
THE FRAMERS' FIRST AMENDMENT: ORIGINALIST CITATIONS IN U.S. SUPREME COURT FREEDOM OF EXPRESSION OPINIONS

By Derigan Silver

This article examines the use of originalist citations by Supreme Court justices in First Amendment freedom of expression opinions. It quantitatively examines when justices use originalist citations and qualitatively explores the content of the justices' citations to determine how the justices are describing the original meaning of the First Amendment. The article concludes that justices uncritically relied on the citations as authoritative; that although it is identified with conservatism and judicial constraint, originalism was frequently used by liberal justices to expand constitutional protections; and that the "blank slate" of originalism makes it a useful tool for originalists and non-originalists alike.



In a series of cases examining the newsgathering rights of the press, several U.S. Supreme Court justices wrote opinions citing James Madison's famous statement: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."¹ In its original context, however, the quote had nothing to do with newsgathering, the rights of the press, or even the First Amendment. The quote originated in an 1822 letter applauding the Kentucky legislature for providing for a public educational system.²

The justices' reliance on Madison's quote is, of course, not unique. Neither is inquiry into the validity of using originalist citations to justify constitutional interpretation. Indeed, the last several decades have witnessed a resurgence of interest in and criticism of constitutional theories that focus on the intent of the framers as a guide to constitutional interpretation.³ A great deal of this attention has been driven by the idea that personal policy preferences should not guide federal judges in their constitutional interpretation and the dueling contentions that referencing originalist material is either the only legitimate way a justice can make a decision that is not based on personal policy preferences or that it is simply a way to cloak judicial decision making based on policy preferences.⁴ As two legal scholars noted, "If history can provide a reliable guide to

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the intent of those who crafted constitutional language, then it may be possible for judges to base their decisions upon neutral principles as opposed to their personal predispositions. Critics, however, continue to question the merits, feasibility, and limits of intentionalism as a jurisprudential approach.”⁵ The out-of-context use of Madison’s quote, however, is an excellent example of the value of a statement made by a framer of the Constitution as a legal authority and guide to judicial decision making even when the quote has little or nothing to do with the constitutional issue being considered.

The purpose of this article is twofold. First, the article quantitatively examines when justices use originalist citations to support their arguments in cases involving freedom of expression. Second, the article qualitatively explores the content of the justices’ originalist citations to determine how the justices are describing the framers’ understanding of the speech and press clauses of the First Amendment. While much of the previous literature on the strategic use of originalist citations has focused solely on the quantitative analysis of citations, this article examines the substance of those citations, as well.⁶ Based on the analysis of originalist citations, the article concludes that although originalism is more closely associated with conservatism,⁷ liberal justices have more frequently used originalist citations to expand constitutional protections for freedom of expression, and most justices uncritically used originalist citations as legitimate interpretive tools.

Originalism and Strategic Citations

As Elena Kagan’s confirmation hearings and former Justice David Souter’s recent commencement address to Harvard University demonstrate,⁸ there is still a great deal of legal and political debate over the power of judicial review and the various methods of constitutional interpretation. Originalism, or original intentionalism, is a mode of constitutional interpretation that focuses on the framers of the U.S. Constitution.⁹ Originalism holds that judges should construe the meaning of the Constitution “according to the preference of those who originally drafted and supported” it¹⁰ and should add no new rights to the Constitution that were not expressly intended by the framers. While the movement was originally focused closely on the specific writings of the framers, its scope has expanded.¹¹ For example, current Supreme Court Justice Antonin Scalia has offered a variant of originalism, which he has described as “original meaning,” or, as other scholars have described it, “public-meaning originalism.”¹² According to Scalia, when interpreting the Constitution, judges should focus on the practices at the time of the framing or attempt to discern what a rational person at the time of the framing of the Constitution would have taken the words of the Constitution to mean.¹³ Thus, today, originalism encompasses a wide range of historical materials from the founding period that address constitutional meaning, even though much of this work was not written by the “framers” or their contemporaries.¹⁴ Despite what evidence one might rely on as an “originalist” source, at the core of originalism “is the view that the appropriate guideposts for constitutional interpretation are . . . sources that probe con-

stitutional 'meaning' by reference to the meaning entertained by the people around the time the Constitution was enacted."¹⁵

No matter which version is being discussed, originalists are "committed to the view that original intent, or original meaning is not only relevant but also authoritative; that we are in some sense obligated to follow the intent, or plain meaning, of the framers."¹⁶ Originalism has the appeal of at least making it seem that judicial decisions are not based on judges' personal preferences, but, rather, are solely the product of following the framers' wishes or the original meaning of the words in the Constitution.¹⁷ Indeed, some originalists hold that binding constitutional interpretation to original meaning of the text is the *only* way to ensure that Supreme Court justices do not substitute their own political preferences and philosophies for those of the framers.¹⁸ Originalists contend that because federal judges are unelected, basing constitutional adjudication on the intentions of the framers has a "democratic legitimacy" that basing decisions on personal policy preferences does not.¹⁹ In 2007, however, Scalia wrote that he and Justice Clarence Thomas were the only two originalists on the U.S. Supreme Court,²⁰ although, after reviewing multiple opinions over a fifteen-year period, one legal scholar concluded that Thomas was "the Real Originalist."²¹

While normative debates for and against binding judicial interpretation of the Constitution to the intent of the framers became increasingly popular in the years following the court's decisions in abortion cases and comments made by Attorney General Edwin Meese in the 1980s,²² originalism remains a controversial and much analyzed mode of interpretation. A number of scholars have made compelling cases against the practice, pointing out numerous problems with using originalism to reach judicial decisions and as a way to predict and explain judicial behavior.²³ Justice William J. Brennan, Jr., for example, contended that because the text of the Constitution is unclear and requires interpretation, efforts to discern its authors' intentions were "little more than arrogance cloaked as humility."²⁴ Brennan stated, "It is arrogant to pretend that from our vantage we can gauge accurately the intent of Framers on application of principles to specific, contemporary questions."²⁵

