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### The First Amendment Originalism of Justices Brennan, Scalia and Thomas

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# THE FIRST AMENDMENT ORIGINALISM OF JUSTICES BRENNAN, SCALIA AND THOMAS

**DERIGAN SILVER\***  
**DAN V. KOZLOWSKI\*\***

*Originalism holds that the U.S. Constitution should be interpreted based on the original intent or original meaning of the Constitution, that original intent is not only relevant but authoritative, and that judges are obligated to follow the framers' original intent and meaning when resolving cases. Normative questions surrounding originalism's merit have produced one of the great constitutional debates of recent decades. This article compares and contrasts the First Amendment originalism of three justices: William Brennan, Antonin Scalia and Clarence Thomas. It examines every First Amendment opinion prior to the 2011 term written by the justices that contains originalism. The article concludes that all three justices used originalism to support a wide variety of arguments in a wide variety of First Amendment cases. In addition, the analysis demonstrates that Justices Scalia and Thomas more frequently supported the First Amendment in opinions in which they used originalism, a finding that contradicts the idea that originalism is associated with judicial restraint. The article contends that, with a few minor exceptions, none of the justices used originalism in a consistent way. Finally, the article offers perspectives on originalism's influence on current First Amendment jurisprudence and the limitations of using originalism for constitutional interpretations.*

In November 2010, the Supreme Court of the United States heard oral arguments in *Brown v. Entertainment Merchants Association*,<sup>1</sup> a case

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<sup>1</sup>131 S.Ct. 2729 (2011).

involving a First Amendment challenge to a California law that barred the sale or rental of violent video games to minors. During the proceedings, Justice Antonin Scalia expressed skepticism at the arguments advanced by the attorney defending the law that the First Amendment contained a wholesale exception for violent video games. “It has never been understood that the freedom of speech did not include portrayals of violence,” Justice Scalia said. “You are asking us to create a whole new prohibition which the American people never ratified when they ratified the First Amendment.” Before Justice Scalia could get a response from the attorney, fellow Justice Samuel Alito humorously interjected, “I think what Justice Scalia wants to know is what James Madison thought about video games.” Although laughter filled the courtroom, any humor was lost on Justice Scalia. “No, I want to know what James Madison thought about violence,” he responded. “Was there any indication that anybody thought, when the First Amendment was adopted, that there – there was an exception to it – for speech regarding violence?”<sup>2</sup>

Justice Scalia did not ask the question simply out of intellectual curiosity. Indeed, the question’s answer influenced his opinion for the Court to strike down the state law. Justice Scalia is one of two avowed originalists on the Supreme Court; Justice Clarence Thomas is the other.<sup>3</sup> Originalism is a mode of interpreting the U.S. Constitution that focuses analysis on the framers who wrote and ratified the document.<sup>4</sup> As political scientists Jeffery A. Segal and Harold J. Spaeth describe it, originalism holds that judges should interpret the Constitution “according to the preference of those who originally drafted and supported”<sup>5</sup> it — and originalists believe that doing so is the only way to ensure that judges do not privilege their own policy preferences when making

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<sup>2</sup>Transcript of Oral Argument 16–17, *Schwarzenegger v. Entm’t Merch. Ass’n*, 131 S.Ct. 2729 (2011) (No. 08–1448) *sub nom.* *Brown v. Entm’t Merch. Ass’n*, available at [http://www.oyez.org/cases/2010-2019/2010/2010\\_08\\_1448](http://www.oyez.org/cases/2010-2019/2010/2010_08_1448).

<sup>3</sup>See Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 44–45 (Steven G. Calabresi ed., 2007) (writing that Justices Scalia and Thomas are the only two originalists currently on the Supreme Court).

<sup>4</sup>Legal scholars differ over the number and nomenclature of the modes of constitutional interpretation. See generally PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying the major modes of constitutional interpretation as historical, textual, structural, ethical and prudential); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV 567, 581–84 (1991) (classifying the types of constitutional interpretive arguments as textual, structural, doctrinal, extrinsic and historical/intentional).

<sup>5</sup>JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 60 (2002).

decisions.<sup>6</sup> Originalists, in other words, 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.”<sup>7</sup>

The approach has taken a variety of labels over time — including, for instance, “interpretivism” and “original intentionalism” — in part because originalists have varied about the degree to which original text is binding and about what encompasses intent.<sup>8</sup> Proponents of originalism initially focused study on the specific writings — and thus the original intent — of the framers. The scope of the movement has since expanded, however. Justice Scalia, for example, adheres to a variant of originalism that he describes as “original meaning” — what other scholars have termed “public-meaning originalism.”<sup>9</sup> He contends that jurists interpreting the Constitution should focus on the practices at the time of the framing or attempt to discern what a rational person at the time of the Constitution’s framing and ratification would have taken the document’s words to mean<sup>10</sup> — hence his historically rooted questions during oral arguments, followed by his language in *Brown* that the state’s “argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none.”<sup>11</sup> For an original-meaning originalist, the approach encompasses a wide range of historical materials from the founding era that address constitutional meaning, even work that was not written by the framers specifically.

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<sup>6</sup>As Professor David J. Goldford wrote, originalists hold that because 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. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 2 (2005). Even critics of originalism admit that, at the very least, there is an appeal to the notion 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. See Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2012 (2002).

<sup>7</sup>Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 331 (2005).

<sup>8</sup>*Id.*

<sup>9</sup>See Larry Kramer, *Panel on Originalism and Pragmatism*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 154 (Steven G. Calabresi ed., 2007) (describing this version of originalism as the one generally practiced today).

<sup>10</sup>See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997) (contending that consulting the framers’ writings was important in constitutional interpretation “not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of intelligent and informed people of the time, display how the text of the Constitution was originally understood”).

<sup>11</sup>*Brown v. Entm’t Merch. Ass’n*, 131 S.Ct. 2729, 2736 (2011).

Debates surrounding originalism's merit have produced what legal commentator Jeffrey Toobin has called "one of the great constitutional dramas" of the past few decades.<sup>12</sup> Although originalism as a mode of constitutional interpretation has existed for a long time, perhaps as long as there have been constitutional interpretations,<sup>13</sup> originalism's defenders in the modern era burst onto the scene in force in the years following the Court's 1970s abortion decisions,<sup>14</sup> along with comments made by then-Attorney General Edwin Meese in the 1980s in support of the approach.<sup>15</sup> Given its intellectual history, and given that Justices Scalia and Thomas are generally recognized as conservative jurists,<sup>16</sup> originalism is typically associated with conservatism.<sup>17</sup> Originalism's critics counter both the position that justices and scholars can accurately ascertain original meanings and the wisdom that, even if they could, those meanings can satisfactorily resolve all of our contemporary issues.<sup>18</sup> Other scholars argue the framers of the Constitution were not originalists themselves.<sup>19</sup> Even sitting justices have criticized the

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<sup>12</sup>Interview by Terry Gross with Jeffrey Toobin, *Fresh Air: How High Court Could Change if Stevens Retires*, National Public Radio (Mar. 15, 2010), available at <http://www.npr.org/templates/rundowns/rundown.php?prgId=13&prgDate=3-15-2010>.

<sup>13</sup>See J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 34 (2012) ("Originalism has been around, in one form or another, since the first days of the Constitution. Indeed, Chief Justice John Marshall routinely displayed originalist tendencies, considering the intentions of the Framers on all manner of topics.").

<sup>14</sup>Originalists hold that judges should not add any new rights to the Constitution and, therefore, generally disapprove of the Court's privacy jurisprudence.

<sup>15</sup>See Edwin Meese III, *Speech Before the American Bar Association*, in *ORIGINALISM: A QUARTER CENTURY OF DEBATE* 47 (Steven G. Calabresi ed., 2007).

<sup>16</sup>See *infra* notes 45-74 and accompanying text for a discussion of the three justices' political ideologies, judicial philosophies, and approaches to originalism.

<sup>17</sup>See, e.g., Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 775 (2008); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POLY 29 (2011).

<sup>18</sup>See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1982); Jeffery Shaman, *The Constitution, the Supreme Court and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004). One line of critique charges that originalism requires judges to become amateur historians, a role for which they are ill equipped. See, e.g., CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 93 (1969) (critiquing the Supreme Court for "convok[ing]" the "court of history" to resolve cases); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 35 (discussing the "law office history" judges employ).

<sup>19</sup>See, e.g., Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1184 (1987).

approach. Justice William Brennan, for instance, offered a spirited response to Meese in a 1985 speech he gave at Georgetown University.<sup>20</sup>

Yet research has shown that it is not only avowed originalist judges who invoke original meaning in their opinions. Originalism, instead, is an approach that has been employed by both conservative and liberal justices — including self-described originalist critics.<sup>21</sup> The purpose of this article is to substantively compare and contrast the First Amendment<sup>22</sup> originalism of three justices central to the debates surrounding originalism: Justices Brennan, Scalia and Thomas. The three justices, a liberal and two conservatives, are known for very different judicial philosophies and approaches to originalism.

First, the article discusses literature related to the study of originalism in Supreme Court opinions. Next, it briefly discusses the justices, their political ideology, and their relationship to originalism. Third, it analyzes every First Amendment opinion written by Justices Brennan, Scalia and Thomas that contains originalism.<sup>23</sup> The study showcases how ideologically diverse justices — one who was a vocal critic of originalism<sup>24</sup> — use originalism to reinforce their constitutional interpretation and support their decisions.

The article concludes that all three justices used originalism to support a wide variety of arguments in a wide variety of First Amendment cases. Interestingly, the research shows Justice Brennan used originalism far more, and Justices Scalia and Thomas used it far less, than their public positions on originalism would suggest. In addition, the research demonstrates that both Justices Scalia and Thomas more frequently

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<sup>20</sup>William J. Brennan Jr., *Speech to the Text and Teaching Symposium*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 55 (Steven G. Calabresi ed., 2007).

<sup>21</sup>See *infra* notes 75–104 and accompanying text. See also Phelps & Gates, *supra* note 4; Derigan Silver, *The Framers' First Amendment: Originalist Citations in U.S. Supreme Court Freedom of Expression Opinions*, 88 JOURNALISM & MASS COMMUNICATION Q. 99 (2011).

<sup>22</sup>The article focuses exclusively on cases involving free expression. Free exercise and establishment cases were not analyzed.

<sup>23</sup>Cases were identified by using a LexisNexis Academic court section search to retrieve Supreme Court cases on a particular topic. The search terms “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://archive.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=supreme.court.freedom.of.expression.cases.topic&subheading=n>. The authors then searched the individual cases for any reference the three justices have made in their opinions to original intent or the historical meaning of the First Amendment. As discussed herein, justices can cite a wide range of material to support originalist arguments — and sometimes justices cite no source at all when they invoke the framers' intent. Therefore the authors conceptualized originalism in the broadest possible way.

<sup>24</sup>See Brennan, *supra* note 20, at 55.

supported the First Amendment in opinions in which they used originalism, a finding that contradicts the idea that originalism is associated with judicial restraint. The article labels Justice Brennan the “opportunist” because of his quick references and citations to the framers. Justice Scalia is termed the “traditionalist,” based on his focus on the traditions and practices at the time of the framing. And Justice Thomas is labeled the “historicist” because of the wide range of historical material he invokes and his tendency to take the role of history professor, lecturing his students. Finally, the article offers concluding perspectives both on originalism’s influence on current First Amendment jurisprudence and the limitations of using originalism for constitutional interpretations.

### ORIGINALISM AND THE FIRST AMENDMENT

A general lack of historical materials exists chronicling the original understanding of the First Amendment.<sup>25</sup> Even avowed originalists admit as much. Former Judge Robert Bork, for instance, once wrote that the “framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”<sup>26</sup> Congress did not debate the merits or meaning of the First Amendment<sup>27</sup> and the final wording of the amendment was decided upon by the First Senate, which kept no record of its meeting.<sup>28</sup> Historian Leonard W. Levy wrote that evidence suggests that the Bill of Rights was actually “more the chance product of political expediency on all sides than of principled commitment to personal liberties.”<sup>29</sup> In addition, legal scholars Matthew D. Bunker and Clay Calvert argued 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

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<sup>25</sup>As noted, there is a large body of literature that critiques the use of originalism in general, and a number of scholars have made compelling cases against the approach, pointing out numerous problems with using originalism to reach judicial decisions and as a way to predict and explain judicial behavior. This article, however, focuses on three justices’ use of originalism in interpreting the meaning of the First Amendment and is not meant to be a broad normative critique of originalism generally.

