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# A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution

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**A CONCISE GUIDE TO THE RECORDS OF THE FEDERAL  
CONSTITUTIONAL CONVENTION OF 1787 AS A SOURCE OF THE  
ORIGINAL MEANING OF THE U.S. CONSTITUTION**

by Gregory E. Maggs\*

**I. Introduction**

The records of the Constitutional Convention of 1787 are often cited in support of claims about the original meaning of the Constitution.<sup>1</sup> These records consist of an official journal of the proceedings, notes taken by participants at the Convention, preliminary drafts of the Constitution, and various other documents.<sup>2</sup> Despite the frequency of their citation, working with these sources is difficult, and most law schools provide little training in their use. Accordingly, judges, lawyers, law clerks, law students, and legal academics may feel uncomfortable in relying on the records or in assessing arguments made by others about what the records might show. The purpose of this essay is to provide helpful guidance on this subject.<sup>3</sup>

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\* Professor of Law, The George Washington University Law School. This essay was presented at a Symposium Commemorating the 100th Anniversary of Farrand's Records of the Federal Convention sponsored by the George Washington Law Review and the Institute for Constitutional History on November 3-4, 2011. I am very grateful to the other speakers and the members of the audience who provided me with helpful guidance and advice.

<sup>1</sup> See *infra* part III.A (describing how cases and law review articles have cited the records).

<sup>2</sup> See *infra* part II.D (identifying the known records of the Convention). Most of the records are collected in THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS], a 3-volume work cited throughout this essay. A further description of this work and supplements to it appears in part II.D.

<sup>3</sup> For similar guides concerning the records of the state ratifying conventions and the Federalist Papers, see Gregory E. Maggs, *A Concise Guide to The Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, and Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).

The essay first describes the Constitutional Convention and the various kinds of records that were kept of its proceedings.<sup>4</sup> The essay then explains, with examples, how judicial opinions and academic works draw upon the records for evidence of the Constitution's original meaning, including both the meaning that the Framers may have subjectively intended the document to have and also other possible meanings.<sup>5</sup> The essay next identifies and assesses seven important potential grounds for impeaching assertions about what the records show.<sup>6</sup> Each of these potential grounds has merit in some contexts, but all of them are also subject to significant limitations or counter arguments. The essay, accordingly, recommends that anyone making or evaluating claims about the original meaning of the Constitution should proceed with caution, carefully taking into account both the possible grounds for impeaching claims and the arguments against these grounds. Appendices to this essay include an annotated bibliography and a table of the deputies who participated at the Constitutional Convention.<sup>7</sup>

This essay does not address the important question of whether or to what extent courts today should be bound to follow the original meaning of the Constitution. Other works, of course, discuss this issue in great detail.<sup>8</sup> This essay simply assumes that lawyers, judges, and scholars may be interested in knowing what the records reveal about the original meaning of the Constitution regardless of the extent to which they consider this meaning to control modern constitutional interpretation.

## **II. The Convention and the Records of the Convention**

### *A. Calling the Convention*

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<sup>4</sup> See *infra* part II.

<sup>5</sup> See *infra* part III.

<sup>6</sup> See *infra* part IV.

<sup>7</sup> See *infra* appendices A (annotated bibliography) & B (table of deputies).

<sup>8</sup> Classic works arguing that judges should follow the original meaning of the Constitution include RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Classic works expressing the opposite view include Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

Between 1781 and 1789, the United States was joined in union by the Articles of Confederation.<sup>9</sup> The Articles of Confederation established a unicameral Congress consisting of representatives from all thirteen states.<sup>10</sup> The Articles gave this Congress limited powers,<sup>11</sup> but otherwise recognized that “[e]ach state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated.”<sup>12</sup> The functioning of the Union under the Articles of Confederation was not entirely successful, and by 1786 deteriorating economic conditions in the United States had become a subject of great concern. Much of the blame lay at the feet of burdensome state commerce regulations.<sup>13</sup> At the suggestion of James Madison, the state of Virginia invited all of the other states to send representatives to a convention in Annapolis, Maryland, to discuss these conditions.<sup>14</sup> Virginia further proposed that the convention write a report to Congress regarding possible changes to the Articles of Confederation to ameliorate the situation.<sup>15</sup>

The Annapolis Convention met in September 1786, but did not achieve its intended goals.<sup>16</sup> Only five of the thirteen states sent commissioners.<sup>17</sup> They were too few in number to make any useful recommendations regarding commerce or

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<sup>9</sup> See 1 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING* 33-34 (2005) (describing the Articles of Confederation).

<sup>10</sup> See Articles of Confederation art. V.

<sup>11</sup> See *id.* art. IX.

<sup>12</sup> *Id.* art. II.

<sup>13</sup> Alexander Hamilton explained: “The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.” *THE FEDERALIST* No. 22, at 130 (Alexander Hamilton) (Jacob Cooke ed., 1961).

<sup>14</sup> Resolution of the General Assembly of Virginia Proposing a Joint Meeting of Commissioners From the States to Consider and Recommend a Federal Plan for Regulating Commerce, Jan. 21, 1786, in *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 38 (Charles C. Tansill ed. 1927) [*hereinafter* *DOCUMENTS ILLUSTRATIVE OF THE FORMATION*].

<sup>15</sup> See *id.*

<sup>16</sup> See 1 VILE, *supra* note 9, at 19-21 (2005) (describing the Annapolis Convention).

<sup>17</sup> 1 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* iv (Joseph Gales ed. 1834) [*hereinafter* *Annals of Congress*]

other subjects.<sup>18</sup> The Articles of Confederation required unanimous approval of every state for any changes,<sup>19</sup> and the commissioners properly worried that the states who had not sent representatives later might disagree with their recommendations. Before disbanding, however, the commissioners took one extremely important action. Finding “important defects in the system of the Federal Government,”<sup>20</sup> they at the Annapolis Convention proposed that each state send representatives to another convention to be held the following year. This second convention, they urged, should:

meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union.<sup>21</sup>

Congress acted on this suggestion by calling for a second convention “for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”<sup>22</sup> This second convention became known as the Federal Constitutional Convention of 1787.

The Convention met in Philadelphia on a total of 79 days between May 14, 1787, and September 17, 1787.<sup>23</sup> During this time, the Convention departed from the mission that Congress had given it. The Convention did not simply draft “alterations” for the Articles of Confederation as amendments. Instead, it proposed an entirely new Constitution to replace the Articles of Confederation.

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<sup>18</sup> *See id.*

<sup>19</sup> *See* Articles of Confederation, art. XIII.

<sup>20</sup> Proceedings of Commissioners to Remedy Defects of the Federal Government, Sept. 14, 1786, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION, *supra* note 14, at 42.

<sup>21</sup> *Id.*

<sup>22</sup> Report of Proceedings in Congress, Feb. 21, 1787, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION, *supra* note 14, at 44. Some of the states sent deputies under different instructions.

<sup>23</sup> The Convention did not meet (1) on Sundays; (2) between May 15 and May 24; (3) on July 3 or 4; and (4) between July 27 and Aug 5. *See* 1 VILE, *supra* note 9, at 77.

The Convention did not ask Congress or the state legislatures to approve the proposed Constitution. Instead, perhaps fearing delay and possible defeat, the Convention called for separate ratifying conventions to be held in each state.<sup>24</sup> Although this arrangement stripped Congress and the state legislatures of some power, they did not block the procedure.

#### B. *Deputies Attending the Constitutional Convention of 1787*

The states each were free to send multiple “deputies”<sup>25</sup> to the Constitutional Convention. At the Convention, however, each state only had one vote.<sup>26</sup> In total, fifty-five men attended the Convention.<sup>27</sup> These men represented all of the states except Rhode Island, which chose not to participate.

Many of the deputies arrived late. In fact, although the Convention was scheduled to begin on May 14, 1787, a quorum did not gather until May 25, 1787.<sup>28</sup> Participants continued to trickle in after that. The deputies from New Hampshire were the tardiest, first arriving on July 23, 1787.<sup>29</sup> In addition, some deputies exited before the close of the Convention. As described more fully below, deputies from Maryland and New York departed because they opposed abandoning the Articles of Confederation.

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<sup>24</sup> See U.S. Const. art. VII (specifying the ratification process). Rufus King of Massachusetts said that he favored presenting the Constitution to ratifying conventions rather than state legislatures because “[t]he Legislatures . . . being to lose power, will be most likely to raise objections.” 1 FARRAND’S RECORDS, *supra* note 2, at 123 (Madison’s Notes, Jun. 5, 1787) (statement of Rufus King).

<sup>25</sup> Some sources, including some Supreme Court cases, informally refer to the representatives as “delegates” rather than “deputies.” See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). But “deputies” is a more accurate term. The states gave credentials (i.e., written statements of authority) to their representatives. These credentials typically described the representatives as “deputies.” See, e.g., Credentials of the Members of the Federal Convention, State of Georgia, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION, *supra* note 14, at 82. In addition, the official journal of the Convention uses the term “deputy” to describe the representatives. See, e.g., 1 FARRAND’S RECORDS, *supra* note 2, at 1 (Journal, May 25, 1787). In addition, when George Washington signed the Constitution, he identified himself as the “Presidt and deputy from Virginia” at the Convention. U.S. Const. signatures.

<sup>26</sup> See 1 FARRAND’S RECORDS, *supra* note 2, at 11 (Madison’s Notes, May 28, 1787).

<sup>27</sup> See *infra* Appendix B (listing deputies).

<sup>28</sup> See 1 FARRAND’S RECORDS, *supra* note 2, at 1 (Journal, May 25, 1787).

<sup>29</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 84 (Journal, May 23, 1787).

At the end of the Convention, thirty-eight deputies signed the Constitution.<sup>30</sup> One deputy also signed for an absent colleague.<sup>31</sup> Three others who were present decided not to sign the Constitution either because they opposed its provisions or because they wanted to reserve judgment.<sup>32</sup>

In general, the deputies were a distinguished group. Historian Richard B. Lewis has tallied their remarkable political accomplishments:

Three had been in the Stamp Act Congress, seven in the First Continental Congress. Eight had signed the Declaration of Independence, and two, the Articles of Confederation. Two would become President, one Vice President, and two Chief Justices of the Supreme Court. Sixteen had been or would later hold State governorships. Forty-two at one time or another had sat in one or another of the Continental Congresses, while at least 30 were Revolutionary War veterans.<sup>33</sup>

Some of the deputies participated more actively than others in framing the Constitution. Accordingly, time and again, the names of a select few of these deputies appear in the records of the Convention. These important deputies fall into seven groups: the grand eminences, the visionaries, the conciliators, the dissenters, the disappointed, the unsure, and the absent.

