NOTES

Originalism: Can Theory and Supreme Court Practice be Reconciled?

MEGAN CAIRNS*

ABSTRACT

After originalism was dealt a series of seemingly devastating blows in the '80s, originalist scholarship evolved in significant ways. One of the most noteworthy changes is the evolution from intentionalism to original public meaning originalism. Now, most modern originalists agree the appropriate inquiry for interpreting the Constitution is the original public meaning of the text. Nonetheless, originalists on the Supreme Court have continued invoking Framers' intentions, interpretations, and expectations in their constitutional interpretations. This Note explores how recent self-proclaimed originalist Supreme Court Justices—Justices Scalia, Thomas, and Gorsuch—have appealed to the views of the Framers, and whether or not these practices can be grounded in public meaning originalist theory.

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* Georgetown University Law Center, J.D. 2021.

INTRODUCTION

In 1986, speaking before the Office of Legal Policy at the United States Department of Justice, future-Supreme Court Justice Antonin Scalia famously proclaimed that when interpreting the Constitution, the Court should seek to uncover "the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended."[1] More than three decades later, most originalist scholars have widely accepted Justice Scalia's sentiment. Gone are the days of trying to ascertain what James Madison or Alexander Hamilton would have thought about modern legal issues that they never could have foreseen.[2] Now most modern originalists agree the appropriate inquiry for interpreting the Constitution is the original public meaning of the text.[3] Nonetheless, originalists on the Supreme Court—including Justice Scalia himself—have continued invoking Framers' intentions, interpretations, and expectations in their constitutional interpretations. This Note explores how the recent self-proclaimed originalists on the Supreme Court—Justices Scalia, Thomas, and Gorsuch—have appealed to the views of the Framers and whether or not these practices can be grounded in public meaning originalist theory.

Section I provides a brief overview of originalism's evolution from original intent to original public meaning. Section II examines the ways that originalist Justices have used the Framers' intent in their opinions. Section III explores two possible theoretical justifications from within original public meaning originalism for how originalist Justices have invoked the views of the Framers. This Section ultimately concludes that from a public meaning perspective, relying in a dispositive manner on the views of the Framers for interpretation is justified only when there are no conflicting viewpoints from educated, informed members of the public at the time of framing and ratification.

This Note contributes to the literature in two ways. First, while many scholars have pointed out the inconsistency between public meaning originalism and the way originalist Justices invoke the views of the Framers, fewer have examined exactly how the Justices use these views and which Framers the Justices regularly cite. Second, this Note is novel because in order to justify certain usages of Framers' intent in judicial opinions, it relies upon recent originalist scholarship that implements philosophy of language concepts into originalist theory.

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1. Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. R. 1683, 1684 (2012) (quoting Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFF. OF LEGAL POLICY, U.S. DEP'T OF JUST., ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 103 (1987)).

2. *See* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture,* CONLAWNOW (2018) ("More than thirty years ago, the mainstream of originalist constitutional theory turned away from intentionalism toward textualism.").

3. *See* Thomas B. Colby, *The Sacrifice of New Originalism*, 99 GEO. L. R. 713, 719 ("It is the New Originalism that has won over converts in the scholarly community.").

I. THE MOVE FROM ORIGINAL INTENT TO ORIGINAL MEANING

A. A Basic Definition of Originalism

The story of originalism's evolution from original intent originalism to original public meaning originalism is well-known, and for that reason, this Section will include only a brief, admittedly oversimplified survey of it. It is helpful to start with a basic definition of originalism. Originalism is best understood as a family of constantly evolving constitutional theories.[4] These theories differ from each other in important ways, but they share a common core. Recently, scholars have identified the two ideas common among all originalist theories. Professor Lawrence Solum calls these ideas the "Fixation Thesis" and the "Constraint Principle":

> The Fixation Thesis claims the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified. The Constraint Principle claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases).[5]

While Professor Solum's description of originalism came decades after the term "originalism" was first introduced, it aptly characterizes the common core of past and modern theories of originalism.

B. The Development of Modern Originalism

The story of modern originalism begins in the 1970s when early originalists such as Robert Bork had just begun sketching the beginnings of the fledgling theory of originalism.[6] Originalism at this time, though not fully theorized, was centered around the idea that constitutional interpretations should be guided by the original intentions of the Founders.[7] In addition to Robert Bork, legal giants like William Rehnquist, Raoul Berger, and Edwin Meese endorsed this view in various writings and speeches.[8] For instance, in his book *Government by Judiciary*, Raoul Berger wrote that the Court had impermissibly strayed far from the original intent of the drafters of the Fourteenth Amendment.[9] Similarly, then-

4. *See* Lawrence B. Solum, *Legal Theory Lexicon: Originalism*, LEGAL THEORY BLOG (August 11, 2019), https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html.

5. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. R. 1, 7 (2015).

6. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBLICATIONS & OTHER WORKS, 6 (2011) ("In 1971 Robert Bork wrote 'Neutral Principles and Some First Amendment Problems' an article that is sometimes considered the opening move in the development of contemporary originalist theory."); Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 INDIANA L. J. 1 (1971).

7. *See* Solum, *supra* note 6, at 6.

