

# A Bibliography for Originalist Research

by

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- \* The following information and more is or will be posted on the new web portal, “The Scholarship of Original Understanding,” <http://www.umt.edu/law/original-understanding/>
- \* The following is a bibliographical summary: It is a rough draft only; and suggestions for corrections or additions will be warmly received.

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The fact that the United States Constitution is America’s supreme legal document should not blind us to the fact that it IS a legal document, and subject to some of the same interpretive tools applied to other legal documents. These tools include the *text* (informed by the rules of construction), the history of the document in the courts, and the circumstances surrounding its adoption, so as to show the understanding of the parties to it.

“Originalist research” is a specialized term for examining the circumstances shedding light on the understanding of one particular legal document, the Constitution.

A court examining the circumstances surrounding adoption of a contract sometimes speaks loosely of finding the parties’ “intent,” when of course the court really means their bargain. Similarly, lawyers sometimes use misleading terms to describe the ultimate goal of originalist research. The Founders would have understood that goal to be to uncover the “meaning (or intent) of the makers.” In the constitutional context, of course, the “makers” were the ratifiers, because their act gave legal force to the document. (The convention that drafted the Constitution merely proposed it.) Commonly the meaning of the ratifiers is called “original understanding.” We arrive at original understanding by

- \* Examining any special, subjective understandings on the force of particular terms;
- \* In the absence of sufficient evidence thereof, examining the probable objective meanings at the time of ratification – sometimes called “original public meaning;” including but not limited to –
- \* the original intent of the drafters.

[Some have argued that the Anglo-American interpretive tradition did not permit consideration of the makers’ subjective understandings. Respectfully, however, I must report that a more

thorough review of the legal and ratification-era sources shows that argument to be erroneous. *See* Robert G. Natelson, *The Real Original Understanding of Original Intent* (forthcoming).]

Certain kinds of evidence can be useful whether one is seeking subjective understanding or objective meaning. These include:

- \* The text of the Constitution;
- \* Evidence from the founding generation's educational canon
- \* Evidence from their reading of Anglo-American history
- \* The records surrounding adoption of the Constitution, including drafting and ratification history, and the history of the First Congress, especially during its first year.
- \* Evidence of legal learning at the time of ratification.

I shall say something of each of these, and provide relevant sources.

### **The Text of the Constitution**

The text is often the best source of original understanding. That having been said, however, one must read the text as a contemporaneous reader would have. Eighteenth Century dictionaries, notably Samuel Johnson's famous dictionary (*SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE* (1755)), can be useful in discovering unsuspected meanings and nuances. The Oxford English Dictionary can be helpful for the same purpose.

Education during the founding generation included a very heavy Latin content. Boys were customarily immersed in the language, and were expected to be fully competent in it before they enrolled in college. Moreover, many words in Eighteenth Century English were closer to their Latin counterparts than they are today. For this and other reasons (see below), fully effective originalist research requires a fair knowledge of Latin. Serious textual misconstructions can arise without that knowledge.

### **Evidence from the Founding Generation's Education Canon**

The founding generation tended to look at the world through a classical lens, not merely because of their immersion in Latin, but 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. (It was said, for example, that Patrick Henry – not someone thought of as a particularly bookish figure – re-read Livy's *History of Rome* every year.) Therefore, the originalist scholar needs at least a cursory knowledge of the history of ancient Greece and Rome, particularly of the Roman Republic. Particularly important are the histories of Rome written by Livy and Polybius, Aristotle's *Politics*, and Cicero's *De Officiis* ("On Duties") and his 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. Also important are Baron Montesquieu's *Spirit of the Laws*, John Locke's, *Of Civil Government: Second Treatise*, David Hume's and Catherine Macaulay's *Histories of England*. I have found DeLolme's *Constitution of England* useful as well.

### **The Records surrounding Adoption of the Constitution including Drafting and Ratification History**

These sources include:

- \* *The 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. The most important writers were Daniel Dulany, James Otis, John Dickinson, Richard Bland, John Adams, James Wilson, and Thomas Jefferson. The locations of these works are scattered: Some, if not all, are available on the Thompson-Gale database, *Eighteenth Century Collections Online* (popularly called ECCO). See also the website of the Constitution Society, [www.constitution.org](http://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://www.yale.edu/lawweb/avalon/avalon.htm>.
- \* *The Articles of Confederation and state constitutions.* These are online at the Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/avalon.htm>.
- \* JOHN ADAMS' DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES, his encyclopedia comparing republican constitutions. This is in three volumes. Only the first had been published by the time of the federal convention, where it was resorted to freely. This is available in most academic libraries, and online at ECCO.
- \* *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 source is available, in fractured form, at the "American Memory" website: <http://memory.loc.gov/ammem/amlaw/lwfr.html>. One should remember to consult James H. Hutson's *Supplement to Max Farrand's Records of the Constitutional Convention of 1787*, and not to rely on volumes that include only Madison's notes.