The grand eminences were George Washington and Benjamin Franklin. George Washington came as a deputy from Virginia and presided over the Convention, except when it sat as a committee of the whole.<sup>34</sup> Having kept the Army together throughout the war, and led it to victory, he was widely viewed as the greatest living American. Although he participated substantively only once in the debates,<sup>35</sup> his presence had great importance because it gave prestige and dignity to the entire enterprise.

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<sup>30</sup> See U.S. Const. signatures.

<sup>31</sup> George Read of Delaware also signed for his absent colleague John Dickinson. See 3 FARRAND'S RECORDS, *supra* note 2, at 587.

<sup>32</sup> These deputies were Elbridge Gerry of Massachusetts, George Mason of Virginia, and Edmund Randolph of Virginia. See *id.* at 588-590.

<sup>33</sup> RICHARD B. LEWIS, FRAMING OF THE FEDERAL CONSTITUTION 45 (1979).

<sup>34</sup> Nathaniel Gorham of Massachusetts presided when the Convention met as a Committee of the Whole. See 1 VILE, *supra* note 9, at 110. The Convention may have selected Gorham for this role to provide the northern states a position of authority. See *id.*

<sup>35</sup> On the last day of the Convention, after mentioning that he had not previously spoken,

Benjamin Franklin of Pennsylvania was the oldest of the deputies, and was widely acclaimed as the most learned. In addition to his great fame as a scientist, inventor, and publisher, Franklin was easily the most experienced diplomat and statesman in America. Among his many other accomplishments, Franklin had helped draft and had signed the Declaration of Independence, he had proposed the Articles of Confederation, and he had negotiated the Treaty of Alliance with France and the Treaty of Paris with Britain.<sup>36</sup> At the Convention, Franklin made several very significant speeches.<sup>37</sup>

The visionaries were the deputies who had the strongest and best articulated ideas about the kind of government that the United States should have. First among these men was James Madison. Madison inspired what was called the Virginia Plan for the government (discussed below) and opposed other plans.<sup>38</sup> Madison also attended every day of the Convention, spoke on most topics, and kept the most comprehensive and accurate notes.<sup>39</sup>

Second among these visionaries was arguably James Wilson of Pennsylvania. Wilson had the most democratic prescription for the new government. He favored direct election of the President. He also supported popular election of the House of Representatives.<sup>40</sup> Wilson criticized the decision to limit Congress's power to restrict the importation of slaves,<sup>41</sup> and he also supported the restriction on state interference with contracts.<sup>42</sup>

Other visionaries included William Paterson (sometimes spelled Patterson) of New Jersey, Alexander Hamilton of New York, and Gouverneur<sup>43</sup> Morris of

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Washington urged his colleagues to change the representation in the House from not more than 1 in 40,000 to not more than 1 in 30,000. See 2 FARRAND'S RECORDS, *supra* note 2, at 644 (Madison's Notes, Sep. 17, 1787).

<sup>36</sup> See 2 VILE, *supra* note 9, at 616.

<sup>37</sup> See *id.*

<sup>38</sup> See 2 VILE, *supra* note 9, at 816.

<sup>39</sup> See 1 FARRAND'S RECORDS, *supra* note 2, at xv-xix (discussing Madison's participation in the Convention and note taking).

<sup>40</sup> *Id.* at 49 (Madison's Notes, May 31, 1787).

<sup>41</sup> See 2 FARRAND'S RECORDS, *supra* note 2, at 372 (Madison's Notes, Aug. 22, 1787).

<sup>42</sup> *Id.* at 440 (Madison's Notes, Aug. 28, 1787).

<sup>43</sup> Gouverneur Morris's unusual first name has a simple explanation; he was named after his mother, whose maiden name was Sarah Gouverneur. 20 THE NEW YORK GENEALOGICAL AND BIOGRAPHICAL SOCIETY, THE NEW YORK GENEALOGICAL AND BIOGRAPHICAL RECORD 23 (1889). Gouverneur Morris held many political positions, but was never the "governor" of



Pennsylvania. Paterson proposed the New Jersey Plan for the national government (discussed below), which would have benefited small states by giving all states equal representation in a unilateral legislature.<sup>44</sup> Hamilton proposed his own plan, which would have created a strong federal government with an executive elected for life.<sup>45</sup> The plan greatly would have reduced state sovereignty by allowing the national executive to appoint executives for each state government. Based on the records, it appears that Gouverneur Morris spoke more than any other delegate.<sup>46</sup> He persuaded James Randolph to change the first resolution of the Virginia plan to say that the national government should have separate legislative, executive, and judicial branches.<sup>47</sup> This resolution not only established the basic structure of the new government, but also made clear that the Convention was going to do more than merely amend the Articles of Confederation. Recognized as a master of elegant expression, Morris also did most of the final stylistic editing of the Constitution.<sup>48</sup>

The principal conciliator was Roger Sherman of Connecticut. Sherman proposed the “Great Compromise” (also known as the “Connecticut Compromise”) adopted by the Convention, under which each state would have equal representation in the Senate and proportional representation in the House.<sup>49</sup> Sherman also assisted others in preparing the Committee of Detail’s draft of the Constitution.<sup>50</sup> Although described above as a grand eminence, Benjamin Franklin deserves additional recognition as a conciliator. In late June, when the debates became particularly contentious over the states’ representation in Congress, Franklin proposed that the Convention institute the practice of beginning each session as a prayer as a way of overcoming their differences:

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any state.

<sup>44</sup> 3 FARRAND’S RECORDS, *supra* note 2, at 611-614 (reprinting The New Jersey Plan or Paterson Resolutions).

<sup>45</sup> *Id.* at 617-630 (reprinting the Hamilton Plan).

<sup>46</sup> 2 VILE, *supra* note 9, at 496.

<sup>47</sup> 1 FARRAND’S RECORDS, *supra* note 2, at 33 (Madison’s Notes, May 30, 1787). The Committee of the Whole passed this resolution shortly afterward. *See id.* at 35 (Madison’s Notes, May 30, 1787).

<sup>48</sup> *See* 1 VILE, *supra* note 9, at 108-109.

<sup>49</sup> Sherman proposed the compromise on June 11, 1787. *See* 1 FARRAND’S RECORDS, *supra* note 2, at 196 (Madison’s Notes, June 11, 1787). The Convention adopted the compromise on July 16, 1787. *See* 2 FARRAND’S RECORDS, *supra* note 2, at 15 (Madison’s Notes, July 16, 1787).

<sup>50</sup> 2 FARRAND’S RECORDS, *supra* note 2, at 97 (Journal, Jul. 24, 1787).

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.<sup>51</sup>

In addition, at the close of the Convention, Franklin urged the deputies to put aside their disagreements with particular provisions of the draft and sign the Constitution. In a now famous speech, he said:

[T]he older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. . . . I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument.<sup>52</sup>

The dissenters were the deputies who adamantly opposed the work of the Convention. Robert Yates and John Lansing, Jr., both of New York, left the Convention on July 10, 1787.<sup>53</sup> They believed that their instructions did not permit them to participate in creating a new Constitution.<sup>54</sup> Their departure had a significant effect. It left Alexander Hamilton as the sole deputy remaining from New York. Afterwards, Hamilton did not vote on questions before the Convention because he could not by himself represent New York’s delegation.<sup>55</sup> Accordingly, New York effectively had no formal voice in the proceedings after July 10.

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<sup>51</sup> 1 FARRAND’S RECORDS, *supra* note 1, at 452 (Madison’s Notes, Jun. 28, 1787) (statement of Benjamin Franklin).

<sup>52</sup> 2 FARRAND’S RECORDS, *supra* note 2, at 642-643

<sup>53</sup> *See* 2 JOHN R. VILE, *supra* note 9, at 852-83.

<sup>54</sup> *See id.*

<sup>55</sup> The Convention adopted a rule permitting a state to vote only when “fully represented.” *See* 1 FARRAND’S RECORDS, *supra* note 2, at 8 (Journal, May 28, 1787). This rule prevented Hamilton from voting on behalf of New York, but did not prevent him from speaking. At the close of the Convention, Hamilton signed the Constitution as a witness that the Convention was acting with the “unanimous consent of the states present.” U.S. Const. signatures. This affirmation was true; although New York did not consent, it was not “present” after Lansing and Yates departed, and therefore the Constitution was approved with the unanimous consent of the states present, an event that Hamilton witnessed.

Two other dissenters, Luther Martin and John Frances Mercer, came from Maryland. Martin wanted the Constitution to preserve state equality.<sup>56</sup> He also proposed the language that later became the Supremacy Clause as an alternative to a proposal that would have allowed Congress to veto state legislation.<sup>57</sup> Mercer was concerned that the Constitution did not sufficiently preserve state sovereignty.<sup>58</sup> Both men left the Convention before its conclusion and later opposed its ratification in Maryland.<sup>59</sup>

The disappointed included two deputies who stayed to the end of the Convention, but refused to sign the Constitution: George Mason of Virginia and Elbridge Gerry of Massachusetts. Although the details of their objections remain debated, both men generally worried that the Constitution would not protect individual liberty.<sup>60</sup> Mason also predicted that the issue of slavery would cause great trouble for the nation.<sup>61</sup>

Edmund J. Randolph of Virginia was famously unsure. He made two great contributions to the Convention. First, he formally proposed the Virginia Plan.<sup>62</sup> Second, while preparing the initial draft of the Constitution for the Committee of Detail, Randolph decided to “insert essential principles only”<sup>63</sup> and to “use simple and precise language and general propositions.”<sup>64</sup> These decisions did much to give the Constitution its enduring quality. Ultimately, however, Randolph did not sign the Constitution because he was unsure of its merits.<sup>65</sup>

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<sup>56</sup> See 1 FARRAND’S RECORDS, *supra* note 2, at 324 (recording that Martin “could never accede to a plan that would introduce inequality”).

<sup>57</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 29 (Madison’s Notes, Jul. 17, 1787).

<sup>58</sup> For example, Mercer and Luther both believed that state consent should be necessary before Congress introduce any federal force into a state. See 2 FARRAND’S RECORDS, *supra* note 2, at 317 (Madison’s Notes, Aug. 17, 1787).

<sup>59</sup> See 1 VILE, *supra* note 9, at 450, 477.

<sup>60</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 646-47 (Madison, Sept. 17, 1787) (describing Gerry’s objections); *id.* at 649 (noting Mason’s refusal to sign).

<sup>61</sup> See *id.*

<sup>62</sup> 1 FARRAND’S RECORDS, *supra* note 2, at 20 (Madison’s Notes, May 29, 1787).

<sup>63</sup> 2 FARRAND’S RECORDS, *supra* note 2, at 137 & n.6 (quoting a document found among George Mason’s papers).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 644, 646, 649 (Madison’s Notes, Sept. 17, 1787).