8. *See id.* at 6–8.

9. *See id.* at 7.

Associate Justice William Rehnquist used the writings of the Framers to criticize living constitutionalism in his 1976 article *The Notion of a Living Constitution*.[10]

In the early 1980s, originalism was dealt a series of seemingly devastating blows. Paul Brest's article *The Misconceived Quest for the Original Understanding* proffered a number of criticisms of original intent originalism, the most powerful of which was that it is practically impossible to ascertain a single intent from a multi-member body like the Constitutional Convention or the state ratifying conventions.[11] Five years after Brest's article, Jefferson Powell published *The Original Understanding of Original Intent*, which convincingly argued that the Framers themselves did not intend or expect that the Constitution would be interpreted according to their intent, as evidenced by the fact that they kept the Convention records secret.[12] Consequently, original intent originalism was a self-defeating theory. Following these critiques, a consensus of scholars concluded that originalism was dead.[13] The theoretical flaws were too substantial for originalism to be a viable theory of constitutional interpretation. Nor were these theoretical problems solved by the detour that originalism briefly took into the realm of ratifiers' intent. An originalism based on the idea of popular sovereignty that focused on the intent of the ratifiers, endorsed by Charles Lofgren in *The Original Understanding of Original Intent?*, was still subject to Brest's powerful critique about the difficulty of ascertaining group intention.[14]

Despite the belief by many that originalism had been dealt a mortal blow, originalist theorists rose to the occasion, and a new form of originalism emerged. The core idea of this "New Originalism" was that the meaning of the Constitution is its original public meaning, or the meaning that an informed member of the public at the time of the framing and ratification would have given to the text.[15] This

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10. *See id.*

11. *See id.* at 8–9. *See generally* Paul Brest, *The Misconceived Quest for Original Understanding,* 60 B.U. L. REV. 204 (1980).

12. *See* Solum, *supra* note 6, at 9–10; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

13. *See* Solum, *supra* note 6; Randy Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611 (1999).

14. *See* Charles Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 78 (1988).

15. For the sake of brevity, this Section may oversimplify the move from the "Old Originalism" to "New Originalism" and the moves made by the New Originalists. "New Originalism" is usually used in reference to a family of originalist theories that reject "Old Originalism's" search for the intent of the Framers. *See* Lawrence B. Solum, *New Originalism*, LEGAL THEORY BLOG (Oct. 12, 2018), https://lsolum.typepad.com/legaltheory/2018/10/legal-theory-lexicon-the-new-originalism.html. It is not a unified theory, and there are many points of disagreement among New Originalists. *Id.* As Thomas Colby puts it:

> "It would be a mistake to view either the Old or the New Originalism as a distinct and coherent constitutional theory; 'originalism' is a label that has been, and continues to be, affixed to a remarkably diverse array of interpretive theories that in fact share surprisingly little in common. But it is fair to say that there has been an unmistakable direction in the general flow of the mainstream of originalist thought. In rejecting the Old Originalism and developing the New one, originalists have, by and large, made a series of significant theoretical moves that have brought them to a very different place from where they started. These moves have not been neatly sequential; different thinkers have embraced different moves at different times, and the various moves have often

New Originalism was no longer concerned with an empirical search for what the Framers, the ratifiers, or the public *actually* understood the Constitution to mean, but instead focused on "how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision."[16] The move from Framers' intent to original public meaning created a New Originalism that withstood the attack launched in Powell's *The Original Understanding of Original Intent*. Moreover, the move from a subjective to an objective inquiry deflected Brest's critiques concerning the problems of historical indeterminacy and ascertaining group intentions.

New Originalists also made another significant move. Conceding to critics that the original meaning of the Constitution cannot always determinately resolve legal disputes, the New Originalists outlined the distinction between interpretation and construction.[17] Interpretation, they explained, is the "discovery of the linguistic meaning of the constitutional text."[18] Construction, on the other hand, is "the determination of the legal effect given to the text."[19] Construction becomes necessary when the linguistic meaning of the text "runs out" and therefore cannot be relied upon to resolve a case.[20] This distinction between interpretation and construction buttressed originalism against Powell's critique that "direct translation of history into norm is [often] not possible,"[21] as well as critiques arguing that allowing the practices and norms of the eighteenth century to guide constitutional interpretation would lead to antiquated and inhumane results.[22]

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occurred simultaneously, each drawing upon the rationales driving the others. Virtually every originalist has embraced at least some of these moves, yet only a few have explicitly embraced all of them. As such, there is no magic line of demarcation between the New and Old Originalism. There has, instead, been a gradual and ongoing—but clearly substantial—change of focus. Thus, although something called "originalism" has recently gained unprecedented acceptance in the academy, the particular originalism of the 1970s and early 1980s is not now (nor was it ever) especially influential in academic circles. It is the New Originalism that has won over converts in the scholarly community."

Thomas Colby, *supra* note 3, at 718–19 (citations omitted).

16. Thomas Colby, *supra* note 3, at 724 (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002)).

17. *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. JOURNAL LAW & PUB. POL'Y (2011); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108–110 (2001); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001); Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). Of course, not all originalists agree that construction or a "zone of construction" must exist in originalist theory. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW L. R. 751 (2009).

