

A Bibliography for Researching Original Understanding

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Lawyers are not necessarily historians, and sometimes it shows.

Despite the obvious importance of the Constitution's original understanding, legal writers attempting to find it often have reached conclusions based on astonishingly few sources. And often they misinterpret the sources they use. Among the malefactors, alas, are some Supreme Court justices and contributors to the nation's most prestigious law reviews.

In an effort to raise the quality of originalist research, I've written this essay to introduce legal writers to the general range of material readily available.

What is Originalist Research?

When lawyers interpret a legal document—whether a contract, statute, or constitution, they generally try to determine the “intent” of those who created the document. “Intent” is a term of art that varies somewhat with the kind of document. For example, the “intent” behind a contract is the parties’ bargain, but the “intent” behind a will is the desire of the testator alone. Often the text of the document (elucidated by rules of construction) sufficiently points to the “intent” behind it, and further inquiry is unnecessary. Occasionally, the legal meaning of the words is fixed by existing law. Often, however, the readers must examine the circumstances surrounding the document’s creation to ascertain the makers’ “intent.” When the reader cannot determine the creator’s or creators’ actual state(s) of mind, the readers generally asks how a reasonable person would have interpreted the document in the circumstances, and then applies that as the presumed intent.

Originalist research is simply doing the same with one particular legal document: the United States Constitution.

There has been a lot of discussion among originalist scholars as to whose intent counts. Should the Constitution be interpreted according to the views of the framers (drafters)? Or of the ratifiers? Or according to how the document would have been read by a hypothetical reasonable person in the years 1787 to 1790? The views of the framers sometimes are called “original intent,” those of the ratifiers “original understanding,” and the interpretation of the hypothetical reasonable person is “original meaning” or “original public meaning.”

It seems evident that if you are going to be faithful to the Constitution you have to be faithful to the legal environment and assumptions within which it was adopted. In other words, we ought to read the document the same way the Founders would have. Most originalists focus on original public meaning. This is partly due to the influence of Justice Antonin Scalia, an original-meaning originalist, and partly due to writings during the 1980s that concluded, erroneously, that lawyers of the Founding Era paid no attention to subjective understanding. In fact, however, they did follow the subjective understanding, if it was available and could be

provided. The evidence on this point is overwhelming. See Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 69 OHIO ST. L.J. 1239 (2007).

As it turns out, the way the Founders interpreted most legal documents is pretty much the same way they are interpreted today: You apply the subjective understanding of those who gave the document legal force. If the evidence of that understanding is insufficient or too conflicting, you apply the interpretation a reasonable person would have placed on the document. In other words, apply the ratifiers' understanding, and if that is not practical, apply the original public meaning.

As a practical matter, original intent, original understanding, and original public meaning usually overlap, and the same evidence often can be used (with an adjustment in the weight given) to demonstrate any of the three. For example, at the Constitutional Convention John Dickinson said without contradiction, that the term "ex post facto law" referred only to a retroactive criminal law, but not to a retroactive civil law. The remark is directly probative of original intent. But it also is evidence (although controverted) of what the term "ex post facto law" generally meant at the time and how the ratifiers understood it.

What Sort of Evidence is Used in Good Originalist Research?

The evidence used in good originalist research includes the text of the Constitution, plus:

- I. Contemporaneous encyclopedias and dictionaries, both English and Latin;
- II. The founding generation's educational canon, particularly the Greco-Roman classics;
- III. Evidence of the Founders' understanding of Anglo-American history, including widely read historical works and pamphlets.
- IV. The historical records surrounding adoption of the Constitution.
- V. Legal materials used at the time of ratification—e.g., charters, state constitutions, powers of attorney, government instructions to agents, British and American statutes, case law, legal treatises, and legal digests.

I shall say something of each of these.

I. Contemporaneous encyclopedias and dictionaries, both English and Latin.

The text of the Constitution is often the best source of original understanding, but you must read it as a contemporaneous reader would have. This means resorting to eighteenth

century

dictionaries. Some examples include—

- * Francis Allen, *A Complete English Dictionary* (1765)
- * John Ash, *The New and Complete Dictionary of the English Language* (2 vols.) (1775)
- * N. Bailey, *A Universal Etymological English Dictionary* (1783)
- * Frederick Barlow, *The Complete English Dictionary* (2 vols.) (1772)
- * Elisha Coles, *A Dictionary, English-Latin and Latin-English* (mult. editions)
- * Alexander Donaldson, *An Universal Dictionary of the English Language* (1763)
- * Thomas Dyche & William Pardon, *A New General English Dictionary* (multiple editions)
- * Samuel Johnson, *A Dictionary of the English Language* (multiple editions)
- * Thomas Sheridan, *A Complete Dictionary of the English Language* (1789)

You must take account of the influence of Latin on eighteenth-century English. The Founders were temporally closer to widespread Latin usage than we are. Also, boys (and some girls) from the influential classes customarily were immersed in Latin from an early age and were expected to be fully competent before they enrolled in college. So it is difficult to do effective originalist research without a fair knowledge of Latin, and some writers have made serious misconstructions from trying to do so.