The absent included men whom the states had appointed to serve as deputies, but who did not attend the Convention. These absentees included famous figures such as Richard Henry Lee, Patrick Henry, Thomas Jefferson, John Adams, Samuel Adams, John Hancock, and others.<sup>66</sup>

### *C. What Happened at the Convention*

For ease of understanding what happened at the Constitutional Convention, the proceedings might be divided into seven chronological segments which each involved significant events:

#### *1. Period of May 14-29, 1787: The Deputies establish the rules and procedures of the Convention.*

Although the Convention was to start on May 14, 1787, no business took place until a quorum was gathered on May 25, 1787.<sup>67</sup> On that day, the deputies began their work by making important decisions about how they would proceed. They unanimously selected George Washington to serve as the Convention's president.<sup>68</sup> They then adopted rules governing the proceedings. These rules specified, among other things, that each state present and fully represented would have one vote;<sup>69</sup> that the proceedings would be kept secret;<sup>70</sup> and that the Convention could reconsider items already voted on.<sup>71</sup>

On May 29, 1787, Edmund Randolph offered 15 resolutions, each just one sentence in length.<sup>72</sup> These resolutions—which became known as the “Virginia Plan” for government—reflected the ideas of James Madison.<sup>73</sup> Under the Virginia Plan, the legislature would have two chambers, one directly elected by the people and the other nominated by the state legislatures.<sup>74</sup> The Plan generally favored

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<sup>66</sup> See 1 VILE, *supra* note 9, at 223.

<sup>67</sup> See 1 FARRAND'S RECORDS, *supra* note 2, at 3 (Madison's Notes, May 25, 1787).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* at 11 (Madison's Notes, May 28, 1787).

<sup>70</sup> See *id.* at 15 (Madison's Notes, May 28, 1787).

<sup>71</sup> See *id.* at 16 (same).

<sup>72</sup> See 1 FARRAND'S RECORDS, *supra* note 2, at 20-22 (Madison, May 29, 1787).

<sup>73</sup> See 1 VILE, *supra* note 9, at 816.

<sup>74</sup> See 1 FARRAND'S RECORDS, *supra* note 2, at 20 (“3. Resd. that the National Legislature ought to consist of two branches. 4. Resd. that the members of the first branch of the National Legislature ought to be elected by the people of the several States . . . . 5. Resold. that the members of the second branch of the National Legislature ought to be elected by

the states with large populations (Massachusetts, Pennsylvania, New York, and Virginia) because it called for proportional representation in both houses.<sup>75</sup> After Randolph made this proposal, the Convention decided to meet as a “Committee of the Whole” to deliberate over the Plan.<sup>76</sup> A committee of the whole is a committee that consists of all of the members of a deliberative body who are present.<sup>77</sup> A committee of the whole is typically used by an assembly for initial drafting of documents because its more flexible rules facilitate discussion.

2. *Period of May 30-June 19: The Committee of the Whole considers the Virginia Plan, the New Jersey Plan, the Hamilton Plan, and other fundamental matters.*

From May 30 to June 19, the deputies primarily met as a Committee of the Whole. On the first day when meeting as a Committee of the Whole, Gouverneur Morris urged James Randolph to modify his resolutions to include the following proposal: “Resolved, that a *national* government (ought to be established) consisting of a *supreme* Legislature, Executive, and Judiciary.”<sup>78</sup> The Committee of the Whole voted to adopt this resolution the same day.<sup>79</sup> With this action, the Committee of the Whole implicitly endorsed creating a new Constitution as the goal of the Convention, rather than merely amending the Articles of Confederation.

The deputies principally debated the Virginia Plan on June 13 and 14.<sup>80</sup> In this debate, the small states opposed the Virginia Plan because they believed that it eliminated state equality.<sup>81</sup> Following debate on the competing plans, the Committee of the Whole agreed on many ideas that made their way into the final version of the Constitution: a single executive, a supreme court and inferior courts created by Congress, a requirement that Congress guarantee the states a republican form of government, a requirement that members of state governments swear to uphold the Constitution, and a plan for states to ratify the Constitution

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those of the first, out of a proper number of persons nominated by the individual Legislatures . . . .”).

<sup>75</sup> *See id.*

<sup>76</sup> *See id.* at 23.

<sup>77</sup> *See* BLACK’S LAW DICTIONARY \_\_\_\_ (9th ed. 2009).

<sup>78</sup> 1 FARRAND’S RECORDS, *supra* note 2, at 33 (Madison’s Notes, May 30, 1787) (emphasis in original).

<sup>79</sup> *See id.* at 35 (Madison’s Notes, May 30, 1787).

<sup>80</sup> *See id.* at 232-237, 240 (Madison’s Notes, Jun. 13 & 14, 1787).

<sup>81</sup> *See id.*

in state ratifying conventions. These ideas were summarized in a report that was to be returned to the full Convention.<sup>82</sup> Following the preparation of this report, William Patterson of New Jersey and Alexander Hamilton of New York subsequently proposed their alternative plans for the government,<sup>83</sup> both of which are discussed above.

3. *Period of June 20-July 24: The Convention agrees to the Great Compromise and other Matters.*

During the period from June 20 to July 23, the deputies ceased meeting as a committee of the whole and met in full convention. Important debates about representation in the legislative branch followed. The large and small states initially could not agree on the composition of the legislative branch. Ultimately, a modified version of the Virginia plan became acceptable to the Convention after the deputies agreed to what has become known as the “Great Compromise” (or alternatively as the “Connecticut Compromise”). In this compromise, the states would have equal representation in the Senate, while the House would have proportional representation.<sup>84</sup> This compromise balanced the interests of large and small states. The Convention as part of this compromise adopted the 3/5ths rule, under which only 3/5ths of the slave populations would be counted for determining representation in the House.

In addition to the Great Compromise, the Convention at this time also addressed a variety of other important topics. They agreed, for example, that federal laws would be supreme over state laws,<sup>85</sup> that judges would be appointed by the President with the advice and consent of the second branch of the legislature,<sup>86</sup> and the federal government would guarantee that each state had a

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<sup>82</sup> See *id.* at 235-237.

<sup>83</sup> See *id.* at 242 (Madison’s Notes, Jun. 15, 1787) (introduction of Paterson’s Plan); *id.* at 291 (Madison’s Notes, Jun. 18, 1787) (introduction of Hamilton’s Plan).

<sup>84</sup> The 3/5ths Compromise linked direct taxation to representation in the popularly elected branch of the federal government. On July 12, 1787, the Convention agreed to the 3/5th rule as a principle to govern direct taxation. The Convention resolved “that the rule of contribution by direct taxation for the support of the government of the United States shall be the number of white inhabitants, and three fifths of every other description in the several States . . . .” 1 FARRAND’S RECORDS, *supra* note 2, at 589 (Journal, Jul. 12, 1787). On July 16, 1787, the Convention resolved that in one branch of the legislature “representation ought to be proportioned according to direct Taxation” and that “in the second Branch of the Legislature of the United States each State shall have an equal vote. See 2 FARRAND’S RECORDS, *supra* note 2, at 14 (Journal, Jul. 14, 1787).

<sup>85</sup> *Id.* at 22 (Journal, Jul. 17, 1787).

<sup>86</sup> See *id.* at 38 (Journal, Jul. 18, 1787).

republican form of government.<sup>87</sup> On July 23, 1787, with the general structure of the government settled, the Full Convention created a “Committee of Detail” to turn the plan into an initial draft of the Constitution.<sup>88</sup> The Full Convention recessed shortly afterward and waited for the Committee of Detail to perform its work.<sup>89</sup>

4. *Period of July 24-August 5: The Committee of Detail prepares a draft of the Constitution.*

The Committee of Detail met from July 24 to August 5, with Edmund Randolph and James Wilson doing most of the drafting.<sup>90</sup> The goal of the Committee was to put all of the matters approved by the Convention into the form of a constitution. When the Committee of Detail had finished its work, it had produced a draft containing 23 articles.<sup>91</sup> The draft produced was a cross between a list of resolutions and a document that looks like our current Constitution. It sent to a printer for distribution to all of the deputies.<sup>92</sup> In addition to describing the new Congress and the selection of its members, the Committee of Detail added the list of the congressional powers and the list of the limitations on state legislation.<sup>93</sup>

5. *Period of August 6-September 8: The Convention debates aspects of the Report of the Committee of Detail.*

From August 6 to September 8, the Full Convention debated the Committee of Detail’s draft and other important matters. They considered among many other questions topics such as limiting suffrage to property owners,<sup>94</sup> the problems of slavery,<sup>95</sup> and the need for each state to give full faith and credit to acts of the others.<sup>96</sup> During this time, the Convention referred some matters to separate committees, which met and reported back to the Convention. After reaching final

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<sup>87</sup> See *id.* at 39.

<sup>88</sup> See *id.* at 95 & n.10 (Journal, Jul. 23, 1787).

<sup>89</sup> See *id.* at 118.

<sup>90</sup> See VILE, *supra* note 9, at 105-106.

<sup>91</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 129-175 (Report of the Committee of Detail)

<sup>92</sup> See *id.* at 175 (McHenry’s Notes, Aug. 4, 2011).

<sup>93</sup> See *id.* at 143-145 (Committee of Detail)

<sup>94</sup> See *id.* at 201-207 (Madison’s Notes, Aug. 7, 1787).

<sup>95</sup> See *id.* at 221-223 (Madison’s Notes, Aug. 8, 1787).

<sup>96</sup> See *id.* at 486 (Journal, Sep. 4, 1787).

conclusions on most items, the Convention appointed a “Committee of Style and Arrangement” to prepare a draft putting the Constitution in a consistent and near final form.<sup>97</sup>

*6. Period of September 8-12: The Committee of Style and Arrangements prepares a near final draft of the Constitution*

From September 8 to 12, the Committee of Style and Arrangement, acting on the Convention’s decision, prepared a near final version of the Constitution.<sup>98</sup> Gouverneur Morris did much of the work, although the Committee also included James Madison, William Johnson, Rufus King, and Alexander Hamilton.<sup>99</sup> A printer made copies of the Committee’s draft for all of the deputies.<sup>100</sup> The Committee of Style had no authorization to alter the meaning of the Constitution.<sup>101</sup> But this does not mean that the Committee’s revisions are to be ignored. In *Nixon v. United States*,<sup>102</sup> the Supreme Court considered the phrase in Article I, section 2 giving the Senate “the sole power to try impeachments.”<sup>103</sup> The petitioner argued that the word “sole” had no substantive meaning because it was a “cosmetic edit” added by the Committee of Style.<sup>104</sup> The Supreme Court rejected this view, asserting “we must presume that the Committee’s reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. . . . We [conclude] that ‘the word “sole” is entitled to no less weight than any other word of the text, because the Committee revision perfected what “had been agreed to.” ’ ”<sup>105</sup>

*7. Period of September 12-17: The Convention debates the Committee of Style’s draft, makes slight modifications, and then approves the Constitution.*

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<sup>97</sup> See *id.* at 547 (Journal, Sep. 4, 1787).

