

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 deduce it often have reached conclusions based on astonishingly few sources. Furthermore, they sometimes 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, this essay is designed to introduce legal writers to the general range of material readily available for competent work.

What is Originalist Research?

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 promulgated the document. "Intent" is a term of art that can vary 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. The intent behind a constitution, is something else – see below.

Often the text of the document (elucidated by rules of construction) sufficiently points to the "intent" behind it, and inquiry behind the text is unnecessary. Sometimes the words used are terms of art whose meanings are fixed by prior court decisions. However, often the interpreter must examine the circumstances surrounding the document's creation to ascertain the makers' "intent." By "originalist research" I mean simply investigation of the circumstances surrounding the adoption of one particular legal document: the United States Constitution.

Originalists have differed as to the kind of "intent" most important for legal purposes. The three principal suggestions have been:

- *Original intent.* This is the intent of the drafters (or framers). If you are seeking original intent, you are looking for the purposes of those who prepared the document at the convention in Philadelphia from May 25 to September 17, 1787.
- *Original understanding.* This consists of the purposes and understanding of those who ratified the Constitution -- that is, principally the understanding of delegates to the various state ratifying conventions, but also the understanding of the public who elected them.

- *Original public meaning (also called "original meaning")* This is the objective meaning of the Constitution to a reasonable citizen reading it at the time of its adoption.

Although some legal writers have been confused as to which, if any, of the foregoing the Founders themselves thought most important, the answer is actually quite clear: Founding Generation interpreters sought first for the subjective intent by the “makers” of the document (in the case of the Constitution, the ratifiers), and if they couldn't recover that understanding on a particular point – or if there were conflicting understandings – then they applied the original public meaning. See Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 69 Ohio St. L.J. 1239 (2007).

As a practical matter, original intent, original understanding, and original public meaning usually overlap, and the same evidence often can be used (with an adjustment in the weight given) to demonstrate any of the three. For example, at the Constitutional Convention John Dickinson made an uncontroverted remark that the term “ex post facto law” referred only to a retroactive criminal law, but not to a retroactive civil enactment. The remark is directly probative of original intent. But it also is evidence (not uncontroverted, however) on what the term “ex post facto law” generally meant at the time and how the ratifiers understood it.

What Sort of Evidence is Used in Good Originalist Research?

Generally speaking, the kinds of evidence used in good originalist research include, besides the text of the Constitution –

- I. Contemporaneous encyclopedias and dictionaries, both English and Latin;
- II. Evidence from 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, pamphlets, and legal documents, such as early state constitutions and laws.
- IV. The historical records surrounding adoption of the Constitution.
- V. Standard legal sources used at the time of ratification.

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 one must read it as a contemporaneous reader would have. This means resorting to eighteenth century dictionaries. Some examples include –

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

The reader also must take account of the influence of Latin on eighteenth-century English. The Founders were temporally closer to widespread Latin usage than we are, and because 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 serious textual misconstructions have arisen from trying to do so.

Important encyclopedias include –

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

All of these encyclopedias and dictionaries are available on the Gale database, *Eighteenth Century Collections Online* (popularly called ECCO) (by subscription only).

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

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

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

III. Evidence of the Founders' understanding of Anglo-American history, including widely-read historical works, pamphlets, and legal documents, such as early state constitutions and laws.

These sources include:

- *The pronouncements of colonial pamphleteers.* Various American writers, mostly leading lawyers, argued the “constitutional” case against Parliamentary supremacy during the period before independence. They wrote in article and pamphlet form. The most important writers were John Adams, Richard Bland, John Dickinson, Daniel Dulany, Alexander Hamilton, Thomas Jefferson, James Otis, and James Wilson. Many of these works are available on ECCO. See also the website of the Constitution Society, www.constitution.org, and academic hard copy collections.
- *Pronouncements of the Continental Congress.* These are available in the Journals of the Continental Congress. They are online at the “American Memory” website of the Library of Congress: <http://memory.loc.gov/ammem/amlaw/lwjc.html>.
- *Pre-independence constitutional documents, such as colonial charters.* These are online at The Avalon Project at Yale Law School: <http://www.yale.edu/lawweb/avalon/avalon.htm>.
- *The Articles of Confederation and state constitutions.* These are online at the Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/avalon.htm>.
- *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>. More complete versions are now available for most states in The Documentary History of the Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino et al, eds. 1976-2006) (multiple vols. projected; not all completed).