In addition to general problems with originalism, legal scholars Clay Calvert and Matthew Bunker wrote, "In the realm of First Amendment free speech and press clauses, the problems with originalism are, if anything magnified."²⁶ Using original intent to discern the meaning of the First Amendment is difficult because of the lack of debate surrounding the actual meaning of the amendment. Congress never debated the merits or meaning of the First Amendment,²⁷ and the final wording of the amendment was decided upon by the first Senate, which did not keep a record of its meeting.²⁸ In addition, Calvert and Bunker noted that "for at least some members of the framing generation, the contemporary understanding of the free speech principle was derived from English law via the enormously influential commentator William Blackstone."²⁹ According to historian Leonard Levy, Blackstone's definition of freedom of expression consisted of a prohibition on prior restraints, but not on criminal or other sanctions imposed after

publication.³⁰ This understanding creates problems, as a Blackstonian view would mean “arguably 90% of modern free speech jurisprudence . . . is intellectually dishonest and historically illegitimate.”³¹ In sum, the problem for a First Amendment originalist is the difficulty inherent in “refereeing a debate between long-dead framers, ratifiers, and other knowledgeable citizens, and arriving at a correct conclusion about the scope of freedom of speech that makes some sense in light of current jurisprudential realities.”³² Added together, these problems are “a serious blow to First Amendment originalism because the ‘original meaning’ is, to a significant degree, a blank slate.”³³

The strategic model of judicial decision making, however, suggests that justices continue to cite originalist sources in order to provide their opinions with legitimacy, whether they are trying to implement their personal policy preference or they are complying with American judicial norms.³⁴ Although most of the scholarship on judicial decision making presumes that either the law decides cases—the legal model—or policy preferences of individual judges best predict and explain courts’ decisions—the attitudinal model³⁵—under the strategic model of judicial behavior, even if a justice is seeking to implement personal policy preferences, he or she is limited by legal factors, the preferences of fellow justices, the norms and authority of the institution of the Supreme Court, and external political and societal factors, such as public opinion.³⁶ While the law gives the justices a great deal of room to maneuver, they must also operate under rules governing their own actions and interactions, protect institutional legitimacy, and sway their colleagues with persuasive *legal* arguments. Thus, whether a justice has come to a case with preconceived policy or legal preferences or is simply trying to validate his or her legal interpretation of the Constitution, his or her opinions must contain legal rationales to justify conclusions, and the mode of legal interpretation becomes a proxy for “merit.”³⁷ Under this view of judicial decision making, because there were multiple framers with various views of the Constitution, the justices are able to strategically use originalist citations as “instruments of persuasion,” designed to persuade other justices, lower courts, lawyers, the public, and the other branches of government.³⁸

Social scientific research on strategic citation of originalist sources has reinforced this view of justices as strategic actors who can use originalism to persuade and legitimize. For example, Supreme Court justices cite the *Federalist Papers* more than any other originalist source because of their great perceived legal authority, and the ambiguous nature of the documents allows them to be used to support multiple constitutional interpretations.³⁹ Using Segal-Cover scores, which determine a justice’s political ideology by examining newspaper editorials during a justice’s Senate confirmation hearings,⁴⁰ to determine if originalist citations were more closely associated with conservative justices, researchers have found a correlation between conservative ideologies and originalist citations.⁴¹ However, this research also found that a justice was most likely to cite the *Federalists* when an opinion needed an extra measure of “perceived credibility,” such as when there was a minimum winning coalition vote, when

the court formally overturned precedent, or when the court declared a law unconstitutional.⁴² In addition, there is evidence that the use of originalist citations might be attempts to attract votes to create a minimum winning coalition, and research suggests justices engage in “dueling citation” patterns. That is, justices are more likely to cite an originalist source in anticipation or reaction to the arguments of their peers.⁴³ This pattern of strategic citations in concurring and dissenting opinions suggests the “citation behavior of Supreme Court justices is strongly anticipatory and tactical, and not the result of some cases merely lending themselves to a discussion of the *Federalist Papers*.”⁴⁴

Originalism can also be used to support divergent conclusions in the same case. Analyzing opinions authored by Justices William Rehnquist and Brennan, John Gates and Glenn Phelps concluded that even though the two justices espoused quite different judicial philosophies regarding originalism, and Brennan was a harsh critic of originalism,⁴⁵ the two did not differ in a statistical sense in their relative use of intentionalism.⁴⁶ However, Gates and Phelps did demonstrate that the justices used the arguments of the same framer, James Madison, to come to divergent conclusions in the same case, *Marsh v. Chambers*.⁴⁷ Gates and Phelps concluded that citing “Madison the framer” or “Madison the legislator” or “Madison the elder statesmen” all supported different results and the justices’ strategic citation to historical support was driven largely by their “competing visions of a constitutional order.”⁴⁸ Previous research on originalist citations, then, provides evidence which “points to more strategic or attitudinal considerations than legal considerations.”⁴⁹

Based on previous research on originalist citations,⁵⁰ a list of originalist citations used by the U.S. Supreme Court was compiled.⁵¹ These writings included the *Federalist Papers*, Joseph Story’s *Commentaries on the Constitution of the United States*, Alexander Hamilton’s *Works*, Madison’s *Papers*, Charles Warren’s *The Supreme Court in U.S. History*, Warren’s *The Making of the Constitution*, James Kent’s *Commentaries on American Law*, Max Farrand’s *The Records of the Federal Convention of 1787*, Jonathan Elliot’s *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, William Rawle’s *A View of the Constitution*, John Fiske’s *The Critical Period in American History, 1783-1789*, and Thomas M. Cooley’s *Constitutional Limitations*. In addition to these sources, citations to William Blackstone, the “oracle of the common law in the minds of the American Framers,”⁵² were also included. Although Blackstone’s works were not included in previous research into originalist citations, they were included in this research because of his prominence in literature detailing the history of freedom of expression,⁵³ originalist scholarship on the original meaning of the First Amendment,⁵⁴ and his “profound influence” on legal thinkers of the founding era.⁵⁵ All written opinions issued in freedom of expression cases decided by the Supreme Court prior to the 2011 term were searched for citations.⁵⁶

Originalist Citations in Freedom of Expression Opinions

Forty-three opinions written in thirty-eight cases had at least one originalist citation. The forty-three opinions consisted of twenty-one majority opinions, nine concurring opinions, and thirteen dissenting opinions. There were a total of sixty-seven citations, with fourteen opinions including citations to more than one originalist source. Surprisingly, Brennan was the justice who most frequently cited an originalist source in a freedom of expression case, having cited an originalist source in five majority, one concurring, and one dissenting opinion. Brennan was followed by Justices John Paul Stevens (five opinions), Hugo Black and Thomas (four opinions each), and William O. Douglas, Felix Frankfurter, and Chief Justice Earl Warren (three opinions each). Justices Lewis F. Powell, Jr., and Potter Stewart each cited an originalist source in two opinions, while ten justices, including Scalia, cited an originalist source in one opinion.⁵⁷ For justices with a score, there was a weak to moderate correlation between the number of opinions authored in which a justice cited an originalist source and political ideology as measured by Segal-Cover Score.⁵⁸ Although originalism is traditionally associated with conservative justices, liberals tended to be more likely to cite an originalist source, although, because of the small sample size, the correlation was not statistically significant ($r = 0.385$; $p > .15$).

