* note 29, at 30–31. Storing goes on to discuss the Anti-Federalists' deep concern for the abuse of power by political rulers. ("Prudence dictates granting too few powers rather than too many; rulers will always exercise their full legal powers, and it is easier to increase power than to lessen it.").

reserved.”<sup>69</sup> Brutus insightfully stated that “it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition . . . is implanted in human nature.”<sup>70</sup>

Anti-Federalists believed that, given the nature of government, once power is ceded it may never be reined in.<sup>71</sup> They were suspicious of the Federalists, who, in their eyes, were designing a government for Federalist rulers, and thus trusted granting the government far-reaching powers.<sup>72</sup> The “rich and great” tended to be the most ambitious and designing.<sup>73</sup> “Public office tends to attract bad men and bring out the worst in good ones.”<sup>74</sup> Thus, we see the foundation of Anti-Federalist political philosophy: given the chance, government necessarily tends towards expanding its powers at the expense of the governed. It is this view of human nature and government that made the Anti-Federalists, at bottom, skeptics. This skepticism, combined with two primary features of the Constitution, led the Anti-Federalists to oppose its ratification: (1) it lacked genuine representation of the people, and (2) it was written in broad and vague language.

When it came to representation, Anti-Federalists condemned the small number of representatives in Congress and warned that the legislature would turn into aristocratic rule from a distance with no genuine representation of the people. George Mason lamented, “In the House of Representatives there is not the Substance, but the Shadow only of Representation; which can never produce

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69. *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican Letter IV* (Oct. 12, 1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 23, 57 [hereinafter *Federal Farmer*]. Cornell notes that “the identity of Federal Farmer remains a mystery . . . . Several Massachusetts papers claimed that the letters were written by Richard Henry Lee with the help of ‘several persons of good sense in New York.’ Although modern scholars have not solved this riddle, the essays were most likely written by a New Yorker, who was part of the Clintonian faction and might well have been Melancton Smith.” CORNELL, *supra* note 36, at 88.

70. *Brutus No. 1* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 112–113.

71. The Letters of Cato argued that government power necessary attracts the “unbridled ambition of a bad man” thus, “a general presumption that rulers will govern well is not a sufficient security.” *Letters of Cato, No. 5* (Nov. 22, 1787), reprinted in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 61, 62 (David Wootton ed., Hackett Pub. Co. 2003).

72. See STORING, *supra* note 29, at 51 (“[T]he extent to which the Federalists were willing to rely on the virtue and honor of the rulers seemed to the Anti-Federalists foolish or suspicious. A wise people will never place themselves in the hands of arbitrary government power in the hopes that it will be virtuous.”).

73. Melancton Smith, the prominent figure in the ratification debates in New York, agreed and did not trust a natural aristocracy to rule, noting that, “ambition was more peculiarly the passion of the rich and great.” *Speeches of Melancton Smith* (June 23, 1788), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 331, 345. Many recent scholars think Smith wrote or strongly influenced both *Brutus* and *Federal Farmer*. See *supra* note 65.

74. STORING, *supra* note 29, at 52.

proper information in the Legislature or inspire Confidence in the People.”<sup>75</sup> Prominent in Anti-Federalist ideology was the notion that representatives and the people they represent must be from a similar walk of life. “The very term, representative, implies, that the person or body chose for this purpose, should resemble those who appoint them.”<sup>76</sup> Thus, because only prominent men would be able to command enough votes to have a seat in the new government, the middling population would be powerless before the ruling aristocracy. Brutus concluded that “the representation is merely nominal—a mere burlesque; and that no security is provided against corruption and undue influence.”<sup>77</sup> Patrick Henry also believed that “one government cannot reign over so extensive a country as this is, without absolute despotism.”<sup>78</sup>

The Anti-Federalists were deeply concerned not only with lack of representation, but also with the Constitution’s ambiguous and sweeping language.<sup>79</sup> Federal Farmer noted that many of the powers in the Constitution are “undefined, and may be used to good or bad purposes as honest or designing men shall prevail.”<sup>80</sup> Emblematic of this concern was the Anti-Federalists’ critique of the judiciary. Brutus treated this issue in great depth, noting the judiciary’s broad and vague power over “all cases in law and equity arising under the constitution.”<sup>81</sup> Because the federal courts had jurisdiction over *all* cases arising under the Constitution, Brutus presciently argued that the judiciary would operate as an unconstrained branch of government: “By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”<sup>82</sup> Because the Constitution broadly grants judicial power, and because the vague language of the Constitution can be construed based on its “spirit” as perceived by judges, judges will have the capacity and incentive to unilaterally expand the federal government’s powers beyond that specified in the Constitution.

Considering the nature of man, the perceived lack of representation provided by the Constitution, and the sweeping language and powers the Constitution granted, the Anti-Federalists concluded that the new government would result in consolidated rule by the designing elite.<sup>83</sup> While their complaints against the

75. George Mason, *Objections to the Constitution of Government Formed by the Convention*, (Nov. 1787), reprinted in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS*, *supra* note 71, at 1.

76. *Brutus No. III* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 124.

77. *Id.* at 126.

78. *Speeches of Patrick Henry* (June 9, 1788), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 317.

79. CORNELL, *supra* note 36, at 59 (“The ambiguity of the language of the document was frequently commented on by Anti-Federalists.”).

80. *Federal Farmer No. IV* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 54.

81. *Brutus No. XI* (1788), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 164.

82. *Id.*

83. Influential Anti-Federalist Elbridge Gerry summed up the issues with the Constitution: “My principal objection to the plan, are, that there is no adequate provision for a representation of the people—that they have no security for the right of election—that some of the powers of the Legislature are ambiguous, and others indefinite and dangerous—that the Executive is blended with and will have

Constitution were fairly uniform, the Anti-Federalists differed among themselves regarding a solution, and struggled to develop a coherent theory of what should be put in its place. There were, however, a few methods by which the Anti-Federalists sought to counteract the centralizing effects of the Constitution. Their most common answers to this fundamental and perpetual danger were (1) confederation on a local level over a homogeneous group of people rather than consolidation,<sup>84</sup> and (2) a bill of rights.<sup>85</sup>

To counteract the lack of representation in the new national government, the Anti-Federalists stressed the importance of a division of labor between the national government and the local government. This division of political labor would reserve regulation of day-to-day life of the populace to state and local governing bodies.<sup>86</sup> For the Anti-Federalists, federalism and local rule were necessary means to achieve the end of protecting individual liberty and civic virtue. Brutus, like many other Anti-Federalists, cited Montesquieu for the proposition that, “in a small [republic], the interest of the public is easier perceived, better understood, and more within the reach of every citizen.”<sup>87</sup> The Anti-Federalists’ dedication to the right to trial by jury as a check on centralized government also demonstrated their commitment to the idea that government power was safest in the hands of the people themselves.<sup>88</sup>

In response to the sweeping language of the Constitution, the Anti-Federalists continuously pushed for a bill of rights. While it is true that the Anti-Federalists failed to attain the structural amendments they desired after ratification, Anti-Federalist writings, among the elite, middling, and plebeian alike, reveal that they believed a bill of rights would educate citizens about essential civil rights

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an undue influence over the Legislature—that the judicial department will be oppressive—that treaties of the highest importance may be formed by the President with the advice of two thirds of a *quorum* of the Senate—and that the system is without the security of a bill of rights.” Cornell concludes, “[T]he general flaw in the structure of the new government was its consolidating tendency.” CORNELL, *supra* note 36, at 29.