- *Public speeches, pamphlets, articles on the Constitution, both pro and con (1787-89)*. These are available in The Documentary History of the Ratification of the Constitution (be sure to check the microfilm supplements for several states, particularly Pennsylvania). Other collections are 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. Although you should be skeptical about the value of post-ratification records as evidence of original understanding, the first session of the First Congress is an exception was held before all the states had ratified and before the Bill of Rights was approved. Political alliances were the same as in 1787. The second (1790) and third (1790) sessions are much less reliable -- some people such as Hamilton, were trying to re-write the Constitution by then -- and should be used with caution, except perhaps on Bill of Rights issues. (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. Standard legal sources used at the time of ratification.

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

The Founders’ understanding of law, despite some attention to continental scholars such as Grotius and Vattel, was informed overwhelmingly by the Anglo-American legal tradition. That tradition was captured in a massive quantity of books: John Worrall’s *Bibliotheca Legum*

Angliae, a 1788 English bibliography of English law, runs nearly 300 pages long. (A copy is available on this website.)

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

- *Case reports.* Cases were summarized and collected by private reporters. Today, their books are referred to as “nominate” reporters. However, the leading cases for the three centuries prior to the Founding – and some from even earlier – have been collected in English Reports (Full Reprint), which is available on Hein online and on the British “Justis” database. 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). Among the most respected reporters were Edmund Plowden, William Salkeld (first two volumes only) and, of course, Edward Coke.

American cases decided before 1792 may be found on Westlaw.

- *English statutes.* Statutory law is generally less important for originalist research than case law. This is a comfort, for the eighteenth century Parliamentary Journals are hard to find in the United States unless you happen to have physical access to a top academic library. (Most of those libraries will not lend their copies, either.) Nor are the Parliamentary Journals available on ECCO, except for a few isolated volumes. Many issues of the Journals of the House of Commons and of the House of Lords and certain reports of parliamentary debates are available at British History online, <http://www.british-history.ac.uk/>, but much of the eighteenth century material is not. (Progress is being made, but it is slow.) Eighteenth century Commons Journals are now available at the British Official Publications Collaborative Reader Information Service (“BOPCRIS,”), <http://www.bopcris.ac.uk/> – see <http://parlipapers.chadwyck.co.uk/marketing/index.jsp>

Those looking for a general review of English statutory law may wish to consult Giles Jacob, *Lex Constitutionis*, or the Gentleman’s Law, available in various editions.

Most abridgments (digests) include summaries of statutes as well as case law.

- *American statutes.* ECCO contains some coverage of pre-1800 American statutory compilations.
- *Treatises on Parliament.* Here are some samples, all available on ECCO.

Jean Louis DeLolme, *The Constitution of England* (multiple editions), available in most academic libraries, and online both at ECCO 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* 93 (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. These included –

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

Edward Coke, *Institutes of the Laws 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 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)

See also Richard Burn, *A New Law Dictionary* (1792), which while published just after the Founding reproduces many definitions prevalent before it.

All of these are available on ECCO.

- *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 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) (available in a 1969 reprint, but not online)

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

- *Legal Maxims and Rules of Construction:*

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

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

- *Criminal law:*

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

- *Conveyancing:*

Gilbert Horsman, *Precedents in Conveyancing* (1785)

Giles Jacob, *the Accomplished Conveyancer* (1716)

John Lilly, *The Practical Conveyancer* (2 vols.) (1742)

Job Mill, *The Present Practice of Conveyancing* (1745)

William Newnam, *The Complete Conveyancer* (3 vols.) (1786)

Anonymous, *New Precedents in Conveyancing* (1742)

- *Commercial Law:*

Anonymous, *A General Law-Treatise of Naval Trade and Commerce* (2 vols.) (1753)

Timothy Cunningham, *The Merchant's Lawyer* (1768)

Giles Jacob, *Lex Mercatoria* (1729)

Gerard Malynes, *Consuetudo vel Lex Mercatoria, or The Ancient Law Merchant* (1622)
[not on ECCO]

Charles Molloy, *De Jure Maritimo et Navali, or A Treatise of Affairs Maritime and of Commerce* (2 vols.) (1769)

- *Equity:*

Henry Ballow, *A Treatise of Equity* (2d ed. 1756)

Henry Home (Lord Kames), *Principles of Equity* (1778) (2 vols.)

- *Trusts, Wills and Estates:*

George Duke, *The Law of Charitable Uses* (1676)

Jeffray [sic] Gilbert, *The Law of Uses and Trusts* (various editions)

John Godolphin, *The Orphan's Legacy: or a Testamentary Abridgment* (1701)

Henry Swinburne, *A Treatise of Testaments and Last Wills* (many editions)

Thomas Wentworth, *The Office and Duty of Executors* (1774)