<sup>98</sup> See *id.* at 565-580 (Draft of the Committee of Style and Arrangement).

<sup>99</sup> See 1 VILE, *supra* note 9, at 109.

<sup>100</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 585 (Madison’s Notes, Sep. 12, 1787)

<sup>101</sup> See *id.* at 553 (Madison’s Notes, Sep. 8, 1787) (noting that “A Committee was then appointed by Ballot to revise the stile of and arrange the articles which had been agreed to by the House,” which implies that the Committee did not have authorization to make changes that the Convention had not agreed upon).

<sup>102</sup> 506 U.S. 224 (1993).

<sup>103</sup> U.S. Const. art. I, § 3, cl. 6.

<sup>104</sup> *Nixon*, 506 U.S. at 231.

<sup>105</sup> *Id.* (quoting the respondent’s brief)



The Convention then proceeded to debate the Committee of Style's draft for several days. On September 12, 1787, George Mason and Elbridge Gerry proposed the inclusion of a declaration of individual rights.<sup>106</sup> The Convention quickly voted 10 states to none to reject this proposal after Roger Sherman briefly argued that the "State Declaration of Rights are not repealed" and that the national "Legislature may be safely trusted."<sup>107</sup> On September 17, 1787, following a number of minor modifications, the Convention approved the Constitution. All of the individual deputies who were still at the Convention, except for Elbridge Gerry, George Mason, and Edmund Randolph, signed the Constitution.<sup>108</sup> The Convention then adjourned.

Article VII says that the Constitution was approved "in Convention by the Unanimous Consent of the States present."<sup>109</sup> This statement is true, but it does not tell the whole story. Although the Constitution was approved by all states "present," it was not approved by Rhode Island or New York. Rhode Island did not approve the Constitution, but it was not "present" because it sent no deputies. New York also did not approve the Constitution but it also was not "present"; although Alexander Hamilton remained after Robert Yates and John Lansing departed, Hamilton could not represent the state by himself. This detail is somewhat concealed because Hamilton signed the Constitution, identifying himself as a deputy from New York. Hamilton could sign because the caption above the signatures on the Constitution says that the signers had "subscribed" their names merely in "witness" of the unanimous approval of the states presents; the signatures therefore were not the approval itself.<sup>110</sup>

#### D. *Records of the Constitutional Convention*

Although the Constitutional Convention met in secret, with the members agreeing not to discuss what took place,<sup>111</sup> we now know a great deal about what transpired during the proceedings. The Convention appointed Major William

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<sup>106</sup> See 2 FARRAND'S RECORDS, *supra* note 2, at 587–588 (Madison's Notes, Sept. 12, 1787).

<sup>107</sup> *Id.* at 588.

<sup>108</sup> See U.S. Const. signatures. Notice that Alexander Hamilton signed the Constitution as a *witness* from New York, even though New York's delegation did not approve the Constitution.

<sup>109</sup> U.S. Const. art. VII.

<sup>110</sup> See *id.*

<sup>111</sup> See 1 FARRAND'S RECORDS, *supra* note 2, at 15 (Journal, May 29, 1787) (recording that the Convention resolved "[t]hat nothing spoken in the House be printed, or otherwise published, or communicated without leave").

Jackson to serve as the secretary.<sup>112</sup> In this capacity, he kept an official Journal of the proceedings.<sup>113</sup> The Journal includes minutes of the full Convention and the proceedings as a Committee of a Whole. The minutes record the text of most of the resolutions before the Convention and the votes taken on them. Unfortunately, William Jackson made some mistakes in his record keeping. In addition, Jackson also omitted various important details, such as the dates of certain votes. Jackson also intentionally destroyed some of the records, either because he did not think them worth saving or because he was seeking to preserve secrecy. Professor Max Farrand, the great scholar of the Constitutional Convention, accordingly has cautioned: “With notes so carelessly kept, as were evidently those of the secretary, the Journal cannot be relied on absolutely.”<sup>114</sup>

In addition to the Journal, at least eight of the deputies kept notes. James Madison attended every day of the Convention, and took substantial notes on each day.<sup>115</sup> For the most part, the notes taken by other deputies merely supplement what is found in Madison’s notes. Madison wrote an introduction to his notes explaining how he had prepared them. He said:

In pursuance of the task I had assumed I chose a seat in front of the presiding member, with the other members on my right & left hands. In this favorable position for hearing all that passed, I noted in terms legible & in abbreviations & marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment & reassembling of the Convention I was enabled to write out my daily notes . . . during the session or within a few finishing days after its close . . . in the extent and form preserved in my own hand on my files.<sup>116</sup>

Professor Farrand has noted an aspect of Madison’s notes that deserves special attention. Madison published the notes late in life, when his memory of the Convention may have faded somewhat. To refresh his recollection, he relied on William Jackson’s Journal to make revisions. In so doing, he may have introduced errors.<sup>117</sup>

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<sup>112</sup> See *id.* at 6 (Yates’s Notes, May 25, 1787).

<sup>113</sup> See *id.* at xi-xiv (describing the Journal).

<sup>114</sup> See *id.* at xiii.

<sup>115</sup> See *id.* at xv-xix (describing Madison’s notes).

<sup>116</sup> See *id.* at xvi (quoting Madison’s introduction).

<sup>117</sup> See *id.* at xvii-xviii.

Although Madison took the most complete notes, the historical record also includes notes taken by seven other deputies. These deputies include:

- Alexander Hamilton of New York, who kept brief notes on eight days of the convention;<sup>118</sup>
- Rufus King of Massachusetts, who took extensive notes on 18 days of the convention;<sup>119</sup>
- George Mason of Virginia, who took only a few pages of notes;<sup>120</sup>
- James McHenry of Maryland, who took extensive notes before June 1, 1787 and after August 5th (but none in between because he was absent attending to an ill relative);<sup>121</sup>
- William Paterson of New Jersey, who made a variety of notes over the course of the Convention;<sup>122</sup>
- William Pierce of Georgia, who kept brief but interesting notes at the start of the Convention;<sup>123</sup> and
- Robert Yates of New York, who took notes consistently from May 31, 1787 until July 5, 1787.<sup>124</sup>

#### *D. Publication of the Records*

The Convention, as explained above, decided that its deliberation should remain secret. William Jackson's journal and the notes taken by the various deputies, accordingly, were kept confidential for many years following the Constitutional Convention. Jackson turned his journal over to George Washington, who in turn gave it to the Department of State. The Department of State held the Journal for many years. Not until 1819 was the Journal—as edited by John Adams at the direction of Congress—first published.<sup>125</sup> Yates published

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<sup>118</sup> *See id.* at xxi.

<sup>119</sup> *See id.* at xix.

<sup>120</sup> *See id.* at xxi.

<sup>121</sup> *See id.* at xx.

<sup>122</sup> *See id.* at xxi

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at xiv.

<sup>125</sup> *See id.* at xiv.

his notes in 1821.<sup>126</sup> Madison's notes were published posthumously in 1840. All of the other notes became public at later dates.<sup>127</sup>

Between 1894 and 1905, the Bureau of Rolls and Library at the U.S. State Department compiled *The Documentary History of the Constitution of the United States of America, 1786-1870*, a five-volume work that among other things collected almost all of the known notes and records of the Constitutional Convention.<sup>128</sup>

In 1911, Professor Max Farrand of Yale University prepared a 3-volume collection of all the known notes and similar documents from the Convention called *The Records of the Federal Convention of 1787*.<sup>129</sup> *Farrand's Records* is a highly influential and accurate collection of the notes and records of the Constitutional Convention. Professor Farrand for the first time placed the materials in chronological order, interspersing the journal entries and the notes taken by the various deputies. This organization facilitated attempts to follow the events of the convention as they unfolded. He tracked down numerous other sources in addition to the notes, such as correspondence by the deputies shedding light on the Convention's actions. He also addressed and clarified a large number of ambiguities in the notes.

Volume 1 of *Farrand's Records* includes a very helpful introduction followed by materials from the Convention, such as excerpts from Madison's notes and the Journal, that start on May 25, 1787, and run until July 13, 1787. Volume 2 includes materials from July 14, 1787, until the Convention ended on September 17, 1787. Volume 3 includes supplementary materials, such as copies of the Virginia Plan, New Jersey Plan, the Hamilton Plan, and various drafts of the Constitution. In 1937, the three original volumes were reprinted and a fourth volume with even more supplementary materials was added.<sup>130</sup> In 1987, James H. Hutson, with the assistance of Leonard Rapport, prepared a *Supplement to Max Farrand's the Records of the Federal Convention of 1787*,<sup>131</sup> which included various

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<sup>126</sup> See *id.* at xii.

<sup>127</sup> See *id.* at xiv.

<sup>128</sup> *The Documentary History of the Constitution of the United States of America, 1786-1870* (1894-1905) (five volumes). This work is available for free at the Google Books website. For more on the history see 1 FARRAND'S RECORDS, *supra* note 2, at xii n.8.

<sup>129</sup> See FARRAND'S RECORDS, *supra* note 2.

<sup>130</sup> See 4 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1937).

<sup>131</sup> SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987).

additional letters and other works, including George Washington's diary during the Convention. Because of its comprehensive collection, chronological organization, and attention to detail, *Farrand's Records* and its supplements are the preferred sources of the courts and most scholars. As explained in the Appendix, the Library of Congress's website includes a copy of the 1911 edition of Farrand's work, in both an image format and a searchable text format; accordingly, it is now much easier to located relevant information in the records than in the past.<sup>132</sup>

One final very practical matter merits brief mention: Because almost all courts and law review articles rely on Max Farrand's *Records*, questions often arise about how to cite them. I recommend that writers use the general *Bluebook* citation form for multivolume books with an editor<sup>133</sup> followed by two optional but very helpful parenthetical phrases. The first parenthetical phrase should identify the source of the record (*e.g.*, "Madison's Notes," "Journal," etc.) and the date of the record. The second parenthetical should identify the speaker if a speaker is being quoted. In addition, because the title of the multivolume work is so long that it would be cumbersome to repeat it in subsequent citations, I also recommend establishing a shortened form for referring to it.<sup>134</sup> The typical short form, used in the *Harvard Law Review* and elsewhere, is "FARRAND'S RECORDS." Consider for example an article citing the following remark of George Mason as recorded by James Madison on July 18, 1787: "The mode of appointing Judges may depend in some degree on the mode of trying impeachments, of the Executive." A citation for this quotation might take the following form:

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41-42 (Max Farrand ed., 1911) [hereinafter 2 FARRAND'S RECORDS] (Madison's Notes, Jul. 18, 1787) (statement of George Mason).

Subsequent citations then would cite the work using the short form of "2 FARRAND'S RECORDS."

### **III. Theory and Practice of Citing the Records of the Constitutional Convention as Evidence of the Original Meaning of the Constitution**

#### *A. History of Citing the Records*

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<sup>132</sup> See Library of Congress, *Farrand's Records*, <<http://memory.loc.gov/ammem/amlaw/lwfr.html>> (visited Feb. 5, 2012).