84. For a discussion on the Anti-Federalist belief in a small republic, see generally STORING, *supra* note 29 at 15–37; CORNELL, *supra* note 36, at 68–74. On connection between federalism and individual rights, see *id.* at 59–68 (“From Martin’s point of view, individual rights were inextricably linked to the nature of federalism.”).

85. For a discussion on the Anti-Federalists’ support for a bill of rights, see STORING, *supra* note 29, at 64–70.

86. For a modern argument on the merits of decentralization framed in a Public Choice Theory perspective, see McConnell, *supra* note 22.

87. *Brutus No. 1* (1787), reprinted in THE ANTI-FEDERALIST, *supra* note 55, at 113. Cornell cites James Winthrop, writing as Agrippa, proposing that, “it is necessary that there should be local law and institutions; for a people inhabiting various climates will unavoidably have local habits and different modes of life, and these must be consulted in making laws. It is much easier to adapt the laws to the manners of the people, than to make manners conform to laws.” CORNELL, *supra* note 36, at 64.

88. STORING, *supra* note 29, at 18–19 (“A related aspect of the question of responsibility concerned the much-discussed jury trial . . . the crux of the objection lay in the political significance of the jury trial. While an adequate representation in at least one branch of the legislature was indispensable at the top, law-making, level, the jury trial provided the people’s safeguard at the bottom, administrative, level.”).

and constrain broad edicts within the Constitution.<sup>89</sup>

There were two primary reasons for a bill of rights. First, rulers by nature seek to expand their power, and therefore explicit limitations on their power are necessary. As Brutus explained:

This principle, which seems so evidently founded in the reason and nature of things, is confirmed by universal experience. Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachment of their rulers.<sup>90</sup>

Because national laws would supersede state laws, and because the Constitution granted broad and undefined powers, the Anti-Federalists concluded that a bill of rights should be adopted to safeguard against tyranny.

The second important reason for a bill of rights, even if structural amendments were not successful, was that it would serve as a prominent source of civic education. Federal Farmer's statement on this purpose is illustrative:

There are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases . . . . We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forget. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book.<sup>91</sup>

As Storing notes, “[t]he fundamental case for a bills of rights is that it can be a prime agency of that political and moral education of the people on which free republican government depends.”<sup>92</sup> While some Anti-Federalists thought a bill

89. Centinel, believed to be Samuel Bryan, who spoke to middling and plebeian Anti-Federalists, noted that the new Constitution contained “no provision for the liberty of the press, that grand palladium of freedom . . . .” Likewise, there is “no declaration of personal rights, premised in most free constitutions.” *Centinel Letter I* (Oct. 1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 7, 19–20. Federal Farmer pointed out that if the Constitution recognized common rights such as the writ of habeas corpus and jury trials in criminal cases, why do they feel no need to secure other basic rights? He concluded that the “bill of right ought to be carried farther, and some other principles established,” including free exercise of religion and trial by jury in civil cases. *Federal Farmer No. IV* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 58. George Mason’s first objection in his *Objections to the Constitution of Government Formed by the Convention* is that “[t]here is no Declaration of Rights; and the Laws of the general Government being paramount to the Law and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.” Mason, *supra* note 75, at 1. See also *Minority of the Convention*, *supra* note 55, at 213 (“The first consideration that this review suggests, is the omission of a Bill of Rights ascertaining and fundamentally establishing those inalienable and personal rights of men . . .”).

90. *Brutus No. II* (1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 55, at 119.

91. *Federal Farmer No. XVI* (1787), in *THE ANTI-FEDERALIST*, *supra* note 55, at 80.

92. STORING, *supra* note 29, at 70.

of rights would be futile in the face of broad constitutional power—a problem they believe could only be avoided via structural amendments<sup>93</sup>—most believed that it would also provide a strong check against the Constitution's broad grants of powers, as well as provide invaluable civic education.<sup>94</sup> Today, this view has been vindicated, as the Bill of Rights remains, for many Americans, emblematic of the freedoms that have been secured for ourselves and our posterity.

In sharp contrast to the power-centralizing impulse that motivated Federalists, and the Anti-Federalists were animated by a desire to decentralize federal power. The aristocratic Anti-Federalism espoused by George Mason, Patrick Henry, and Elbridge Gerry was far different from the radical democratic populism found in the backcountry.<sup>95</sup> Yet this difference appears not to be a weakness in their body, but rather a vindication of their belief in political decentralization. Anti-Federalists could point to their own social, economic, and regional decentralization as a confirmation of their philosophy that no constitution could justly represent all Americans.

But the Anti-Federalists failed in that they allowed themselves to be swept into a centralizing project. Thus, they were constantly torn between state and union, struggling to reconcile the admitted need for a stronger central government with their deep-seated skepticism of centralized power. While, in this sense, the Anti-Federalists were destined to fail from the beginning, they succeeded on numerous grounds as well. As Cornell argues, they instilled in the American ethos a skepticism of centralized power. Furthermore, despite their failure to pass the structural amendments they thought necessary, there is no question that the Bill of Rights has endured as a piece of civic education and the bedrock of American constitutionalism. Finally, the Anti-Federalists' ongoing dialogue with the Federalists shaped the document that governs us today. The modern resurgence of Anti-Federalist scholarship only confirms the enduring role they played in American constitutional history.

## II. THE ANTI-FEDERALISTS AND MODERN CONSTITUTIONAL JURISPRUDENCE

### A. *What Role Should the Anti-Federalists Play in Ascertaining Original Meaning?*

Given the dissenting role the Anti-Federalists played in the Founding, should their ideas influence modern approaches to constitutional interpretation? I will argue that, due to the Constitution's genesis in dialogue, seeking its original meaning requires examining both sides of the dialogue. Furthermore, it is the

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93. *Id.* at 67 (“Despite all their rhetorical emphasis on a bill of rights, however, the Anti-Federalists were typically quite doubtful about the practical utility of this kind of provision in the new Constitution . . . . The debate over a bill of rights was an extension of the general debate over the nature or limited government, and at this level the Anti-Federalists can perhaps claim a substantial, though not unmitigated, accomplishment.”).

94. *Id.* at 64–70 (discussing the Anti-Federalists' arguments in favor of a bill of rights).

95. CORNELL, *supra* note 36, at 81.



Anti-Federalists' skepticism—established in Part I—that gave life to their dissent, and, ultimately, contributed to the resulting Constitution. Anti-Federalist thought may inform the modern search for original meaning in two ways. First, a direct debate between a Federalist and Anti-Federalist over a constitutional clause may shed light on its textual meaning. If both understand the clause to mean the same thing, and they are arguing over its merits, this common understanding is good evidence of the meaning of the clause at the time. Thus, the Anti-Federalists' writings serve the same “dictionary function” as the Federalists' writings because both groups used common language.<sup>96</sup>

Second, historical context plays an important role in ascertaining original meaning. Because the Anti-Federalists played such a prominent role in the Founding, and, particularly in the passage of the Bill of Rights, a successful examination of original meaning demands that we do not ignore their side. This is not because the ideals of the Anti-Federalists bind us in any way, but rather because the Anti-Federalists often raised concerns that the Federalists responded to. Thus, the Constitution often synthesized Anti-Federalist concerns with Federalist reassurances. This was most prominently on display when, in response to widespread calls for a bill of rights, Madison and the Federalists acquiesced after ratification. I will first provide historical evidence of this contextual method of constitutional interpretation and then discuss Professor Laura Donohue's *The Original Fourth Amendment*<sup>97</sup> as an example of a successful originalist study that incorporates Anti-Federalist thought.