18. Solum, *supra* note 15.

19. *Id.*

20. *See id.*

21. Thomas Colby, *supra* note 3, at 731 (quoting H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. (1985)).

22. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. R. 1127 (1997).

II. ORIGINALIST JUSTICES AND ORIGINAL INTENT

Despite originalism's well-accepted move from original intent to original public meaning, self-proclaimed originalists on the Supreme Court continue to invoke the interpretations, expectations, and intentions of the Framers in their constitutional interpretation. This Note focuses on the opinions of three Justices in particular: Scalia, Thomas, and Gorsuch. The late Justice Scalia was quite explicit in his adherence to originalism, famously proclaiming that while originalism may not be perfect, it is "the only game in town."[23] Justice Scalia was also one of the first to enter the original intent versus original public meaning debate, landing squarely on the side of public meaning originalism. In 1997, he wrote, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[24] Similarly, Justice Gorsuch is a self-avowed original public meaning originalist. In a concurring opinion for the Tenth Circuit in 2016, then-Judge Gorsuch wrote: "Ours is the job of interpreting the Constitution. And that document isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning."[25] Justice Thomas has been comparatively more opaque about his brand of originalism. While he is clearly a devoted originalist, he has not committed to a specific theory of originalism. In his paper *Which Originalism Matters to Justice Thomas?*, former Justice Thomas clerk Professor Gregory Maggs writes:

> Rather than focusing on the original intent of the Framers, the original understanding of the ratifiers, or the original objective meaning of the Constitution, Justice Thomas appears to look for what I have called the general original meaning. He considers a variety of historic sources on point, regardless of what specific type of meaning they might show.[26]

Since Justice Thomas is not an avowed public meaning originalist, his opinions citing to the Framers' intent display greater internal consistency than the opinions of Justices Scalia or Gorsuch. Still, originalist theory has been moving clearly toward public meaning originalism in the academy. Justice Thomas's opinions show the discord between mainstream originalist theory and originalist judicial practices.[27] While other Justices, such as Justices Kavanaugh and Alito, also have originalist tendencies, they have not publicly proclaimed their acceptance of

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23. SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 211 (Christopher J. Scalia & Edward Whelan eds., 2017)

24. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

25. Cordova v. City of Albuquerque, 816 F.3d 645, 661 (10th Cir. 2016).

26. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 NYU J. L. LIBERTY 494, 516 (2009).

27. Justice Thomas invokes Framers' intent in cases such as United States v. International Business Machines Corp., 7 517 U.S. 843, 859–61 (1996) (citing 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 95, 305–08, 359–63 (rev. ed. 1966)); and U.S. Term Limits, Inc. v. Thornton 514

originalism and are not usually considered to be part of the originalist bloc of Justices on the Court. Consequently, this Note does not examine their opinions.

Originalist Justices invoke the views of the Framers in many ways. They cite to the Federalist Papers, writings of the Framers, and James Madison's notes from the Constitutional Convention. This paper focuses on the third example because Madison's records of the Constitutional Convention best capture the Framers' views separate from contemporaneous public thought. The Federalist Papers and public writings of the Framers were available to the public and therefore, could plausibly have affected the original public meaning of the Constitution. Conversely, the proceedings of the Philadelphia Convention were shrouded in secrecy as the Framers adopted a rule of confidentiality from the outset of the Convention.[28] James Madison's notes from the Constitutional Convention were not released to the public until 1840—more than fifty years after the Convention.[29] Madison's convention notes could not have influenced public opinion at the time of drafting and ratification; therefore, these notes represent a purer form of Framers' intent. Historian Max Farrand's famous work *The Records of the Federal Convention* is the standard reference for Madison's Convention notes.[30] Accordingly, this Note will exclusively focus on instances in which the three originalist Justices cite to Max Farrand's *Records*.

The originalist Justices have authored twenty four total opinions (including dissents and concurrences) that cite to Farrand's *Records*.[31] Examining these opinions, a few categories of usage emerge.[32] First, Justices use the voting and drafting history from the Convention as evidence to support a specific interpretation. For instance, in Justice Thomas's concurrence in *Adoptive Couple v. Baby Girl*, he cited the drafting history of the Indian Commerce Clause as evidence that the Clause should be interpreted narrowly.[33] In the cited portion of the

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U.S. 779, 877 (1995) (Thomas, J., dissenting). Contrast with the fact that originalist scholars have turned away from intentionalism to original public meaning. *See* Solum, *supra* note 2.

28. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1115 (2003).

29. *Id.* at 1115.

30. *Id.* at 1114–15.