<sup>26</sup>Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 22 (1971).

<sup>27</sup>David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 485 (1983).

<sup>28</sup>*Id.* at 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.

<sup>29</sup>LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION XXI* (1963).

commentator William Blackstone,<sup>30</sup> a jurist whose positions now run counter to large swaths of current First Amendment law.<sup>31</sup> Bunker and Calvert concluded that, added together, these problems are “a serious blow to First Amendment originalism because the ‘original meaning’ is, to a significant degree, a blank slate.”<sup>32</sup>

According to one body of literature, however, the blank slate of First Amendment originalism might actually be its greatest strength. The strategic model of judicial decision-making suggests that justices continue to cite originalist sources despite these problems in order to provide their opinions with legitimacy. Under this model of judicial behavior, although justices, like other political actors, seek the implementation of personal policy preferences, they are limited by legal factors, the preferences of their fellow justices, the norms and authority of the institution of the Supreme Court, and external political and societal factors, such as public opinion.<sup>33</sup> The strategic model suggests that although the law gives justices a great deal of room to maneuver, they must also operate under rules governing their own actions and sway their colleagues with persuasive legal arguments. Thus, while a justice might come to a case with preconceived legal and policy preferences, the justice’s opinion must contain *legal rationales* to justify its conclusion, and invoking originalism thus becomes a proxy for merit.<sup>34</sup> From this perspective, because there were multiple framers with various views of the Constitution and Bill of Rights, justices are able to strategically use originalist materials as “instruments of persuasion”<sup>35</sup> to advance their

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<sup>30</sup>Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 333 (2010).

<sup>31</sup>Blackstone wrote that freedom of speech meant only that prior restraints were barred — and subsequent punishment for “criminal” speech was acceptable. See Leonard W. Levy, *Preface*, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 104–05 (Leonard W. Levy ed., 1966).

<sup>32</sup>Bunker & Calvert, *supra* note 30, at 334.

<sup>33</sup>See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992); FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); Forrest Maltzman & Paul J. Wahlbeck, *May it Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853 (1996); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

<sup>34</sup>Volokh, *supra* note 17, at 771-72.

<sup>35</sup>James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers*, 1985 BYU L. REV. 66, 72-73 (1985).

policy preferences, insulate their decisions from criticism, and persuade other justices to join their decisions.

Judicial politics research on strategic citation of originalist sources has reinforced this view of justices as strategic actors who use originalism to persuade and legitimize. Political scientists Pamela C. Corley, Robert M. Howard and David C. Nixon, for example, found that justices often cite *The Federalist* to both legitimize decisions and support conflicting constitutional interpretations.<sup>36</sup> They concluded that a justice was most likely to cite *The Federalist* when an opinion needed an extra measure of perceived credibility. This included cases in which there was a minimum winning coalition vote, when the Court formally overturned precedent, or when the Court declared a law unconstitutional.<sup>37</sup>

Their research also suggests justices engage in “dueling citation” patterns, meaning justices invoke originalism in anticipation or reaction to the arguments of their peers.<sup>38</sup> Corley, Howard and Nixon thus found dissenting opinions were significantly more likely to reference *The Federalist* if a majority or concurring opinion did. They concluded that this pattern of strategic citations suggested “the *Federalist Paper* 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*.”<sup>39</sup>

Analyzing opinions authored by Justices William Rehnquist and Justice Brennan over a ten-year period, John B. Gates and Glenn A. Phelps concluded that even though the two justices espoused quite different judicial philosophies regarding originalism, they did not differ in their relative use of originalism in a statistical sense.<sup>40</sup> In a separate article, they also demonstrated that two justices, in this case Justice Brennan and Chief Justice Warren Burger, used the arguments of the same framer, James Madison, to come to divergent conclusions in the same case.<sup>41</sup>

Focusing on First Amendment cases, Professor Derigan Silver recently conducted both quantitative and qualitative analyses of Supreme

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<sup>36</sup>Corley, Howard & Nixon, *supra* note 7, at 338–39.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 336.

<sup>40</sup>Phelps & Gates, *supra* note 4, at 591–92.

<sup>41</sup>John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245, 254 (1996). The case is *Marsh v. Chambers*, 463 U.S. 783 (1983).

Court references to the most commonly used originalist citations.<sup>42</sup> Silver found that justices uncritically relied on the citations as authoritative and used them to advance a wide range of constitutional interpretations. He also found that justices were more likely to use an originalist citation in freedom of expression cases when an opinion required additional credibility, such as closely decided cases and when an opinion supported arguments that an act of another branch of government was unconstitutional.

Yet Silver's article, like much of the relevant judicial politics scholarship in general, is limited in that it only examined particular originalist citations. Justices, however, are not restricted to simply citing particular sources researchers have identified as "originalist" to support arguments based on originalism. Justices can — and do — invoke a wide range of historical works and events to justify their decisions. And justices also use framers' intent to support decisions without citing any historical work at all. Thus, originalism was conceptualized broadly and the three justices' opinions were searched for any reference to originalist materials, arguments, or the "original understanding" of the reach and scope of the First Amendment — which ranges, for instance, from a justice referencing the framers, to a citation to *The Federalist*, to a justice's use of an eighteenth century dictionary to decipher a word's etymology. Doing so encompasses the broad range of originalist sources the justices have used to support their decisions. To paraphrase Matthew Festa, even when an originalist reference in an opinion is not central to the reasoning of a justice's decision, that reference nonetheless "stands for an attempt, however modest, to cloak the . . . opinion with the aura of [originalist] legitimacy."<sup>43</sup> Thus, any reference to originalism used by

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<sup>42</sup>Silver, *supra* note 21. Silver's work used previous studies to amass a list of the most frequently discussed originalist materials. He then looked for these citations in Supreme Court freedom of expression opinions. These materials are THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1883); JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1876); MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937); THE FEDERALIST (Jacob E. Cooke ed., 1961); JOHN FISKE, THE CRITICAL PERIOD IN AMERICAN HISTORY, 1783–1789 (1916); ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON (Henry Cabot Lodge ed., 1904); JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); JAMES MADISON, THE PAPERS OF JAMES MADISON (Robert A. Rutland & William M.E. Rachal eds., 1973); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION (1825); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922); and CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928). In addition to those sources, Silver included references to William Blackstone. Blackstone's works were included because of his prominence in literature detailing the history of freedom of expression.

<sup>43</sup>Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing the Federalist, 1986-2007*, 31 SEATTLE UNIV. L.R. 75, 106 n.105 (2007).

the three justices in every freedom of expression opinion they wrote, or have written, while on the bench was examined.<sup>44</sup>

### THE JUSTICES AND THEIR VIEWS ON ORIGINALISM

William J. Brennan Jr. was sworn in as a Supreme Court Justice on October 15, 1956. He retired from the bench thirty-four years later on July 20, 1990, at the age of 84. Brennan, considered an integral part of the liberal Warren Court's expansion of individual rights, came to the Court through a recess appointment by President Dwight D. Eisenhower after serving on the New Jersey Supreme Court for five years.<sup>45</sup> During his time on the Court, Brennan authored 149 opinions in free expression cases. He spent four years on the Court with Antonin Scalia, who was sworn in on September 26, 1986. Scalia, appointed by President Ronald Reagan, came to the Court having served four years as a judge of the United States Court of Appeals for the District of Columbia Circuit. Prior to his time as a circuit judge, Scalia worked in the Nixon and Ford Administrations and taught at the University of Virginia and the University of Chicago.<sup>46</sup> Through the 2010 term, over the course of his time on the Court Justice Scalia wrote fifty-six freedom of expression opinions. Clarence Thomas, the second African American to serve on the Court, was nominated by President George H. W. Bush and sworn in on October 23, 1991, after a contentious nomination hearing. Prior to his appointment, Justice Thomas, like Justice Scalia, was a judge on the United States Court of Appeals for the District of Columbia Circuit, having been confirmed by the Senate to that position on October 30, 1989.<sup>47</sup> Through the 2010 term, during his time on the Court Justice Thomas authored thirty-four opinions in free expression cases. Justices Scalia and Thomas have served on the Court together for twenty-one years; Justice Thomas never sat on the Court with Justice Brennan.

In that 1985 speech he gave at Georgetown University, Justice Brennan emphatically rejected originalism as the key to constitutional interpretation.<sup>48</sup> He famously stated that because the text of the Constitution is unclear and requires interpretation, efforts to discern the

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<sup>44</sup>Justice Brennan left the Court in 1990. The opinions of Justices Scalia and Thomas were analyzed through the 2010 term.

<sup>45</sup>See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010).

<sup>46</sup>See JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

<sup>47</sup>See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* (2004).

<sup>48</sup>See WILKINSON, *supra* note 13, at 12.

framers' intentions were "little more than arrogance cloaked as humility."<sup>49</sup> He noted that records of ratification debates provided sparse or ambiguous evidence of the original intention of the framers, the framers themselves disagreed on the meaning of constitutional provisions, and it was difficult to determine exactly who should be considered a "framer."<sup>50</sup> He continued, "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principles to specific, contemporary questions."<sup>51</sup> Instead, Justice Brennan was one of the foremost proponents of living constitutionalism,<sup>52</sup> an approach to interpreting the constitution diametrically opposed to originalism. For Justice Brennan, and for living constitutionalists generally, "[T]he evolution of textual meaning is not only possible but desirable."<sup>53</sup> He thus advocated applying the general principles of the Constitution to the "problems of the twentieth century."<sup>54</sup> He wrote:

We current Justices read the Constitution in the only way that we can: as twentieth century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time?<sup>55</sup>

The genius of the Constitution, he wrote, rests "in the adaptability of its great principles to cope with current problems and current needs."<sup>56</sup> Even though Justice Brennan was a critic of originalism, he nonetheless frequently cited the framers and other founding-era documents to support his decisions.<sup>57</sup>

Justice Scalia, on the other hand, is "widely recognized" as the preeminent proponent of originalism.<sup>58</sup> Both advocates and critics of

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<sup>49</sup>Brennan, *supra* note 20, at 58.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>See, e.g., WILKINSON, *supra* note 13, at 11 (describing Justice Brennan as a justice who "trumpeted" living constitutionalism throughout his career); Phelps & Gates, *supra* note 4 (identifying Justice Brennan as a proponent of a living constitution).

<sup>53</sup>WILKINSON, *supra* note 13, at 12.

<sup>54</sup>Brennan, *supra* note 20, at 61 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>See *infra* notes 75–104 and accompanying text. See also Phelps & Gates, *supra* note 4; Silver, *supra* note 21.