Blackstone's *Commentaries* was the most frequently referenced, having been cited at least once in fourteen opinions. Blackstone was closely followed by Cooley's *Constitutional Limitations*, which was cited at least once in twelve opinions, Madison's *Papers*, which were cited in eleven opinions, and the *Federalist* and Elliot's *Debates*, which were each cited at least once in nine opinions. Story's *Commentaries*, Hamilton's *Works*, Warren's *The Making of the Constitution*, and Farrand's *The Records of the Federal Convention of 1787* were each cited at least once in two opinions. Finally, Kent's *Commentaries on American Law* and Rawle's *A View of the Constitution* were each cited in one opinion, while Warren's *The Supreme Court in U.S. History* and Fiske's *The Critical Period in American History, 1783-1789* were not cited as authoritative originalist citations on the meaning of the First Amendment in any opinion.

There was little evidence of dueling citations in First Amendment opinions. Although there were several cases in which multiple originalist citations were used, only two of the thirty-eight cases, *Near v. Minnesota*⁵⁹ and *Gertz v. Welch*,⁶⁰ featured a majority or concurring opinion and a dissenting opinion with a citation. In *Near*, both Justice Charles Evans Hughes' majority opinion and Justice Pierce Butler's dissenting opinion used originalist citations to support their construction of the meaning and reach of the First Amendment. Hughes' opinion cited Blackstone, Story, and Madison for the proposition that the *primary* purpose of the First Amendment was to prohibit prior restraints⁶¹ and Cooley to support the contention that the First Amendment was not limited to protecting against prior restraints.⁶² Butler, on the other hand, cited Story, Cooley, Kent, Rawle, and Madison in his dissent.⁶³ Butler argued that these authors clearly supported the contention that the freedom of the press guaranteed by the First Amendment only meant "that 'everyman shall be

at liberty to publish what is true, with good motives and for justifiable ends."⁶⁴ In addition, Butler attacked the majority opinion's citation of Blackstone, suggesting the court was not interpreting the passage it cited correctly.⁶⁵

In *Gertz*, Powell's majority opinion and Justice Byron White's dissenting opinion contained originalist citations. Powell's opinion in the landmark defamation case cited a quote by Madison from Elliot's *Debates* to support the majority's conclusion that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."⁶⁶ Although White admitted the framers' "articulated intention" of the First Amendment were "unclear and inconclusive,"⁶⁷ the justice cited Cooley and Blackstone to support his argument that the First Amendment was never "intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers."⁶⁸ In addition, White argued in a footnote that "the men who wrote and adopted the First Amendment . . . learned [from Blackstone] that the major means of accomplishing free speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious."⁶⁹

Originalist citations appeared most frequently in close cases. Fourteen opinions (32.6%) with a citation were written in cases decided 5-4. Additionally, two opinions containing originalist citations were issued in 4-3 decisions. Thus, a total of 37.2% of the opinions containing originalist citations were issued in cases decided by one vote. However, while previous research has concluded originalist citations are found in concurring opinions of close cases to justify the justice's decision to vote with a majority or persuade others to join a majority,⁷⁰ none of these citations were found in straight concurrences. Six were majority opinions,⁷¹ eight were dissenting opinions,⁷² and two opinions were concurring in part and dissenting in part.⁷³ Originalist citations were found in majority and concurring opinions in unanimous decisions second most frequently. Eight opinions (18.6%)—five majority⁷⁴ and three concurring⁷⁵—used an originalist citation in a 9-0 decision. Notably, of these, eight opinions were in favor of First Amendment protections.

Furthermore, of the forty-three opinions that contained one or more originalist citations, twenty-seven (62.8%) supported arguments that an act of another branch of government was unconstitutional and argued in favor of First Amendment protections. Twenty-two of the opinions were majority or concurring opinions. Of those, nine were opinions supporting striking down a state law;⁷⁶ seven opinions argued in favor of extending protections for defamatory communications⁷⁷ or extending the actual malice requirement to false-light cases;⁷⁸ four opinions wrote that a city or local ordinance was unconstitutional;⁷⁹ one opinion declared a judicial contempt order unconstitutional;⁸⁰ and one opinion dealt with the dismissal of employees from a sheriff's office.⁸¹ Two dissenting opinions would have declared a federal law⁸² or city ordinance⁸³ unconstitutional; two argued a judicial order was unconsti-

tutional;⁸⁴ and one contended a sheriff's order restricting access to a correctional facility was unconstitutional.⁸⁵

In addition to these twenty-seven opinions, it is important to note that the court's opinion in *Gitlow v. New York*,⁸⁶ the case that first ruled that the Fourteenth Amendment extended the reach of certain provisions of the Bill of Rights to the governments of the individual states, contained originalist citations. Citing Story's *Commentaries* in addition to previous case law for support, the court wrote, "[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁸⁷

Qualitative Analysis

A qualitative analysis of the content of the citations demonstrates the justices used framers' intent to advocate for specific understandings of the original purpose, intent, and reach of the First Amendment. In addition, the majority of justices uncritically relied upon the citations as if they were valid descriptions of the framers' intentions and a binding mode of constitutional interpretation. Only three justices, Black, White, and Sandra Day O'Connor, admitted that analyzing debates over the Bill of Rights provided unclear and inconclusive results, although all three still used originalism as a mode of constitutional analysis.⁸⁸ O'Connor wrote:

In general . . . we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms Consequently, we ordinarily simply apply those general principles. . . . But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone.⁸⁹

This ambiguity, however, allowed the justices to use originalist citations to advance a wide variety of constitutional interpretations. Originalist citations were used to argue in favor of an absolute First Amendment, as well as a limited one. Citations were used to support arguments that the original purposes of the First Amendment were to protect political speech and prevent prior restraints and contentions that these were not the only purposes of the Amendment. In addition, originalist citations were used to support extending the First Amendment to federal courts, to argue both for and against protecting defamatory communications, to contend the First Amendment included a right to gather information, and to support the idea that the right to anonymous speech was fundamental.