Important encyclopedias include—

- * Ephraim Chambers, *Cyclopaedia* (1778)
- * *Encyclopedia Britannica* (2d ed. 1778)

All of these encyclopedias and dictionaries are available on the Gale database, *Eighteenth Century Collections Online* (popularly called ECCO) (by subscription only). Where there are multiple editions, the best practice is usually to adopt the latest edition that precedes the Constitution's ratification.

II. Evidence from the founding generation's educational canon, particularly the Greco-Roman classics.

The Founding Generation tended to look at the world through a classical lens, partly

because Greco-Roman writings comprised such a large part of their education. Many of the Founders retained a love of classics throughout their entire lives. (Patrick Henry—not someone thought of as a particularly bookish figure—annually re-read Livy’s Roman History.) Therefore, the originalist scholar needs at least a cursory knowledge of the history of ancient Greece and Rome, particularly of the Roman Republic. Especially important are the histories of Rome written by Livy and Polybius, Aristotle’s *Politics*, and Cicero’s *De Officiis* (“On Duties”) and Cicero’s more important orations.

Although the Founders didn’t talk much about it, they also were influenced by the Bible, long passages from which children learned by heart.

III. Evidence of the Founders’ understanding of Anglo-American history, including widely-read historical works and pamphlets.

These sources include:

- * Pronouncements of colonial pamphleteers: Various American writers, mostly leading lawyers, argued the “constitutional” case against Parliamentary supremacy during the period before Independence. They wrote in article and pamphlet form. Among these writers were John Adams, Richard Bland, John Dickinson, Daniel Dulany, Alexander Hamilton, Stephen Hopkins, Thomas Jefferson, James Otis, Josiah Quincy, and James Wilson. Many of these works are available on ECCO. See also the website of the Constitution Society, www.constitution.org, and academic hard copy collections.
- * Pronouncements of the Continental Congress: These are available in the *Journals of the Continental Congress*. They are online at the “American Memory” website of the Library of Congress: <http://memory.loc.gov/ammem/amlaw/lwjc.html>.
- * Pre-independence constitutional documents, such as colonial charters: These are online at The Avalon Project at Yale Law School: <http://avalon.law.yale.edu/default.asp>.
- * The Articles of Confederation and state constitutions. These also are online at the Avalon Project at Yale Law School.
- * Important contemporaneous works of political science. These include, Baron Montesquieu’s *Spirit of the Laws*; John Locke’s *Of Civil Government: Second Treatise*; and John Adams’ *Defence of the Constitutions of the United States* (an encyclopedia comparing republican constitutions). The first volume of Adams’ work circulated freely at the federal convention. Adams’ work is online at ECCO and at Google Books. Also useful is Jean Louis DeLolme, *The Constitution of England* (multiple editions), available in most academic libraries, and online at ECCO and at Google Books.

IV. The historical records surrounding adoption of the Constitution.

- * The Records of the Federal Convention: The best source is still *The Records of the Federal Convention of 1787* (Max Farrand ed., 1937) (4 vols.). This work is available, in fractured form, at the “American Memory” website: <http://memory.loc.gov/ammem/amlaw/lwfr.html>. DON'T rely on volumes that include only Madison's notes. Remember to consult James H. Hutson, *Supplement to Max Farrand's Records of the Constitutional Convention of 1787*.
- * Transcripts of the state ratifying conventions: The long-time standard source has been Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (5 vols; 1941 ed. inserted in 2 vols.). This is online at the “American Memory” website at <http://memory.loc.gov/ammem/amlaw/lwed.html> and four of the five volumes are available through Google Books. More complete versions are now available for most states in *The Documentary History of the Ratification of the Constitution* (John P. Kaminski & Gaspare J. Saladino et al, eds. 1976-) (multiple vols. projected; not all completed).
- * Public speeches, pamphlets, articles on the Constitution, both pro and con (1787-89): These are available in *The Documentary History of the Ratification of the Constitution* (be sure to check the microfilm supplements, particularly for Pennsylvania). Other collections are *The Anti-Federalist Papers* (Herbert Storing, ed.); *Friends of the Constitution: Writings of the “Other” Federalists* (Sheehan & McDowell, eds.), and the Constitution Society's website: www.constitution.org. When examining such material, remember that work that is famous today may not have been as widely published or influential as work now less well known. For example, much of *The Federalist* was not published until fairly late in the ratification debates, and many people considered its articles so dry and difficult as not to be worth the effort. The writings of Tench Coxe (“A Freeman,” among other names), John Dickinson (“Fabius”), Noah Webster (“America”), and the speeches of James Wilson probably were more influential.
- * The Debates and History of the First Congress: The first session was held in 1789, before all states had ratified and while political alliances were the same as in 1787-88. The second (1790) and third (1790) sessions are much less reliable, since some people (such as Hamilton) were trying to essentially re-write the Constitution by then. Material on the Bill of Rights can be used if arising before the Bill was ratified on December 15, 1791. Debates in the First Congress are available in the *Annals of Congress*, available online at the “American Memory” website: <http://memory.loc.gov/ammem/amlaw/lwac.html>. A more recent source is *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791* (Linda Grant de Pauw, Charlene Bangs Bickford, Kenneth R. Bowling, LaVonne Marlene Siegel & Helen E. Veit, eds.).