31. Trump v. Mazars USA, LLP, 140 S.Ct. 2019, 2046 (2020); Kisor v. Wilkie, 139 S. Ct. 2400, 2438 (2019); Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018); Jesner v. Arab Bank, 138 S. Ct. 1386, 1417 (2018); Patchak v. Zinke, 138 S. Ct. 897, 906 (2018); Evenwel v. Abbott, 136 S. Ct. 1120, 1127 (2016); Adoptive Couple v. Baby Girl, 570 U.S. 637, 663 (2013); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1216 (2015); Arizona v. Intertribal Council, 133 S. Ct. 2247, 2258 (2013); Arizona v. United States, 567 U.S. 387, 436 (2012); McDonald v. City of Chicago, 561 U.S. 742, 807 (2010); Haywood v. Drown 556 U.S. 729, 744 (2009); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 1008 (2006); Vieth v. Jubelirer, 541 U.S. 267, 276 (2004); Edmond v. United States, 520 U.S. 651, 660 (1997); Printz v. United States, 521 U.S. 898, 921 (1997); Camps Newfound v. Town of Harrison, 520 U.S. 564, 627 (1997); Gasperini v. Ctr. for Humanities, 518 U.S. 415, 451 fn 1 (1996); United States v. Int'l Bus. Mach. Corps., 517 U.S. 843, 861 (1996); Term Limits, Inc. v. Thornton, 514 U.S. 779, 792 (1995); Morrison v. Olson, 487 U.S. 654, 699, 720–22 (1988); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); Honig v. Doe, 484 U.S. 305 (1988); Tyler Pipe Indus. v. Wash. Dep't of Revenue, 483 U.S. 232 (1987).

32. This list is not exhaustive but represents the main patterns observed.

33. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 663 (2013) (Thomas, J. concurring) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106 (M. Farrand ed., rev. ed. 1966)).

Records, Madison had proposed a broad Indian Commerce Clause that gave Congress the power to regulate "Indian affairs."[34] The Committee of Detail and Committee of Eleven narrowed the Clause, giving Congress the power to regulate only "commerce" with the Indian tribes.[35] Ultimately, the delegates approved the narrowed version in the final Constitution. Justice Thomas argued that this drafting history shows that a narrower interpretation of the Indian Commerce Clause is the correct interpretation.[36] The second way Justices use the Convention Records is by citing quotes from the Framers that reflect broad principles in order to lend support to a more specific interpretation. For instance, in Justice Gorsuch's *Kisor v. Wilkie* opinion, he cited a quotation from Caleb Strong expounding the importance of separation of powers to support his argument that *Auer* deference violates the Constitution.[37] Lastly, the Justices cite evidence of the expected applications of the Founders to support their interpretations. For instance, in Justice Scalia's majority opinion in *Vieth v. Jubelirer*, he cited a Convention quote from Madison that displayed Madison's expectation that Article 1, §4 would give Congress the ability to regulate partisan gerrymandering in state elections.[38]

III. THEORETICAL JUSTIFICATIONS FOR INVOKING THE VIEWS OF THE FRAMERS

A. Contextual Enrichment as a Justification for Invoking Framers' Intent

In his 1986 speech before the Department of Justice, future-Justice Scalia said that the "expressions of the Framers," far from being irrelevant to original public meaning originalism, "are strong indications of what the most knowledgeable people of the time understood the words to mean."[39] Similarly, in his article *Heller and the New Originalism*, Professor Mark Tushnet wrote, "proponents of the new originalism acknowledge, or at least should acknowledge, that nearly everything examined by old originalists is relevant to the new originalist inquiry. What a drafter believed a constitutional provision to mean is evidence of what at least one reasonably well-informed contemporary understood the provision to mean."[40] Professor Solum put forth this same idea in his article *Originalism and Constitutional Construction*:

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34. *See id.*
35. *See id.*
36. *See id.*
37. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 75 (M. Farrand ed. 1911)).
38. *See* Vieth v. Jubelirer, 541 US 267, 275 (Scalia, J.) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 240–41 (M. Farrand ed.1911)).
39. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFF. OF LEGAL POLICY, U.S. DEP'T OF JUST., ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, 103 (1987).
40. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO STATE L.J. 609, 612 (2008).

> Under normal circumstances, the intentions of the Framers will be reflected in the public meaning of the constitutional text: as competent speakers and writers of the natural language English, the Framers are likely to have understood that the best way to convey their intentions would be to state them clearly in language that would be grasped by the officials and citizens to whom the constitutional text was addressed.[41]

Essentially, Framers' intent, while not dispositive in constitutional interpretation, can persuasively evince a text's public meaning.

The value of the Framers' intent as evidence of public meaning increases when one considers how context enriches constitutional meaning. In his *Originalism & The Unwritten Constitution*, Professor Lawrence Solum challenges the idea that original public originalism is merely concerned with analyzing the semantic content of the Constitution's words in isolation.[42] Rather, Professor Solum—by reference to philosophy of language concepts and the mechanisms by which meaning is regularly produced in human conversation—posits that an understanding of the context in which an utterance or text is made enriches the meaning attributed to that utterance or text. Specifically, Professor Solum explains that the "communicative content" or linguistic meaning of any utterance or text can be broken down into two concepts: semantic content and context. Semantic content is made up of the conventional semantic meanings of words, as well as the syntax and grammar that combine them. But the literal meaning of an utterance or text can only bring the listener or reader so far. Words and phrases are given meaning by reference to the context in which they are uttered. Therefore, the full meaning of an utterance or text must consider both the semantic content and context. Indexicals are the clearest and simplest example of the importance of context to meaning. Indexicals are words such as "I," "here," "this," and "that," whose meanings are dependent on the context in which they are uttered.[43] That an indexical's meaning changes depending on the context in which it is uttered evinces, *a fortiori,* the importance of context in elucidating the meaning of speech.