<sup>58</sup>Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 595 (2007).

originalism as a mode of constitutional interpretation credit Justice Scalia as a champion of the method.<sup>59</sup> Justice Scalia's 1997 book *A Matter of Interpretation* makes the case for originalism in strong and unambiguous terms.<sup>60</sup> According to Justice Scalia, judges should turn to the framers' writings when interpreting the Constitution not because they were framers per se, and thus "their intent is authoritative," but "rather because their writing, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."<sup>61</sup> Thus, Justice Scalia, who has argued that the intent of legislatures should never be followed in statutory interpretation,<sup>62</sup> reasoned that originalism was not the process of following the intent of an individual framer or group of framers. It was instead the process of determining the "original meaning (whether derived from Framers' intent or not)" of the Constitution and following it, rather than the "current meaning."<sup>63</sup>

Although Justice Thomas has not taken nearly the high-profile public stance in support of originalism that Justice Scalia has taken, he has embraced originalism as an approach to constitutional interpretation. In 2007, Scalia wrote that although he was hopeful the influence of originalism was expanding in law schools and federal courts, he and Thomas were the only two originalists on the Supreme Court.<sup>64</sup> Legal scholars have also strongly associated Justice Thomas with the originalist movement, with at least one scholar declaring Justice Thomas, and not Justice Scalia, to be the "real originalist" on the Court.<sup>65</sup> And according to Professor Christopher E. Smith:

Thomas seeks to base his opinions on the original intent of the Framers of the Constitution, Bill of Rights, and subsequent constitutional

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<sup>59</sup>See, e.g., *id.* See also GEOFFREY STONE & WILLIAM P. MARSHALL, *THE FRAMER'S CONSTITUTION: TOWARD A THEORY OF PRINCIPLED CONSTITUTIONALISM* 4 (2011), available at [http://www.acslaw.org/sites/default/files/Stone\\_Marshall\\_-\\_The\\_Framers\\_Constitution\\_Issue\\_Brief\\_1.pdf](http://www.acslaw.org/sites/default/files/Stone_Marshall_-_The_Framers_Constitution_Issue_Brief_1.pdf); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1139-40 (2003); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 11 n.34 (1994); Gene R. Nichol, Essay, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 956 (1999).

<sup>60</sup>SCALIA, *supra* note 10.

<sup>61</sup>*Id.* at 38.

<sup>62</sup>When interpreting statutory law Scalia argues in favor of textualism because he says it is too hard to determine the intent of a legislative body. *Id.* at 23-37. See also *Edwards v. Aguillard*, 482 U.S. 578, 610-39 (1987) (Scalia, J., dissenting); *Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., dissenting).

<sup>63</sup>SCALIA, *supra* note 10, at 38.

<sup>64</sup>Scalia, *supra* note 3, at 44-45.

<sup>65</sup>Jacob, *supra* note 58, at 649.

amendments. His opinions are replete with references to the primacy of the Framers' intentions. He treats these intentions as compelling directives that dictate the outcomes and reasoning in cases.<sup>66</sup>

Stanford Levinson called Justice Thomas's opinions in *United States v. Lopez*<sup>67</sup> and *United States Term Limits v. Thornton*<sup>68</sup> "the most unpromising originalist opinions in decades."<sup>69</sup> Similarly, in an analysis of Justice Thomas' opinions from 1992 to 2006, Professor Bradley P. Jacob concluded Justice Thomas wrote seventeen opinions that contained detailed discussions of originalism in a variety of cases.<sup>70</sup>

The justices also are known to have different ideological orientations. Justice Brennan was a liberal justice<sup>71</sup> — a recent biography termed him a "liberal champion"<sup>72</sup> — known for his support of the First Amendment. Justices Scalia and Thomas are recognized as conservative jurists,<sup>73</sup> although this does not necessarily mean they oppose First Amendment rights of individuals or corporations.<sup>74</sup> Thus, the examination of opinions

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<sup>66</sup>Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 9 (1997).

<sup>67</sup>514 U.S. 549 (1995).

<sup>68</sup>514 U.S. 779 (1995).

<sup>69</sup>Stanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 501 (1996).

<sup>70</sup>Jacob, *supra* note 58, at 649.

<sup>71</sup>Political scientists use both exogenous measures — those that are completely independent of the votes justices cast — and endogenous measures — those that rely at least in part on those votes — to measure judicial ideology. Segal-Cover scores, which determine a justice's political ideology by examining newspaper editorials during a justice's Senate confirmation hearings, are one of the most widely used empirical measures of justices' ideology based on exogenous measures. Ideology scores range from 0 (most conservative) to 1 (most liberal). Brennan's Segal-Cover score is 1.00. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal & Albert D. Cover, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005*, available at <http://www.stonybrook.edu/commcms/polisci/professors/qualtable.pdf> [hereinafter Segal & Cover, *Perceived Qualifications*].

<sup>72</sup>STERN & WERMIEL, *supra* note 45.

<sup>73</sup>Scalia's Segal-Cover score is .000. Thomas' Segal-Cover score is .160. Segal & Cover, *Perceived Qualifications*, *supra* note 71.

<sup>74</sup>Liberalism has long been associated with a fundamental commitment to First Amendment freedom of expression rights in the political science judicial decision-making literature. See e.g., McGuire & Stimson, *supra* note 33. Recent research, however, has begun to question whether support for free expression rights is still one of the defining features of a liberal judge. See Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 J. L. & POL'Y 81(2006) for a discussion of the literature and an examination of whether the relationship between ideology of Supreme Court justices and their support for the guarantees of speech, press, assembly, and association has declined in recent years. See also Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2002*, available at [www.law.ucla.edu/volokh/howvoted.htm](http://www.law.ucla.edu/volokh/howvoted.htm) (updating Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV.

that follows analyzes how two conservative justices who are avowed originalists and one liberal justice who was an outspoken originalist critic — and a proponent of a contrary approach to constitutional interpretation — use originalism to support their First Amendment opinions.

### *Justice Brennan*

Though Justice Brennan publicly argued against originalism, he used it in some form in almost 20% of his free expression opinions. Of the 149 opinions in free expression cases he authored, he used originalism in twenty-eight (18.8%). Of those twenty-eight opinions, nine were majority, six were concurring, three were plurality, nine were dissenting, and one opinion was concurring in part and dissenting in part. The opinions consisted of two obscenity cases, seven involving libel or false light invasion of privacy, three involving access, two prior restraint cases, two involving public forums, and then one each involving — in no particular order — patronage, commercial speech, anonymous speech, expressive boycotts, flag burning, campaign finance, election speech, permit applications, employee speech, public broadcasting, military regulations, and the removal of books from a school library.<sup>75</sup>

In 89% of the opinions in which Justice Brennan used originalism, he voted in favor of the First Amendment claim, an unsurprising finding given Justice Brennan's reputation as a champion of the First Amendment. He used originalism in those twenty-eight opinions to argue for an expansive range of First Amendment interpretations, including that the First Amendment protects speech about public affairs and matters of public concern<sup>76</sup> but that it does not protect obscenity.<sup>77</sup> Using originalism, Justice Brennan contended the First Amendment has a "special constitutional function"<sup>78</sup> in national life, it was intended to protect defamatory communications<sup>79</sup> and the right to receive ideas,<sup>80</sup> and it

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1191 (2001)). Legal scholars, however, have a longer tradition of questioning this association. See H.N. Hirsch, *Second Thoughts on the First Amendment*, in CONSTITUTIONAL POLITICS 223 (Sotirios A. Barber & Robert P. George eds., 2001); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

<sup>75</sup>See Appendix 1.

<sup>76</sup>See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) (Brennan, J., dissenting); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (Brennan, J., concurring in part); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>77</sup>*Roth v. U.S.*, 354 U.S. 476 (1957).

<sup>78</sup>*Greer v. Spock*, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting).

<sup>79</sup>*Rosenbloom v. Metromedia, Inc.*, 402 U.S. 29 (1971); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>80</sup>*Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

includes a right of access to criminal trials because, even though that access is not explicitly mentioned in the First Amendment: “[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices.”<sup>81</sup> Justice Brennan also used originalism to support the position that the chief purpose of the First Amendment is to prevent prior restraints,<sup>82</sup> that mailboxes should be considered public forums for First Amendment purposes,<sup>83</sup> and that expressive boycotts have historical importance.<sup>84</sup>

Interestingly, Justice Brennan’s use of originalism increased over his time on the Court. His first free expression opinion, in 1957,<sup>85</sup> used originalism, but his second use occurred not until seven years later, in his twenty-fifth opinion. All told, Brennan used originalism in 11% of his opinions in the 1950s, 6% in the 1960s, 21% in the 1970s, and 28% in the 1980s.<sup>86</sup> He had at least one originalism reference every year but one from 1979 to 1990.<sup>87</sup> While he was verbally sparring with Attorney General Meese and critiquing originalism, Justice Brennan’s own use of originalist materials in free expression cases was increasing.

His first two opinions to use originalism offered arguably the fullest historical discussion and context of any of Justice Brennan’s other originalism opinions. In *Roth v. United States*,<sup>88</sup> Justice Brennan wrote the majority opinion for the Court that ruled obscenity was outside of First Amendment protection. Justice Brennan noted that free speech guaranties in effect in ten of the fourteen states that had ratified the Constitution by 1792 did not protect expression absolutely. In fact, thirteen of the fourteen states allowed for the prosecution of libel, and in all of the states blasphemy, profanity or both were considered crimes. And profanity and obscenity were related offenses, Justice Brennan wrote. “At the time of the adoption of the First Amendment, obscenity law was

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<sup>81</sup>*Globe Newspaper Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596, 604 (1982). See also *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (Brennan, J., concurring in judgment).

<sup>82</sup>*Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (Brennan, J., concurring in judgment) (citing *Near v. Minnesota*, 283 U.S. 697 (1931)); *New York Times v. United States*, 403 U.S. 713 (1971) (Brennan, J., concurring) (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

<sup>83</sup>*U.S. Postal Serv. v. Council of Greenburgh Civic Ass’n*, 453 U.S. 114 (1981) (Brennan, J., concurring in judgment).

<sup>84</sup>*Federal Trade Comm’n v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

<sup>85</sup>*Roth v. United States*, 354 U.S. 476 (1957); *Kingsley Books v. Brown*, 354 U.S. 436 (1957) were decided on the same day.

<sup>86</sup>In 1990, Justice Brennan wrote eight free expression opinions and used originalism in one of them (12.5%).

<sup>87</sup>1987 was the only year in which Justice Brennan did not use originalism during that period.

<sup>88</sup>354 U.S. 476 (1957).

not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press,”<sup>89</sup> Justice Brennan wrote, with citations to several early nineteenth century laws and state court cases. Justice Brennan wrote that speech and press freedoms were meant to “assure unfettered interchange of ideas for the bringing about of political and social changes,”<sup>90</sup> and he cited a 1774 Continental Congress letter for support. But, he wrote, “[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”<sup>91</sup>

Although in *Roth* Justice Brennan noted that thirteen of fourteen states in 1792 allowed for the prosecution of libel, he later used originalism in his opinion for the Court in *New York Times v. Sullivan*<sup>92</sup> to constitutionalize libel law and enshrine the actual malice standard for libel suits involving public officials. In his opinion, Justice Brennan quoted James Madison for the proposition that “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.”<sup>93</sup> He also detailed the controversy surrounding the Sedition Act of 1798, which he said “first crystallized a national awareness of the central meaning of the First Amendment.”<sup>94</sup> His opinion quoted extensively from the Virginia Resolutions authored in protest of the Sedition Act, and he again referenced Madison for the premise that the Constitution created a form of government in which the people were sovereign. “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,”<sup>95</sup> Justice Brennan wrote. He said the attacks upon the Sedition Act’s validity “carried the day in the court of history,” and for support he quoted a letter that President Thomas Jefferson wrote to Abigail Adams in 1804.<sup>96</sup> He marshaled this historical evidence to underscore the Court’s holding that libel against public officials merited First Amendment protection unless it was published with knowledge it was false or with reckless disregard for its truth.

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<sup>89</sup>*Id.* at 483.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 484.

<sup>92</sup>376 U.S. 254 (1964).

<sup>93</sup>*Id.* at 271 (quoting JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

<sup>94</sup>*Id.* at 273.

<sup>95</sup>*Id.* at 275.

<sup>96</sup>*Id.* at 276.

After *Sullivan*, Justice Brennan's originalism, though it increased in frequency, tended to be shorter in content. Only rarely did he offer any sort of protracted historical discussion,<sup>97</sup> but he continued to invoke Madison: In seven opinions Justice Brennan cited or quoted Madison, from writings situated at various times of Madison's public life.<sup>98</sup> Moreover, Brennan proved in free expression cases to be more likely to cite what researchers have termed the traditional or most frequently discussed originalist citations, such as Thomas M. Cooley's *Constitutional Limitations*.<sup>99</sup> In *Brown v. Glines*, for instance, Brennan's dissenting opinion cited Joseph Story's *Commentaries on the Constitution of the United States* for support of his position that petitions are a "traditionally favored method of political expression and participation."<sup>100</sup> On the other hand, Justice Brennan on occasion generically referenced the framers, without providing any historical evidence or citations for support. In *Texas v. Johnson*, for instance, Justice Brennan wrote in the majority opinion striking down a state law that banned flag desecration that "we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack"<sup>101</sup> — but he offered no citations or supporting evidence to back that assertion.

