



WHICH ORIGINAL MEANING OF THE CONSTITUTION MATTERS TO JUSTICE THOMAS?

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Introduction	495
I. Types of Original Meaning.....	496
II. Why Knowing Justice Thomas’s Views Might Matter	502
III. My Initial Hypothesis Rejected	504
IV. Two Other Hypotheses Rejected	509
V. My “General Original Meaning” Theory	511
VI. Assessment	514
VII. Conclusion.....	516

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INTRODUCTION

This essay addresses a basic question about Justice Clarence Thomas's originalist jurisprudence. When Justice Thomas looks for the original meaning of the Constitution, does he seek (a) the meaning intended by the Framers at the Constitutional Convention in Philadelphia ("original intent"), (b) the meaning as understood by the delegates to the thirteen state ratifying conventions ("original understanding"), (c) the objective meaning of the Constitution's text at the time of its adoption ("objective meaning"), or (d) some other type of original meaning? The answer to this question may be helpful in predicting the outcome of constitutional issues that might come before the Supreme Court and benefit litigants deciding what arguments to make to the Court. The answer also may contribute to scholarly assessments of the theory behind Justice Thomas's decisions.

My research leads me to conclude that the answer to date is that Justice Thomas, unlike certain other originalists, has not shown a notable preference for any of the first three kinds of original meanings listed above. Instead, Thomas has developed his own brand of originalist jurisprudence. He looks for what might be called the "general original meaning." When Thomas decides constitutional issues, what is important to him is an agreement among multiple sources of evidence of the original meaning. Rather than focusing on whether historic documents might show the original intent of the Framers, the original understanding of the ratifiers, or the original objective meaning, Justice Thomas looks for a general meaning shown in common by all relevant sources.

In advancing this thesis, I must begin by making one important disclaimer. Although I clerked for Justice Thomas in the 1991 October Term of the Supreme Court and have had regular contact with him since, we have not discussed the subject of this essay. I claim no inside knowledge, and I am revealing no confidential information. Instead, in this essay, I have sought to discern which original meaning of the Constitution matters to Justice Thomas solely from his written opinions.

I. TYPES OF ORIGINAL MEANING

The Supreme Court for many years has confronted the fundamental question of whether it should adhere to the original meaning of the Constitution.¹ Certainly, this question is a worthy subject of debate, and many authors have addressed it in scholarly writing.² But I do not consider the issue here. Instead, I accept as a starting point that Justice Thomas has decided that the Court must follow either the original meaning of the Constitution or precedent.³ My focus in this essay is solely on how Justice Thomas determines the controlling original meaning.

The Constitution has several distinct types of original meaning.⁴ One frequently considered original meaning—the “original intent”—is what the delegates to the federal Constitutional Convention in Philadelphia in the summer of 1787 collectively intended the Constitution to have.⁵ A common method of determining the original intent

¹ Compare, e.g., *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.”), with *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 443 (1934) (rejecting without apology the idea that “the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them”).

² For classic arguments that the Supreme Court should follow the original meaning of the Constitution, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For opposing views, see Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

³ See, e.g., *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578, 2595 (2008) (Thomas, J., dissenting) (declining to join the majority opinion because “the Court’s holding is not supported by the original meaning . . . or any reasonable interpretation of our precedents”).

⁴ This paragraph and the two that follow are adapted from Maggs, *Federalist Papers*, supra note *, at 805–06. For more on this topic, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229–31 (1988) (describing the original intent, original understanding, and original textual meaning as separate original meanings of the Constitution).

⁵ See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800 (1995) (making conclusions about what the “Framers intended” based in part on comments of James Madison at the Constitutional Convention).

is to look at what the delegates said about the Constitution during debates at the Constitutional Convention.⁶ We know a fair amount about what the delegates thought because nine of them took notes that have survived, and these notes have been carefully organized and published.⁷ In addition to these notes, other sources, such as letters or essays written by the delegates during and after the Convention, may also provide information about what the Framers were thinking.