Public meaning originalists draw significant lessons from the philosophy of language and its observations of the way that texts and utterances are regularly understood. The originalist Fixation Thesis states that "the original meaning ('communicative content') of the constitutional text is fixed at the time each provision is framed and ratified."[44] Combining this ecumenical Fixation Thesis with

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41. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 464 (2013).

42. *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 UNIV. ILL. L. REV. 1935, 1941–1943 (2013).

43. *Id*. at 1938.

44. The Fixation Thesis is meant to be inclusive of different theories of originalism. As discussed earlier in this paper, originalists of different strands disagree on whether the communicative content of the Constitution is the original public meaning, the original intent of the Framers, the original understanding of the ratifiers, or something else. But all originalists agree that the communicative content of the constitutional text—regardless of the nature of the content—is fixed at the time the

lessons from philosophy of language, Professor Solum breaks the concept down into two separate theses: (1) "The semantic content of constitutional meaning is fixed by linguistic practices at the time each constitutional provision is framed and ratified,"[45] and (2) "The publicly available context of constitutional communication is fixed at the time the text is framed and ratified."[46] If one adds to this the original public meaning thesis to which public meaning originalists subscribe, which says "[t]he original meaning of the constitution is the public meaning that each provision had at the time it was framed and ratified,"[47] a slight variation emerges. The communicative content or linguistic meaning of the Constitution is its original public meaning which is made up of "(1) the conventional semantic meaning of the text as understood by competent speakers of American English"[48] at the time the Constitution was framed and ratified and "(2) the contextual enrichment added by the publicly available context at the time each provision of the Constitution was framed and ratified."[49] When determining the original public meaning of a clause of the Constitution, public meaning originalists look to clarifying pieces of context such as the structure of the Constitution, the text in its entirety, the authors of the Constitution, the way that the Constitution was enacted, the ethos and beliefs of the time, historical events, and the norms of constitutional communication.[50] Critically, these contextual factors must have been publicly available at the time of the framing and ratification for them to play a role in meaning because public meaning originalism is concerned principally with how members of the public would have understood the text.[51]

A good example of contextual enrichment, according to Professor Solum, in the constitutional context is the Ninth Amendment, which says, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[52] Contextual enrichment can help us understand the Ninth Amendment in a couple ways. First, most people intuitively understand the Ninth Amendment to imply that there exist rights retained by the people. But that is not what the text of the Ninth Amendment asserts. This is evident by the implication[53] that peoples' retained rights could be cancelled if the Ninth Amendment said "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, *if they*

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provision is framed and ratified. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015).

45. Solum, *supra* note 42, at 1941.

46. *Id.*

47. Lawrence B. Solum, *New Originalism*, LEGAL THEORY BLOG (Oct. 14, 2018, 9:00 AM), https://lsolum.typepad.com/legaltheory/2018/10/legal-theory-lexicon-the-new-originalism.html [https://perma.cc/C7F7-C3VF].

48. Solum, *supra* note 42, at 1943.

49. *Id.*

50. *Id.*

51. *Id.*

52. U.S. CONST. amend. IX.

53. I am using implication broadly here to include all kinds of implication including entailment and implicature.

exist." The implication that there are rights retained by the people is dependent on the contextual factor of norms of constitutional conversation that the public would have understood at the time of framing and ratification and that we continue to understand now. One norm of communication in legal texts and conversations in general is the norm of brevity. When conversing, people generally do not convey more information than necessary to their audience. Because of this norm and the brevity of the Constitution (both contextual factors), we can conclude that the Framers would not have authored and adopted an Amendment that would be unnecessary because it had no practical effect. As in, the Framers would not have adopted the Ninth Amendment if there were, in fact, no rights retained by the people.[54] Strictly looking at only the semantic content of the Ninth Amendment would not bring us to this conclusion, but a fully informed member of the public at the time of framing and ratification, who knew all the relevant context, would have arrived at this conclusion. Contextual enrichment is also important for the Ninth Amendment because it can help us to interpret the meaning of the phrase "rights retained by the people" past the semantic content of the words. As Professor Solum explains, the publicly available context at the time of framing and ratification could help us understand which rights are retained by the people. He explains:

> If that context included widespread public agreement on a theory of natural rights such that competent speakers of American English immersed in the political culture would understand that 'retained rights' were natural rights, then the publicly shared theory of natural rights might liquidate a substantial amount of the implicated vagueness.[55]

This is all important in the context of originalist Justices invoking the views of the Framers for two reasons. First, the Constitutional Convention may provide evidence of publicly available context at the time of the framing and ratification

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54. This Ninth Amendment example is an example of what philosopher Paul Grice calls "implicature." Implicatures are meanings that the hearer of an utterance can understand in an utterance even though it is not literally expressed. Hearers can understand these meanings "by virtue of the premise that the speaker is cooperative and the fact that she expressed herself in a particular way under a particular set of circumstances." John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015). Paul Grice started with the proposition that conversations are cooperative enterprises between speakers and hearers. Because conversations are cooperative enterprises, speakers generally follow established maxims. Paul Grice named some of these maxims and divided them into four categories for convenience: Quantity, Quality, Relation, and Manner. The Ninth Amendment example is an example of an implicature that arises from the maxim of quantity, which states, in part: "Do not make your contribution more informative than is required." *Id.* Since competent users of language generally follow this maxim, we can assume that the Framers would not have authored and adopted an Amendment that would be unnecessary and have no practical effect. Therefore, the Ninth Amendment is best understood as implying that there exist rights retained by the people. This Note does not fully explore this concept or the other ways in which context can produce meaning for fear of misunderstanding important contexts. For in-depth explorations of the concept, see SCOTT SOAMES, PHILOSOPHY OF LANGUAGE (2010).