In *Wood v. Georgia*,⁹⁰ Warren quoted Cooley as a guide to understanding the purpose of the Amendment. He wrote:

The purpose of the First Amendment includes the need: “to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.”⁹¹

Nearly forty years later, Thomas cited Cooley to assert “Political speech is the primary object of First Amendment protection.”⁹² In addition, justices used originalist citations to note the fundamental nature of First Amendment rights and their importance to the American system of government.⁹³ For example, in *New York Times v. Sullivan*, Brennan wrote, “The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.”⁹⁴ However, while the justices used originalist citations to support the argument that freedom of expression was a “fundamental right,” citations were also used to establish limits on the framers’ understanding of the First Amendment. After citing Story to support the argument that freedom of expression was a fundamental right,⁹⁵ Justice Edward Sanford’s majority opinion in *Gitlow v. New York* also cited Story for the proposition that it was “a fundamental principle, long established that the freedom of speech and of the press . . . does not confer an absolute right to speak or publish”⁹⁶ and the Amendment was not intended to protect speech that disturbed the peace or attempted to subvert the government.⁹⁷

In contrast to this approach, however, Black cited Madison’s writings to support his contention that the First Amendment was intended to place *all* speech totally beyond the reach of government regulation. In his concurring opinion in *Smith v. California*,⁹⁸ although Black admitted that using original intent to support interpretations of the First Amendment was problematic, he nonetheless used originalism to support his conclusion that the First Amendment was intended as a complete and absolute bar on government action.⁹⁹ Black also cited Blackstone to argue that the First Amendment, as originally understood, applied to federal courts as well as Congress.¹⁰⁰ Similarly, Douglas also used a citation of Elliot to support his contention that First Amendment protections were intended to be absolute.¹⁰¹

Several of the citations centered on the difference between prior restraints and post-publication punishments. Multiple justices cited Blackstone’s statement that the liberty of the press encompassed by the First Amendment consisted “in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published”¹⁰² or only applied to administrative censorship.¹⁰³ For example, in *Lakewood v. Plain Dealer Publishing Co.*, Brennan cited Blackstone for the proposition that licensing was historically the “archetypal censorship” the First Amendment was designed to prevent,¹⁰⁴ while Scalia’s lone First Amendment originalist citation communicated the same concept in *Thomas v. Chicago Park District*.¹⁰⁵

As noted, citations were also used to counter the argument that the First Amendment, as originally understood, applied *only* to prior restraints, however. For example, in *Near v. Minnesota*, after citing Blackstone's conceptualization of freedom of the press, the court then quoted Cooley's criticism of that conceptualization, writing, "the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions" and that "liberty of the press might be rendered a mockery and a delusion . . . if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."¹⁰⁶ Warren's dissenting opinion in *Times Film Corp. v. Chicago*, a case involving a Chicago ordinance requiring submission of films for examination before a permit for public exhibition was granted, cited both Blackstone's argument and Cooley's criticism in the same paragraph.¹⁰⁷ Perhaps the best example of this practice, however, came in Kennedy's lengthy discussion of the history of prior restraints and post-publication punishments in *Alexander v. United States*.¹⁰⁸ Citing both Blackstone and the writings of Madison, Kennedy concluded that Blackstone was primarily concerned with prior restraints because historically "those methods were the principal means used by government to control speech and press."¹⁰⁹ Yet, Kennedy contended Madison's writings demonstrated that the First Amendment was not intended to be limited to Blackstone's definition of freedom of the press. Kennedy wrote that Blackstone's "idea of the freedom of the press can never be admitted to be the American idea of it."¹¹⁰ The justices were thus able to overcome Blackstone's definition of freedom of expression by explaining that while preventing prior restraints was the *primary* intent of the First Amendment, it was not the *only* intent.

Citations were used to argue in favor of expanding protections under the First Amendment in other ways. In *Grosjean v. American Press Co.*,¹¹¹ *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹¹² *Curtis Publishing Co. v. Butts*,¹¹³ and *Bigelow v. Virginia*,¹¹⁴ justices cited Cooley for the proposition that the First Amendment went well beyond censorship of the press. In *Grosjean*, the court's opinion cited Cooley to support the contention that the First Amendment prohibited the government from imposing a discriminatory sales tax on newspapers with circulations over 20,000. The court wrote, "Judge Cooley has laid down the test to be applied, 'The evils to be prevented were not censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters.'"¹¹⁵ In *Minneapolis Star & Tribune*, the *Federalists* were used to support the contention that "[t]here is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment."¹¹⁶ In *Bigelow*, the same passage was used to argue that the original intent of the First Amendment was to prevent censorship *and* protect the dissemination of information and opinion, even when found in commercial speech.¹¹⁷ In addition, as noted above, several justices quoted Madison's statement regarding public education to support the idea that the First Amendment as originally understood included a First Amendment right to gather information.¹¹⁸

Citations were also used in a number of defamation cases to both limit and expand the reach of the First Amendment concerning defamatory expression. For example, in a footnote in his concurring opinion in *Beauharnais v. Illinois*, Frankfurter used a citation to Elliot's *Debates* to support the contention that the First Amendment was not intended to protect libel.¹¹⁹ White, as noted above, also used originalism in his dissenting opinion in *Gertz*. Although, as noted, White questioned the validity of using original intent in First Amendment cases,¹²⁰ he cited Cooley and Blackstone to support his argument that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel."¹²¹

Alternatively, a number of other justices relied upon citations to expand protections for defamatory communications. For example, Brennan referenced numerous originalist citations in *New York Times v. Sullivan*.¹²² First, citing a passage that made its way into numerous Supreme Court opinions,¹²³ Brennan wrote:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of truth on the speaker. . . . As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than that of the press."¹²⁴