Justice Brennan, in numerous cases, also cited or quoted discussions about original meaning or intent from earlier Court opinions. In six cases, he referenced the 1940 opinion *Thornhill v. Alabama*. In the libel case *Herbert v. Lando*, for instance, Justice Brennan's dissenting opinion quoted *Thornhill* for the proposition that "those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and

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<sup>97</sup>An exception would be his discussion of the history of public trials in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (Brennan, J., concurring in judgment).

<sup>98</sup>*McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring) (quoting 1 Annals of Cong. 738 (1789)); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)); *Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982) (quoting THE FEDERALIST No. 51 324 (H. Lodge ed. 1888)); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971) (quoting 6 WRITINGS OF JAMES MADISON, 1790-1802 336 (G. Hunt ed. 1906)); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) (quoting JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 571 (1876)); *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)); *Roth v. United States*, 354 U.S. 476, 488 (1957) (quoting Madison's REPORT ON THE VIRGINIA RESOLUTIONS).

<sup>99</sup>See Silver, *supra* note 21, at 103 for a discussion of traditional originalist sources. As noted above, there are many different forms of originalism. Silver's list of sources was based on numerous previous articles and was an attempt to compile a list of the most frequently discussed originalist citations.

<sup>100</sup>444 U.S. 348, 363 (1980) (Brennan, J., dissenting).

<sup>101</sup>491 U.S. 397, 418 (1989).

economic truth.”<sup>102</sup> *Mills v. Alabama* was another popular reference for Justice Brennan. Five times he quoted or cited that case’s conclusion that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”<sup>103</sup> Four times he referenced Justice Louis Brandeis’ famous concurring opinion from the 1927 case *Whitney v. California*. Quoting *Whitney*, Justice Brennan wrote for the majority in *FCC v. League of Women Voters* that the “Framers of the Bill of Rights were most anxious to protect . . . speech that is ‘indispensable to the discovery and spread of political truth.’”<sup>104</sup>

Thus, despite his public opposition to originalism, in the realm of First Amendment jurisprudence Brennan frequently invoked originalism to support his positions. Justice Scalia, on the other hand, has often engaged in long historical discussion of the traditions at the time of the framing, although he too at times simply cites an argument as originalist without any discussion or citation to support his arguments.

### ***Justice Scalia***

Of the fifty-six freedom of expression opinions Justice Scalia wrote between his arrival on the Court and the conclusion of the 2010 term, seventeen contained originalism (30.4%). Although Justice Scalia is the best-known jurist associated with the originalist movement, he spent four years on the Court and wrote fourteen freedom of expression opinions before he first used originalism in 1990.<sup>105</sup> His use of originalism, however, appears recently to have increased. From 1990 to 2011 Scalia never wrote more than four consecutive freedom of expression opinions without some kind of reference to originalism. Justice Scalia wrote five opinions in 2010 and 2011 and four contained originalism (80%). Of Justice Scalia’s seventeen opinions containing originalism, four were campaign finance cases; two concerned anonymous speech; two involved time, place, and manner restrictions; one was a patronage case; one considered nude dancing; one was about hate speech/fighting words; one involved employee speech; one was a commercial speech case; one considered government funding for the arts; one involved speech rights of

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<sup>102</sup>441 U.S. 153, 194 (1979) (Brennan, J., dissenting) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

<sup>103</sup>384 U.S. 214, 218 (1966).

<sup>104</sup>468 U.S. 364, 383 (1984) (Brandeis, J., concurring) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927)).

<sup>105</sup>*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684-85 (1990) (Scalia, J., dissenting).

candidates in judicial elections; one case considered whether voting merited First Amendment protection; and one reviewed a statute concerning violent video games. Five were majority opinions, five were dissenting opinions, and six were concurring. When using originalism, Justice Scalia voted in favor of the free speech claim in nine cases (52.9%).<sup>106</sup>

Like Justice Brennan, Justice Scalia used originalism to argue for a wide variety of First Amendment interpretations. He used originalism to contend the First Amendment was designed to advance the widest possible dissemination of information from diverse sources, including corporations.<sup>107</sup> Justice Scalia relied on originalism to argue the First Amendment was designed to especially protect unpopular ideas<sup>108</sup> and criticism of government.<sup>109</sup> According to Justice Scalia, however, it was not intended to end patronage systems<sup>110</sup> or protect nude dancing,<sup>111</sup> nor was it intended to be absolute.<sup>112</sup> He also used originalism to support his contentions that the First Amendment was primarily designed to protect political speech<sup>113</sup> but did not protect anonymous distribution of leaflets,<sup>114</sup> anonymous voting,<sup>115</sup> or employee speech.<sup>116</sup> He also argued the amendment was only intended to prevent the “abridgement of speech” and was not implicated by selective government funding of speech.<sup>117</sup> Furthermore, he used originalism to argue that while the framers preferred the merit selections of judges, they intended to protect the speech of candidates in judicial elections.<sup>118</sup> In addition, although he discussed originalism, he concluded in *44 Liquormart v. Rhode Island* that there was not enough historical evidence available to convince him that

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<sup>106</sup>See Appendix 2.

<sup>107</sup>*McConnell v. FEC*, 540 U.S. 93, 256 (2003) (Scalia, J., concurring in part and in judgment and dissenting in part); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684-85 (1990) (Scalia, J., dissenting).

<sup>108</sup>*Austin*, 494 U.S. at 693; *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

<sup>109</sup>*McConnell*, 540 U.S. at 252, 257 (Scalia, J., concurring in part and in judgment and dissenting in part).

<sup>110</sup>*Rutan*, 497 U.S. at 97 (Scalia, J., dissenting).

<sup>111</sup>*Barnes v. Glen Theatre*, 501 U.S. 560, 574 (1991) (Scalia, J., concurring in judgment).

<sup>112</sup>*R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

<sup>113</sup>*FEC v. Wisconsin Right to Life*, 551 U.S. 449, 494 (2007) (Scalia, J., concurring in part and concurring in judgment); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002).

<sup>114</sup>*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

<sup>115</sup>*Doe v. Reed*, 130 S.Ct. 2811, 2833 (2010).

<sup>116</sup>*Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 687 (1996) (Scalia, J., dissenting).

<sup>117</sup>*NEA v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in judgment).

<sup>118</sup>*Republican Party v. White*, 536 U.S. 765, 787-88 (2002).

protecting commercial speech was a “long accepted practice” at the time of the framing.<sup>119</sup>

Many of Justice Scalia’s opinions were less concerned with what a particular founder wrote or advocated than they were with the traditions of the American people at the time of the founding or the adoption of the Fourteenth Amendment.<sup>120</sup> Scalia, then, is less likely to cite a traditional originalist source than Brennan.<sup>121</sup> Instead, he is far more concerned with what the American people were doing or the kinds of speech that were accepted by society at the time.

For example, in one of his most recent uses of originalism in *Doe v. Reed*,<sup>122</sup> Justice Scalia spent four pages examining the history and practices of voting in early America to support his contention that the First Amendment was not intended to protect anonymous voting. In his concurring opinion, Justice Scalia relied on the text of the Constitution and state constitutions enacted around the time of the founding and historical works that examined practices at town meetings or studied the election practices of the original thirteen states.<sup>123</sup> Justice Scalia traced the evolution of voting in America from 1789 to 1888. Other examples in other cases of Justice Scalia using long discussions of historical works include his analysis of the work of Alexis de Tocqueville<sup>124</sup> and an examination of the practice of state legislatures at the time of the framing.<sup>125</sup> In determining whether the National Endowment for the Arts’

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<sup>119</sup>517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment).

<sup>120</sup>Just as Justice Scalia believes the meaning of the First Amendment should be determined by reference to what it meant when it was ratified in 1791, he argues the meaning of the Fourteenth Amendment should be decided by what it meant when it was ratified in 1868. The concept of the First Amendment as a limitation on state power through the doctrine of incorporation also implicates the Fourteenth Amendment. Justice Scalia thus considers this important because the Court applied the First Amendment to the states *via* the due process clause of the Fourteenth Amendment, a process known as incorporation. *See, e.g.,* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting) (writing “Preferring the views of the English utilitarian philosopher John Stuart Mill to the considered judgment of the American people’s elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.”). *See* Bunker & Calvert, *supra* note 30, at 334 for a discussion of First Amendment originalism and the Fourteenth Amendment.

<sup>121</sup>*See supra* note 42 for a list of traditional originalist sources.

<sup>122</sup>130 S.Ct. 2811, 2833-37 (2010).

<sup>123</sup>*Id.* at 2834-36.

<sup>124</sup>*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 693 (1990) (Scalia, J., dissenting).

<sup>125</sup>44 *Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment).

grant-making procedures violated artists' First Amendment rights, Justice Scalia cited an eighteenth-century dictionary to contend the First Amendment only dealt with abridgement of speech and not selective funding of speech,<sup>126</sup> along with an exchange between John Marshall and John Adams to support his argument that not all "great minds" even thought funding the arts was a good idea in the first place.<sup>127</sup> In the Court's unanimous opinion in *Thomas v. Chicago Park District*,<sup>128</sup> Justice Scalia also relied on multiple historical texts, including Fredrick Siebert's classic *Freedom of the Press in England, 1476-1776*,<sup>129</sup> to argue the primary purpose of the First Amendment was to prevent licensing. Justice Scalia again cited Siebert, as well as two other books on the history of freedom of expression, in *McConnell v. FEC* when he used originalism to argue that campaign finance laws were similar to the British efforts to tax the press with the Stamp Acts of 1712 and 1765.<sup>130</sup> He then cited a fourth text to contend that because corporations were familiar in America by the end of the eighteenth century, if the Framers had not intended for corporations to have First Amendment rights, the text of the Amendment would say so.<sup>131</sup>

Justice Scalia adopted a similar approach in a later campaign finance case, *Citizens United v. FEC*,<sup>132</sup> although he added ten additional books or journal articles on the history of corporations or the press in America. Indeed, *Citizens United* represents one of Justice Scalia's most detailed historical discussions. In his concurring opinion, Justice Scalia noted he wrote separately only to address Justice John Paul Stevens' use of originalism in Justice Stevens' dissent.<sup>133</sup> Justice Scalia took Justice Stevens to task for suggesting that because the framers did not like corporations they did not intend for the First Amendment to apply to them. Justice Scalia wrote that Justice Stevens could only rely on originalism if he could prove the First Amendment was never intended to protect "the freedom to speak in association with other individuals,"<sup>134</sup> including corporations. Justice Scalia wrote, "The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech."<sup>135</sup> Justice Scalia, however,

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<sup>126</sup>NEA v. Finley, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in judgment).

<sup>127</sup>*Id.* at 597.

<sup>128</sup>534 U.S. 316, 320 (2002).

<sup>129</sup>FREDRICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 (1965).

<sup>130</sup>540 U.S. 93, 252-53 (2003) (Scalia, J., concurring in part and dissenting in part).

<sup>131</sup>*Id.* at 256.

<sup>132</sup>130 S.Ct. 876, 925 (2010) (Scalia, J., concurring).