<sup>133</sup> See *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 107-108 (Columbia Law Review Ass'n et al. eds., 7th ed. 2000) (Rules 15.1.1 & 15.1.2).

<sup>134</sup> See *id.* at 43 (Rule 4.2(b)).

Judicial opinions did not rely on the records of the Constitutional Convention during early years for the simple reason that judges and lawyers did not have access to the records. As noted above, the most significant of these records, Madison's notes, were first published in 1840. But once the records of the Convention became public, judges began to cite them for evidence of the meaning of the Constitution. In 1854, the Supreme Court cited Madison's notes in *Pennsylvania v. Howard*.<sup>135</sup> In that case, the Court rejected a challenge under the Ex Post Facto Clause<sup>136</sup> to the retroactive application of a state inheritance statute. In its opinion, the Court cited Madison's notes for evidence that the Framers did not intend the clause to apply to civil laws. The Court said: "The debates in the federal convention upon the constitution show that the terms 'ex post facto laws' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap. 1399, 1450, 1579."<sup>137</sup>

The Supreme Court has continued to cite the records of the Convention in the modern era. In the past four decades, the Supreme Court has referred to them in at least 71 cases.<sup>138</sup> Many of the Court's landmark constitutional decisions rely heavily on them. In *Buckley v. Valeo*,<sup>139</sup> for example, the Supreme Court held among many other things that only the President may appoint officers of the United States.<sup>140</sup> In its reasoning, the Court considered but rejected an argument that this holding would contradict the intent of the Framers by making Congress inferior to the executive and judicial branches.<sup>141</sup> The Court said: "[T]he debates of the Constitutional Convention . . . are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."<sup>142</sup> The Court supported this assertion with numerous references to Madison's notes.<sup>143</sup> Similarly, in *U.S. Term Limits, Inc. v. Thornton*,<sup>144</sup> both the majority and dissent relied on the records of the

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<sup>135</sup> 58 U.S. (17 How.) 456 (1854).

<sup>136</sup> U.S. Const. art. I, § 9, cl. 1.

<sup>137</sup> 58 U.S. at 463.

<sup>138</sup> WestLaw's SCT database was searched for "farrand & date(aft 1/1/1982)." The results were reviewed to confirm that the "Farrand" cited was the editor of the *Farrand's Records*.

<sup>139</sup> 424 U.S. 1 (1976).

<sup>140</sup> *Id.* at 125-126.

<sup>141</sup> *Id.* at 128-129.

<sup>142</sup> *Id.* at 129.

<sup>143</sup> *See id.* at 129-131 & nn. 168-172.

<sup>144</sup> 514 U.S. 779 (1995).

Constitutional Convention in reviewing a state law that limited the ability of Congressional incumbents to have their names appear on ballots.<sup>145</sup>

Lower courts also regularly cite the records of the Constitutional Convention. More than 230 cases in the past four decades have relied on them.<sup>146</sup>

As one might expect, jurists generally known for taking an originalist perspective on constitutional issues—like Judge Frank Easterbrook and retired Judge Robert H. Bork—have cited the records in their opinions.<sup>147</sup> Perhaps more interestingly, jurists not generally considered originalists—like Judge Stephen Reinhardt or retired Judge Patricia Wald—also have relied on the records.<sup>148</sup> Academic authors also pay a great deal of attention to the records of the Constitutional Convention, and have cited them in thousands of law review articles that address nearly every constitutional issue imaginable.<sup>149</sup>

B. *How the Records of the Constitutional Convention Have Been Cited as Evidence of the Original Intent of the Framers*

As odd as this proposition at first may sound, the Constitution in some instances may have had more than one “original meaning.” Specifically, the Framers (*i.e.*, the deputies at the Federal Constitutional Convention in Philadelphia) may have intended the Constitution to have one meaning, the participants at the state ratifying conventions may have understood it to have a slightly different meaning, and the words and phrases in the Constitution may have had a still different objective meaning based on the customary usage of language at the time. Other works have identified several specific examples of this phenomenon.<sup>150</sup> Substantial debates have existed for a long time over whether one of these types original meanings or any of them should control interpretation of the constitution.<sup>151</sup> Some writers have argued that the original intent of the

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<sup>145</sup> See *id.* at 790 (citing “2 Records of the Federal Convention of 1787, pp. 249-250 (M. Farrand ed. 1911”).

<sup>146</sup> Westlaw’s ALLCASES database was searched for “farrand /10 records & date(aft 1/1/1972).”

<sup>147</sup> See, *e.g.*, *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Com’n*, 838 F.2d 536 (D.C. Cir. 1988) (Bork, J.); *City of Milwaukee v. Yeutter*, 877 F.2d 540 (7th Cir. 1989) (Easterbrook, J.).

<sup>148</sup> See, *e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (Reinhardt, J.); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (Wald, J.).

<sup>149</sup> Westlaw’s JLR database was searched for “farrand w/10 records.”

<sup>150</sup> See Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 NYU Journal of Law & Liberty 494, 499-500 (2009)

<sup>151</sup> See *id.* at 500-501.

Framers is the most important,<sup>152</sup> others believe it is the original understanding of the ratifiers,<sup>153</sup> still others have said that it is the original objective meaning,<sup>154</sup> and of course some may contend that the original meaning should not control modern interpretation of the Constitution.<sup>155</sup>

This essay does not seek to enter the controversy over which original meaning, if any, is most significant. Instead, it will suffice to point out that most writers who cite the records of the Constitutional Convention claim that the records provide evidence of the original intent of the Framers, as opposed to the original understanding of the ratifiers or the original objective meaning of the Constitution. Their theory for citing the records to show the Framers' intent is not often articulated, but it presumably rests on the reasoning that the most direct way to determine what the Framers intended—given that we cannot ask them now—is to look at the comments, suggestions, arguments, and other remarks that they made while drafting and approving the Constitution. (The following section of this part considers possible, although limited, ways in which the records alternatively might provide evidence of the original understanding of the ratifiers or the original objective meaning.)

Making claims about the original intent of the Framers based on the records of the Constitutional Convention unfortunately is usually not a simple exercise. It would be very convenient for us now if at the Convention James Madison,

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<sup>152</sup> See Edwin Meese III, *Speech Before the American Bar Association (July 9, 1985)*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 53 (Steven Calabresi ed., 2007); Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1024 (1991-1992).

<sup>153</sup> James Madison, for example, wrote: "[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution." 5 Annals of Cong., *supra* note 17, at 776 (1796) (remarks of James Madison on April 6, 1796).

<sup>154</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts* in INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) ("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.").

<sup>155</sup> See *supra* note 8 (citing classic examples).



Gouverneur Morris, James Wilson, or some other deputy had made succinct speeches defining each of the terms in the Constitution, giving examples of how they should apply in a variety of situations, and then asking for and receiving some indication that the majority of the other deputies concurred. But that did not happen often. The deputies very rarely explicitly defined terms or addressed ambiguities. And they did not take votes about the correctness of everything that was said.

As a result, writers using the records to make claims about what the Framers intended usually must rely on indirect clues and logical reasoning for support. It would be impossible to attempt to list and describe all of the different kinds of evidence and kinds of reasoning writers have used or could use. But what follows are four of the most common types of reasoning used by judges and academics when making assertions about how the records of the Convention show the Framers' Intent:

1. *Reliance on Arguments Made in Support of Provisions that Ultimately Were Included in the Constitution.*

Sometimes courts and other writers make claims about the Framers' intent with respect to particular constitutional provisions by citing arguments that deputies had made in support of those provisions. For example, in *United States v. International Business Machines Corp.*,<sup>156</sup> the Supreme Court had to decide whether the Export Clause prohibited imposing a federal tax on insurance policies covering exported goods. The Export Clause says: "No Tax or Duty shall be laid on Articles exported from any State."<sup>157</sup> The government argued for a narrow interpretation of the Export Clause that would allow the Court to uphold the tax.<sup>158</sup> But the Court concluded that the Framers had intended to deny Congress the power to tax exports at all, and therefore that Congress could not tax the insurance policies.<sup>159</sup> In reaching this conclusion, the Court cited statements made by deputies who spoke in favor of adopting the clause. The Court said:

While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is

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<sup>156</sup> 517 U.S. 843 (1996).

<sup>157</sup> U.S. Const. art. I, § 9, cl. 5.

<sup>158</sup> 517 U.S. at 859.

<sup>159</sup> *Id.* at 859-860.

evident in the language. *See, e. g.*, 2 Farrand, Records of the Federal Convention . . . at 220 (Mr. King: “In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited-exports could not be taxed”); *id.*, at 305 (“Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports”); *id.*, at 360 (Mr. Ellsworth [sic]: “There are solid reasons agst. Congs taxing exports”); *ibid.* (“Mr. Butler was strenuously opposed to a power over exports”); *id.*, at 361 (Mr. Sherman: “It is best to prohibit the National legislature in all cases”); *id.*, at 362 (“Mr. Gerry was strenuously opposed to the power over exports”).<sup>160</sup>

Notice in this passage that none of the speakers quoted directly said anything like “the clause we are adopting imposes a complete ban on federal taxes on exports.” What each of the quoted speakers said instead indicated that they supported a complete ban such taxes. The Court’s unspoken logical inference is that the arguments of these speakers prevailed and, in the Export Clause that was ultimately adopted, they achieved what they wanted: a complete ban on taxes on exports.

The theory for citing arguments made by persons who supported a constitutional provision as evidence of the provision’s intended meaning is familiar to anyone who studies legislative debates. When a provision is debated and then approved, it is usually the people who supported the provisions whose views prevailed and whose views therefore reflect the majority’s sentiments. This theory may not be true in all cases because supporters of a provision may have different understandings of the provision or because compromises may have been necessary to obtain passage. But the theory is not an uncommon or baseless generalization.

2. *Reliance on the Rejection of Arguments Made Against Provisions that were Ultimately Included in the Constitution.*

Sometimes writers rely on the rejection of arguments made by opponents of constitutional provisions to determine the meaning of those provisions. For example, when a prohibition on ex post facto laws was proposed, Oliver Ellsworth and James Wilson argued against including the prohibition on grounds that the ex

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<sup>160</sup> *Id.* at 860.

post facto law violated principles of natural law and that it was therefore unnecessary to include them.<sup>161</sup> Madison documented the arguments as follows:

Mr. ELSEWORTH contended that there was no lawyer, no civilian who would not say that ex post facto laws are void of themselves. It can not then be necessary to prohibit them.