A second commonly discussed type of original meaning—the “original understanding”—is the collective meaning that the delegates who participated in the thirteen state ratifying conventions beginning in the fall of 1787 understood the Constitution to have.⁸ The original understanding may differ from the original intent because the Constitutional Convention met in secret and its records did not become public until many years after ratification of the Constitution.⁹ As a result, the ratifiers—except for the few who had participated in the Constitutional Convention¹⁰—could not know exactly what the Framers intended and they may have attached different meanings to the Constitution. The clearest way of discerning the original understanding of the ratifiers is to look at what they said at the state ratifying conventions.¹¹ Another key method of discerning the original understanding is to consider the arguments made for and against ratification by Federalists

⁶ See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 30 (1988) (noting that “those concerned with original intent consult such materials as Madison’s notes on the Federal Constitutional Convention”).

⁷ Max Farrand’s classic *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., rev. ed. 1937) (four volumes) contains all the notes and records of the Constitutional Convention known as of 1937. The introduction contains an extremely detailed account of who took the notes, when they were published, and why they may contain inaccuracies. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra*, at xi–xxv.

⁸ See, e.g., *Alden v. Maine*, 527 U.S. 706, 716–19 (1999) (discussing evidence of the “original understanding” of the ratifiers of the Constitution).

⁹ See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 7, at xi–xxv (describing when the notes and records of the Constitutional Convention became public).

¹⁰ One or more of the delegates to the Constitutional Convention participated in each of the state ratifying conventions, except for Rhode Island, which did not send any delegates to the Constitutional Convention. See Maggs, *Records of the State Ratifying Conventions*, *supra* note *, at 481.

¹¹ See *id.* at 482.

and Anti-Federalists, on the theory that these arguments may have influenced the ratifiers.¹²

A third important type of original meaning—the “original objective meaning” (also known as the “original public meaning”)—is the reasonable meaning of the text of the Constitution at the time of its adoption.¹³ This meaning is not necessarily what the Framers subjectively intended the Constitution to have or what participants at the ratification debates actually understood it to have, but instead what a reasonable person of the era would have thought.¹⁴ Put another way, it is a hypothetical meaning that someone reading the Constitution around 1787 to 1789 might have understood the document to mean. The standard way of discerning this objective meaning is to look at period dictionaries and a variety of writings from the founding period to discern the then-customary meaning of words and phrases in the Constitution.¹⁵

Although less commonly considered, the Constitution also has other types of original meaning. For example, historians might be interested in how specific figures, such as Thomas Jefferson, subjectively understood the Constitution at the time of its adoption. Jefferson did not participate in the Constitutional Convention or any state ratifying convention¹⁶ and thus his views may vary from the original intent, original understanding, or original meaning as defined above. But his

¹² Judge Lawrence Silberman, for example, has cited *The Federalist Papers* as key evidence of the original understanding because they “were available to the state ratifying conventions.” In re Sealed Case, 838 F.2d 476, 492 (D.C. Cir. 1988), *rev'd sub nom.*, *Morrison v. Olson*, 487 U.S. 654 (1988); see also Maggs, *Federalist Papers*, *supra* note *, at 821–23.

¹³ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 100–09 (2004) (describing this kind of meaning).

¹⁴ See Maggs, *Federalist Papers*, *supra* note *, at 806.

¹⁵ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 111–25 (2001) (using the methodology to determine whether the word “commerce” in the Commerce Clause refers specifically to the exchange of goods or more broadly to any gainful activity).

¹⁶ See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 557–59 (listing the delegates who attended the Constitutional Convention); 3 DEBATES ON THE FEDERAL CONSTITUTION 662 (J. Elliot ed., 1836) (listing delegates at the Virginia ratifying convention).

views could still be important because he was clearly an influential figure during the founding era.¹⁷