### 1. Dictionary Function and Original Public Meaning

Anti-Federalists' writings serve a “dictionary function” in ascertaining original meaning. As Aaron Zelinsky describes, “the Anti-Federalist Papers are used like a dictionary to illuminate the generally accepted meaning of words at the time of the Founding.”<sup>98</sup> This method is closely associated with original public meaning originalism or “New Originalism.”<sup>99</sup> New Originalism developed in response to critiques of 1980s originalism, which focused on original *intent*.<sup>100</sup> In contrast to original intent originalism, original public meaning originalism seeks to “identify the original public meaning of the words of the text. In other words, it seeks the meaning actually communicated to the public by the words on the page. This is like the objective or ‘reasonable’ meaning of a contract at the time of its formation.”<sup>101</sup> Proponents argue that the primary benefit of this

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96. Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1081 (2012) (“The Anti-Federalist Papers as Dictionary”).

97. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181 (2016).

98. Zelinsky, *supra* note 96, at 1081.

99. Randy E. Barnett, *The Gravitational Force or Originalism*, 82 FORDHAM L. REV. 411, 412 (2013).

100. *Id.* at 412–15 (discussing the differences between original public meaning and intentionalist originalism).

101. *Id.* at 415.

sort of originalism is that it seeks an achievable end. After all, it is easier to identify the objective meaning of a document as commonly understood at a particular time than to identify the subjective intents of multiple authors.<sup>102</sup>

What role does this leave for the Anti-Federalists in understanding the original public meaning of the Constitution? Because New Originalism considers the general understanding of the words used by the public at the time, when using “publicly available communicative context” to interpret the meaning of the text, the Anti-Federalists’ use of language is just as valuable as the Federalists’. This is because we are not interested in the speakers’ *intentions*, but rather how they understood the words they used.

For an example of the dictionary function of the Anti-Federalists in service of original public meaning, we can look to Professor Randy Barnett citing Melancton Smith in *The Original Meaning of the Commerce Clause*.<sup>103</sup> By citing Smith at the New York ratifying convention, Barnett is not making a point about the Anti-Federalist role in the dialogue of the Founding. Instead, he is looking at *how* a prominent voice in the ratification process was using the word “commerce.” Professor Barnett states, “Although this statement employs the term ‘commercial interests’ broadly, it still uses the narrow conception of ‘commerce’ as distinct from ‘productions’ and ‘manufactures’ as included among these ‘commercial interests.’”<sup>104</sup> Thus, because we are seeking *how* words were used, not *who* used them for what intent, the Anti-Federalists’ writings serve the dictionary function just as well as the Federalists’ writings do in our quest to determine the original public meaning.

New Originalism addresses several problems with original intent. First, it seeks to resolve the question of *whose* intent matters. We no longer need to worry about whether the Anti-Federalists’ intent should be considered because we only care about semantic meaning. Furthermore, it provides a remedy to potentially disingenuous arguments during ratifying conventions by removing the motives of the speaker from the equation. Moving forward, we will consider an approach that offers a different role for the Anti-Federalists in the originalism debate. That is, the Constitution cannot be understood without considering the dialogue between supporters and dissenters alike.

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102. It does seem, however, that original intent and original public meaning would at times collide. For example, if a popular voice in the Founding speaks publicly about the meaning of a clause, this seems to be good circumstantial evidence as to what the public understanding of the meaning of the clause is. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 106 (2001) (“If publicly known and widely accepted, these original intentions *could* have shaped the original meaning of terms, and, for this reason, they are not completely immaterial to an originalist analysis. But, at best, evidence of the framers’ and ratifiers’ intentions (as distinct from evidence of how they used the words they used) is circumstantial evidence of meaning while at worst it can distract from the words of the document that were actually employed.”).

103. *Id.*

104. *Id.* at 119.

## 2. Originalist Contextualism and the Role of Dialogue

A primary criticism of New Originalism is that it leaves out the nuance of the historical debate. A second, more historical and intent-based originalist approach suggests that discovering original meaning requires an examination of the *text* within the *context* of its history. We will deem this originalist contextualism. It treats the larger dialogue between the Federalists and the Anti-Federalists as evidence of the compromises the two sides ultimately placed into the Constitution's text. In this section, we will examine the historical origins of this approach, examine Laura Donohue's *The Original Fourth Amendment* as an example, and apply this approach to the development of federalism at the time of the Founding.

Originalist contextualism was identified early in our history when, during a debate over the meaning of the treaty-making power, congressmen invoked evidence from the Founding to dispute the text's meaning.<sup>105</sup> Federalist William Smith stated that "arriving at the true meaning of the Constitution required uncovering 'the general sense of the whole nation at the time the Constitution was formed.'"<sup>106</sup> Smith and other Federalists, however, proceeded to practice originalism poorly. That is, they cherry-picked quotations from the Anti-Federalists expounding on the immense powers of the federal government, concluding that "[s]ince the Anti-Federalists had raised this objection and the Constitution had still been ratified . . . the objection had been effectively dismissed by the people."<sup>107</sup>

The former Anti-Federalists then present at the debate pointed out that "if such claims were to be invoked, they had to be properly contextualized."<sup>108</sup> More particularly, as Cornell explains:

Democratic-Republicans insisted that Anti-Federalist writings had to be read in conjunction with the responses of those Anti-Federalists who genuinely sought to quiet the apprehension of their opponents. To cite Anti-Federalist writings by themselves obscured the fact that those writings had been part of a public debate. If one had to quote from only one side, then it was more appropriate to quote from the assurances provided by Federalists, not the fears expressed by Anti-Federalists. It was the founding dialogue between Anti-Federalists and Federalists that shaped the debate within the individual ratifying conventions.<sup>109</sup>

Thus, members of Congress understood early on the importance of examining the Anti-Federalists' arguments to better understand the meaning of the Constitution, while also recognizing the inherent danger of misuse of the Founding

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105. CORNELL, *supra* note 36, at 222.

106. *Id.* at 223.

107. *Id.*

108. *Id.* at 225.

109. *Id.*

debates. Numerous former Anti-Federalists and Democratic-Republicans pushed for an original understanding of the Constitution that considered Anti-Federalist arguments in their original context.<sup>110</sup> Their “general indictment of certain defects in the Constitution . . . had been answered by the Federalists,”<sup>111</sup> and “[t]he original meaning of the Constitution was a product of give-and-take between Anti-Federalists and Federalists.”<sup>112</sup> The value of the Anti-Federalists in original meaning lies in providing context of the debate. Because the Anti-Federalists were skeptical, they raised concerns, and the Federalists felt the need to respond to those concerns. As we will see both in Professor Donohue’s article and in Section B, this interpretive method has come to be the primary role of the Anti-Federalists in modern constitutional jurisprudence.