Mr. WILSON was against inserting any thing in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so . . . .<sup>162</sup>

Dr. William Johnson went further, and argued that including an express prohibition on ex post facto laws would be dangerous because it might suggest that Congress would pass improper laws if not restrained:

Doc'r JOHNSON thought the clause unnecessary, and implying an improper suspicion of the National Legislature.<sup>163</sup>

The Convention, however, apparently rejected all of these arguments against including express prohibitions against ex post facto clauses because the Ex Post Facto clauses were included in the Constitution.<sup>164</sup> Professor Susannah Sherry concludes from the debate: “This exchange strongly suggests that the deputies, who by this time understood that they were enacting fundamental law, did not intend to enact positively all existing fundamental law, instead relying on unwritten natural rights to supplement the enacted Constitution.”<sup>165</sup> In other words, the rejection of the arguments of the opponents of the clauses, according to Professor Sherry, indicated that the deputies as a whole did not think that by expressing some protections in the Constitution, they were necessarily excluding unstated protections.

Notice here again the evidence for the conclusion about the Framers’ intent is indirect. No one said expressly: “When we include some rights expressly in the Constitution, we do not mean to suggest that other rights are not protected.” But Professor Sherry infers this to be the case because the Convention rejected the

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<sup>161</sup> See 2 FARRAND’S RECORDS, *supra* note 2, at 376 (Madison’s Notes, Aug. 22, 1787).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See U.S. Const. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

<sup>165</sup> Susannah Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1158 (1987).

arguments of those who said that such a suggestion would be implicit. The theory here is that the Framers' intent differs from the views of those who opposed provisions that were adopted. The theory must rest on the idea that, if the opponents' arguments had been accepted, then the provisions would not be adopted. Again, while this may sometimes be an overgeneralization, it is a common type of argument when attempting to discern the intent of a deliberative body.

### 3. *Reliance on Negative Inferences Drawn from Proposals that were Rejected by the Convention*

In some instances, writers rely on proposals rejected by the Constitutional Convention to show the Framers' intent. For example, in *Kawakita v. United States*, a person holding Japanese and American citizenship challenged his conviction for treason for actions taken in Japan during World War II.<sup>166</sup> He argued that treason against the United States cannot be committed abroad by an American with a dual nationality. Relying heavily on the records of the Constitutional Convention, the Supreme Court rejected the argument, saying:

The definition of treason . . . contained in the Constitution contains no territorial limitation. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. \* \* \* " Art. III, § 3. A substitute proposal containing some territorial limitations was rejected by the Constitutional Convention. See 2 Farrand, *The Records of the Federal Convention*, pp. 347-348. . . . We must therefore reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them.<sup>167</sup>

The cited excerpt from records says the following:

Mr. Govr Morris and Mr Randolph wished to substitute the words of the British Statute & moved to postpone Sect. 2. art VII in order to consider the following substitute—"Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of Treason, it is therefore ordained, declared & established, that if a man do levy war agst. the U. S. *within their territories*, or be adherent to the enemies of the U. S.

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<sup>166</sup> 343 U.S. 717 (1952).

<sup>167</sup> *Id.* at 732.

*within the said territories, giving them aid and comfort within their territories or elsewhere, and thereof be provably attainted of open deed by the People of his condition, he shall be adjudged guilty of Treason”>*

On this question: N.H. Mas- no. Ct. no. N. J- ay Pa. no. Del. no. Md. no. Va.- ay. N. C. no- S. C. no. Geo- no. [Ayes -- 2; noes -- 8.]<sup>168</sup>

Notice that the deputies did not expressly resolve that treason was a crime that might be committed anywhere in the world. Instead, they rejected a proposal that would have expressly established that the crime of treason can be committed only within the territory of the United States. The Court infers from the rejection of this proposal that the Convention did not want to impose any territorial limitations. Again, the logic is not iron-tight; it could be that the Convention rejected the proposal for reasons other than the proposed territorial limitation. Still, the inference drawn by the Supreme Court is one commonly drawn when looking at evidence of this type.

4. *Reliance on Comparisons of Different Draft Versions of Provisions Ultimately Included in the Constitution.*

Various parts of the Constitution went through multiple drafts before reaching their final forms. Sometimes judges and other writers draw inferences from changes made in these various drafts. For example, in *Utah v. Evans*,<sup>169</sup> the Supreme Court had to determine the meaning of the term “actual enumeration” in the Census Clause.<sup>170</sup> The State of Utah challenged the method by which the Census Bureau was gathering its data. Utah argued that the words “actual Enumeration” required the Census Bureau to seek out each individual that the Census Bureau counted and therefore contended that the Census Bureau therefore could not rely upon “imputation” or the completion of data by making assumptions.<sup>171</sup> The Court rejected this view, focusing on how the words “actual enumeration” came to appear in the final draft. The Court said:

The history of the constitutional phrase supports our understanding of the text. The Convention sent to its Committee of Detail a draft stating that Congress was to “regulate the number of representatives

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<sup>168</sup> 2 FARRAND’S RECORDS, *supra* note 2, at 347-348 (Madison’s Notes, Aug. 20, 1787) (emphasis added and footnote omitted).

<sup>169</sup> 536 U.S. 452 (2002).

<sup>170</sup> U.S. Const. art. I, § 2, cl. 3.

<sup>171</sup> *See* 536 U.S. at 473-74.

by the number of inhabitants, . . . which number shall . . . be taken in such manner as . . . [Congress] shall direct.” 2 M. Farrand, Records of the Federal Convention of 1787, pp. 178, 182-183 . . . . After making minor, here irrelevant, changes, the Committee of Detail sent the draft to the Committee of Style, which, in revising the language, added the words “actual Enumeration.” *Id.*, at 590, 591. Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style “had no authority from the Convention to alter the meaning” of the draft Constitution submitted for its review and revision. . . . Hence, the Framers would have intended the current phrase, “the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct,” as the substantive equivalent of the draft phrase, “which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.” 2 Farrand 183.<sup>172</sup>

In other words, the language initially approved by the Convention did not use the words “actual enumeration.” These words were added by the Committee of Style, a committee that was directed not to change any meanings. The inference therefore is that even though the clause uses the words “actual enumeration,” the Framers intended the clause to mean the same thing that it would have meant if it did not contain these specific words. While that was the conclusion of the Supreme Court in this case, other changes in the language of drafts, however, might indicate that the framers intended to change the meaning of other provisions of the Constitution.

The foregoing examples show just four ways that courts and scholars have relied on the records of the Constitutional Convention in making claims about the Framers’ intent. These four ways are not the only ways that the records may be used, but they are among the most common. Certainly other writers, using logic and ingenuity, may find additional ways to make inferences about what the Framers intended based on the Records.

*C. How the Records of the Constitutional Convention have been used as Evidence of the Original Understanding of the Ratifiers or as Evidence of the Original Objective Meaning of the Constitution*

Although the records of the Constitutional Convention are mostly relied on to support claims about the original intent of the Framers, the records also might provide limited evidence of the original understanding of the ratifiers and of the original objective meaning of the Constitution.

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<sup>172</sup> *Id.* at 475-476.

The best evidence of the original understanding of the ratifiers comes from the records of the state ratifying conventions.<sup>173</sup> But those records are not the only evidence. An argument that the records of the Convention might be relevant is the following: Deputies to the federal Convention also served as delegates to the state ratifying conventions in every state except Rhode Island.<sup>174</sup> Their views, accordingly, represent not only the views of the Framers, but also the views of at least some of the ratifiers.<sup>175</sup> Indeed, they may reflect the ideas of some of the most important ratifiers because many of these deputies played very important roles at the state conventions. It is thus probably not a stretch to imagine that their understanding of the Constitution helped to shape the understanding of others at the ratifying conventions. Thus, even though the Records of the Constitutional Convention were not published until later, they may provide some indirect evidence about what the ratifiers were thinking.

One example comes from *U.S. Term Limits, Inc. v. Thornton*.<sup>176</sup> In that case, the Court discussed at considerable length what the ratifiers of the Constitution thought about the need for “rotation” of public officials by limiting the maximum years or terms that they could remain in office. The Court said:

The draft of the Constitution that was submitted for ratification contained no provision for rotation. In arguments . . . opponents of ratification condemned the absence of a rotation requirement, noting that “there is no doubt that senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and their attachments to the people.” Even proponents of ratification expressed concern about the “abandonment in every instance of the necessity of rotation in office.” At several ratification conventions, participants proposed amendments that would have required rotation.<sup>177</sup>

While this passage was addressing the understanding of the ratifiers, the Court bolstered its assertions with a footnote citing the records of the Constitutional Convention. The footnote said in part: “A proposal requiring rotation for Members of the House was proposed at the Convention, see 1 Farrand 20, but was defeated

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<sup>173</sup> See Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the Constitution*, *supra* note 3, at 482.

<sup>174</sup> See *infra* appendix B.

<sup>175</sup> See *id.*

<sup>176</sup> 514 U.S. 779 (1995).

<sup>177</sup> *Id.* at 812-813 (footnotes omitted).

unanimously, *see id.*, at 217.”<sup>178</sup> The thought in including this footnote appears to have been that it lends credibility to claims about the original understanding of the ratifiers to point out that their asserted understanding matches the intent of the Framers, especially when so many of the Framers participated in ratification debates.

The records of the Constitutional Convention also may provide some evidence of the original objective meaning of the Constitution. This meaning, as discussed above, is the meaning that the public would have attached to the words and phrases in the Constitution based on their ordinary meanings and context. Courts often rely on period dictionaries to determine the objective meaning of words. But they can also make inferences about the meaning by examining texts of all sorts from the period. Because the Records of the Constitutional Convention are from the relevant era, they thus can provide some evidence of the original objective meaning.

For example, in seeking to determine the original objective meaning of the term “commerce” in the Commerce Clause,<sup>179</sup> Professor Randy Barnett looked at a wide variety of period sources to see how the word was used.<sup>180</sup> These sources included the other text in the Constitution, contemporary dictionaries, the Federalist Papers, notes from the state ratification debates, early judicial interpretations, and in addition all of these, record of the constitutional convention. Professor Barnett says in part:

In Madison's notes for the Constitutional Convention, the term “commerce” appears thirty-four times in the speeches of the delegates. Eight of these are unambiguous references to commerce with foreign nations which can only consist of trade. In every other instance, the terms “trade” or “exchange” could be substituted for the term “commerce” with the apparent meaning of the statement preserved. In no instance is the term “commerce” clearly used to refer to “any gainful activity” or anything broader than trade.

Professor Barnett is not making any claims about what the Framers subjectively intended the Commerce Clause to mean. Instead, he is just looking at how the

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<sup>178</sup> *Id.* at 812 n.22.

<sup>179</sup> *See* U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

<sup>180</sup> *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 111-25 (2001).



people of the period, including the Framers, used the word “commerce” in order to determine its objective meaning. The theory is apparently that the records of the constitutional convention provide a substantial body of linguistic evidence of how words and phrases—especially the words in phrases in the Constitution—were used. This body of linguistic evidence may be considered along with other evidence to determine the objective meaning of the words in the Constitution at the time of its adoption.