55. Solum, *supra* note 42, at 1960.

that can be used by the Court in its constitutional interpretation. Second, since the communicative content of the Constitution is composed of more than just the semantic content of the text, as it includes the publicly available context of the time, studying linguistic usages of words and phrases at the time (for instance through corpus linguistics) can only bring one so far in the exercise of interpretation. Since the Framers were aware of the publicly available context of the time and likely incorporated it into the views they expressed at the Convention regarding the Constitution, studying those views may be the most expedient and accurate way to interpret the Constitution in the absence of conflicting interpretations from educated members of the public during the period.

Justice Scalia's partial concurrence in *Arizona v. United States* is an example of using the Convention records to obtain publicly available context at the time of framing and ratification to use in the course of interpretation. The case concerned an Arizona law intended to increase the powers of local law enforcement to enforce federal immigration laws.[56] The law made failure to comply with federal alien-registration requirements a state misdemeanor and authorized state and local officers to arrest without a warrant "a person the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States."[57] The question presented was whether the state law usurped the federal government's authority to regulate immigration laws and enforcement.

Arguing that states have a sovereign power to regulate immigration unless their measures have been prohibited by or conflict with federal law, Justice Scalia wrote that the Constitution's near-silence on the issue of immigration powers should be interpreted to give both the federal and state governments the power to regulate immigration. In refuting the majority's holding, Justice Scalia asked whether it is conceivable that the states at the time of ratification would have agreed to a provision that gave exclusive power to establish limitations on immigration to the legislature and exclusive power to enforce immigration limitations to the President. Justice Scalia responded to his rhetorical question with the answer that "the delegates to the Grand Convention would have rushed to the exits" if such a provision was proposed.[58] To support this proposition, Justice Scalia cited a statement by Edmund Randolph at the Constitutional Convention in which Randolph acknowledged "the jealousy of the states with regard to their sovereignty."[59] This protectiveness of the states of their sovereignty was likely publicly available information during the framing and ratification of the Constitution. Indeed, the people knew that the states were very reluctant to cede power to the national government. In a speech before the Virginia Ratifying Convention, anti-

56. Arizona v. United States, 567 U.S. 387 (2012).

57. *Id.* at 394.

58. *Id.* at 436.

59. *Id.* (Scalia, J. concurring in part) (citing 1 RECORDS OF THE FEDERAL CONVENTION 19 (M. Farrand ed.1911)).

Federalist Patrick Henry expressed this sentiment publicly, arguing that if the constitutional project was accepted, "our rights and privileges are endangered, and the sovereignty of the states will be relinquished."[60] This publicly available context that the states were very protective of their sovereignty may have had a bearing on the way an educated, informed member of the public at the time of framing and ratification would have interpreted the Constitution concerning the immigration powers. Using Convention records in this way, to obtain information that was available to both the Framers and the public at large, is entirely appropriate from a public meaning originalism point of view.[61]

The second justification for using the Convention records in lieu of other sources and methods such as period dictionaries and corpus linguistics is that the Framers likely incorporated publicly available context into their deliberations on the Constitution. Period dictionaries and corpus linguistics are very useful methods for uncovering the semantic content of the Constitution.[62] But, as Professor Solum explains in his paper *Originalist Methodology*, "[b]are semantic meanings are sparse."[63] Context thus plays an important role in the production of meaning. While in some cases scholars and judges can use methods like corpus linguistics to learn the semantic meaning of a clause and to use other historical methods to learn all of the relevant context and then to combine the two to accurately understand the communicative content of the clause in question, this is no easy feat. In most cases, it will be extremely difficult and time-consuming, and in some cases, learning all the relevant context and accurately combining it with semantic meaning will be impossible. For this reason, the writings of the Framers, educated men who had all the publicly available contextual knowledge and were diligently focused on the constitutional project, could be the most accurate tool for constitutional interpretation in many cases.

However, one should be careful not to overstate the situations in which using the Convention records can be justified in this way. Under this theoretical justification, when Founding-era writings about the Constitution exist from educated and informed members of the public who were not present at the Constitutional Convention that differ from the views of the Framers at the Convention, there is no justification for privileging the views of the Framers over an educated member of the public. Nevertheless, originalists on the Court did and continue to do just that. For instance, in *Patchak v. Zinke*, Justice Thomas, writing for the majority, cited the so-called Madisonian Compromise that occurred during the Convention as evidence that the Judicial Vesting Clause should be interpreted to grant Congress the power to create lower federal courts, but not to require it to do so.[64]

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60. Patrick Henry, Speech Before the Virginia Ratifying Convention (Jun. 5, 1788), *in* TEACHING AMER. HIST., https://teachingamericanhistory.org/library/document/patrick-henry-virginia-ratifying-convention-va/ [https://perma.cc/4XG5-ECEN].