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

meticulously traced the history of corporations and the press from the time of the founding to the 1936 case *Grosjean v. American Press Co.*,<sup>136</sup> the Court's first case to recognize the First Amendment rights of a corporation. Based on this examination, Justice Scalia concluded there was no historical evidence that the framers did not intend to protect the rights of individuals to speak in association with each other as corporations, media or otherwise.<sup>137</sup>

These opinions are an excellent example of what Justice Scalia has described as "original meaning" originalism. As previously discussed, in his public writings Justice Scalia has advocated that 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, and many times his approach to originalism in his free expression opinions mirrors this. In a 1990 dissenting opinion, Justice Scalia explained the role of tradition in his decision-making. He wrote that adhering to long-held traditions of the American people was the only way to formulate a constitutional jurisprudence that would not reflect the shifting personal philosophies of the nine members of the Supreme Court.<sup>138</sup> Justice Scalia then tackled what he said was the "customary invocation of *Brown v. Board of Education*"<sup>139</sup> that adhering to tradition had "dangerous consequences." Justice Scalia explained: "I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution."<sup>140</sup> According to Justice Scalia, this made originalism inappropriate to use in *Brown* because the Thirteenth and Fourteenth Amendments were not ambiguous. Five years later, in *McIntyre v. Ohio Elections Commission*,<sup>141</sup> Justice Scalia engaged in his most in-depth examination of historical practices and explained the difficulty in using originalism to decide if anonymous electioneering was intended to be protected by the First Amendment. Justice Scalia wrote that when there was evidence a practice was widely accepted at the time of the framing the practice must be considered constitutional. Similarly, when there was evidence the practice was not widely accepted because of constitutional objections the practice must be considered unconstitutional. However, when

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<sup>136</sup>297 U.S. 233 (1936).

<sup>137</sup>*Citizens United*, 130 S.Ct. at 929 (Scalia, J., concurring).

<sup>138</sup>*Rutan v. Republican Party of Illinois*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

<sup>139</sup>347 U.S. 483 (1954).

<sup>140</sup>*Rutan*, 497 U.S. at 96.

<sup>141</sup>514 U.S. 334 (1995).

neither type of evidence was present a decision about the constitutionality of a practice must involve “not just history but judgment.”<sup>142</sup>

In other free expression opinions, however, Justice Scalia has spent far less time exploring the historical support for his decisions, frequently citing no authority or historical analysis whatsoever. For example, in *Barnes v. Glen Theatre* the justice declared there was no historical basis for protecting nudity without citing anything other than previous Court cases,<sup>143</sup> a practice he also used in *R.A.V. v. City of St. Paul* to declare that freedom of speech was traditionally never thought to protect speech of “slight social value.”<sup>144</sup> In *Board of County Commissions v. Umbehr*, Justice Scalia criticized the majority for “proscribing as unconstitutional practices that do not violate any explicit test of the Constitution and that have been regarded as constitutional ever since the framing” by simply saying the practice of political patronage was a “long and unbroken tradition of our people,” without any historical support.<sup>145</sup> Several times Justice Scalia wrote that the framers’ original understanding of the primary purpose of the First Amendment was to protect political speech or the criticism of government without citing a specific framer or any historical work. In his *Hill v. Colorado* dissent, for example, Justice Scalia wrote that the majority’s decision declaring a Colorado statute that restricted protests in front of health care facilities a valid time, place, and manner restriction did not respect the framers’ understanding that the “freedom to speak and persuade is inseparable from, and antecedent to, the survival of self-government.”<sup>146</sup> Justice Scalia, however, offered no support for this contention. Similarly, in *Republican Party v. White*,

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<sup>142</sup>*Id.* at 375 (Scalia, J., dissenting).

<sup>143</sup>501 U.S. 560, 574-75 (1991) (Scalia, J., concurring in judgment).

<sup>144</sup>505 U.S. 377, 383 (1992).

<sup>145</sup>518 U.S. 668, 687 (1996) (Scalia, J., dissenting). Although Justice Scalia was discussing political patronage, his statement encompassed any practice with a long tradition, and he lamented the fact that even with the addition of Justice Thomas to the Court the majority was still unwilling to refrain from transforming the Constitution “overnight.” *Id.*

<sup>146</sup>530 U.S. 703, 763-64 (2000) (Scalia, J., dissenting). *See also* *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 494 (2007) (Scalia, J., concurring in part and concurring in judgment) (writing the “principal objective” of the First Amendment was to prevent laws targeting political speech without attribution); *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and judgment and dissenting in part) (writing the First Amendment was primarily intended to protect the right to criticize government without offering any citations or historical support); *id.* at 257 (contending “There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs” without any further discussion) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978)) (internal quotation marks, footnotes and citations omitted).

without any evidence or citations, he wrote that the framers did not support judicial elections.<sup>147</sup>

In addition to his use of originalism to support his positions about the scope and limits of the First Amendment, in one opinion Justice Scalia even used originalism to support the use of originalism. In his dissenting opinion in *McIntyre v. Ohio Elections Commission*, Justice Scalia, in one of the few times he referenced directly to a specific framer, cited Thomas Jefferson for the proposition that the correct way to interpret the Constitution was to consider what the framers thought.<sup>148</sup> Justice Scalia also wrote that both the Supreme Court and society considered originalism to be the “traditional” method of constitutional interpretation. He wrote:

The question posed by the present case is not the easiest sort to answer for those who adhere to the Court’s (and the society’s) traditional view that the Constitution bears its original meaning and is unchanging. Under that view, “on every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”<sup>149</sup>

### ***Justice Thomas***

Although he is an avowed originalist, Justice Thomas used originalism in just ten of the thirty-four opinions he wrote in free expression cases decided between his arrival on the Court and the conclusion of the 2010 term (29.4%). Of those ten, three were dissenting, six were concurring, and one opinion was concurring in part and dissenting in part. Seven of the ten were solo-authored opinions, and two were joined only by Justice Scalia. The opinions included two commercial speech cases, two involving election regulations, three campaign finance cases, one involving government speech, and two involving the speech rights of minors.<sup>150</sup>

Justice Thomas used originalism to argue for an array of interpretations of the First Amendment — that the First Amendment protects

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<sup>147</sup>536 U.S. 765, 787-88 (2002).

<sup>148</sup>514 U.S. 334, 371-72 (1995) (Scalia, J., dissenting).

<sup>149</sup>*Id.* (citing Thomas Jefferson, Letter to William Johnson (June 12, 1823), in 15 WRITINGS OF THOMAS JEFFERSON 439, 449 (A. Lipscomb ed., 1904)).

<sup>150</sup>See Appendix 3.

anonymous writings,<sup>151</sup> that it protects commercial speech to the same degree as non-commercial speech,<sup>152</sup> that it protects political speech and the exchange of political information<sup>153</sup> — especially in the context of elections — and that the First Amendment does not offer protection to students or include a right of minors to access speech.<sup>154</sup> His two most recent originalism opinions — *Morse v. Frederick* in 2007 and *Brown v. Entertainment Merchants Association* in 2011 — involved that latter category and have drawn criticism from commentators who chide Justice Thomas for treating minors as society did in the eighteenth and nineteenth centuries.<sup>155</sup> Interestingly, however, in seven (70%) of the opinions in which Thomas has used originalism he has voted in favor of the First Amendment claim, a finding that challenges the position that originalism is only associated with judicial restraint.

Though Justice Thomas joined the Court in October of 1991, nearly four years passed before he used originalism in a speech or press clause opinion. Then in April 1995 he authored an opinion concurring in the judgment in *McIntyre v. Ohio Elections Commission* — an opinion that was prototypical originalism, with Justice Thomas playing the role of historian, probing for evidence of practice in the founding era.<sup>156</sup> In the case, an Ohio law banned the distribution of anonymous campaign literature. The majority struck down the law as a content-based speech restriction that failed strict scrutiny. Justice Thomas wrote that although the majority faithfully followed the Court's doctrinal approach, “[W]e need not undertake this analysis when the original understanding provides the answer.”<sup>157</sup> Instead, Justice Thomas said, the judicial task was to determine whether the phrase “‘freedom of speech, or of the press,’

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<sup>151</sup>*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (Thomas, J., concurring in judgment).

<sup>152</sup>*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Thomas, J., concurring in part and concurring in judgment); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (Thomas, J., concurring in part and concurring in judgment).

<sup>153</sup>*Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (Thomas, J., concurring in judgment); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (Thomas, J., dissenting); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (Thomas, J., dissenting); *McConnell v. FEC*, 540 U.S. 93 (2003) (Thomas, J., concurring in the result, concurring in judgment, and dissenting in part).

<sup>154</sup>*Morse v. Frederick*, 551 U.S. 393 (2007) (Thomas, J., concurring); *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729 (2011) (Thomas, J., dissenting).

<sup>155</sup>See, e.g., Stephen Kanter, *Symposium: Speech and the Public Schools After Morse v. Frederick: Bong Hits 4 Jesus as a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61, 99 (2008) (“In *Morse*, Justice Thomas articulated a Dickensian view of the world . . . with virtually no room for student rights.”).

<sup>156</sup>514 U.S. 334 (1995) (Thomas, J., concurring in judgment).

<sup>157</sup>*Id.* at 370 (Thomas, J., concurring in judgment).

as originally understood, protected anonymous political leafletting.”<sup>158</sup> Justice Thomas concluded that it did. He pointed out that no record exists of discussions about anonymous political expression either in the First Congress or in the state ratifying conventions, so Justice Thomas instead focused his attention “on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets.”<sup>159</sup> He conducted a lengthy examination of historical evidence, referencing, among other things, *The Federalist* and the anonymous political pamphlet that birthed the John Peter Zenger trial and the use of pseudonyms in pamphlets and newspaper articles discussing candidates in the country’s first federal elections. Justice Thomas also detailed the controversy surrounding the attempt in 1787 of two Federalist editors to refuse to publish anonymous Anti-Federalist pieces. Justice Thomas said the widespread Anti-Federalist outrage to the policy, and the subsequent Federalist retreat, led him to conclude that “both Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author’s name.”<sup>160</sup> In sum, he wrote, the weight of the evidence persuaded him that “Founding-era Americans” understood the First Amendment to protect anonymous speech.<sup>161</sup>

Not all of Justice Thomas’ originalist references have involved the examination of historical practice with such depth. In his concurring opinion in *44 Liquormart v. Rhode Island*, for instance, he argued against relegating commercial speech to a lower rung on the constitutional ladder, reasoning that he did not “see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”<sup>162</sup> He said only that “some historical materials” suggest that conclusion, though, and he cited for support, though without discussion, Benjamin Franklin’s *Apology for Printers, dicta* from three Court opinions, and an amicus curiae brief filed by the American Advertising Federation that addressed commercial activity in colonial America.<sup>163</sup> In his 2005 concurring opinion in *Johanns v. Livestock Marketing Association*, Justice Thomas’ use of originalism amounted to just one sentence.<sup>164</sup> He agreed with the majority that a federal beef promotion

<sup>158</sup>*Id.* at 359 (Thomas, J., concurring in judgment).

<sup>159</sup>*Id.* at 360 (Thomas, J., concurring in judgment).

<sup>160</sup>*Id.* at 367 (Thomas, J., concurring in judgment).

<sup>161</sup>*Id.* at 361 (Thomas, J., concurring in judgment).

<sup>162</sup>517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment).

<sup>163</sup>*Id.* (Thomas, J., concurring in judgment). Professors Matthew D. Bunker and Clay Calvert wrote that Thomas only made “a nod toward originalism in *44 Liquormart*.” Bunker & Calvert, *supra* note 30, at 352. Thomas quoted his *44 Liquormart* opinion in the 2001 advertising case, *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring in part and concurring in judgment).

<sup>164</sup>544 U.S. 550, 567 (2005) (Thomas, J., concurring).

program constituted government speech, and he cited *The Federalist* for the proposition that “the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding.”<sup>165</sup> And in his concurrence in the judgment in *Buckley v. American Constitutional Law Foundation*,<sup>166</sup> Justice Thomas approvingly quoted Justice Powell’s conclusion in *First National Bank of Boston v. Bellotti* that the framers entrusted citizens with the responsibility of evaluating competing arguments in our democracy. “[I]f there be any danger that the people cannot evaluate the information and arguments advanced by [one source], it is a danger contemplated by the Framers of the First Amendment,” Justice Powell wrote.<sup>167</sup>

Justice Thomas invoked originalism in three campaign finance cases, primarily to champion the importance of political speech. In *Nixon v. Shrink Missouri Government PAC*,<sup>168</sup> for instance, Thomas dissented from the Court’s decision to uphold a state law that set limits on campaign contributions. Thomas argued that “political speech is the primary object of First Amendment protection” — a proposition he said the Framers supported, especially speech during campaigns. “The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information,” he wrote.<sup>169</sup> Justice Thomas also quoted Madison and Hamilton from *The Federalist*. And in *McConnell v. Federal Election Commission*, Thomas quoted Jonathan Elliot’s *Debates on the Federal Constitution* and Blackstone’s *Commentaries on the Laws of England* to buttress his argument that the rationale the majority used in the case to uphold regulations on corporations could endanger media outlets as well.<sup>170</sup>

No other Thomas opinion had rivaled *McIntyre* for its vigor in searching founding-era thought and practice — until his two most recent originalism opinions, *Morse* and *Brown*. In *Morse*, the Court upheld the

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<sup>165</sup>*Id.*

<sup>166</sup>525 U.S. 182 (1999).

