

Recent Developments in Methods of Constitutional Interpretation at the Supreme Court

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Development # 1

The number of cases citing sources of the original meaning of the Constitution has increased substantially in recent years.

Cases Citing Key Sources of the Original Meaning

Source	October Terms 2007-2013	October Terms 2000-2006
The Federalist Papers	43	29

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One possible contributing factor: Most sources of the original meaning are now on-line in a searchable format ...

AMERICAN MEMORY

A Century of Lawmaking For a New Nation

U.S. Congressional Documents and Debates
1774-1875

Search All Titles

- Continental Congress and the Constitutional Convention
- Journals of the Continental Congress
- Letters of Delegates to Congress
- Elliot's Debates
- Farrand's Records

Statutes and Documents

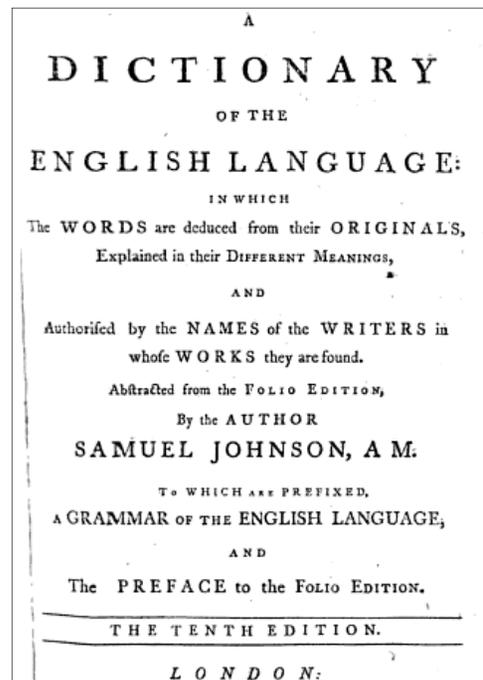
- Bills and Resolutions
- Statutes at Large
- American State Papers
- U.S. Serial Set

Journals of Congress

- House Journal
- Senate Journal
- Senate Executive Journal
- Maclay's Journal

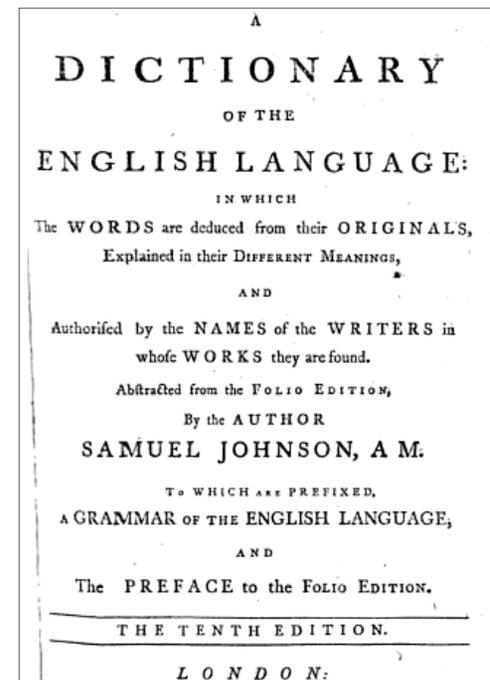
Debates of Congress

- Annals of Congress
- Register of Debates
- Congressional Globe
- Congressional Record



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The image shows a website interface for 'A Century of Lawmaking For a New Nation: U.S. Congressional Documents and Debates, 1774-1875'. At the top, there is a blue banner with the American flag and the text 'AMERICAN MEMORY'. Below this, the title 'A Century of Lawmaking For a New Nation' is displayed in a large, serif font, followed by the subtitle 'U.S. Congressional Documents and Debates' and the years '1774-1875'. A central illustration depicts a woman in a purple and white dress, holding a scale and a sword, standing on a pedestal. To the left of the illustration, there is a search bar with the text 'Search All Titles' and a list of categories: 'Continental Congress and the Constitutional Convention', 'Journals of the Continental Congress', 'Letters of Delegates to Congress', 'Elliot's Debates', 'Farrand's Records', 'Statutes and Documents', 'Bills and Resolutions', 'Statutes at Large', 'American State Papers', and 'U.S. Serial Set'. To the right of the illustration, there is a list of specific documents: 'Journals of Congress', 'House Journal', 'Senate Journal', 'Senate Executive Journal', 'Maclay's Journal', 'Debates of Congress', 'Annals of Congress', 'Register of Debates', 'Congressional Globe', and 'Congressional Record'.



... with the exception of the legislative history of the 14th Amendment, which is on-line but still not searchable.

Another possible contributing factor: Sources of the original meaning often lend support to both sides of a constitutional issue.