Next, in his comparison of the case to the Sedition Act of 1798, Brennan cited Cooley and Elliot to support his contention that the act was unconstitutional.¹²⁵ Finally, he cited Cooley, in addition to other authors, to argue that "[t]he consensus of scholarly opinion" favored a constitutional guarantee that prohibited public officials from recovering damages for a defamatory falsehood absent a showing the statement was made with knowledge of falsity or reckless disregard for the truth.¹²⁶ Black's opinion went even further. Citing the editor's appendix to Blackstone's *Commentaries*, Black argued that the First Amendment, as originally understood, left the U.S. government with no power "to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials."¹²⁷ Additionally, in *Harte-Hanks Communications v. Connaughton*, Stevens cited Elliot's *Debates* to contend the First Amendment required "special vigilance" when the court considered defamatory speech related to the political process.¹²⁸

This article has examined a prominent and controversial approach to constitutional interpretation meant to both justify and limit the use of judicial review: originalism. There are a number of conclusions to be drawn from this research. First, it is apparent that originalist citations were used uncritically by a wide range of justices to help interpret or advocate for specific meanings of the First Amendment. As noted, only

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three justices acknowledged that originalist sources were limited in their usability. Furthermore, the use of citations was not tied to or limited by judicial philosophy or political ideology. Brennan's repeated reliance on originalist citations and the relatively limited reliance by Scalia indicate citation patterns in First Amendment cases are not direct reflections of espoused judicial philosophy. In addition, as noted, there was a moderate correlation between liberal political ideology and the frequency with which a justice used an originalist citation, although originalism is most closely associated with conservative justices and the only two avowed originalists on the court are conservatives.

Second, originalist citations were frequently used to expand protections afforded by the First Amendment. While originalism itself is designed to limit the use of judicial review, in the case of the First Amendment, it appears that originalist citations were used by justices who were seeking to expand First Amendment protection. This explains why Brennan, a champion of the First Amendment, frequently deployed originalism even though he publically argued against it. The ambiguous nature of originalist citations and their perceived authority made them useful tools to justify the expansion of First Amendment rights.

Third, there was evidence that originalist citations were used as tools of persuasion to either persuade other justices to join an opinion or to provide legitimacy. While there was little evidence of dueling citations, the use of originalist citations by non-originalist justices to expand constitutional protections and their appearance in 5-4 decisions suggests tactical decisions to either justify expanding First Amendment protections, attract votes to an opinion, or to provide external legitimacy to a decision when the court was speaking with a fractured voice. In addition, the citations' appearance in a wide variety of cases suggests that it isn't the case that some topics simply lend themselves to originalist citations. While every Supreme Court opinion is an act of persuasion and legitimization, and thus every citation in an opinion can be seen as an effort to persuade or legitimize, the justices' use of originalist citations when arguing that an act of another branch of government was unconstitutional or in an opinion in a closely decided case suggests the justices view the citations to be especially useful tools in their judicial tool box.¹²⁹

The qualitative analysis of the citations further revealed that the ambiguous nature of originalist citations made it easy for the justices to support their own views of the meaning and scope of the First Amendment through originalism. It was also apparent that Blackstone's limited understanding of freedom of expression was not a limitation on the justices. While Blackstone was cited numerous times, Cooley and Madison were both cited to support the contention that Blackstone's understanding of freedom of expression was not the framers' understanding. This use of originalism makes it clear that justices can argue for a narrow understanding of the First Amendment, as well as an expansive understanding, by citing similar sources.

Finally, it is important to note that unlike research into other areas of law,¹³⁰ the *Federalist Papers* were not the most important or frequently cited originalist source in First Amendment cases. Citations to the

Federalist were primarily used to emphasize the important role of and traditional protection for anonymous speech.¹³¹ One notable exception to this, however, was Thomas' extensive use of *Federalist* citations and the writings of Madison to support his contention that limitations on campaign contributions violated the First Amendment¹³² and his argument that using taxes to fund government speech was not a violation.¹³³

This is most likely due to the fact that the *Federalists* were primarily concerned with arguments in favor of the ratification of the U.S. Constitution and did not directly address the Bill of Rights,¹³⁴ and is consistent with findings that justices are less likely to cite the *Federalists* in cases involving civil rights and civil liberties.¹³⁵ However, Thomas' use of the *Federalist* is important because, as noted above, Thomas is an originalist adherent. This suggests that what might constitute a legitimate originalist citation varies by justice. Thus, future research should carefully parse when and how a justice is invoking framers' intent. For example, although some authors have suggested Scalia is not "the Real Originalist" on the court,¹³⁶ it is also possible he simply has a different idea of what constitutes an originalist citation. In addition, the lack of citations to the *Federalist*, coupled with the frequency with which other justices cited Blackstone in freedom of expression opinions, suggests new research would benefit from examining sources considered authoritative within the specific area of law under examination as well as other ways originalism might be invoked.¹³⁷

In sum, although scholars have argued that the "blank slate" of original meaning is a "serious blow" to First Amendment originalism, it appears the opposite is true. The blank slate of originalism makes it a tool for originalists and non-originalists alike, and First Amendment originalism has been an important factor in the jurisprudence of both liberal and conservative justices. While originalist citations are not the only way a justice can invoke originalism, this study provides evidence that originalism is an important mode of constitutional interpretation that has played a significant role in defining the current scope of freedom of expression in the United States. Indeed, originalist citations have frequently served as justification for many of the broad First Amendment protections for freedom of expression that exist today.

NOTES

1. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting); *Houchins v. KQED*, 438 U.S. 1, 31-32 (1978) (Stevens, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting); *Branzburg* at 723 (Douglas, J., dissenting).

2. James Madison to W.T. Barry, August 4, 1822, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1910), 103. "The liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded. A popular Government, without popular information, or

the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

3. See generally Steven G. Calabresi, ed., *Originalism: A Quarter Century of Debate* (Washington, DC: Regnery Publishing, Inc., 2007); and Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (New York: Cambridge University Press, 2005).

4. Most of the scholarship on judicial decision making is based on one of two presumptions: that the law decides cases, or that the policy preferences of individual judges' best predict and explain courts' decisions. See Jeffery A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 44. Models of judicial decision making are attempts to reduce the many factors that contribute to judicial decisions to the ones that validly and reliably explain and predict judicial decisions. Models attempt to explain multiple decisions rather than analyze a single decision. No model attempts to take into account all factors, nor does any model perfectly explain all decisions. As political scientists Segal and Spaeth point out, the goal of a good model is to predict and explain a number of decisions better than competing models. Segal and Spaeth, *The Supreme Court and Attitudinal Model Revisited*, 46.