<sup>167</sup>*Id.* at 213 (Thomas, J., concurring in judgment) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978)).

<sup>168</sup>528 U.S. 377 (2000).

<sup>169</sup>*Id.* at 411 (Thomas, J., dissenting). *See also* *McConnell v. FEC*, 540 U.S. 93, 265 (2003) (Thomas, J., concurring in the result, concurring in judgment, and dissenting in part) (“The very purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”) (internal citations and quotations omitted); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 466 (2001) (Thomas, J., dissenting) (“I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend.”).

<sup>170</sup>540 U.S. 93, 286 n.17 (2003) (Thomas, J., concurring in part and dissenting in part).

suspension of a high school student for displaying what his principal thought was a pro-drug banner. Justice Thomas wanted to go much further, though — his concurring opinion argued, on originalism grounds, that the Court should overturn its then nearly forty-year-old precedent from *Tinker v. Des Moines Independent Community School District* that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>171</sup> Though public schools did not even exist at the time of the framing, Justice Thomas said that public education started to proliferate in the early 1800s, and public schools were relatively common by the time states ratified the Fourteenth Amendment. He thus argued, “If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.”<sup>172</sup> His twelve-page concurring opinion surveyed early public school history. He said the legal doctrine of *in loco parentis* prevailed then, with courts upholding the right of schools — and giving schools broad discretion — to discipline students, set rules and maintain order. In short, “[E]arly public schools gave total control to teachers, who expected obedience and respect from students.”<sup>173</sup> Because students had no speech rights then, Justice Thomas reasoned they should have no speech rights now as well.

Justice Thomas’ dissenting opinion in *Brown* similarly relied on originalism to argue for restricting minors’ First Amendment rights. Justice Scalia’s majority opinion in the case struck down a state law that banned the sale or rental of violent video games to minors. Justice Thomas said that decision did not “comport with the original public understanding of the First Amendment.”<sup>174</sup> As Justice Thomas framed the case, *Brown* was not about violent speech but it instead was a case about minors’ speech rights. And for him, “[T]he practice and beliefs of the founding generation establish that [the First Amendment] does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”<sup>175</sup> Justice Thomas’s extended discussion of the “founding generation’s views on children”<sup>176</sup>

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<sup>171</sup>393 U.S. 503, 506 (1969). James Fleming wrote that a hallmark of originalism is that the “original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.” James Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1151 (2007).

<sup>172</sup>*Morse v. Frederick*, 551 U.S. 393, 411 (2007) (Thomas, J., concurring).

<sup>173</sup>*Id.* at 419 (Thomas, J., concurring).

<sup>174</sup>*Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting).

<sup>175</sup>*Id.* (Thomas, J., dissenting).

<sup>176</sup>*Id.* at 2752 (Thomas, J., dissenting).

began in colonial New England. He discussed the works of John Locke, Jean-Jacques Rousseau, and Noah Webster and the writings of John Adams. He referenced Thomas Jefferson's approach to raising children and cited historical scholarship that documented the authority parents asserted over what their children read. The question, he said, is not "whether certain laws might make sense to judges or legislators today, but rather what the public likely understood 'the freedom of speech' to mean when the First Amendment was adopted."<sup>177</sup> For Justice Thomas, it was clear from the social and legal practices of the era that the founding generation "believed parents to have complete authority over their minor children and expected parents to direct the development of those children."<sup>178</sup> It was clear for him, then, that a law that in effect required parental consent to speak to a minor comported with the First Amendment.

## DISCUSSION

Multiple conclusions can be drawn from examining these justices' use of originalism and from comparing their opinions. In some ways, the justices' use of originalism was similar. All three justices were unprincipled in their use of originalism, and few patterns emerged to explain how or why a justice would use originalism in a particular case, although there were some notable exceptions. The three justices were inconsistent in the amount of historical evidence they used, the sources they consulted, and the evidence they considered conclusive. There were, however, ways in which the justices' use of originalism differed. For example, general trends emerged that allow for labels — the opportunist, the traditionalist, the historicist — that generalize the way the justices used originalism in their First Amendment opinions. However, it is important to note that, because none of the justices was principled in when or how he used originalism, these labels are only a shorthand of sorts — and the generalizations would not hold up if one were to independently examine every instance of each justice's First Amendment originalism.

It is clear Justice Brennan was frequently using originalism opportunistically. While publicly arguing against originalism, Justice Brennan was using it in roughly one-fifth of his First Amendment opinions. One of the striking aspects of Justice Brennan's originalism is its influence on current First Amendment jurisprudence. Justice Brennan used originalism in several landmark and notable cases to advance a wide

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<sup>177</sup>*Id.* at 2759 n.2 (Thomas, J., dissenting).

<sup>178</sup>*Id.* at 2758 (Thomas, J., dissenting).

variety of First Amendment arguments. This presents a clear picture of a justice using a tool — originalism — to strategically add merit to his arguments and advance First Amendment protections. As noted, in First Amendment opinions containing originalism, Justice Brennan voted in favor of the First Amendment overwhelmingly. Perhaps more importantly, Justice Brennan used originalism in nine majority opinions. These opinions shaped First Amendment law over a span of thirty-four years and continue to guide First Amendment decisions.

The opinions declared obscenity was not protected by the First Amendment;<sup>179</sup> established the actual malice fault requirement for public officials suing for libel;<sup>180</sup> extended the actual malice requirement to false light invasion of privacy lawsuits based on “reports of matters of public interest;”<sup>181</sup> found a right to attend criminal trials in the First Amendment;<sup>182</sup> declared a law that prohibited candidates for public office from promising material benefit to voters was a violation of the First Amendment;<sup>183</sup> held the Public Broadcasting Act of 1967 was unconstitutional;<sup>184</sup> struck down campaign finance regulations as applied to nonprofit corporations;<sup>185</sup> declared a city’s news rack placement ordinance was unconstitutional because it gave the mayor boundless discretion to determine whether to grant a permit;<sup>186</sup> and declared flag burning protected by the First Amendment.<sup>187</sup>

In his free expression opinions, Justice Brennan rarely engaged in long, historical discussions or explained how originalism or historical material should be used by the Court. Instead, his originalism often took the form of quickly citing or referencing the original meaning of the First Amendment or framers’ intent without a searching historical examination of practices or tradition. As noted, Justice Brennan was far more likely to directly cite to a framer or a discussion of what framers believed than Justice Scalia or Justice Thomas. Justice Brennan’s preferred originalist sources were documents that discussed framers’ beliefs, the writings of the framers, or discussion of the debates surrounding the ratification of the Constitution. He was also fond of citing originalism found in previous Court opinions.

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<sup>179</sup>Roth v. United States, 354 U.S. 476 (1957).

<sup>180</sup>New York Times v. Sullivan, 376 U.S. 254 (1964).

<sup>181</sup>Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967).

<sup>182</sup>Globe Newspaper Co. v. Super. Ct. for the County of Norfolk, 457 U.S. 596 (1982).

<sup>183</sup>Brown v. Hartlage, 456 U.S. 45 (1982).

<sup>184</sup>FCC v. League of Women Voters, 468 U.S. 364 (1984).

<sup>185</sup>FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986).

<sup>186</sup>Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750 (1988).

<sup>187</sup>Texas v. Johnson, 491 U.S. 397 (1989).

Justice Brennan's opportunism can also be shown in that he used originalism to support divergent conclusions regarding obscenity. In *Roth*, his longest discussion of historical practices other than *Sullivan*, Brennan relied heavily on the laws in effect in the states in 1792 to argue the First Amendment was not intended to protect obscenity. However, in *Paris Adult Theatre v. Slaton*,<sup>188</sup> decided sixteen years after *Roth*, Justice Brennan changed course and argued obscenity tests were vague and the First Amendment should protect sexually explicit material so long as minors and unwilling adults were protected. Although Brennan again discussed the history of obscenity regulations, he instead focused on the argument that the First Amendment was designed to protect "all matters of public concern."<sup>189</sup>

Justice Scalia's approach to First Amendment originalism was much different from that of Justice Brennan. As explained in his book, Justice Scalia's opinions were frequently — though not always — less concerned with what a particular founder wrote or advocated than they were with the traditions of the American people at the time of the founding or the adoption of the Fourteenth Amendment.<sup>190</sup> Indeed, much of Justice Scalia's originalism is almost better classified as "traditionalism" because of his focus on the "traditions" or "long accepted practices of the American people."<sup>191</sup> Thus, Justice Scalia was more likely to cite

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<sup>188</sup>413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

<sup>189</sup>*Id.* at 103 (Brennan, J., dissenting).

<sup>190</sup>SCALIA, *supra* note 10, at 38.

<sup>191</sup>*Doe v. Reed*, 130 S.Ct. 2811, 2832-33 (2010) ("Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect."); *Republican Party v. White*, 536 U.S. 765 (2002) ("[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional."); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment) ("[T]he long accepted practices of the American people" should decide First Amendment cases where political speech was not involved.); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality."); *Id.* at 688 ("If [a] long and unbroken tradition of our people does not decide these cases, then what does?"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) ("We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations."); *Barnes v. Glen Theatre*, 501 U.S. 560, 574 (1991) (Scalia, J., concurring in judgment) ("Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of 'the freedom of speech.'"); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.").

historical references or long-held American traditions to support his originalism than material written by or about the framers themselves. As noted, he frequently cited the practices in place at the time of the framing, the laws of the original states, antique dictionaries, and historical works by lawyers and First Amendment historians.

Justice Scalia used originalism in a wide variety of arguments and in a wide variety of cases. No clear pattern emerged for either justice with the exception that Scalia frequently used originalism in cases dealing with elections, be they campaign finance cases,<sup>192</sup> anonymous electioneering<sup>193</sup> or anonymous referendum petitions,<sup>194</sup> or the right of judges to express their views during judicial elections.<sup>195</sup> Most strikingly, in every opinion he has authored on the topic, Justice Scalia used originalism when arguing that campaign finance laws should be struck down as unconstitutional.

Like Justice Brennan, Justice Scalia used originalism to make a lasting impression on First Amendment jurisprudence. Of the seventeen opinions Justice Scalia wrote containing originalism, five were majority opinions. In these opinions, the Court struck down a hate speech ordinance as content and viewpoint-based;<sup>196</sup> held the First Amendment was not violated by a licensing system needed for an event held in a public park;<sup>197</sup> held the Minnesota Supreme Court's canon of judicial conduct that prohibited a candidate for judicial office from announcing the candidate's views on legal or political issues was unconstitutional;<sup>198</sup> ruled a law requiring elected officials to disqualify themselves when they are asked to vote on matters that touch on commitments in a private capacity did not violate the First Amendment;<sup>199</sup> and prevented the enforcement of a law that imposed restrictions and labeling requirements on the sale or rental of violent video games to minors.<sup>200</sup>

In opinions in which he used originalism, Justice Scalia voted in favor of the First Amendment claim more frequently than in opinions in

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<sup>192</sup>*Citizens United v. FEC*, 130 S.Ct. 876 (2010) (Scalia, J., concurring); *McConnell v. FEC*, 540 U.S. 93, 252-53 (2003) (Scalia, J., concurring in part and judgment and dissenting in part); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684-85 (1990) (Scalia, J., dissenting).

<sup>193</sup>*FEC v. Wisconsin Right to Life*, 551 U.S. 449, 494, 503 (2007) (Scalia, J., concurring in part and concurring in judgment); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371-78 (1995) (Scalia, J., dissenting).