V. Legal materials used at the time of ratification.

A super-majority of the leading Founders were lawyers. Legal knowledge also was very widespread among educated non-lawyers in the founding generation, and legal arguments were common public fare in the debate over ratification. Yet much of what passes for originalist scholarship treats legal sources skimpily—relying on little more than Coke and Blackstone. Great opportunities await writers willing to cast their nets further.

The Founders' understanding of law, despite some attention to continental scholars such as Grotius and Vattel, was informed overwhelmingly by the Anglo-American legal tradition. That tradition was captured in a massive quantity of books: John Worrall's *Bibliotheca Legum Angliae*, a 1788 English bibliography of English law, runs nearly 300 pages long. (A copy is available on this website.)

Following is a survey of leading legal resources. Knowledge of Latin and Law French is necessary for full access to all of them. Where an item went through multiple editions, the edition closest to 1788 (but not after) is usually most probative of original understanding.

- * English case reports: Cases were summarized and collected by private reporters, today called “nominate” reporters. Some reporters are more reliable than others, and Founding-Era judges and lawyers treated some with more respect than others. The standard source on the nominate reporters is John William Wallace, *The Reporters Arranged and Characterized with Incidental Remarks* (1882), which is available on Google Books.

Among the most respected reporters were Edmund Plowden, William Salkeld (first two volumes only) and, of course, Edward Coke.

The cases in the nominate reporters from the three centuries prior to the Founding—and some from even earlier—are collected in *English Reports (Full Reprint)*, which is available at Hein Online and on the British *Justis* database. Many law journals now cite only the English Reporter citation for a case and omit the nominate reporter. This is foolish, because the identity of the nominate is relevant to how persuasive the case is. Scholars should check Wallace's work (above) in assessing the value of a case.

- * American cases decided before 1792 may be found on Westlaw.
- * English statutes: Statutory law is generally less important for originalist research than case law. This is a comfort, for the eighteenth century Parliamentary Journals are hard to find in the United States unless you happen to have physical access to a top academic library. (Most of those libraries will not lend their copies, either.) Nor are the Parliamentary Journals available on ECCO, except for a few isolated volumes. Many issues of the Journals of the House of Commons and of the House of Lords and certain reports of parliamentary debates are available at British History online, <http://www.british-history.ac.uk/>, but much of the eighteenth century material is not.

(Progress is being made, but it is slow.) Eighteenth century Commons Journals are now available at a University of Southampton site, in the Bopcris Ford collection:
<http://www.southampton.ac.uk/library/bopcris/projects.html>.

Those looking for a general review of eighteenth century English statutory law may wish to consult Giles Jacob, *Lex Constitutionis, or the Gentleman's Law*, available from ECCO in various editions. Also, most English case digests (see below) include summaries of statutes as well as case law.

* American statutes: ECCO contains some coverage of pre-1800 American statutory compilations, as does Google Books.

* Treatises on Parliament. Here are some samples, all available at ECCO and some at Google Books:

Jean Louis DeLolme, *The Constitution of England* (multiple editions), also available in most academic libraries and at Google Books.

William Petyt, *Jus Parliamentarium: or the Antient Power, Jurisdiction, Rights, Liberties, and Privileges of the Most High Court of Parliament* (1741)

George Philips, *Lex Parliamentaria, or A Treatise of the Law and Custom of Parliaments* (3d ed. 1747)

* Comprehensive legal treatises: A number of overviews of the English law system were widely used in America at the time of the founding. They are on ECCO, but if you do not have a subscription, try Google Books. They include –

William Blackstone, *Commentaries on the Law of England* (various editions, beginning in 1765)

Edward Coke, *Institutes of the Lawes of England* (1628-44) (many editions)

John Cowell (or “Cowel”), *The Institues of the Lawes of England* (“W.C.”, trans. 1651)

Henry Finch, *Law or Discourse Thereof* (1759)

John Fortesque, *De Laudibus Legum Angliae* (various editions)

Giles Jacob, *A Treatise of Laws* (1721)

Thomas Wood, *An Institute of the Laws of England* (various editions)