5. John B. Gates and Glenn A. Phelps, "Intentionalism in Constitutional Opinions," *Political Research Quarterly* 49 (2, 1996): 245.

6. Not only does the practice of focusing on quantitative analysis limit the reach of previous research, it does not take into account the use of originalist citations in freedom of expression cases to address issues unrelated to freedom of expression. This research discovered numerous originalist citations in freedom of expression cases that had nothing to do with freedom of expression. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Republican Party of Minnesota v. White*, 536 U.S. 765, 765 (2002); *Huchinson v. Proxmire*, 443 U.S. 111, 163-64 (1979); *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. Alexander Volokh, "Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else," *New York University Law Review* 83 (3, 2008): 775.

8. David Souter, Harvard Graduation Commencement Speech, May 27, 2010, available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

9. Philip Bobbitt, *Constitutional Interpretation* (Cambridge, MA: Basil Blackwell, Inc. 1991), 12-13. Bobbitt identified the dominant modes of constitutional interpretation as historical, textual, structural, doctrinal, ethical, and prudential.

10. Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 60.

11. Larry Kramer, "Panel on Originalism and Pragmatism," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, Inc., 2007), 153.

12. Kramer, "Panel on Originalism and Pragmatism," 153.

13. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997).

14. Kramer, "Panel on Originalism and Pragmatism," 153. According to Kramer, "public-meaning originalism" is the version that is most generally practiced today.

15. Robert W. Bennett, "Originalism: Lessons from Things that Go Without Saying," *San Diego Law Review* 45 (3, 2008): 646.

16. Pamela C. Corley, Robert M. Howard, and David C. Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," *Political Research Quarterly* 58 (2, 2005): 331.

17. Erwin Chemerinsky, "The Rhetoric of Constitutional Law," *Michigan Law Review* 100 (8, 2002): 2012.

18. Steven G. Calabresi, "Introduction" in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, Inc., 2007), 3. See also, Goldford, *The American Constitution and the Debate over Originalism*, 3 (quoting a speech made by Senator Orrin Hatch at the confirmation hearings for Justice Ruth Bader Ginsburg to assert that the "standard originalist position" is that originalism is the only way to ensure unelected federal judges are not making decisions based on personal policy preferences).

19. Goldford, *The American Constitution and the Debate over Originalism*, 2.

20. Antonin Scalia, "Foreword" in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, Inc., 2007), 44-45.

21. Bradley P. Jacob, "Will the Real Constitutional Originalist Please Stand Up?," *Creighton Law Review* 40 (3, 2007): 650.

22. Edwin Meese III, "Speech Before the American Bar Association," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, Inc., 2007), 53.

23. See, e.g., William J. Brennan, Jr., "Speech to the Text and Teaching Symposium," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, Inc., 2007), 58; Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," *Yale Law Journal* 90 (5, 1981): 1063; Jeffery Shaman, "The Constitution, the Supreme Court and Creativity," *Hastings Constitutional Law Quarterly* 9 (winter 1982): 257; Larry G. Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" *California Law Review* 73 (5, 1985): 1482.

24. Brennan, "Speech to the Text and Teaching Symposium," 58.

25. Brennan, "Speech to the Text and Teaching Symposium," 58.

26. Clay Calvert and Matthew D. Bunker, "Contrasting Conurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases," *Georgia State University Law Review* 26 (2, 2010): 332.

27. David A. Anderson, "The Origins of the Press Clause," *University of California at Los Angeles Law Review* 30 (February 1983): 485.

28. Anderson, "The Origins of the Press Clause," 480. Sessions of

the Senate were closed throughout the period during which the Bill of Rights was being drafted. The Senate Journal and the History of the Proceedings and Debates recorded only actions taken.

29. Calvert and Bunker, "Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases," 332.

30. Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson* (Durham, NC: Carolina Academic Press, 1966), 104-05.

31. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Knopf Doubleday Publishing Group, 1992).

32. Calvert and Bunker, "Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases," 333-34.

33. Calvert and Bunker, "Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases," 334.

34. See Volokh, "Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else," 777-85, for a lengthy discussion of the multiple factors that would lead a strategically minded judge to base his opinion on one of the recognized modes of interpretation.

35. See Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 44.

36. See, e.g., Forrest Maltzman, James F. Spriggs, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, UK: Cambridge University Press, 2000); Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: Congressional Quarterly Inc., 1998); Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics* 66 (4, 2004); Forrest Maltzman and Paul J. Wahlbeck, "Strategic Policy Considerations and Voting Fluidity on the Burger Court," *American Political Science Review* 90 (3, 1996); Forrest Maltzman and Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (2, 1996); Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill, NC: University of North Carolina Press, 1992); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

37. Volokh, "Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else," 771-72.

38. James G. Wilson, "The Most Sacred Text: The Supreme Court's Use of the The Federalist Papers," *Brigham Young University Law Review* 1985 (1, 1985): 72-73.

39. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 335-39.

40. See Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," *American Political Science Review* 83 (2, 1989).

41. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 333.

42. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 333. Overall, in cases that formally altered precedent or declared a federal, state, or local law unconstitutional, the relative odds of the majority opinion referencing the *Federalist* were 315% and 297%, respectively, higher than in cases that did not. In addition, in cases decided by a single vote, when the court is not speaking with one authoritative voice, the relative likelihood of a concurrence referring to the Federalist Papers was 155% higher than when the case was decided by a wider margin.

43. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 333. Dissenting opinions are significantly more likely to reference the *Federalist* if a majority or concurring opinion did, but are not significantly more likely to if a complementary dissenting opinion did. However, it is important to note that it is very difficult to determine if a citation was included to attract votes or legitimize close cases to the public and the other institutions of government without analyzing how votes change during the opinion writing process.

44. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 336.

45. See generally Brennan, "Speech to the Text and Teaching Symposium."

46. Glenn A. Phelps and John B. Gates, "The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan," *Santa Clara Law Review* 31 (3, 1991): 591-92.

47. 463 U.S. 783 (1983).