- \* 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 on line at the “American Memory” website at <http://memory.loc.gov/ammem/amlaw/lwed.html>. 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. 1976-2006) (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 for several states, particularly Pennsylvania). Other collections are found at *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](http://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, Especially During its First Year**

I am generally skeptical about the value of post-ratification records as evidence of original understanding, because they are particularly subject to non-authoritative interpretive “spin.” This is because once ratification was an accomplished fact people could claim the Constitution meant anything they pleased to have it mean without constitutional consequences. However, debate early in the First Congress has special value because (a) two states, North Carolina and Rhode Island, had not yet ratified, and were watching what transpired there, (b) Virginia’s legislature formally applied for a new constitutional convention pursuant to Article V of the new Constitution, and congressional proceedings could determine the success of that petition, and (c) the Bill of Rights was not been ratified until December 1791 and the survival of the new government depended somewhat on the potential content and fate of those proposed amendments.

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.).

## Legal Sources

A clear supermajority of the leading Founders, including many, if not most, of the leading Antifederalists, were lawyers. Moreover, legal knowledge was very widespread among educated non-lawyers. Legal arguments were common public fare in the debate over ratification. Despite some attention to continental scholars such as Grotius and Vattel, overwhelmingly the legal understanding was informed by the Anglo-American legal tradition. The following legal materials are important; knowledge of Latin and Law French is necessary for full access to all of them.

*Case reports.* Cases were reported by private reporters. Today, their books are referred to as the “nominate reporters.” However, the leading cases for the three centuries prior to the Founding have been collected in ENGLISH REPORTS (FULL REPRINT), which is available on the British analogue of Westlaw: the Justis database.

Some reporters are more reliable than others, and the courts accordingly treated some reporters with far more respect than others. The standard source on the nominate reporters is JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS (1882). Among the most respected reporters: Edmund Plowden, William Salkeld (first two volumes only) and, of course, Edward Coke.

American cases before 1792 may be found on Westlaw.

*Statutory Law.* 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. 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 most of the Eighteenth Century material is not. There are plans to place Eighteenth Century Parliamentary Journals at the British Official Publications Collaborative Reader Information Service (“BOPCRIS,”), <http://www.bopcris.ac.uk/> – see 18<sup>th</sup> Century Parliamentary papers: <http://www.bopcris.ac.uk/18c/>. I am informed that the opening date is March, 2007.

Among useful treatises on Parliament are the following:

- \* JEAN LOUIS DELOLME, THE CONSTITUTION OF ENGLAND (3rd ed. 1790)
- \* WILLIAM PETYT, JUS PARLIAMENTARIUM: OR THE ANTIEN T 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 93 (3d. ed. 1747)

These are available on *Eighteenth Century Collections Online (ECCO)*

*Comprehensive treatises.* A number of overviews of the English law system were used at the time of the founding. These included:

- \* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1765)
- \* EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1628-44)
- \* JOHN COWELL (or “Cowel”), THE INSTITUTES OF THE LAWS OF ENGLAND (“W.C.”, trans. 1651)
- \* HENRY FINCH, LAW OR DISCOURSE THEREOF (1759)
- \* JOHN FORTESQUE, DE LAUDIBUS LEGUM ANGLIAE (John Selden, ed. 1737)
- \* THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (1754)

*Legal Dictionaries.* These were popular, and frequently so detailed as to be closer to legal encyclopedias than dictionaries. In some of their most probative editions, they are as follows:

- \* THOMAS BLOUNT, A LAW-DICTIONARY AND GLOSSARY (3d ed. 1717)
- \* 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 (3d ed. 1783)
- \* GILES JACOB, A NEW LAW-DICTIONARY (8th ed. 1762)
- \* WILLIAM RASTALL, TERMES DE LA LEY (mult. eds.)
- \* ANONYMOUS, THE STUDENT’S LAW-DICTIONARY (1740).

All of these are available on ECCO. The most popular law dictionary in America appears to have been that by Giles Jacob.

*Digests.* These were similar to the famous West “Keynumber” digests, but they included statutory provisions and excerpts from commentary as well as cases. All were multi-volume works and 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:

- \* MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (5<sup>th</sup> ed. 1786)
- \* JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND (1780) (5 vols.)
- \* KNIGHTLY D’ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW (3 vols.) (1725-37)
- \* WILLIAM NELSON, AN ABRIDGMENT OF THE COMMON LAW(1725-27)(3 vols.)
- \* CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY(1742-47)(23 vols)

*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 (1716)
  - MATTHEW HALE, PLEAS OF THE CROWN (1716)
- \* Conveyancing:
- GILBERT HORSMAN, PRECEDENTS IN CONVEYANCING (1785) (3 vols.)
  - GILES JACOB, THE ACCOMPLISHED CONVEYANCER (1716)
  - JOB MILL, THE PRESENT PRACTICE OF CONVEYANCING (1745)
  - PIGGOT, NEW PRECEDENTS IN CONVEYANCING (1742)
- \* Commercial Law:
- ANONYMOUS, A GENERAL LAW-TREATISE OF NAVAL TRADE AND COMMERCE (2 vols.) (1753)
  - 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 (2<sup>nd</sup> ed. 1756) (2 vols)
  - 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 (2d ed. 1741)
  - JOHN GODOLPHIN, THE ORPHAN'S LEGACY: OR A TESTAMENTARY ABRIDGMENT (1701)
  - HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS (6<sup>th</sup> ed. 1743)
  - THOMAS WENTWORTH, THE OFFICE AND DUTY OF EXECUTORS (1774)