* Legal Dictionaries. These were popular, and frequently so detailed as to be closer to legal encyclopedias than dictionaries. Some, all available on ECCO, include—

Anonymous, *The Law-French Dictionary* (1701 & 1718) (includes a useful English-to-Latin section)

Anonymous, *The Student's Law-Dictionary* (1740)

Thomas Blount, *A Law-Dictionary and Glossary* (various editions)

John Cowell (or “Cowel”) , *A Law Dictionary or The Interpreter* (1777)

Timothy Cunningham, *A New and Complete Law Dictionary, or, General Abridgment of the Law* (various editions)

Giles Jacob, *A New Law-Dictionary* (many editions) – probably the most popular law dictionary in America

William Rastall, *Termes de la Ley* (many editions)

Richard Burn, *A New Law Dictionary* (1792) (published just after the Founding, but reproducing many definitions prevalent before it.

* Digests: These were similar to the famous West “Key Number” digests, but they included statutory provisions and excerpts from commentary as well as cases. All were multi-volume works and all, except Webb, are available on ECCO. When there are multiple editions, it is wisest to obtain the edition closest to the ratification (1788), but still prior in time. They include:

Anonymous (“A Gentleman of Lincoln’s Inn”), *A Digest of Adjudged Cases in the Court of King’s Bench* (1775)

Anonymous (“A Gentleman of the Middle Temple”), *A General Abridgment of Cases in Equity* (various editions)

Matthew Bacon, *A New Abridgment of the Law* (many editions)

Henry Barnes, *Notes of Cases in Points of Practice Taken in the Court of Common Pleas* (1772)

Josiah Brown, *A New Abridgment of Cases in Equity* (1793) (because of its later date, this probably should be used only as a case-finder rather than for commentary)

John Burchell, *Arrangement and Digest of the Law* (1796) (because of its late date, use as a King's Bench and Common Pleas case finder only)

Richard Burn, *The Justice of the Peace and Parish Officer* (4 vols.) (1785)

John Comyns, *A Digest of the Laws of England* (various editions)

Michael Dalton, *The Country Justice* (various editions)

Knightly D'Anvers, *A General Abridgment of the Common Law* (1725-37) (this incomplete set was one of the most popular law books in the American colonies)

Thomas Hertly, *A Digest of the Laws of the United States of America* (1800)

John Lilly, *The Practical Register* (various editions)

William Nelson, *An Abridgment of the Common Law* (1725-27) (not highly regarded)

Joseph Shaw, *The Practical Justice of Peace* (2 vols.) (1751)

Charles Viner, *A General Abridgment of Law and Equity* (1742-47)(23 vols) (de rigueur, but noted by contemporaries to be subject to error)

William Waller Hening, *The New Virginia Justice* (1795)

George Webb, *The Office and Authority of a Justice of Peace* (1736)

T.W. Williams, *A Compendious Digest of the Statute Law* (1787)

* Legal Maxims and Rules of Construction:

T. Branch, *Principia Legis et Aequitatis* (1753), available on ECCO

* Specialized treatises. There was an array of works on specialized areas of the law. The following represent only some examples. Some are available on ECCO, and others are not.

Criminal law: William Hawkins, *Pleas of the Crown* and Matthew Hale, *Pleas of the Crown* (both in various editions)

Conveyancing: Gilbert Horsman, *Precedents in Conveyancing* (1785); Giles Jacob, the

Accomplished Conveyancer (1716); John Lilly, *The Practical Conveyancer* (2 vols.) (1742); Job Mill, *The Present Practice of Conveyancing* (1745); William Newnam, *The Complete Conveyancer* (3 vols.) (1786); Anonymous, *New Precedents in Conveyancing* (1742)

Commercial Law: Anonymous, *A General Law-Treatise of Naval Trade and Commerce* (2 vols.) (1753); Timothy Cunningham, *The Merchant's Lawyer* (1768); Giles Jacob, *Lex Mercatoria* (1729); Gerard Malynes, *Consuetudo vel Lex Mercatoria, or The Ancient Law Merchant* (1622) [not on ECCO]; Charles Molloy, *De Jure Maritimo et Navali, or A Treatise of Affairs Maritime and of Commerce* (2 vols.) (1769)

Equity: Henry Ballow, *A Treatise of Equity* (2d ed. 1756); Henry Home (Lord Kames), *Principles of Equity* (1778) (2 vols.)

Trusts, Wills and Estates: George Duke, *The Law of Charitable Uses* (1676); Jeffray [sic] Gilbert, *The Law of Uses and Trusts* (various editions); John Godolphin, *The Orphan's Legacy: or a Testamentary Abridgment* (1701); Henry Swinburne, *A Treatise of Testaments and Last Wills* (many editions); Thomas Wentworth, *The Office and Duty of Executors* (1774).