Professor Donohue uses the Anti-Federalists’ views in a contextual originalist framework in *The Original Fourth Amendment*.<sup>113</sup> Donohue explores the deep history of the ideological underpinnings of what came to be the Fourth Amendment<sup>114</sup> to rebut Akhil Amar’s conclusion that “the core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness.”<sup>115</sup> Donohue explains that throughout the ratification debates, the Anti-Federalists, concerned with many awesome powers being centralized in the new government, “immediately focused in on the absence of protection against general warrants as one of the most significant gaps in the new Constitution.”<sup>116</sup> As a check on this dangerous consolidation of power, the Anti-Federalists argued forcefully for the inclusion of a bill of rights. As a result, key states such as Virginia and New York submitted statements calling for amendments that would protect individual rights, including the common law right against general warrants.<sup>117</sup> Donohue notes responses to the Anti-Federalists by Hamilton and others who argued against a bill of rights. Yet “the Federalist argument did not override Anti-Federalist concerns about the growing power of the federal government,” and “there was little question following the state convention that Congress would have to incorporate a bill of rights into the Constitution for the United

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110. *Id.* at 227.

111. *Id.* For a general discussion on this topic, see *id.* at 223–30. For more on this strategy of the early Democratic-Republicans, see Cornell, *supra* note 2, at 47–48 (“Spencer Roane and Luther Martin, for example, each tried to use the authority of Publius to challenge the decrees of the Marshall Court. For Roane and Martin, Publius provided one way of demonstrating that the Marshall Court’s nationalist jurisprudence far exceeded the Framers’ intent.”).

112. CORNELL, *supra* note 36, at 228.

113. Donohue, *supra* note 97.

114. Donohue concludes that the original meaning of “unreasonable” is against reason, as in against the common law, thus, against requiring probable cause and a warrant. “[T]he choice of the word ‘unreasonable’ conveyed a particular meaning: namely, against reason, or against the reason of the common law.” *Id.* at 1270.

115. *Id.* at 1185 (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994)).

116. *Id.* at 1284.

117. *Id.* at 1287–89.

States to survive.”<sup>118</sup>

Donohue’s scholarship demonstrates the value of grappling with Anti-Federalists’ ideas to construct the Founding Era historical context. The Anti-Federalists’ influence on the passage of a bill of rights provides the starkest example of the Anti-Federalists’ skepticism leading to Federalist alterations to the Constitution’s text. But without a Donohue-like approach, modern readers cannot understand the concerns that animate the ratified text. Understanding the historical debate, in turn, sheds light on the meaning of the document itself.

In addition to the Bill of Rights, the Anti-Federalists’ critiques directly influenced the Federalists’ own conception of the Constitution and the developing government. As Cornell puts it:

Anti-Federalist objections to the Constitution forced Federalists to justify and qualify their positions . . . . The Framers’ original understanding of the document changed as a result of the debates waged during the ratification controversy. Federalists attempted to assuage popular fears and secure popular support for the Constitution prompted the publication of essays designed to explicate the original text.<sup>119</sup>

Thus, Madison, Hamilton, and Jay sought to respond to the Anti-Federalists’ and general population’s concerns by penning the Federalist Papers, which downplayed the federal government’s power. Jeffrey Tulis argues that this synthesis of discourse influenced the public understanding of federalism at the Founding, as evidenced by the arguments in the Federalist Papers.<sup>120</sup> He points out that “*The Federalist’s* initial response to the Anti-Federal worry was to attempt to mollify those uncomfortable with such a radical departure from the status quo.”<sup>121</sup> Instead of selling the new government as a purely nationalist endeavor, the authors of the Federalist Papers argued that “a new federalism was being invented, in which sovereignty would be shared by dividing spheres of influence between states and a central authority.”<sup>122</sup> While many Anti-Federalists accepted that argument, others remained skeptical.<sup>123</sup> Nonetheless, the Anti-Federalists and the Democratic-Republicans continued to invoke the

118. *Id.* at 1297. See also Cornell, *supra* note 2, at 62 (“Most important of all was the Anti-Federalist agitation for a written bill of rights. Their repeated criticism of the Constitution for failing to include a written bill of rights, combined with the many calls for conditional ratification pending the adoption of a bill of rights, forced Federalists to concede the necessity of incorporating a formal bill.”).

119. Cornell, *supra* note 2, at 61.

120. Storing also discusses the conception of dual federalism as a synthesis of the Founding discourse. See STORING, *supra* note 29, at 32–33. (“Consequently, [the Anti-Federalists] followed the Federalists into what we may call the ‘new federalism’ (i.e., a mixed national and federal system) and, despite early misgivings, became its strongest advocates; for it seemed, under all circumstances, the best way to preserve the principles they thought fundamental.”).

121. Jeffrey Tulis & Nicole Mellow, *The Anti-Federal Appropriation*, 3 AM. POL. THOUGHT 157, 162 (2014).

122. *Id.*

123. *Id.*

notion of dual sovereignty to argue against the more nationalistic projects of the federal government.<sup>124</sup> Tulis concludes that “it was the rhetoric of *The Federalist* that helped turn the biggest losers in American politics, the Anti-Federalists, into winners in the long run.”<sup>125</sup>

Given that the Federalist Papers have taken on canonical status in constitutional interpretation, and given that they were written partially to respond to Anti-Federalist charges and fears, the Anti-Federalists have influenced the interpretation and structural understanding of our Constitution *via* the Federalist Papers. William Eskridge sums up this “reliability of discourse” as follows:

When the debate over adoption or ratification is sharply divided, opponents also make statements attacking the proposed provision . . . . [R]esponses by key supporters to opponents’ attacks . . . are potentially worth a great deal because of their strategic posture. When key supporters respond to attacks, they are motivated to win over undecided players, without alienating fellow supporters of the measure . . . . Opponents are alert to any potential inconsistency between the sponsors’ statements and the plain meaning of the proposed measure. The foregoing scenario shows how public dialogue of the sort engaged in by the authors of *The Federalist* and the Anti-Federalists is potentially quite reliable for figuring out original constitutional understanding or meaning . . . .<sup>126</sup>

Professor Finkelman argues that the Anti-Federalists were “the losers in *all* of the debates over ratification of the Constitution”;<sup>127</sup> therefore originalist arguments citing them are “predicated on a losers’ vision, which the authors and the ratifiers of the Constitution and the Bill of Rights clearly rejected.”<sup>128</sup> This analysis misses the mark. Anti-Federalist ideas, as we have seen, permeate the Constitution—a document that resulted from a dialogue between the Anti-Federalists and their Federalist counterparts. The Anti-Federalists’ writings and arguments influenced the Constitution’s text; their debates influenced the rebuttals made in the Federalist Papers; and their skepticism led to the Bill of

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124. *Id.*

125. *Id.* at 159; *see also id.* at 165–66 (“*The Federalist* provided the rhetorical resources that enabled their opposition to regroup and attempt to achieve through interpretation what they could not achieve in the original constitutional construction. American politics can be understood as a layered political development, vibrant Anti-Federal ideas layered over and in tension with the unfolding Federalist design.”).

126. William N. Eskridge Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1318 (1998). For another analysis of Eskridge’s viewpoint, see Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217, 265–66 (2004) [hereinafter *Sources of Federalism*]. Smith’s article is an exceedingly helpful analysis of the Court citing Federalists and Anti-Federalists in federalism cases. The article “presents the results of a study of citation patterns in federalism cases since 1970 and demonstrates that the Court’s current majority in such cases gives substantially more weight than the dissent to Anti-Federalist views.” *Id.* at 217.

127. Finkelman, *supra* note 43, at 877.

128. *Id.* at 878.

