

A Bibliography for Researching Original Understanding

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Lawyers are not necessarily historians, and sometimes it shows.

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

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

What is Originalist Research?

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

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

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

If you are going to be faithful to the Constitution you have to be faithful to the legal environment and assumptions within which it was adopted. In other words, we ought to read the document as the Founders would have. Most originalists focus on original public meaning. This is partly due to the influence of the late Justice Antonin Scalia, an original-meaning originalist. It also is due partly to writings published during the 1980s that concluded, erroneously, that lawyers of the Founding Era paid no attention to subjective understanding. Actually, they did follow the subjective understanding, if it was available and coherent. *See* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 69 OHIO ST. L.J. 1239 (2007).

The manner in which the Founders interpreted most legal documents is pretty much the same mode we use today: That is:

- Apply the subjective understanding of those who gave the document legal force if that understanding is coherent and recoverable.
- Otherwise, apply the interpretation a reasonable person would have placed on the document.

In other words, apply the ratifiers' understanding, and if that is not practical, apply the original public meaning.

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

What Sort of Evidence is Appropriate for Originalist Research?

Appropriate evidence includes the text of the Constitution, plus:

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

I shall say something of each of these.

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

The text of the Constitution is often the best source of original understanding, but you must read it as a contemporaneous reader would have read it. This requires resort to eighteenth century dictionaries. When the Constitution was written, the principal lay dictionaries were as follows:

- Francis Allen, *A Complete English Dictionary* (1765)
- John Ash, *The New and Complete Dictionary of the English Language* (2 vols.) (1775)
- Nicholas Bailey, *A Universal Etymological English Dictionary* (1783)
- Frederick Barlow, *The Complete English Dictionary* (2 vols.) (1772)
- Edward Cocker, *Cocker's English Dictionary* (various editions)
- Elisha Coles, *A Dictionary, English-Latin and Latin-English* (mult. editions)
- Alexander Donaldson, *An Universal Dictionary of the English Language* (1763)
- Thomas Dyche & William Pardon, *A New General English Dictionary* (multiple editions)
- Samuel Johnson, *A Dictionary of the English Language* (multiple editions)
- John Kersey, *A New English Dictionary* (1713)
- William Perry, *Royal Standard English Dictionary* (see esp. 1st American ed., 1788)
- Thomas Sheridan, *A Complete Dictionary of the English Language* (1789)

Remember that you must take account of the influence of Latin on eighteenth-century English. The Founders were temporally closer to widespread Latin usage than we are. Also, boys (and some girls) from the influential classes customarily were immersed in Latin from an early age and were expected to be fully competent before they enrolled in college. So it is difficult to do effective originalist research without a fair knowledge of Latin, and some writers have made serious misconstructions from trying to do so. Today the leading Latin dictionary is probably Charlton T. Lewis & Charles Short, *A Latin Dictionary* (Oxford Univ. Press, various editions) (commonly called “Lewis and Short”).

Important encyclopedias include—

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

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

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

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

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

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

These sources include:

- Pronouncements of colonial pamphleteers: Various American writers, mostly leading lawyers, argued the “constitutional” case against Parliamentary supremacy during the period before Independence. They wrote in article and pamphlet form. Among these writers were John Adams, Richard Bland, John Dickinson, Daniel Dulany, Alexander Hamilton, Stephen Hopkins, Thomas Jefferson, James Otis, Josiah Quincy, and James Wilson. Many of these works are available on ECCO. Some are available at the website of the Constitution Society, www.constitution.org, at the website of the Liberty Fund (http://oll.libertyfund.org/people?historical_period=The+18th+Century) and in academic hard copy collections.
- Pronouncements of the Continental Congress: These are available in the *Journals of the Continental Congress*. They are online at the “American Memory” website of the Library of Congress: <http://memory.loc.gov/ammem/amlaw/lwjc.html>.
- Pre-independence constitutional documents, such as colonial charters: These are online at The Avalon Project at Yale Law School: <http://avalon.law.yale.edu/>.
- The Articles of Confederation and state constitutions: These also are online at the Avalon Project at Yale Law School.
- Important contemporaneous works of political science: These include, Baron Montesquieu’s *Spirit of the Laws*; John Locke’s *Of Civil Government: Second Treatise*; and John Adams’ *Defence of the Constitutions of the United States* (an encyclopedia comparing republican constitutions). The first volume of Adams’ work circulated freely

at the federal convention. Adams' work is online at ECCO and at Google Books. Also useful is Jean Louis DeLolme, *The Constitution of England* (multiple editions), available in most academic libraries, and online at ECCO and at Google Books.

IV. The historical records surrounding adoption of the Constitution.

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

States of America, March 4, 1789-March 3, 1791 (Linda Grant de Pauw, Charlene Bangs Bickford, Kenneth R. Bowling, LaVonne Marlene Siegel & Helen E. Veit, eds.).

V. Legal materials used at the time of ratification.

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

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

Note that knowledge of Latin and Law French is necessary for full access to the law of the Founders.

Following are some important legal sources. Where an item went through multiple editions, the edition closest to 1788 (but not after) is usually most probative of original understanding.

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

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

- Reprinted English case reports: The cases in the nominate reporters from the three centuries prior to the Founding—and some from even earlier—are collected in *English Reports (Full Reprint)*, which is available at Hein Online and on the British *Justis* database. Note that many law journals now cite only the *English Reporter* citation for a case and omit the nominate. The originalist must know what the nominate reporter was because his identity is relevant to how persuasive the Founders would have believed the report to be.

- American cases decided before 1792 may be found on Westlaw.
- English statutes: These are collected in the 18th century *Statutes at Large*, available on ECCO. Eighteenth century Parliamentary Journals are harder to find unless you happen to have physical access to a top academic library. The journals of the House of Commons can be found at the Proquest House of Commons Parliamentary Papers database (subscription only). Nor are the Parliamentary Journals available on ECCO, except for a few isolated volumes. British History online, <http://www.british-history.ac.uk/> includes very few 18th century Commons journals, but nearly all the Lords journals.

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

- American statutes: ECCO contains some coverage of pre-1800 American statutory compilations, as does Google Books.
- American legislative journals (proceedings, minutes). These include the Journals of the Continental Congress and the records of colonial and early state legislatures, such as the early volumes of the *Public Records of the State of Connecticut* (Charles J. Hoadley, ed.). Many of these are on line, but there are still major gaps due to lost records and failure to digitize. Most are available in good academic and major municipal libraries.
- Treatises on Parliament. Here are three, all available at ECCO and some at Google Books:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Legal Maxims and Rules of Construction:

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

- Specialized treatises. There was an array of works on specialized areas of the law. The following represent only a few examples. Some are available on ECCO, but others are not.

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

Conveyancing: Gilbert Horsman, *Precedents in Conveyancing* (1785); Giles Jacob, the Accomplished Conveyancer (1716); John Lilly, *The Practical Conveyancer* (2 vols.) (1742); Job Mill, *The Present Practice of Conveyancing* (1745); William Newnam, *The Complete Conveyancer* (3 vols.) (1786); Anonymous, *New Precedents in Conveyancing* (1742)

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

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

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