<sup>194</sup>*Doe v. Reed*, 130 S.Ct. 2811, 2832-37 (2010) (Scalia, J., concurring in judgment).

<sup>195</sup>*Republican Party v. White*, 536 U.S. 765, 785-86 (2002).

<sup>196</sup>*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>197</sup>*Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002).

<sup>198</sup>*Republican Party v. White*, 536 U.S. 765 (2002).

<sup>199</sup>*Nevada Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011).

<sup>200</sup>*Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729 (2011).

which he did not use originalism. Justice Scalia supported the First Amendment in nine (52.9%) of the seventeen opinions in which he used originalism. In the thirty-nine opinions in which he did not use originalism, Justice Scalia supported the First Amendment in sixteen opinions (42.1%). In total, in the fifty-five opinions he wrote involving freedom of expression, Scalia supported the First Amendment claim in twenty-five opinions (45.5%).

Justice Thomas used originalism to argue both in favor of First Amendment freedoms and against them — depending upon the identity of the speaker. He used originalism to advance his argument that the First Amendment should protect campaign speech of corporations and his contention that the Amendment should grant full protection to commercial speech. However, he also used it to argue for less protection for minors' speech.

Like Justice Scalia, Justice Thomas had a particular affinity for using originalism in cases related to elections. He did not use originalism in every such case in which he authored an opinion. For example, he wrote an opinion in *Citizens United* that did not use originalism. But three of his ten opinions containing originalism were campaign finance cases and two others involved election regulations. Thus, 50% of his opinions using originalism dealt with speech in the context of elections.

If Justice Scalia could be considered a “traditionalist” based on his focus on the traditions and practices of society and the people at the time of the framing, Justice Thomas could be considered a “historicist.” In several of his First Amendment opinions — though not uniformly in all of them — Justice Thomas amassed a wide range of historical references and engaged in detailed historical analysis, often placing himself in the position of a history professor lecturing his students. He cited history books, even those written long after the framing; the writings of Noah Webster; the diary of Jefferson; or any material that provided him with evidence of the legal traditions and practices and common understandings of the law at the time of the framing based on extensive citations to a wide variety of writers — although at times Justice Thomas, like Justice Scalia, was also concerned with the everyday *traditions* of the people.<sup>201</sup> One source Justice Thomas relied upon frequently, which was not cited by the other two justices to any great extent, was *The Federalist*.<sup>202</sup>

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<sup>201</sup>See, e.g., *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729, 2751-58 (2011) (Thomas, J., dissenting) (discussing the childrearing practices of the founding generation to support the contention that the First Amendment was not intended to grant speech protection to minors).

<sup>202</sup>See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 567 (2005) (Thomas, J., concurring); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 414 (2000) (Thomas, J.,

However, while Justice Thomas engaged in protracted historical discussion in many of his First Amendment opinions, he did not always do so. In *44 Liquormart v. Rhode Island*, for example, Justice Thomas wrote there was no historical support for the proposition that commercial speech should receive less protection, but he cited only a few sources and offered no elaboration.<sup>203</sup> In *Lorillard Tobacco Co. v. Reilly*, Justice Thomas made the same claim, but only cited *44 Liquormart*.<sup>204</sup> In *Johanns v. Livestock Marketing Association*, his originalism amounted to one sentence with a single citation to *The Federalist*.<sup>205</sup> From an analysis of Justice Scalia's and Justice Thomas' First Amendment originalism, then, it appears as if even avowed originalists who maintain their decisions are based on historical evidence rather than personal policy preference do not always feel compelled to provide their readers with evidence. Justice Scalia and Justice Thomas, in other words, have been selective in the lengths they go to prove their originalist argument.

Unlike that of Justice Brennan and Justice Scalia, Justice Thomas' originalism did not attract other members of the Court. During his time on the Court, Justice Thomas has authored five majority opinions in free expression cases. However, none of Justice Thomas' originalist opinions appeared in a majority opinion, and 70% of his opinions with originalism were joined by no one, not even Justice Scalia. Based on their use of originalism in majority opinions, then, Justice Scalia's originalism, and even Justice Brennan's originalism, has had more influence.

In opinions in which he used originalism, Justice Thomas voted in favor of the First Amendment claim far more frequently than in opinions in which he did not use originalism. Justice Thomas supported the First Amendment in seven of the ten opinions in which he used originalism (70%). In the twenty-four opinions in which he did not use originalism, Justice Thomas supported the First Amendment in thirteen opinions (54.2%). In total, in the thirty-four First Amendment opinions he wrote, Justice Thomas supported the First Amendment claim in twenty opinions (58.8%).

It is clear by looking at these three justices that originalism has affected modern First Amendment jurisprudence. Together, Justices Scalia and Brennan have written fifteen First Amendment majority opinions containing originalism. It is also clear originalism has

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dissenting); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

<sup>203</sup>517 U.S. 484, 522 (1996) (Thomas, J., concurring).

<sup>204</sup>533 U.S. 525, 575 (2001) (Thomas, J., concurring in part and concurring in judgment).

<sup>205</sup>544 U.S. 550, 567 (2005) (Thomas, J., concurring) (writing "the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding").

frequently been used to argue for expanding First Amendment protections. While it comes as no surprise that Justice Brennan voted in favor of the First Amendment claim with such regularity, it is surprising that Justices Scalia and Thomas used originalism to expand First Amendment protections so frequently. Although political scientists have traditionally associated support for the First Amendment with liberal justices, much legal scholarship has argued that may no longer be the case. It is thus not necessarily so surprising that the conservatives Justices Scalia and Thomas are supporting the First Amendment. What is noteworthy, however, is that both conservative and liberal justices as measured by political scientists are *using originalism* in opinions that vote to expand First Amendment protections. This contradicts most traditional scholarship that has associated originalism with opposition to the expansion of individual rights.<sup>206</sup> Instead, both conservative and liberal justices appear to be using originalism in free expression cases to expand individual rights in the ways they prefer. For Justice Brennan, for instance, this meant using originalism to argue for greater protection of libel. For Justice Scalia it meant using originalism to argue for greater protection for speech by corporations. For Justice Thomas it meant using originalism to argue for greater protection for anonymous political speech but little to no protection for minors' speech rights. No particular type of case, in other words, seemed to automatically lend itself to the use of originalism by the three justices. The decision of when to use originalism thus appears to be based on individual preference.

The three justices used originalism in majority, dissenting and concurring opinions, and little evidence of dueling originalism among the three justices materialized. There also was no evidence originalism was more likely to appear in an opinion written in a case with a minimum winning coalition.<sup>207</sup> The justices used originalism in such a wide variety of cases and opinions that it is difficult to say any discernible pattern emerged of when a justice was likely to use originalism, other than the two times Justice Thomas wrote about minors' speech rights — a small sample size — he used originalism, and both Justices Scalia and Thomas used originalism most of the time they wrote about

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<sup>206</sup>See, e.g., Brennan, *supra* note 20, at 59 (“A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right.”).

<sup>207</sup>Less than half the time the justices used originalism was in cases decided by a minimum winning coalition. The strategic citation literature has found that justices are more likely to cite *The Federalist* in concurring opinions when a minimum winning coalition decides a case. See Corley, Howard & Nixon, *supra* note 7, at 338-39.

election-related speech — be it campaign finance, anonymous electioneering, or the speech of candidates for judicial office.<sup>208</sup>

There were a few notable examples of dueling originalism, however. Two in particular involved a duel between Justices Scalia and Thomas. Closely analyzing the justices' originalism in *McIntyre v. Ohio Elections Commission* showcases their different approaches to originalism. In *McIntyre*, Justices Scalia and Thomas offered detailed discussions of how originalism should be used, cited different evidence to support their divergent decisions, and disagreed with each other's conclusions. As previously noted, the case involved a law banning the distribution of anonymous campaign literature. Justice Thomas's concurring opinion amassed a wealth of historical evidence, citing *The Federalist*, Anti-Federalist works, the John Peter Zenger trial, and the historical use of pseudonyms in pamphlets and newspapers. Based on this, Justice Thomas concluded the evidence supported the contention the First Amendment was intended to protect anonymous speech.

Justice Scalia's dissenting opinion, however, also engaged in a lengthy discussion of originalism. Justice Scalia came to a different conclusion and was highly critical of Justice Thomas's concurrence. Although Justice Scalia wrote that the question presented by the case was not "the easiest sort to answer for those who adhere to the Court's traditional view that the Constitution bears its original meaning and is unchanging,"<sup>209</sup> he nonetheless used originalism to support his conclusion and criticize Justice Thomas' arguments. According to Justice Scalia, while Justice Thomas could gather evidence to show that anonymous electioneering was used frequently, this did not mean it was a constitutional right. Justice Scalia wrote, "Quite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional, or else modern election laws . . . would be prohibited, as would (to mention only a few other categories) modern antinoise regulation

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<sup>208</sup>From this research, it is unclear why Justices Scalia and Thomas tended to use originalism more in cases dealing with election-related speech. It is possible they did so because these cases were closely decided (57% of Justice Scalia's originalist opinions in election-related speech cases were cases decided by a minimum winning coalition, but only 40% of Justice Thomas' originalist opinions were written in such cases), the justices felt these opinions needed added authority because they considered the issue contentious, or if it is because the framers were particularly concerned with political speech and there was thus evidence available that aligned with the justices' desired result. However, because it was outside the scope of the study to examine votes before and after conference, and because the justices never explicitly stated in any opinion or in any other writing why election-related speech cases would be more likely to be decided by originalism, it is impossible to determine exactly why the justices used originalism in these opinions so frequently.

<sup>209</sup>*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371-72 (1995) (Scalia, J., dissenting).

... and modern parade-permitting regulation.”<sup>210</sup> Justice Scalia criticized all the examples Justice Thomas provided of anonymous speech being supported by the framers. “The concurrence recounts other pre- and post-Revolution examples of defense of anonymity in the name of ‘freedom of the press,’ but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here,” Justice Scalia wrote.<sup>211</sup>

Instead of this historical evidence, Justice Scalia turned to his most preferred guide: tradition. He wrote that what truly mattered was how long a governmental practice had been considered acceptable. He wrote that while Justice Thomas’ evidence was weak, “[T]here *is* other indication, of the most weighty sort: the widespread and longstanding traditions of our people . . . A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.”<sup>212</sup> Thus, because the earliest statute of the sort in question “was adopted by Massachusetts in 1890, little more than 20 years after the Fourteenth Amendment was ratified,”<sup>213</sup> Justice Scalia argued the statute was constitutional. He concluded: “Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.”<sup>214</sup>

In *Brown v. Entertainment Merchants Association*, the 2011 case in which the Court struck down a California law regulating the sale or rental of violent video games to minors, the two justices confronted each other again. In his dissenting opinion, Justice Thomas engaged in a lengthy historical analysis — one of the longest in any opinion he authored — to support his contention the law should be upheld. Justice Thomas began, “The Court’s decision today does not comport with the original public understanding of the First Amendment.”<sup>215</sup> After an extended discussion of what he called the “founding generation’s views on children,”<sup>216</sup> Justice Thomas concluded:

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<sup>210</sup>*Id.* at 373 (Scalia, J., dissenting) (citations omitted).

<sup>211</sup>*Id.* at 374 (Scalia, J., dissenting). In addition, Justice Scalia wrote that he would also “want further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution.” *Id.* at 375 (Scalia, J., dissenting).

<sup>212</sup>*Id.* at 375 (Scalia, J., dissenting).

<sup>213</sup>*Id.* (Scalia, J., dissenting).

<sup>214</sup>*Id.* at 377 (Scalia, J., dissenting).

<sup>215</sup>131 S.Ct. 2729, 2751 (2011) (Thomas, J., dissenting).

<sup>216</sup>*Id.* at 2752 (Thomas, J., dissenting).