Rights. Thus, *we already invoke the arguments of the Anti-Federalists*. As Cornell puts it,

For those who wish to make an argument about original intent, it is impossible to ignore the bargain that was struck to pave the way for adoption: ratification rested on an implicit contract between Federalists and Anti-Federalists. In a very real sense, then, Anti-Federalist intentions are relevant to understanding the Constitution; without their acquiescence ratification might never have been secured.<sup>129</sup>

Historians and constitutional scholars seeking to derive the original meaning of the Constitution must take into consideration the Anti-Federalists' skepticism, the dialogue it created, and the results that dialogue produced, *especially* when seeking to understand the Bill of Rights.<sup>130</sup> The Anti-Federalists' skepticism of centralization runs deep in constitutional history, and any understanding of the original meaning of the Constitution must account for its influence.

#### *B. How Has the Supreme Court Invoked the Anti-Federalists?*

The Supreme Court has more frequently cited the Anti-Federalists in recent decades.<sup>131</sup> There are three key reasons for the increasing number of citations to the Anti-Federalists by the Court: (1) the changing historical fortune of the Anti-Federalists;<sup>132</sup> (2) the increased use of originalist methodology;<sup>133</sup> and (3) increased access to the writings of the Anti-Federalists.<sup>134</sup>

129. Cornell, *supra* note 2, at 66–67. Also, note that Cornell is speaking of originalist *intent*. As discussed earlier, he has been far more critical of original public meaning originalism.

130. *Id.* at 67 (“Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights. While recognizing that Anti-Federalists were among the Framers of the Bill of Rights, we must consider the full range of amendments proposed during ratification—not merely restrict ourselves to the debates over the Bill of Rights in the First Congress. It is especially important that we do not limit our discussion of Anti-Federalist views of the Bill of Rights to the thoughts of those Anti-Federalists who participated in the debates within the First Congress. Such a limitation would impoverish our understanding of the vision of federalism and liberty that lay at the root of the Anti-Federalist critique of the Constitution. Since Madison himself carefully scrutinized the proposals of different state conventions before drafting his own version of the Bill of Rights, these earlier proposals are essential to any understanding of this aspect of our constitutional tradition.”).

131. Zelinsky, *supra* note 96, at 1075–76 (“From 1900 to 1959, the Court cited the Anti-Federalist Papers approximately once per decade. Over the subsequent fifty years, citations to the Anti-Federalist Papers have increased dramatically, with a minimum of three and a maximum of eleven such citations per decade.”).

132. *Id.* at 1075 (attributing the lack of Anti-Federalist citations in the nineteenth century to the “disrepute into which the papers fell following the Civil War as they had been invoked by the South as support for the right to secede.”).

133. *Id.* at 1076 (“While the quantitative increase in Anti-Federalist citations may be explained, at least in part, by a renewed interest in originalism, the explosive diversification of Anti-Federalist Papers cited by the Court has its roots in the dangers of availability as explored further at Part VI.”).

134. *Id.* at 1102 (discussing the dangers of increased availability, beginning with Storing’s *The Complete Anti-Federalist* in 1981, and continuing with access to electronic databases today).

Although specific methodologies differ, it has become customary in cases contemplating issues of federalism, separation of powers, and the Bill of Rights to give at least some credence to the original meaning of the Constitution's text. As Professor Peter J. Smith points out in his examination of the Court's use of Founding language, "In federalism cases both the majority and the dissent on the current Court appear to have embraced originalism."<sup>135</sup> Likewise, both the left and right sides of the Court have been willing to cite the Anti-Federalists, although the right does so more frequently.<sup>136</sup> The more the Court studies Founding documents for evidence of the Constitution's original meaning, the more likely the Court is to cite them.

Herbert Storing's *The Complete Anti-Federalist*, published in 1981, contributed significantly to the accessibility of Anti-Federalist texts.<sup>137</sup> Thus, it is unsurprising that "[f]rom 1790 to 1980, the Court cited to the Anti-Federalist Papers in twenty-one cases . . . [and] from 1981 to 2009, the Court cited the Anti-Federalist Papers twenty-seven times."<sup>138</sup> In his own study of the Court's use of the Anti-Federalists, Zelinsky also notes another effect of the increased availability of Anti-Federalist writings: citations to "a more diverse array of papers than were cited in the first 190 years of the Court's constitutional interpretation."<sup>139</sup> He points to the dangers of such access, specifically flattening, cherry-picking, and snowballing.<sup>140</sup> While it is important to avoid these misuses of evidence, the increased access to resources creates the same problem as any valuable tool: it can be used for good or for evil.<sup>141</sup> Zelinsky argues the Court fails by granting equal weight to little-known and little-circulated Anti-Federalists as to more influential elite Anti-Federalists such as George Mason and Patrick Henry.<sup>142</sup> In doing so, he underestimates the potential value in citing lesser-known Anti-Federalists. Widespread access to these lesser-known writers allows greater understanding of the differing views of more middling and plebeian Anti-Federalists. Comparing their writings to those of the elite Anti-Federalists like Mason or Henry reveals where there is greater uniformity in Anti-Federalist thought, and where ideological dividing lines can be drawn between social classes.

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135. Smith, *supra* note 126, at 217.

136. Zelinsky, *supra* note 96, at 1076.

137. THE COMPLETE ANTI-FEDERALIST, *supra* note 28.

138. Zelinsky, *supra* note 96, at 1094.

139. *Id.* at 1094.

140. *Id.* at 1102. Flattening occurs "when equal contemporary availability of sources causes readers to ascribe to them equivalent historical authority." *Id.* at 1103. Cherry-picking is "the selective use of documents to advance a particular narrative." *Id.* at 1105. Snowballing is "the continued and increasing citation of such material eventually causes courts to accept such sources and treat them as authoritative, even if such authority is unwarranted." *Id.* at 1107.

141. For Zelinsky's discussion of the dangers of availability, see *id.* at 1102–07.

142. *Id.* at 1094 (arguing that the Court has more recently cited Anti-Federalists of little historical value due to increased availability).



Next, we will examine some specific examples of the Court's use of the Anti-Federalists. First, I examine the Court's invocation of the Anti-Federalists when performing an original public meaning analysis. Then, I examine the dialogue-based method used more frequently by the Court, including Justice Thomas's rule of construction that applies to this method. Finally, I provide recommendations on how to better invoke the Anti-Federalists in the future.

### 1. The Supreme Court on Dictionary Function and Original Public Meaning

First, we examine the Supreme Court's use of the dictionary function of the Anti-Federalists, discussed in Part II.A.1. Zelinsky correctly points to Justice Thomas's concurrence in *United States v. Lopez*<sup>143</sup> as the strongest example of this use. While searching for the original public meaning of "commerce," Thomas notes that Federalists and Anti-Federalists discussing the Commerce Clause during the ratification period often used "trade (in its selling/bartering sense) and commerce interchangeably."<sup>144</sup> If both Federalists and Anti-Federalists appear to agree on the meaning of a word, their use of that word provides strong evidence of the term's original public meaning. Even those strict adherents to public meaning originalism who give little weight to historical and intentionalist evidence often reference the Anti-Federalists in this manner.<sup>145</sup>

### 2. The Supreme Court on Originalist Contextualism and the Role of Dialogue

We continue on to the main point of our discussion: the Supreme Court's use of the dialogue method of interpretation. The most explicit delineation of a rule of construction invoking the Anti-Federalists in this manner is Justice Thomas's statement in *Missouri v. Jenkins* that "[w]hen an attack on the Constitution is

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143. 514 U.S. 549 (1995) (Thomas, J., concurring).