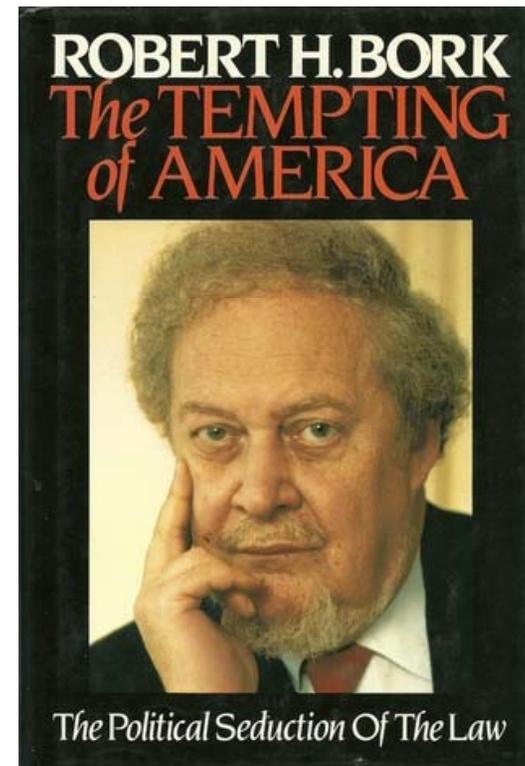
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To DIRECT. *v. a.* [*directum*, Latin.]
1. To aim in a straight line. *Pope.*
2. To point out against as a mark. *Dryden.*
3. To regulate; to adjust. *Eccles.*
4. To prescribe certain measure; to mark out a certain course. *Job.*
5. To order; to command.

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"Yet an originalist approach to interpretation has—like a phoenix from the ashes or Dracula from his grave, depending on your point of view—survived into the Twenty-first Century as an intellectual contender. Indeed, it has thrived like no other approach to interpretation."

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"We are all originalists now."
Justice Elena Kagan in the 2010 hearing on her nomination.

Development # 2

The Justices often find these sources of the original meaning to be not merely relevant to deciding constitutional issues, but also to provide certain answers (even when they disagree about what those answers are).

***District of Columbia v. Heller* (2008) on the Second Amendment**



- Justice Scalia: "[C]learly an individual right, having nothing whatever to do with service in a militia."
- Justice Stevens, dissenting: "The text of the Amendment, its history, and our decision in *United States v. Miller* . . . provide a clear answer."
- Justice Breyer, dissenting: "[A]bundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes."

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Development # 3

Supreme Court decisions also now show an increasing tendency to recognize, and distinguish among, different types of original meaning.

Original Intent of the Framers at the Constitutional Convention

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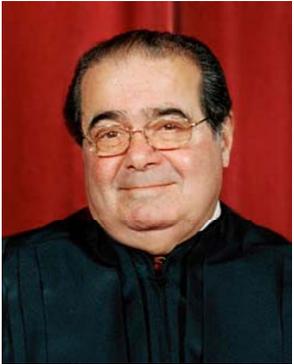
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Original Objective (or Public) Meaning

"[T]he original public understanding of a constitutional provision does not . . . comport with" *Brown v. Entertainment Merchants* (2011)
(Thomas, J., dissenting)

Development # 4

While early proponents of originalism focused on the original intent or original objective meaning, the modern trend is to emphasize the original objective meaning.



"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." Justice Scalia, *A Matter of Interpretation* (1998)



"When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted." *McDonald v. City of Chicago* (2010) (Thomas, J., concurring in part and concurring in the judgment)

Observations

- Any other view might be inconsistent with a reluctance to consider legislative history when interpreting statutes.
- The preference for the original objective meaning may explain the substantial increase in reliance on dictionaries from the founding era.

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... but the Justices have continued to rely on the sources most commonly cited as evidence of the original intent and original understanding.

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Development # 5

A major challenge for Justices who rely on sources of the original meaning is deciding what weight to give non-originalist precedents. They are developing new principles to address this question.

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- "In *Ashe* the Court departed from the original meaning of the Double Jeopardy Clause ... Even if I am to adhere to *Ashe* on *stare decisis* ... [I will not accept an] ... extension of that case." *Yeager v. United States* (2009) (Scalia, J., dissenting)

Conclusions

In light of these trends . . .

- Law schools should provide better instruction in how to use sources of the original meaning of the Constitution.
- Lawyers who are not researching the original meaning and citing these sources in constitutional cases should do so.
- Lower courts should recognize the role these sources now play at the Supreme Court.

Sources of the Original Meaning	Court of Appeals for the Armed Forces and CCAs 2007-2014
The Federalist Papers	?
Dictionaries from the Founding Era	?
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Notes from the Constitutional Convention	?
Records of the State Ratifying Conventions	?
Acts of the First Congress	?
Legislative History of the Bill of Rights	?
Legislative History of the Civil War Amendments	?

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Acts of the First Congress	0
Legislative History of the Bill of Rights	0
United States Code, 14 U.S.C. § 1112	0