In light of this history, the Framers could not possibly have understood “the freedom of speech” to include an unqualified right to speak to minors. Specifically, I am sure the founding generation would not have understood “the freedom of speech” to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech – for example, by requiring parental consent to speak to a minor – “abridge[e] the freedom of speech” within the original meaning of the First Amendment.<sup>217</sup>

Justice Scalia’s majority opinion discounted Justice Thomas’ argument. Justice Scalia’s originalism once again focused on tradition, noting there was not “a longstanding tradition in this country of specially restricting children’s access to depictions of violence.”<sup>218</sup> Discussing the works of the Brothers Grimm, *The Odyssey*, *The Inferno* and *The Lord of the Flies*, Justice Scalia concluded many classic works contain violence and many of these are given to children to read by their parents and teachers, even if there was some historical evidence that consumption of violence did encounter resistance.<sup>219</sup> Responding to Justice Thomas’ use of originalism directly, Justice Scalia wrote that laws preventing children from receiving information did not “enforce *parental* authority over children’s speech,” they imposed “*governmental* authority, subject only to parental veto.”<sup>220</sup> Justice Scalia wrote that it was “the absence of any historical warrant or compelling justification” in favor of the law that made the majority conclude the restriction was invalid.<sup>221</sup>

That originalism might be used to reach different conclusions is something originalists readily admit. Justice Scalia wrote in 1997 that this type of disagreement was natural to originalism and should not be considered a criticism of the practice. Justice Scalia wrote that there was “plenty of room for disagreement as to what original meaning was, and even as to how the original meaning applies to the situation before

<sup>217</sup>*Id.* at 2759 (Thomas, J., dissenting).

<sup>218</sup>*Id.* at 2736.

<sup>219</sup>*Id.* at 2737 (discussing the history of opposition to violent movies and comic books).

<sup>220</sup>*Id.* at 2736 n.3 (emphasis in original).

<sup>221</sup>*Id.* Additionally, in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), a commercial speech case involving advertising for liquor, the two justices also had different takes on how originalism resolved the case, although their discussion was not as detailed. Citing Benjamin Franklin’s *Apology for Printers* and three cases decided between 1878 and 1913 in his dissenting opinion, Justice Thomas wrote that “some historical materials” suggest commercial speech was not considered of “lower value” historically. *Id.* at 522 (Thomas, J., dissenting) (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878); *In re Rapier*, 143 U.S. 110, 134-35 (1892); *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 315 (1913)). Justice Scalia, on the other hand, was unconvinced. He wrote that the historical evidence before the Court was “certainly not dispositive.” *Id.* at 517 (Scalia, J., concurring in part and concurring in judgment).

the court. But the originalist at least knows what he is looking for: the original meaning of the text.”<sup>222</sup> Thus, Justice Scalia admitted that “[s]ometimes (though not very often)”<sup>223</sup> there would be disagreement between even avowed originalists.

This does not explain, however, why none of the justices seemed to be principled in their approach to originalism. The justices appear to pick and choose when they demand fidelity to the original understanding of the First Amendment and what amount of evidence is warranted to support an originalist argument. Even Justices Scalia and Thomas, two avowed originalists who champion the approach to constitutional interpretation, used originalism only infrequently. Normative arguments maintain that originalism is the only way to keep policy preferences out of decision-making. However, if even avowed originalists only invoke originalism roughly 30% of the time, either the approach is not the only way, or these originalists are allowing policy preferences to influence the vast majority of their First Amendment decisions. An originalist’s response might be that originalism is used only when it can be; that it is the “preferred way” to settle disputes — used when it provides an answer — rather than the only way. A more cynical perspective, however, is that justices use originalist evidence when that evidence reinforces their desired outcome.

## CONCLUSIONS

This research thus supports earlier criticisms of originalism, while showing at the same time how important the mode of constitutional interpretation has been to the development of modern First Amendment jurisprudence. In a biting critique of Justice Scalia, Randy Barnett has written that the justice embraces originalism “[w]here originalism gives him the results he wants.”<sup>224</sup> Others have pointed out that even an earnest originalist will have trouble objectively analyzing the past. “[E]ven a very sincere interpreter of history would find his or her own reflection when looking in the mirror of the past,” Traci Reid argued.<sup>225</sup> Justices employing originalism are not necessarily bad

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<sup>222</sup>SCALIA, *supra* note 10, at 45.

<sup>223</sup>*Id.*

<sup>224</sup>Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006).

<sup>225</sup>Traci V. Reid, *A Critique of Interpretivism and its Claimed Influence Upon Judicial Decision Making*, 16 AM. POL. Q. 329, 347 (1988). See also LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 384 (1988) (“The fact is, and it is a fact, that Bork and Rehnquist, like any other originalist judges, are every bit as subjective as Brennan. . . . What they attribute to the Framers derives from their own moral reasoning.”).

historians then — though they may in fact be; they are *selective* historians. Originalism, in other words, even with its emphasis on relying on original intent and meaning rather than judicial preference, is an approach that in actuality offers virtually no restraints on judicial behavior. Judge J. Harvie Wilkinson III recently argued that originalism “tried so earnestly and so hard to be an exemplar” of judicial restraint.<sup>226</sup> In spite of that effort, Judge Wilkinson wrote, originalism is instead only “activism masquerading as restraint.”<sup>227</sup> Indeed, as this article shows, Justices Scalia and Thomas were actually more likely to vote in favor of the First Amendment claim and expand First Amendment protections when they used originalism.

Moreover, justices, even self-proclaimed originalists, can selectively employ the approach and the evidence used to support their decisions. Using originalism, as Judge Wilkinson argued, “[A] judge is free to choose . . . whatever outcome seems desirable and then support this choice with historical evidence.”<sup>228</sup> Even Justice Brennan — who was an outspoken critic of originalism — invoked original understanding nearly 20% of the time in his First Amendment opinions. Originalism, like living constitutionalism or any other approach to constitutional interpretation, thus does not restrain judicial power. Instead, approaches to constitutional interpretation, including originalism, simply offer tools that are available to a justice to advance his or her desired result.

In First Amendment originalism, these tendencies are only exasperated by the ambiguous nature of what little we know about the original understanding of the First Amendment. It is thus easy for justices to draw on a wide range of historical material to support their own views of the meaning and scope of the Amendment. Justice Brennan, for example, often appeared to opportunistically use originalism to gild the First Amendment lily, inserting a brief or fleeting citation to an originalist source to add originalist credibility to his opinions. That originalism allows flexibility in First Amendment jurisprudence, though, should not discount the fact that originalism was used by these justices in a significant number of their opinions. The “blank slate”<sup>229</sup> of First Amendment originalism makes it a powerful device in a justice’s tool kit.

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<sup>226</sup>WILKINSON, *supra* note 13, at 33.

<sup>227</sup>*Id.*

<sup>228</sup>*Id.* at 47.

<sup>229</sup>Bunker & Calvert, *supra* note 30, at 334.

In sum, originalism is not an approach reserved exclusively for — and used consistently by — conservative judges.<sup>230</sup> It is instead a decision-making tool, available for use by liberals and conservatives to support their opinions. This article has illuminated in detail how justices who are ideologically different and who have espoused different philosophies regarding originalism can use the approach to advance different conclusions about the scope and extent of First Amendment protections in cases as varied as obscenity, campaign finance, defamation or commercial speech.

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<sup>230</sup>For normative arguments that originalism should not be the exclusive domain of conservatives, see, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009); STONE & MARSHALL, *supra* note 59.

**APPENDIX 1**  
**OPINIONS IN WHICH JUSTICE BRENNAN USED ORIGINALISM**

Case	Type of Opinion	For or Against 1stA Claim	Vote Count
Roth v. United States, 354 U.S. 476 (1957)	Majority	Against	6-3
New York Times Co. v. Sullivan, 376 U.S. 254 (1974)	Majority	For	9-0
Time, Inc. v. Hill, 385 U.S. 374 (1967)	Majority	For	6-3
New York Times Co. v. United States, 403 U.S. 713 (1971)	Concurrence	For	6-3
Rosenbloom v. Metromedia, 403 U.S. 29 (1971)	Plurality	For	5-3*
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)	Dissent	For	5-4
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	Dissent	For	5-4
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	Dissent	For	5-4
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	Concurring in jmt	For	9-0
Elrod v. Burns, 427 U.S. 347 (1976)	Plurality	For	5-3*
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976)	Concurring in part	For	7-1
Greer v. Spock, 424 U.S. 828 (1976)	Dissent	For	6-2
Herbert v. Lando, 441 U.S. 153	Dissent in part	For	6-3
Richmond Newspapers v. Virginia, 448 U.S. 55 (1980)	Concurring in jmt	For	7-1*
Brown v. Glines, 444 U.S. 348	Dissent	For	5-3
U.S. Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981)	Concurring in jmt	Against	7-2
Board of Education v. Pico, 457 U.S. 853 (1982)	Plurality	For	5-4*
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	Majority	For	6-3
Brown v. Hartlage, 456 U.S. 45 (1982)	Majority	For	9-0
Connick v. Myers, 461 U.S. 138 (1983)	Dissent	For	5-4
FCC v. League of Women Voters, 468 U.S. 364 (1984)	Majority	For	5-4
McDonald v. Smith, 472 U.S. 479 (1985)	Concurrence	Against	8-0
Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)	Dissent	For	5-4
Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986)	Dissent	For	5-4
FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)	Majority	For	5-4
Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988)	Majority	For	5-3
Texas v. Johnson, 491 U.S. 397 (1989)	Majority	For	5-4
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	Majority	For	6-3

\*Plurality opinion. For purposes of calculating minimum winning coalitions, concurring opinions were counted as voting with the majority.

**APPENDIX 2**  
**OPINIONS IN WHICH JUSTICE SCALIA USED ORIGINALISM**

Case	Type of Opinion	For or Against 1stA Claim	Vote Count
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	Dissent	For	6–3
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)	Dissent	Against	5–4
Barnes v. Glen Theatre, 501 U.S. 560 (1991)	Concurring in jmt	Against	5–4*
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	Majority	For	9–0
McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995)	Dissent	Against	7–2
Board of County Comm’rs v. Umbehr, 518 U.S. 668 (1996)	Dissent	Against	7–2
44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)	Concurring in part & in jmt	For	9–0
NEA v. Finley, 524 U.S. 569 (1998)	Concurring in jmt	Against	8–1
Hill v. Colorado, 530 U.S. 703 (2000)	Dissent	For	6–3
Thomas v. Chicago Park District, 534 U.S. 316 (2002)	Majority	Against	9–0
Republican Party v. White, 536 U.S. 765 (2002)	Majority	For	5–4
McConnell v. FEC, 540 U.S. 93 (2003)	Concurring & dissenting	For	5–4
FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007)	Concurring in part & in jmt	For	5–4
Doe v. Reed, 130 S.Ct. 2811 (2010)	Concurring in jmt	Against	8–1
Citizens United v. FEC, 130 S.Ct. 876 (2010)	Concurring	For	5–4
Nevada Comm’n on Ethics v. Carrigan, 131 S.Ct. 2343 (2011)	Majority	Against	9–0
Brown v. Entertainment Merchants Ass’n, 131 S.Ct. 2729 (2011)	Majority	For	7–2

\*Plurality opinion. For purposes of calculating minimum winning coalitions, concurring opinions were counted as voting with the majority.

**APPENDIX 3**  
**OPINIONS IN WHICH JUSTICE THOMAS USED ORIGINALISM**

Case	Type of Opinion	For or Against 1stA Claim	Vote Count
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)	Concurring in jmt	For	7-2
44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)	Concurring in part & in jmt	For	9-0
Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999)	Concurring in jmt	For	6-3
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)	Dissent	For	6-3
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	Concurring in part & in jmt	For	5-4
FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001)	Dissent	For	5-4
McConnell v. FEC, 540 U.S. 93 (2003)	Concur in part & in jmt & dissent in part	For	5-4
Johanns v. Livestock Mktg Ass'n, 544 U.S. 550 (2005)	Concurrence	Against	5-4
Morse v. Frederick, 551 U.S. 393 (2007)	Concurrence	Against	5-4
Brown v. Entertainment Merchants Ass'n, 131 S.Ct. 2729 (2011)	Dissent	Against	7-2