144. Zelinsky, *supra* note 96, at 1081 (citing *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring)).

145. There are other examples of the Court using the Anti-Federalists in the dictionary function. *E.g.*, *Heller v. District of Columbia*, 554 U.S. 570, 594–95 (2008) (citations omitted) ("As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"). Scalia's opinion in *Heller*, however, also invokes the historical dialogue function of the Anti-Federalists and the Bill of Rights, stating, "The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." *Id.* at 598. *See also id.* at 604 ("The Federalist-dominated first Congress chose to reject virtually all major structural revisions favored by the Antifederalists, including the proposed militia amendments. Rather, it adopted primarily the popular and uncontroversial (though, in the Federalists' view, unnecessary) individual-rights amendments. The Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia."). Thus, he is examining the nature of the constitutional dialogue to extract evidence of meaning.

followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.”<sup>146</sup> While this inquiry may demand other considerations such as *who* made the attack on the Constitution and the context of the Federalist rebuttal, it largely embodies the contextual use of the Anti-Federalists in modern constitutional interpretation.<sup>147</sup>

In *Missouri v. Jenkins*, Justice Thomas employed this method when discussing the federal courts’ Article III equity powers. He starts by exploring the nature of the Anti-Federalist critique of the Constitution. Invoking Brutus and Federal Farmer, he notes that

Anti-Federalists attacked the Constitution’s extension of the federal judicial power to “Cases, in Law and Equity,” arising under the Constitution and federal statutes. According to the Anti-Federalists, the reference to equity granted federal judges excessive discretion to deviate from the requirements of the law.<sup>148</sup>

Justice Thomas points out the Anti-Federalist argument: the federal judiciary would interpret the spirit of the Constitution broadly in the face of such broad constitutional grants of power, resulting in the federal powers swallowing up the states.<sup>149</sup>

Of course, citing Anti-Federalist concerns is only the first step in the analysis. Next, Justice Thomas examines how the Federalists responded to this charge. If the Federalists embraced Anti-Federalist understanding of the text, and said this was the desired result, this dialogue would be strong evidence *against* giving any credence to the arguments of the Anti-Federalists. However, Justice Thomas points out that Anti-Federalist criticisms of the extensive judicial powers of Article III “provoked a Federalist response that explained the meaning of Article III’s words.”<sup>150</sup> In Hamilton’s discussion of the Judiciary in the Federalist Papers, he “explicitly relied upon the precise nature of the equity system that prevailed in England and had been transplanted in America.”<sup>151</sup> That is, “equity jurisdiction was necessary . . . because litigation ‘between individuals’ often would contain claims of ‘*fraud, accident, trust or hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction.”<sup>152</sup> Thus, “equity” was “jurisdiction over certain types of cases rather than as a broad

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146. 515 U.S. 70, 126 (1995) (Thomas, J. concurring).

147. For Zelinsky’s discussion on this method and the use of the Anti-Federalists in interpreting the Bill of Rights, see Zelinsky, *supra* note 96, at 1077–81.

148. *Jenkins*, 515 U.S. at 128.

149. *See id.* at 128–29.

150. *Id.* at 129.

151. *Id.* at 130.

152. *Id.* (quoting THE FEDERALIST NO. 80, at 539 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961)).

remedial power.”<sup>153</sup> Thomas concludes that because the Federalists had, in the Federalist Papers, rebutted the Anti-Federalists’ concern regarding equity power and explained the more restricted meaning, this dialogue operates as evidence in favor of the adoption of the more restricted meaning.

Justice Thomas invokes contextual originalism frequently in constitutional cases. In his *Gonzalez v. Raich* dissent, he uses this methodology to supplement his argument on the limited reach of the Necessary and Proper Clause.<sup>154</sup> He first points out, citing George Mason’s *Objections to the Constitution*, that

Anti-Federalists objected that the Necessary and Proper Clause would allow Congress, *inter alia*, to “constitute new Crimes, . . . and extend [its] Power as far as [it] shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.”<sup>155</sup>

Subsequently, he noted that in *Federalist* 33 “Hamilton responded that these objections were gross ‘misrepresentation[s].’ He termed the Clause ‘perfectly harmless,’ for it merely confirmed Congress’ implied authority to enact laws in exercising its enumerated powers.”<sup>156</sup> Thus, because the Federalists responded to the Anti-Federalists in the Federalist Papers by promoting a more limited understanding of the Necessary and Proper Clause, the dialogue serves as evidence that the narrower interpretation captures the Clause’s true meaning.<sup>157</sup>

153. *Id.*

154. *Gonzalez v. Raich*, 545 U.S. 1 (2005) (Thomas, J. dissenting).

155. *Id.* at 66, n.5 (quoting George Mason, *Objections to the Constitution Formed by the Convention* (1787), in 2 THE COMPLETE ANTI-FEDERALIST 11, 12–13 (Herbert J. Storing ed., 1981) (emphasis added)). It is also worth noting that Justice Thomas does not appear to find these pieces of evidence to be dispositive, but rather a part of his larger argument of original meaning.

156. *Id.* (quoting THE FEDERALIST No. 33, at 204–05 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961)).

157. For other examples of this type of methodology, on the Necessary and Proper Clause, see *United States v. Comstock*, 560 U.S. 126, 161 (2010) (Alito, J., concurring) (citation omitted) (“This limitation was of utmost importance to the Framers. During the State ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power.”); on the Tenth Amendment, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 568–72 (1985) (Powell, J., dissenting) (footnotes omitted) (citations omitted) (“George Mason feared that ‘the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former.’ Antifederalists raised these concerns in almost every state ratifying convention . . . So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary.”); on the Treaty Power, see *Bond v. United States*, 134 S. Ct. 2077, 2105–06 (2014) (Thomas, J., concurring) (citations omitted) (“Anti-Federalists leveled the charge that the Treaty Power gave the Federal Government excessive power. But Madison insisted that just ‘because this power is given to Congress,’ it did not follow that the Treaty Power was ‘absolute and unlimited.’”); on the First Amendment, see *City of Boerne v. Flores*, 521 U.S. 507, 549 (1997) (O’Connor, J., dissenting) (citations omitted) (“Federalists, the chief supporters of the new Constitution, took the view that amending the Constitution to explicitly

Justice Thomas again utilizes the Anti-Federalists in *McIntyre v. Ohio Elections Commission*.<sup>158</sup> He invokes the Anti-Federalists' outrage at a prominent newspaper refusing to publish them anonymously as evidence that anonymous speech is protected under the First Amendment. Justice Thomas first tracks the history of prominent newspapers refusing to publish anonymous essays discussing the Constitution, fearing that "'emissaries' of 'foreign enemies' would attempt to scuttle the Constitution by 'fill[ing] the press with objections' against the proposal."<sup>159</sup> He concedes that "ordinarily, the fact that some Founding-era editors as a matter of policy decided not to publish anonymous articles would seem to shed little light upon what the Framers thought the *government* could do."<sup>160</sup> However, Thomas argues in this case that

[t]he widespread criticism raised by the Anti-Federalists, however, who were the driving force behind the demand for a Bill of Rights, indicates that they believed the freedom of the press to include the right to author anonymous political articles and pamphlets. That most other Americans shared this understanding is reflected in the Federalists' hasty retreat before the withering criticism of their assault on the liberty of the press.<sup>161</sup>

Thus, we see a familiar argument structure. Because the Anti-Federalists "were the driving force behind the demand for a Bill of Rights,"<sup>162</sup> their criticisms inform our understanding of the meaning of the text.