#### **IV. Potential Grounds for Impeaching Claims about the Original Meaning of the Constitution that Rely on the Records of the Constitutional Convention**

Many lawyers, judges, and scholars correctly approach the records of the Constitutional Convention with a degree of awe. The records preserve the thoughts of the great figures of the founding era as they were drafting and debating the nation’s most fundamental legal document. Perusing the records, accordingly, is almost like joining the framers at the Constitutional Convention, facing with them the great issues, and watching as the framers work through them.

The august provenance of the records, however, should not blur careful thought about their use as evidence of the original meaning of the Constitution. Some writers fall into the mistake of thinking that, because a particular passage appears in the notes and records of the Convention, the passage offers definitive proof about what the Constitution means. In reality, statements taken from the notes and records of the Constitutional Convention do not always provide unassailable evidence of the original meaning. In fact, when someone makes an argument about the original intent of the Framers that relies on the records of the convention to support a controversial claim, it is not uncommon for someone else to disagree about whether the evidence supports the claim.

The following paragraphs identify six important potential grounds for impeaching claims made about the original meaning of the Constitution based on passages taken from the records of the Constitutional Convention. Not all claims about the original meaning suffer from the weaknesses identified by this list of grounds for impeachment. In addition, each of the identified grounds is also subject to significant limitations or counter arguments. Yet, a good practice would be for any writers making assertions based on the records, or any readers assessing the assertions of others, to consider in each case whether any of these potential criticisms is applicable.

1. *The claim relies on specific words included in the records without recognizing that the records are not a verbatim account of what was said at the Convention.*

Writers sometimes rely on the specific words used in the records of the Constitutional Convention when making claims about the original meaning of the Constitution. For example, in *Nixon v. Sirica*, a case involving President Richard Nixon, Judge MacKinnon placed special emphasis on Gouverneur Morris's use of the word "after" in a statement about the relationship between a criminal trial and an impeachment.<sup>181</sup> Judge MacKinnon wrote:

The contemporaneous view of the Framers clearly supports the view that all aspects of criminal prosecution of a President must follow impeachment. For example, Gouverneur Morris stated during the debates on impeachment that:

A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment.

2 Farrand, Records of the Federal Convention 500 (rev. ed. 1966) (emphasis added).<sup>182</sup>

A potential ground for questioning claims of this sort is that the deputies who took notes at the Convention could not and did not make verbatim transcripts of what was said at the Convention. In most instances, for this reason, no one can know for certain whether the notes record the specific words that the deputies used when debating the Constitution. James Madison, who kept the most thorough records, prefaces his account with this important warning:

It may be proper to remark, that, with a very few exceptions, the speeches were neither furnished, nor revised, nor sanctioned, by the speakers, but written out from my notes, aided by the freshness of my recollections.<sup>183</sup>

For this reason, Madison's notes seldom provide an exact account of the various deputies' views on particular issues.

In the quotation of Gouverneur Morris above, Madison may not have captured Morris's exact words. For example, Morris might have said something

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<sup>181</sup> 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part).

<sup>182</sup> *Id.*

<sup>183</sup> 3 FARRAND'S RECORDS, *supra* note 2, at 550 (James Madison's preface to his notes).

lengthy like: “A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments is that two separate trials are possible. The Senate can try the impeachment and remove the President from office, and the courts can try the President separately on any criminal charges and put him in prison.” Madison may have abbreviated this longer statement by simply saying the courts would try the President “after” the trial of impeachment. The abbreviation would not be wholly accurate, but abbreviations by definition are not never a complete account of something.

We know that Madison’s notes plainly omit much of what the Deputies said during debates. James H. Hutson has calculated that in the month of June, when Madison took the greatest volume of his notes, he wrote down on average only 2,740 words per session.<sup>184</sup> A person speaking at the normal speaking rate of 180 words per minute could say all of these words in about 15 minutes.<sup>185</sup> The deputies surely must have said much more during their day long meetings, but we will never know exactly what they said.

Even when the various note takers sought to memorialize what their fellow deputies were saying, they clearly did not copy every word verbatim. We know this because the notes often disagree about what exactly was said. A good example concerns the Constitution’s provision saying that “Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.”<sup>186</sup> In attempting to discern the original intention of the Framers, Professor David Engdahl has observed that the Convention records offer conflicting accounts of its drafting. He explains:

Madison . . . reports that the motion used the word “institute,” not “constitute.” “Institute” also was the word Dickinson used in the earlier comment that prompted the Wilson-Madison motion. Accounts of the same motion in the Journal and in Yates’s notes use the word “appoint” instead. Moreover, Madison reports that discussion of the motion took place in terms of “establishing” such courts. Both the Journal and Madison show the word “appoint” being used when the proposition was reaffirmed on July 18th; and

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<sup>184</sup> James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34 (1986).

<sup>185</sup> *See id.*

<sup>186</sup> U.S. Const. I, § 8, cl. 9.

“appoint” was the word employed in the resolution as referred to the Committee of Detail.<sup>187</sup>

This kind of disagreement, needless to say, makes it difficult to rely on any of the words quoted on the subject.

Another factor may contribute to a discrepancy between what was actually said and what Madison’s notes record: Madison appears to have expanded many of his own remarks at the Convention. In several instances, Madison’s accounts of his speeches may take multiple pages, while other note takers may summarize them in just a few lines. James H. Hutson hypothesizes that Madison spoke extemporaneously, and then wrote down and augmented his remarks after each session was completed.<sup>188</sup> Given that Madison took the most notes and did the second most talking, this shortcoming of the notes has substantial significance.

For these reasons, anyone reading the notes should avoid placing excessive weight on any particular choice of words. The quotations may not be entirely accurate. This caveat, however, does not mean that the notes are completely unreliable. Scholars and judges stand on firmer ground when they cite the notes as evidence of what the deputies were generally thinking. They are on weakest ground when they assume that direct quotation of the words used in the notes proves exactly what the deputies said.

To return to the example above, given the general nature of his remarks, it appears that Gouverneur Morris was arguing that both the Senate and the courts should be involved when the President is accused of committing a crime because two separate trials are necessary. The issue of whether the criminal trial should come before or after the Senate’s trial of the impeachment is not central to his argument. (It is certainly possible for a criminal trial to occur before an impeachment; although a President has not faced criminal charges, federal judges have been tried and convicted of criminal offenses in court before ever being tried by the Senate and removed from office.<sup>189</sup>) For this reason, although excessive reliance on the word “after” in Morris’s quotation may be questionable, reliance on the general idea that there should be two trials, one in the Senate and one in the courts, is much less so.

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<sup>187</sup> David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 105-106 (footnotes omitted).

<sup>188</sup> See Hutson, *supra* note 184, at 35.

<sup>189</sup> See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (concerning the impeachment of a federal district judge after he had criminally convicted).

2. *The claim relies on particular statements in the records of the Convention without recognizing that the records also contain contradictory statements.*

The Convention records are numerous, they are not verbatim, and they include the works of several different participants. For these reasons, perhaps unsurprisingly, the records contain numerous contradictory statements. For example, consider the provision in Article III giving federal courts jurisdiction over cases “arising under laws of the United States.”<sup>190</sup> One question, discussed by Steward Jay, is whether the Framers intended the term “laws of the United States” to include only federal legislation or whether the term includes both federal legislation and federal common law.<sup>191</sup> A proponent of the idea that the Framers were thinking only about statutes might cite the Journal for evidence of the original intent. The Journal records that, on July 18, 1787, the Convention resolved that “the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature . . . .”<sup>192</sup> Although the Committee on Detail later made stylistic changes, the July 18 resolution certainly suggests that the deputies were thinking only of legislation and not of common law. Madison’s notes, however, provide a different account of the Convention’s resolution. According to Madison, the Convention resolved that federal courts would have jurisdiction in cases arising “under the Natl. laws.”<sup>193</sup> Under this resolution, the term “National laws” might include both federal common law and legislation.<sup>194</sup>

This example does not prove that every statement in the records is unreliable because it is contradicted by some other statement. Nor does it show that writers can place no reliance on contradicted statements. But the example does show that anyone who cites statements taken from notes of the Constitutional Convention needs to look carefully for contradictory evidence. *Farrand’s Records* includes both a general index,<sup>195</sup> and an index by clauses of the Constitution.<sup>196</sup> These superb indices can be extremely helpful in finding everything said about a particular topic and thus help to locate potential conflicts.

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<sup>190</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>191</sup> Stewart Jay, *Origins of the Federal Common Law: Part Two*, 133 UNIV. PA. L. REV. 1231 (1985).

<sup>192</sup> 2 FARRAND’S RECORDS, *supra* note 2, at 39 (Journal, Jul. 18, 1787).

<sup>193</sup> See *id.* at 46 (Madison’s Notes, Jul. 18, 1787).

<sup>194</sup> Jay, *supra* note 191, at 1255 & n.119.

<sup>195</sup> See 3 FARRAND’S RECORDS, *supra* note 2, at 651

<sup>196</sup> See *id.* at 633.

If conflicts are found, then writers must find reasons for choosing one view over the other. A statement in a resolution adopted by the Convention, for example, may carry more weight than an oral aside made by one of the parties when debating an unrelated issue.

3. *The claim relies on particular statements in the records of the convention without recognizing that evidence from other sources contradicts the statements.*

Sometimes statements in the records of the federal Convention contradict evidence from other sources. For example, they may conflict with arguments made at the state ratifying conventions, remarks in the Federalist Papers, and debates about early federal legislation. These contradictions weaken the authority of all of the sources.

Professor Jonathan Turley has identified one example.<sup>197</sup> At the Convention, Madison argued that “mal-administration” was not an appropriate ground for the impeachment of the President because it was too ambiguous.<sup>198</sup> Yet, several years later while serving as a member of Congress, Madison said that mal-administration would be a basis for impeachment.<sup>199</sup> Madison either changed his mind, or the records contain an error; either way, historians have difficulty using these sources to determine the original meaning of the Constitution.

The existence of contrary statements should come as little surprise. The confidentiality of the Convention proceedings may have freed the deputies from the burden of adhering to their views; they could change their minds without others knowing about it. Accordingly, looking at the notes alone seldom produces a complete account of what the deputies at the Federal Convention were thinking. An extremely useful source for identifying potential conflict among sources is *The Founders' Constitution*, a 5-volume work edited by Philip B. Kurland and Ralph Lerner, which is available both in print and online.<sup>200</sup> The editors of this work

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<sup>197</sup> See Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 750 & nn. 88 & 91 (1999).

<sup>198</sup> See 2 FARRAND'S RECORDS, *supra* note 2, at 550 (Madison's Notes, Sep. 8, 1787).

<sup>199</sup> See 1 Annals of Cong., *supra* note 17, at 498 (1789) (“In the first place, [the President] will be impeachable by this House, before the Senate[,] for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.”).