48. Phelps and Gates, "The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan," 591.

49. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 337.

50. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers"; Buckner F. Melton, Jr., and Jennifer J. Miller, "The Supreme Court and The Federalist: A Supplement, 1996-2001," *Kentucky Law Journal* 90 (2, 2002); Ira C. Lupu, "Time, the Supreme Court, and The Federalist," *George Washington Law Review* 66 (5 and 6, 1998); Buckner F. Melton, Jr., "The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996," *Kentucky Law Journal* 85 (2, 1997); Gates and Phelps, "Intentionalism in Constitutional Opinions"; Wilson, "The Most Sacred Text: The Supreme Court's Use of The Federalist Papers."

51. As noted above, there are many different forms of originalism. Therefore, there is debate about what exactly qualifies as an originalist source. The list outlined in this article is based on numerous previous articles and is an attempt to compile a list of the most frequently discussed originalist citations in the strategic citation literature. As discussed, however, originalism is a very loosely defined judicial philosophy, and there are multiple ways a justice can support an originalist argument. It is beyond the scope of a single article to analyze every sin-

gle way a justice could support an originalist argument or every method a justice might use to interpret the First Amendment. The purpose of this article is to advance our understanding of which justices have used originalist citations, how those citations have been used, and how they have shaped free expression jurisprudence.

52. Leonard W. Levy, *Emergence of a Free Press* (Chicago: Ivan R. Dee, 1985), 12.

53. See, e.g., David A. Copeland, *The Idea of a Free Press* (Evanston, IL: Northwestern University Press, 2006), 216-17; Jeffery A. Smith, *War and Press Freedom* (New York: Oxford University Press, 1999), 27-44; Levy, *Emergence of a Free Press*, 12; Fredrick S. Siebert, *Freedom of the Press in England 1476-1776* (Urbana, IL: University of Illinois Press, 1965), 4-9.

54. See, e.g., Eugene Volokh, "Symbolic Expression and the Original Meaning of the First Amendment," *Georgetown Law Journal* 97 (4, 2009): 1057.

55. Saul Cornell, "The Original Meaning of Original Understanding: A Neo-Blackstonian Critique," *Maryland Law Review* 67 (1, 2007): 151. See also Albert W. Alschuler, "Rediscovering Blackstone," *University of Pennsylvania Law Review* 145 (1, 1996).

56. Cases were identified by using a LexisNexis Academic court section search to retrieve Supreme Court cases on a particular topic. The search term "court (supreme) and first amendment and freedom of speech or freedom of the press" in the Additional Terms field were used. This list was then cross-referenced with the list of freedom of expression cases compiled by the First Amendment Center, available at http://www.firstamendmentcenter.org/fac/library/libraryexpression.aspx?topic=supreme_court_freedom_of_expression_cases_topic&subheading=n. All opinions from each case on either list were then searched electronically for citations. (E.g., each opinion was searched for the term "Blackstone.") Only those citations that directly addressed the original meaning of the First Amendment were tabulated and analyzed.

57. Other justices to cite an originalist source in one opinion included Justices Harry Blackmun, Pierce Butler, John Marshall Harlan II, Charles Hughes, Anthony Kennedy, Sandra Day O'Connor, Edward Stanford, George Sutherland, and Byron White.

58. Ideology scores range from 0 (most conservative) to 1 (most liberal). For the justices' Segal-Cover scores, see Segal and Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices" and "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005," available at <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf>.

59. 283 U.S. 697 (1931).

60. 418 U.S. 323 (1974).

61. *Near* at 713-14.

62. *Near* at 714-15 (quoting Cooley's contention that "the liberty of the press might be rendered a mockery and a delusion . . . if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.").

63. *Near* at 734-35 (Butler, J., dissenting).

64. *Near* at 735 (quoting Story).

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65. *Near* at 733-34; *Near* at 734 n.2.
66. *Gertz*, 418 U.S. at 340. Powell continued, "As James Madison pointed out in the Report on the Virginia Resolutions of 1798: 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'" (quoting Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 571 [1876]).
67. *Gertz* at 383 (White, J., dissenting).
68. *Gertz* at 381-82 (White, J. dissenting).
69. *Gertz* at 382 n.14 (White, J. dissenting).
70. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 336.
71. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Near v. Minnesota*, 283 U.S. 697 (1931).
72. *Brown v. Glines*, 444 U.S. 348, 363 (1980) (Brennan, J., dissenting); *Houchins v. KQED*, 438 U.S. 1, 34 (1978) (Stevens, J., dissenting); *Gertz* at 381 (White, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting); *Branzburg* at 723 (Douglas, J., dissenting); *Times Film Corp. v. Chicago*, 365 U.S. 43, 53 (Warren, C.J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 151 (1959) (Black, J., dissenting); *Near v. Minnesota*, 283 U.S. 697, 735 (1931) (Butler, J., dissenting).
73. *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Thomas, J., concurring in part and dissenting in part); *Alexander v. United States*, 509 U.S. 544, 567 (1993) (Kennedy, J., concurring in the judgment and dissenting in part).
74. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989); *Bond v. Floyd*, 385 U.S. 116 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).
75. *New York Times v. Sullivan*, 376 U.S. 254, 295 (1964) (Black, J., concurring); *Smith v. California*, 341 U.S. 147, 158 (1959) (Black, J., concurring); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 523 (1952) (Frankfurter, J., concurring).
76. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *id.* at 360 (Thomas, J., concurring); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bond v. Floyd*, 385 U.S. 116 (1966); *Speiser v. Randall*, 357 U.S. 513, 535 (1958) (Douglas, J., concurring); *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931).
77. *Harte-Hanks Comm. v. Connaughton*, 491 U.S. 657 (1989); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time v. Pape*, 401 U.S. 279 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *id.* at 295 (Black, J., concurring).
78. *Time v. Hill*, 385 U.S. 374 (1967).