Thomas presents evidence that the Anti-Federalists believed such tactics by the newspapers "foreshadowed the oppression permitted by the new Constitution."<sup>163</sup> Because the Anti-Federalists, in attacking this policy, spoke in terms of freedom of speech, and compared it to the impending despotism under the Constitution, Justice Thomas says,

When Federalist attempts to ban anonymity are followed by a sharp, widespread Anti-Federalist defense in the name of the freedom of the press, and then by an open Federalist retreat on the issue, I must conclude that both

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protect individual freedoms was superfluous, since the rights that the amendments would protect were already completely secure . . . Anti-Federalists, however, insisted on more definite guarantees. Apprehensive that the newly established Federal Government would overwhelm the rights of States and individuals, they wanted explicit assurances that the Federal Government had no power in matters of personal liberty.").

158. 514 U.S. 334 (1995) (Thomas, J., concurring).

159. *Id.* at 363 (quoting Boston Independent Chronicle (Oct. 4, 1787), *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 315 (John P. Kaminski & Gaspare J. Saladino eds., 1981)).

160. *Id.* at 364.

161. *Id.* (footnote omitted).

162. *Id.*

163. *Id.* at 365.

Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name.<sup>164</sup>

The potential shortcomings of this argument in this particular case are clear: Justice Scalia in dissent points out that Justice Thomas's "conurrence recounts other pre- and post-Revolution examples of defense of anonymity in the name of 'freedom of the press,' but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here."<sup>165</sup> Justice Thomas himself laments that "[t]he historical record is not as complete or as full as [he] would desire."<sup>166</sup> However, we see just how dedicated Justice Thomas is to examining the dissenters of the Constitution.

The left side of the Court has not engaged in this method of interpretation as frequently as the right side of the Court,<sup>167</sup> doing so "only when the Federalist response supported a more expansive conception of federal power."<sup>168</sup> A good example of this is *Printz v. United States*.<sup>169</sup> While debating the historical merits of the anti-commandeering doctrine, Justice Stevens argues in dissent:

Opponents of the Constitution had repeatedly expressed fears that the new Federal Government's ability to impose taxes directly on the citizenry would result in an overbearing presence of federal tax collectors in the States. Federalists rejoined that this problem would not arise because, as Hamilton explained, 'the United States . . . will make use of the State officers and State regulations for collecting' certain taxes.<sup>170</sup>

Stevens points out that in this case, the initial Anti-Federalist dispute was the notion of federal agents exerting control locally, and the Federalist response was to suggest that state and local officials would carry out these duties instead. Hamilton was "offering a *concession* to those who feared greater centralized authority . . . he relented and gave the Anti-Federalists exactly what they wanted: an assurance that the federal government would commandeer state officers to enforce federal law."<sup>171</sup> Citing Patrick Henry, Justice Stevens points out that "Antifederalists acknowledged this response, and recognized the likelihood that

164. *Id.* at 367.

165. *Id.* at 374 (Scalia, J., dissenting).

166. *Id.* at 367.

167. Smith, *supra* note 126, at 258 tbl.II.

168. *Id.* at 272.

169. 521 U.S. 898 (1997). For Smith's discussion of *Printz*, see Smith, *supra* note 126, at 263. Smith cites *Printz* to support the proposition that "[t]he current federalism dissenters, on the other hand, have cited Anti-Federalist views only to demonstrate that the Constitution was understood to mean precisely what the Anti-Federalists feared it would mean." However, it seems to fall under the category of the more expansive federalist response, as well. *Id.* at 262.

170. *Printz*, 521 U.S. at 946–47 (Stevens, J., dissenting) (footnote omitted) (quoting THE FEDERALIST No. 36, at 235 (Alexander Hamilton) (E. Bourne ed., 1947)).

171. Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1107 (2013).

the Federal Government would rely on state officials to collect its taxes.”<sup>172</sup>

Thus, the dissenters use Justice Thomas’s method of acknowledging an Anti-Federalist grievance, and then give weight to the limiting response from the Federalists. Here, the limiting response is allowing the federal government to commandeer state officials in certain circumstances.<sup>173</sup> Perhaps this example is also evidence that justices will be more likely to use certain types of originalist arguments when doing so serves their desired ends, and to avoid such arguments when they do not.

Sometimes this method of originalist interpretation does not yield a clear answer. Thus, it is possible that two sides can use the same interpretive framework and disagree on the outcome. While this is not a reason to discard the method altogether, it is important to note its limits when being exercised. A prominent example of this is in the Court’s state sovereign immunity jurisprudence.

The interpretation of the Citizens-State Diversity Clause in Article III and its bearing on state sovereign immunity has been the subject of originalist debate on the Court.<sup>174</sup> In 1890, the Supreme Court pointed out in *Hans v. Louisiana*<sup>175</sup> that the Anti-Federalists raised concerns “that Article III’s citizen-state diversity clause appeared plainly to permit individuals’ suits against states.”<sup>176</sup> This was “a state of affairs that [Mason] found intolerable”;<sup>177</sup> and as a result Madison, Hamilton, and Marshall all clearly and unequivocally assured the Anti-Federalists that it held no such meaning.<sup>178</sup> Justice Powell explains the historical argument in *Welch v. Texas Department of Highways and Public Transportation*:

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172. *Printz*, 521 U.S. at 947 n.6.

173. It is important to note that, while this methodology is useful for ascertaining evidence, it may not be dispositive in the outcome in the present case. It is, rather, strong evidence that those in the Founding generation believed that commandeering state officials was not a *per se* violation of the Constitution, but could be, depending on the circumstances. See Campbell, *supra* note 171, at 1176–77 (“From the Founding generation’s perspective, however, the Constitution does not categorically prevent the federal government from commandeering [the] state executive and judicial officers. The Founders simply didn’t think that commandeering always violates federalism principles. . . . This is not to suggest that originalists in the mold of Justice Scalia should think that commandeering is *always* constitutional.”).

174. For Smith’s analysis of this debate, see Smith, *supra* note 126, at 266–70.

175. 134 U.S. 1, 12–14.

176. Smith, *supra* note 126, at 266 n.246.

177. *Id.*

178. *Id.* (“James Madison responded by arguing: ‘Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court . . . It appears to me that [the citizen-state diversity clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.’” (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1836))).

Opponents of ratification, including Patrick Henry, George Mason, and Richard Henry Lee, feared that the Constitution would make unconsenting States subject to suit in federal court. Despite the strong rhetoric in the dissent, these statements fall far short of demonstrating a consensus that ratification of the Constitution would abrogate the sovereign immunity of the States. Indeed, the representations of Madison, Hamilton, and Marshall that the Constitution did *not* abrogate the States' sovereign immunity may have been essential to ratification.<sup>179</sup>

We see the same interpretive method invoked in both *Hans* and *Welch*: the Anti-Federalists were skeptical and raised a concern, and the most prominent Federalists assured them that their concern was unfounded. Thus, the more limited explanation is adopted.