<sup>200</sup> See THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders>.

have located, collected, and reprinted historical sources—including records of the Constitutional Convention—that address nearly every clause in the Constitution.

4. *The claim relies on particular statements in the records of the convention but it is unclear that the majority of the deputies agreed with the position stated.*

Many authors cite statements in the records without indicating who made the statements or whether the Convention agreed with them. For example, in *Saenz v. Roe*, the Supreme Court cited a single sentence from the Records as evidence that the Framers based Article IV of the Constitution on Article IV of the Articles of Confederation.<sup>201</sup> The Court, however, did not indicate who uttered the sentence or whether anyone agreed with it.

This practice is generally unpersuasive because some excerpts from the Record do not reflect the intent of the Framers. A total of fifty-five deputies attended the Convention. They expressed a wide variety of different ideas during their debates. Sometimes the majority of deputies (or at least a majority of the state delegations) agreed with the arguments, and sometimes they did not. In some instances, speakers addressed topics that the Convention never thought necessary to decide by vote. For this reason, even if a passage presents evidence of what one of the deputies believed, it does not necessarily prove that all of the deputies shared that belief. Before citing passages from the records, authors should consider their content and context.<sup>202</sup> They stand on firmest ground when they can point to the kinds of reasoning described in part III.B. for inferring that statements or action reveal the Framers' intent with respect to particular matter.

5. *The claim relies on excerpts from the records of the Constitutional Convention that lack sufficient detail to support the proposition for which they are cited.*

Anyone reading the notes and records of the Constitutional Convention for evidence of the original meaning of the Constitution soon discovers the deputies often are not recorded as having said much about the issues they confronted. The notes cover many topics with just a phrase, a sentence, or possibly a paragraph, and on some issues there is almost no explication. For example, the Supreme

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<sup>201</sup> 526 U.S. 489, 501 n.13 (1999) (citing “3 Records of the Federal Convention of 1787, p. 112 (M. Farrand ed. 1966)”). The statement was by Charles Pinckney.

<sup>202</sup> See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1360-1361 (2001) (carefully distinguishing positions the Convention rejected from those it accepted).

Court has observed that the clause providing for the appointment of inferior officers<sup>203</sup> “was added to the proposed Constitution on the last day of the Grand Convention, with little discussion.”<sup>204</sup> In such cases, statements taken from the notes and records often lack sufficient detail to provide persuasive evidence of the original meaning on particular questions.

For this reason, critics sometimes dismiss claims about the original meaning if they are based on what they consider ambiguous snippets taken from the records. For instance, in reviewing Raoul Berger’s book, *Federalism: The Founders’ Design*, Professor Mark V. Tushnet wrote that he found the account of the original intent regarding federalism “massively unconvincing,” asserting that Berger had justified his claims by taking “snippets of statements about federalism from the debates on the Constitution, as if a compilation of snippets amounted to an interpretation of intent.”<sup>205</sup> Similarly, Professor Calvin R. Massey, questioned whether the Supreme Court by “[s]titching together snippets of . . . expressions of concern in the 1787 Convention”<sup>206</sup> had properly discerned the original intent of the Framers on the subject of state imposed term limits on members of Congress in *U.S. Term Limits v. Thornton*.<sup>207</sup>

Although this potential ground for impeachment may have merit in some instances, it is not universally true that the records are too ambiguous to provide any guidance on the original meaning of the Constitution with respect to all issues. For example, the Records make abundantly clear that, when the Constitution uses the phrase “three fifths of all other Persons” in explaining the apportionment of representatives and direct taxes,<sup>208</sup> the term “other Persons” is a euphemism for slaves.<sup>209</sup>

Writers can best avoid the potential criticism simply by not exaggerating what the records show. If the records do not provide clear answers, they should acknowledge this limitation. For example, in *Powell v. McCormack*, the Supreme

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<sup>203</sup> U.S. Const., Art. II, § 2, cl. 2.

<sup>204</sup> *Edmond v. United States*, 520 U.S. 651, 661 (1997) (citing 2 FARRAND’S RECORDS, *supra* note 2, at 627-628).

<sup>205</sup> Mark V. Tushnet, *The Court that Was*, A.B.A. J., Jul. 1, 1987, at 93 (reviewing RAUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN*).

<sup>206</sup> Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL’Y 887, 893 (1997).

<sup>207</sup> 514 U.S. 779 (1995).

<sup>208</sup> U.S. Const. art. I, § 1

<sup>209</sup> 1 FARRAND’S RECORDS, *supra* note 2, at 580-587 (discussion of the three-fifths compromise).



Court confronted the question of whether the House of Representatives could exclude Adam Clayton Powell, Jr. from its membership based on his prior misconduct.<sup>210</sup> An important issue in the case was whether the age, citizenship, and residency requirements set forth in Article I are the exclusive qualifications for representatives.<sup>211</sup> The Supreme Court considered numerous passages from the records of the Constitutional Convention. Although these records contained some relevant statements, the Court ultimately announced that the debates themselves simply were inconclusive on the specific issue before it.<sup>212</sup>

*6. The claim relies on statements taken from the records without recognizing the potential personal biases of the individuals who created the records.*

The seven deputies who took notes did not attend the Convention as disinterested observers. On the contrary, they actively participated in the debates. Each of them had their own views of the issues. The two deputies who took the most copious notes, Madison and Yates, fundamentally disagreed about the project of the Convention. The personal views of the deputies may have colored their notes or even led them to misreport the views of the other deputies. Professor William W. Crosskey famously accused Madison of this type of bias. Crosskey asserted that, for political reasons, Madison “presented falsely the sentiments of other men” and invented statements that he put in his notes.<sup>213</sup> Professor Richard B. Bernstein and Kym S. Rice similarly have speculated that Robert Yates may have been taking notes to provide “ammunition to justify his and Lansing’s opposition to the Convention.”<sup>214</sup>

No surefire method exists for assessing the degree of intentional or unintentional bias in the notes taken by deputies. Indeed, even if Madison or the other note takers accurately recorded some of the debates, they could have distorted other parts. For this reason, claims about the original intent of the Framers ideally should rest on notes taken by more than one person. If the notes of several deputies express similar sentiments, the likelihood that any one them misrepresented the proceedings diminishes.

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<sup>210</sup> 395 U.S. 486 (1969).

<sup>211</sup> See U.S. Constitution, art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”).

<sup>212</sup> See 395 U.S. at 532.

<sup>213</sup> 2 WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1012 (1953).

<sup>214</sup> RICHARD B. BERNSTEIN & KYM S. RICE, ARE WE TO BE A NATION 193 (1981).

## V. Conclusion

This essay has attempted to provide guidance to judge, lawyers, law students, and others who are seeking to make or evaluate arguments about the original meaning of the Constitution based on the records of the Constitutional Convention of 1787. Beyond describing the Convention, its records, and how writers cite the records, its most important message is that task of using the records to show the original meaning of the Constitution is difficult. The records unfortunately do not provide direct answers to most questions. Instead, it is necessary in most cases to draw inferences from arguments made by supporters or opponents of particular provisions or from variations in drafts. Even then, there are important pitfalls to avoid in making claims about the original meaning.

### Appendix A. Annotated Bibliography

1. Max Farrand's classic *Records of the Federal Convention of 1787* (rev. ed. 1937) (4 volumes) contains all the notes and records of the Constitutional Convention known until 1937. The introduction contains an extremely detailed account of who took notes, when they were published, and why they may have inaccuracies. The indices are invaluable as finding aids. The first three volumes are available on line at the Library of Congress's website: <http://memory.loc.gov/ammem/amlaw/lwfr.html>

2. James Hutson's *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (1987), updates the earlier four volumes by including sources discovered between 1937 and 1987.

3. John R. Vile's *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding* (2005) (2 volumes). This comprehensive and extremely accessible work contains several hundred entries, arranged from A-Z, on all manner of topics relating to the Convention.

4. *The Founders' Constitution* (1987) is a 5-volume work edited by Philip B. Kurland and Ralph Lerner. It breaks the Constitution down into individual clauses, and contains then contains historical sources from the founding period—including records from the Constitutional Convention—that address those sources. The works is available at the University of Chicago Press's website: <http://press-pubs.uchicago.edu/founders>.

5. *The Framing of the Federal Constitution* (1979) by Robert Morris provides a short, readable, but thorough account of the Constitutional Convention.

6. *Are We to be a Nation* (1987), by Richard B. Bernstein and with Kym S. Rice, contains an informative account not only of what the Framers did at Philadelphia but also the context in which they acted.

7. James H. Hutson's article, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1 (1986), presents highly interesting information about the notes and records of the Constitutional Convention, including many potential problems in relying on them for evidence of the original meaning of the Constitution.

8. Robert N. Clinton provides an introductory description, designed for law students, in *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891 (1990).

## **Appendix B. Table of Deputies at the Constitutional Convention**

\* = did not sign the Constitution

† = subsequently participated at the state ratifying convention<sup>215</sup>

### **Connecticut**

William Samuel Johnson†  
Roger Sherman†  
Oliver Ellsworth (Elsworth)\*†

James McHenry†  
Daniel of St. Thomas Jenifer  
Daniel Carroll  
Luther Martin\*†  
John F. Mercer\*†

### **Delaware**

George Read  
Gunning Bedford, Jr.†  
John Dickinson  
Richard Bassett†  
Jacob Broom

### **Massachusetts**

Nathaniel Gorham†  
Rufus King†  
Elbridge Gerry\*† (spoke at the state ratifying convention but was not a delegate)  
Caleb Strong\*†

### **Georgia**

William Few†  
Abraham Baldwin  
William Houston\*  
William L. Pierce\*

### **New Hampshire**

John Langdon†  
Nicholas Gilman

### **Maryland**

### **New Jersey**

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<sup>215</sup> See Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the Constitution*, *supra* note 3, at 468-481.

William Livingston  
David Brearly (Brearley)†  
William Paterson (Patterson)  
Jonathan Dayton  
William C. Houston\*

**New York**

Alexander Hamilton†  
John Lansing, Jr.\*†  
Robert Yates\*†

**North Carolina**

William. Blount†  
Richard. Dobbs Spaight  
Hugh Williamson  
William R. Davie\*†  
Alexander Martin\*†

**Pennsylvania**

Benjamin Franklin  
Thomas Mifflin  
Robert Morris  
George Clymer

Thomas Fitzsimons (FitzSimons;  
Fitzsimmons)  
Jared Ingersoll  
James Wilson†  
Gouverneur Morris

**Rhode Island**

Rhode Island did not send deputies.

**South Carolina**

John Rutledge  
Charles Cotesworth Pinckney†  
Charles Pinckney†  
Pierce Butler

**Virginia**

John Blair†  
James Madison Jr. †  
George Washington  
George Mason\*†  
James McClurg\*  
Edmund J. Randolph\*†  
George Wythe\*†