61. Solum, *supra* note 42.

62. Lawrence Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017).

63. *Id*. at 285.

64. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (Thomas, J.) (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 125 (M. Farrand ed. 1911)).

The Madisonian Compromise is shorthand for an agreement implemented during the Convention to resolve the contentious issue of whether the Constitution should empower Congress to create lower courts. Through a Convention vote, it was ultimately decided that Congress would have the power to create lower courts when it deemed them necessary, but it was under no obligation to do so. Despite this agreement, recent scholars have noted that Gouverneur Morris may have drafted the Judicial Vesting Clause to undo the Madisonian Compromise. The final text of the Judicial Vesting Clause, drafted by Gouverneur Morris, read "[t]he judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . ." Some modern scholars like Dean William Treanor argue that, although the Clause does not explicitly say that Congress *must* establish lower courts, it is implicated by the words "shall" and "such."[65] Nonetheless, most scholars, and ultimately the Supreme Court, have interpreted the Constitution to give Congress discretion as to whether to establish lower courts, citing the Convention Records as proof that the Madisonian Compromise won the day and is reflected in the text. This disagreement over whether the Constitution commands Congress to establish lower courts has been raging since the Founding Era. In the debates over the Federal Judiciary Act of 1789, several Congressmen, including Fisher Ames and William Smith, argued that the appropriate interpretation of the Judicial Vesting Clause was that Congress was mandated to establish lower courts.[66] Since Founding Era sources from educated, informed, competently-speaking members of the public on the opposite side of the debate exist, the idea of contextual enrichment cannot be used to justify citing Convention Records as evidence of the Madisonian Compromise.[67] Informed and educated members of the public would bring contextual enrichment to their interpretations of the Constitution, and there is no justification for privileging the views of the Framers over them.

In fact, in cases where the Framers disagreed with educated members of the public, the public interpretations may be more reliable. The Framers could easily have been blinded by contextual factors that are not known to the public—pieces of information that were only known to those attending the Constitutional Convention. To a public meaning originalist, context that is not available publicly

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65. William Michael Treanor, *The Case of the Dishonest Scrivener* 119 U. MICH. L. REV. (forthcoming 2021). Given the idea of Constitutional implicatures discussed earlier in this Note, this interpretation of the Judicial Vesting Clause seems accurate. Indeed, if someone says "the documents shall be put in my house and my car," the natural implication of the utterance is that I have a car. Likewise, the natural implicature of the Judicial Vesting Clause is that inferior courts will exist.

66. Treanor, *supra* note 66.

67. One public originalist reply to this may be that the Convention records are superior to the statements of Ames and Smith because they are from before ratification, while the debate over the Federal Judiciary Act of 1789 is from post-ratification; and they may have a point. Nonetheless, this example was meant to be illustrative only and the proposition still stands that the Convention records should not be privileged over views of educated, informed members of the public during the time of framing and ratification.

should have no bearing on constitutional interpretation. In the case of the Madisonian Compromise, the Framers may have been so influenced by contextual factors known only to them—such as the vote on the compromise—that they were unable to comprehend the actual public meaning of the text.

To conclude, contextual enrichment provides a strong justification for using the Convention Records when there do not exist writings on the specific topic from educated, informed members of the public who were not present at the Convention. The Convention Records give us a window into how knowledgeable, intelligent men who possessed all the relevant contextual information understood the Constitution and can illuminate the Constitution's communicative content when no contrary writings from educated, informed members of the public exist.

B. Invoking Framers' Intent in the Exercise of Construction

Another justification for invoking the views of the Framers is that the Justices are not applying the *Records* in the course of interpretation but rather, in the course of construction. As Professor Solum explains in his article *The Interpretation-Construction Divide*, the exercise of interpretation is aimed at uncovering facts and is therefore "value-neutral."[68] Theories of construction, conversely, are justified by legal norms. Thus, construction is not a value-neutral exercise, but a normative one.[69] A chief proponent of the idea that the Court's references to the Convention Records can be justified as an exercise of construction is Professor Jamal Greene. In his *The Case for Original Intent*, he writes:

> [This Article] makes two moves. The first move is to identify constitutional construction with a related term of longer lineage. A theory of constitutional construction may be understood as a particular kind of theory of constitutional authority. It is a conceptual apparatus that specifies whether and how to assign weight to competing sources of constitutional wisdom when—because of vagueness, indeterminacy, or normative preference—no single source is dispositive. The second move is to understand that originalism may readily be conceptualized as a theory of authority either in addition to or instead of a theory of interpretation. On this view, originalism is not only the notion that the meaning of constitutional text is specified by its original public meaning; it is also the notion that the subjective expectations of the Framers are a privileged source of wisdom within constitutional practice. When we refer to the Convention debates or to the Federalist, it is often in the service of this second understanding of originalism, the one that occurred to most legal professionals prior to the celebrated shift to original meaning, and the one that still occurs to many legal professionals today.[70]