In response to this historical argument, Justice Brennan's dissent in *Atascadero State Hosp. v. Scanlon* argues that the historical record is less than clear:

[T]here was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States. Certain opponents of ratification, like Mason, Henry, and the 'Federal Farmer,' believed that the state-citizen diversity clause abrogated state sovereign immunity. . . . [Some proponents of the Constitution] agreed concerning the interpretation of Article III but believed that this constituted an argument in favor of the new Constitution. Finally, Madison, Marshall, and Hamilton believed that a State could not be made a defendant in federal court in a state-citizen diversity suit. The majority of the recorded comments on the question contravene the Court's statement in *Hans*, that suits against States in federal court were inconceivable.<sup>180</sup>

Brennan concludes that "the context . . . reveals that [Madison's, Hamilton's, and Marshall's] statements were intended to suggest only that nothing in Article III would eliminate the state-law immunity that states would enjoy in suits brought under the citizen-state diversity clause, suits that (they assumed) would be governed by state law."<sup>181</sup> In response to a similar argument in *Welch*, the majority notes that principles of stare decisis weigh in favor of following *Hans* even if the historical question is ambiguous.<sup>182</sup>

Both sides of this debate are seeking historical context via the same interpretive framework. However, in *Welch*, the court is giving greater weight to the rebuttal of key Federalists, while in *Scanlon*, Justice Brennan in dissent gives more weight to the Anti-Federalist concerns, independent of Federalist responses. After extensively citing Anti-Federalist concerns with the perceived power of the federal courts to call a state into court, he states in a footnote:

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179. 483 U.S. 468, 482–83 (1987) (footnotes omitted).

180. 473 U.S. 234, 278–79 (1985) (Brennan, J., dissenting) (footnote omitted).

181. *Id.* at 269.

182. *See Welch*, 483 U.S. at 478–79, 483–84.

It has been suggested that the remarks of the opponents of the Constitution should be given less weight. However, the same argument could be made concerning the remarks of Madison and Marshall, especially in light of Marshall's later interpretation of Article III as Chief Justice . . . Their fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy.<sup>183</sup>

Here, however, the Court *should* give remarks of the opponents of the Constitution less weight, because Madison, Hamilton, and Marshall allayed such fears.<sup>184</sup> Some states even took precautions to ensure the more limited meaning being sold to them by the Federalists would stick. “[T]he New York Convention appended to its ratification resolution a declaration of understanding that ‘the Judicial Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Person against a State.’”<sup>185</sup> Brennan admits as much, noting that “the fervent desire” to ratify “led them to downplay” those aspects of the Constitution in question.<sup>186</sup> However, in doing so, the Federalists limited the scope of the clause when selling it to the ratifiers and, ultimately, the people. The debate over the original meaning of the Article III citizen-state diversity clause raises more difficult questions: what if a response by the Federalists is insincere? Or what if no one takes their rebuttal seriously? These questions must be considered as well in a historical analysis. Yet, in interpreting the Founding dialogue, the Court generally grants more weight to prominent Federalists assuaging the fears of the Anti-Federalist than it does to the Anti-Federalist fears standing alone.<sup>187</sup>

### 3. Recommendations for Invoking the Anti-Federalists

When the Court invokes Anti-Federalist concerns, it has primarily done so when using the contextual originalist approach. This suggests that while public meaning originalism focuses less on intent, the Court still takes intentionalist arguments seriously. However, justices often rely on more than one method of originalist interpretation, as demonstrated by Justice Thomas's jurisprudence. Professor Gregory Maggs describes Justice Thomas's jurisprudence:

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183. *Scanlon*, 473 U.S. at 270 n.20 (Brennan, J., dissenting).

184. *See* *Hans v. Louisiana*, 134 U.S. 1, 12–14 (1890) (outlining Hamilton's, Madison's, and Marshall's assurances to the Anti-Federalists that their construction of the citizen-state diversity clause in Article III was unfounded).

185. *Welch*, 483 U.S. at 483.

186. *Scanlon*, 473 U.S. at 270 n.20 (Brennan, J., dissenting).

187. Smith argues that this line of jurisprudence is evidence that the majority and dissent will read the same history and come to a different conclusion. He argues it is an example of the majority reading the federalists “federalistic statements” as “authoritative evidence of meaning” while the dissent cites them “narrowly in the light of context.” Smith, *supra* note 126, at 258.



Typically, when Thomas makes claims about the original meaning of the Constitution, he relies on multiple sources of evidence. These sources do not just show the original intent, original understanding, or original objective meaning. Instead, taken together, these sources are capable of showing all of these different meanings. My conclusion is that Justice Thomas routinely seeks what might be called a ‘general original meaning’—a meaning best supported by all of the available historic evidence.<sup>188</sup>

While there are concerns associated with the methodology Professor Maggs terms “general original meaning,” it carries strengths as well. Maggs is concerned about how “Thomas’s approach . . . will apply in the rare, but possible, situations when evidence of the original intent, original understanding, and original objective meaning point in divergent directions.”<sup>189</sup> His concern is exacerbated because Thomas has not developed a theory for dealing with this potential issue. This increases the possibility that a Justice, albeit unintentionally, cherry-picks and uses whichever originalist methodology fits their desired ends.

General original meaning methodology carries benefits as well. One may think of original public meaning, original intent, and originalist contextualism as differing forms of probative evidence. While in some circumstances analyzing the original public meaning is more dispositive of the Constitution’s meaning, other circumstances may call for the lens of originalist contextualism. If a sound theory for prioritizing these different forms of evidence is developed, the search for original meaning will become clearer.

The primary role of Anti-Federalist thought in searching for original meaning is their skepticism in the Founding dialogue. The most thorough explication of this method is Justice Thomas’s previously discussed rule of construction: “[w]hen an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.”<sup>190</sup> I propose a tweak to this otherwise sound rule.

The current *per se* nature of the historical rule is inflexible and broad. Factors such as *who* makes the statement, in what setting, and how prominent and public the voice, all play a role in whether the attack of the Constitution—and the rebuttal—should be taken seriously for interpretive purposes. For instance, a concern raised by Patrick Henry or George Mason at a ratifying convention that is responded to at length in *The Federalist Papers* is far more probative than a little-heard attack followed by a disingenuous and little-published response. Thus, I suggest Justice Thomas’s rule take into consideration these factors, and that when an attack on the Constitution is followed by an open Federalist effort

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188. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 511 (2009).

189. *Id.* at 515.

190. *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring).

to narrow the provision, *the presumption* is that the drafters and ratifiers approved the more limited response. This presumption can be rebutted by other historical facts and context such as who raised the concern, in what setting, and who responded to the concern, and how publicly. This alteration to the rule will increase flexibility and support a more robust historical inquiry.

#### CONCLUSION

Part I surveyed some of the prominent voices in interpreting the thought of the Anti-Federalists and their role in our constitutional history. I then offered my own conception of the Anti-Federalists and their common element: a prominent skepticism of centralizing government power.

Part II showed that the Anti-Federalists' skepticism underlies the Anti-Federalist role in modern originalist interpretation. The Anti-Federalists raised concerns about the Constitution *because* of their skepticism, and the Federalists responded to those concerns by creating the compromise that is our Constitution. Part II.A.1 explored the use of the Anti-Federalists for public meaning originalism, and II.A.2 focused on originalist contextualism as a method that takes into account both the Anti-Federalist dissent and the Federalist rebuttal when interpreting the Constitution.

Part II.B explored the specifics of the Court's use of the Anti-Federalist dissent and how they have invoked the arguments in II.A. I conclude that the Court should seek to invoke this method consistently and adopt a rule of construction similar to Justice Thomas's. However, it should be rebuttable rather than a *per se* historical rule. If these steps are followed and the Anti-Federalists—and their skepticism—are taken seriously, courts and scholars alike will achieve further insight into the original meaning of the Constitution.