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79. *Lakewood v. Plain Dealer*, 486 U.S. 750 (1988); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 624 (1976) (Brennan, J., concurring in part); *Tally v. California*, 362 U.S. 60 (1960); *Smith v. California*, 341 U.S. 147, 158 (1959) (Black, J., concurring).
80. *Wood v. Georgia*, 370 U.S. 375 (1962).
81. *Elrod v. Burns*, 427 U.S. 347 (1976).
82. *Barenblatt v. United States*, 360 U.S. 109, 151 (1959) (Black, J., dissenting).
83. *Times Film Corp. v. Chicago*, 365 U.S. 43, 53 (1961) (Warren, C.J., dissenting).
84. *Branzburg* at 726 (Stewart, J., dissenting); *Branzburg* at 723 (Douglas, J., dissenting).
85. *Houchins* at 34 (Stewart, J., dissenting).
86. 268 U.S. 652, 666 (1925) (citing Joseph Story, Commentaries on the Constitution 698 [1950]).
87. *Gitlow* at 666.
88. *Minneapolis Star & Tribune Co.* at 583 n.6; *Gertz* at 383 (White, J., dissenting); *Smith* at 158 n.2 (Black, J., concurring).
89. *Minneapolis Star & Tribune Co.* at 583 n.6.
90. 370 U.S. 375 (1962).
91. *Wood* at 392 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 885 [1883]). See also *Elrod v. Burns*, 427 U.S. 347, 374 n.29 (1976).
92. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting).
93. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Thomas, J., dissenting); *Roth v. United States*, 354 U.S. 476, 488 n.22 (1957); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
94. *Sullivan* at 275. See also *Sullivan* at n.15.
95. *Gitlow* at 666.
96. *Gitlow* at n.9.
97. *Gitlow* at 667. See also *Near* at 735 (Butler, J., dissenting) (writing Story understood the meaning of freedom of the press meant the liberty to publish only "what is true, with good motives and for justifiable ends").
98. 341 U.S. 147 (1959).
99. *Smith* at 158 n.2 (quoting Madison writings that the First Amendment placed the liberty of the press "beyond the reach of this Government" and "as it originally stood . . . the amendment was intended as a positive and absolute reservation" of the government's power over the press).
100. *Barenblatt v. United States*, 360 U.S. 109, 151 n.23 (1959) (Black, J., dissenting).
101. *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 156-57 (1973) (Douglas, J., concurring). In a paragraph discussing the absolute nature of the First Amendment, Douglas quoted a statement from Thomas Jefferson concerning the unconstitutionality of the Alien and Sedition Acts.
102. See, e.g., *Near* at 714 (quoting William Blackstone, 2 Commentaries

*151-52).

103. *See, e.g.*, *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 391 (1973) (quoting William Blackstone, 2 Commentaries *152).

104. 486 U.S. 750, 760 (1988).

105. 534 U.S. 316, 320 (2002).

106. *Near* at 715 (quoting Thomas M. Cooley, *Constitutional Limitations* 885 [1883]).

107. 365 U.S. 43, 53-54 (1961) (Warren, C.J., dissenting).

108. 509 U.S. 544, 567-69 (1993) (Kennedy, J., concurring in the judgment in part and dissenting in part).

109. *Alexander* at 568.

110. *Alexander* at 568.

111. 297 U.S. 233 (1936).

112. 460 U.S. 575 (1983).

113. 388 U.S. 130 (1967).

114. 421 U.S. 809 (1975).

115. *Grosjean* at 249-50 (quoting Thomas M. Cooley, *Constitutional Limitations* 866 [1883]).

116. *Minneapolis Star & Tribune Co.* at 583-84.

117. *Bigelow* at 829.

118. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting); *Houchins* at 31-32 (Stevens, J., dissenting); *Branzburg* at 726 (Stewart, J., dissenting); *Branzburg* at 723 (Douglas, J., dissenting).

119. *Beauharnais* at 257 n.6 (Frankfurter, J., concurring).

120. *Gertz* at 383 (White, J., dissenting).

121. *Gertz* at 381 (White, J., dissenting); *Gertz* at 382 n.14 (White, J., dissenting)

122. 376 U.S. 254 (1964).

123. *See Gertz* at 340; *Time v. Pape*, 401 U.S. 279, 290 (1971); *Time v. Hill*, 385 U.S. 374, 388-89 (1967).

124. *Sullivan* at 271 (quoting Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 571 [1876]).

125. *Sullivan* at 274 (quoting Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 553-54 [1876]); *Sullivan* at 276.

126. *Sullivan* at 280 n.20.

127. *Sullivan* at 295-96 (Black, J., concurring). *See also Sullivan* at 297 (Black, J., concurring).

128. 491 U.S. 657, 687 (1989).

129. The methodology employed made it impossible to determine if the justices were using an originalist citation as a tool of internally or externally oriented strategy. That is, it is impossible to know if a strategic citation was used in closely decided cases to attract other justices to form a minimum winning coalition or to enhance the perceived authority of a fractured opinion to outside observers. No effort was made to determine if a justice was influenced to change a vote based on the inclusion of an originalist source in a majority or dissenting opinion by

reviewing votes taken at conference and final votes.

130. See, e.g., Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers"; Melton, Jr., and Miller, "The Supreme Court and The Federalist: A Supplement, 1996-2001"; Lupu, "Time, the Supreme Court, and The Federalist"; Melton, Jr., "The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996"; Gates and Phelps, "Intentionalism in Constitutional Opinions"; Wilson, "The Most Sacred Text: The Supreme Court's Use of The Federalist Papers."

131. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *McIntyre* at 343 n.6; *McIntyre* at 360-61 (Thomas, J., concurring in the judgment); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 625 (1976); *Branzburg* at 730 n.6 (Stewart, J., dissenting); *Tally v. California*, 362 U.S. 60, 64-64 (1960).

132. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410-11 (2000); *Nixon* at 410-14; *Nixon* at 424 n.9.

133. *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550, 567 (2003) (Thomas, J., concurring).

134. Melton, Jr., "The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996," 250.

135. Corley, Howard, and Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," 334.

136. Jacob, "Will the Real Constitutional Originalist Please Stand Up?" 650.

137. As noted, there is a wide range of originalism, and justices are not limited to traditional originalist citations to support arguments based on originalism. See, e.g., *Morse v. Fredrick*, 551 U.S. 393, 410-11 (2007) (discussing a historical analysis of public education in America to argue that "the First Amendment, as originally understood, does not protect student speech in public schools"); *Central Hudson G & E v. Public Service Commission* 447 U.S. 557, 598 (1980) (asserting that commercial speech was not "the kind of speech that those who drafted the First Amendment had in mind" without offering any historical support).