An examination of which Framers originalist Justices cite when invoking the constitutional convention supports the view that Justices citing to Farrand are

68. Lawrence B. Solum, *The Interpretation-Construction Divide*, 27 CONST. COMM. 95 (2010).
69. *Id.*
70. Greene, *supra* note 1, at 1696.

engaged in the "rhetorical" exercise of invoking the views of heroic American figures who "carry authority in narratives of American identity,"[71] not interpretation. There are a total of twenty four cases in which the self-proclaimed originalists on the Court cited to Farrand's *Records*. James Madison was involved in the cited material in fifteen.[72] In contrast, Gouverneur Morris, who spoke more often than any other Constitutional Convention delegate, was involved in only four of the originalist Justices' citations.[73]

Given the modern-day reputational differences between Gouverneur Morris and James Madison, the Justices' over-representation of James Madison in their citations supports the notion that the originalist Justices' invocations of Framers' intents can be justified as the rhetorical exercise of invoking the views of historical heroes who carry authoritative weight in modern times. Madison was notoriously concerned with his legacy during his lifetime to the point that some scholars have suggested that he edited his Convention notes to preserve it.[74] Madison's long-term image was helped by the fact that he lived longer than any other Framer and that his outsized ambitions led him to play an enormous role in the development of the young republic. Meanwhile, Gouverneur Morris was much less concerned with his legacy, leading a less distinguished career than Madison after the Convention and focusing a great deal on his personal life.[75] Madison's efforts at preserving his legacy were successful, while Morris eventually faded from America's national consciousness. James Madison is often hailed as the Father of our Constitution, and despite the damage that the reputations of Thomas Jefferson and other Framers have borne because of their ownership of slaves, James Madison has managed to escape similar scrutiny and generally continues to be highly regarded.

Despite the attractiveness of Professor Greene's theoretical justification, a few problems arise that make it less plausible. First, out of the twenty four cases in which originalist Justices cite Farrand's *Records,* only two cases cite to a portion of the Records that involve Alexander Hamilton in any capacity.[76] Hamilton's legacy is nearly as large, if not larger, than that of James Madison. If the Justices

71. *Id*. at 1697.

72. By involved, I mean in any capacity from proposing a winning vote to Madison's own personal narration in the preface to proposing an idea that is overruled. Lucia v. SEC, 138 S. Ct. 2044 (2018); Patchak v. Zinke, 138 S. Ct. 897 (2018); Evenwel v. Abbott, 136 S. Ct. 1120 (2016); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Perez v. Mortgage Assoc., 135 S. Ct., 1199 (2015); Haywood v. Drown, 556 U.S. 729 (2009); Central VA Community College v. Katz, 546 U.S. 356 (2006); Vieth v. Jubelierer, 541 U.S. 267 (2004); Printz v. United States, 521 U.S. 898 (1997); Camps Newfound v. Town of Harrison, 520 U.S. 564 (1997); Edmond v. United States, 520 U.S. 651, 660 (1997); Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Honig v. Doe, 484 U.S. 305 (1988); Morrison v. Olson, 487 U.S. 654, 699, 720–22 (1988); Tyler Pipe v. Wash. Dept. of Rev., 483 U.S. 232 (1987).

73. Lucia v. SEC 138 S. Ct. 2044 (2018); Edmond v. United States, 520 U.S. 651, 660 (1997); Term Limits, Inc. v. Thornton 514 U.S. 779 (1995); Morrison v. Olson, 487 U.S. 654, 699, 720–22 (1988).

74. MARY BILDER, MADISON'S HAND: REVISING THE CONSTITUTION (2017).

75. Will Wilkinson, *The Fun-Loving Founding Father*, REASON (July 2004).

76. Evenwel v. Abbott 136 S. Ct. 1120 (2016); Morrison v. Olson, 487 U.S. 654, 699, 720–22 (1988).

were appealing to the authority of heroic figures, we would expect Hamilton to receive nearly as many citations as Madison.

Additionally, the Justices appear to be engaging in interpretation, rather than construction, when they cite to Farrand's *Records*. In all of these cases, the Justices appear to be using the Convention Records as evidence of the meaning of the text rather than as a normative exercise to give the meaning of the text legal effect. Professor Greene concedes that one criticism of his thesis might be that he "conflates the normative and the descriptive." His response to this critique is not fully satisfying. While it is entirely acceptable from a public meaning originalist point of view to invoke the views of the Framers when engaging in construction, the empirical reality appears to be that this is not what the Justices were doing, and therefore, this cannot serve as a justification for the Justices' citations to Madison's notes.

CONCLUSION

This Note examines how originalist Justices on the Supreme Court regularly rely on the views of the Framers in their judicial opinions. It then explores whether or not these practices can be grounded in original public meaning originalist theory. It concludes that given what we know about contextual enrichment, invoking the views of the Framers can be justified as the most expedient and accurate way to discover meaning in the absence of conflicting writings from educated, informed members of the public. While invoking the views of the Framers is acceptable when engaged in construction, the originalist Justices seem to mainly cite to Farrand's *Records* when they are engaged in interpretation, and therefore, the concept of construction cannot be used to reconcile the practices of the originalist Justices with public meaning originalism.