Recognizing that the Constitution has multiple original meanings is important. Although the original intent, original understanding, and original objective meaning are often the same or very similar, some differences can and do exist. For example, Article III, section 2 contains a clause saying that the federal judicial power extends to cases “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”¹⁸ A fundamental question is whether this clause grants the federal courts subject matter jurisdiction over any lawsuit between a state and a citizen of another state or an alien, regardless of who is the plaintiff and who is the defendant. Do the federal courts have jurisdiction, for instance, over a suit brought by a citizen of Illinois against the state of Indiana for breach of contract? Or do the federal courts only have jurisdiction if the lawsuit is brought by a state against a citizen of another state or alien? The Supreme Court has said that the language of this clause, read objectively, would provide jurisdiction for a non-citizen or an alien to sue a state in federal court.¹⁹ But the Court has also recognized that the ratifiers of the Constitution may have had a different understanding of the clause.²⁰ At the Virginia ratifying convention, John Marshall urged his fellow delegates to read the clause in a more limited way. He said: “I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states.”²¹ If the ratifiers agreed with Marshall, then they may have attached a meaning to the words that is different from the meaning a reasonable person apparently would have read them to have.

Another possible example, in which original intent and original understanding might differ, concerns the legal effect of federal treaties.

¹⁷ See, e.g., Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45 (2006).

¹⁸ U.S. CONST. art. III, § 2, cl. 1.

¹⁹ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 261 (1985) (“The clauses by their terms permitted federal jurisdiction over any suit between a State and a non-citizen or a State and an alien, and in particular over suits in which the plaintiff was the noncitizen or alien and the defendant was the State.”).

²⁰ See *id.* at 267.

²¹ 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 16, at 555 (quoted in *Atascadero*, 473 U.S. at 267).

Some of the Framers at the Constitutional Convention may have thought that treaties would normally be self-executing (i.e., that they would not require implementing legislation).²² James Wilson, for instance, apparently held this belief. He wanted to amend the draft of the Constitution to require treaties to be approved not only by the Senate, but also by the House of Representatives.²³ Wilson's justification for this amendment suggests that he believed (and feared) that treaties would be self-enforcing just like any other laws. Madison's notes record: "Mr. Wilson moved to add, after the word 'Senate' the words, 'and House of Representatives.' As treaties he said are to have the operation of laws, they ought to have the sanction of laws also."²⁴ Although the Constitutional Convention ultimately did not amend the draft as Wilson wanted, the other delegates may have shared his apparent view that treaties would be self-executing. But ratifiers at the state conventions may have had a different understanding. Hamilton, for example, wrote in the *Federalist Papers* that treaties "are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."²⁵ Hamilton appears to have meant that the treaties will be commitments between the United States and other governments (i.e., sovereign and sovereign), not laws that apply directly to the people of the United States (i.e., the sovereigns' subjects). If this interpretation is correct, and other ratifiers shared this view, then the original understanding may have differed from the original intent.

Originalists have different views on which original meaning should control interpretation of the Constitution. Many older Supreme Court decisions specifically focus on the original intent. For example, in 1838, the Supreme Court announced that it would interpret the Constitution according to the "meaning and intention of the convention which framed and proposed [the Constitution] for adoption and ratification to the conventions of the people of and in

²² See John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2037-40, 2074 (1999) (summarizing conflicting views at the Constitutional Convention and at the state ratifying conventions on whether treaties would be self-enforcing).

²³ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 538.

²⁴ *Id.*

²⁵ THE FEDERALIST NO. 75, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the several states.”²⁶ Former Attorney General Edwin Meese famously advocated in the 1980s that courts should follow this type of meaning. He said: “Those who framed the Constitution chose their words carefully; they debated at great length the minutest points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was.”²⁷ Professor Lino Graglia has offered a concise rationale for this approach. He has explained that it is the task of courts to interpret the Constitution, and by definition “interpreting a document means to attempt to discern the intent of the author.”²⁸

But other Originalists have disagreed with this view. For example, although James Madison was one of the most influential Framers at the Constitutional Convention, he did not believe that the original intent should control. On the contrary, he argued that the original understanding of the ratifiers was most important and that the records of the state ratification conventions provided the best evidence of the original meaning. Madison explained this position as follows:

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in

²⁶ *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838); see also *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (“The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it.”).

²⁷ Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 47, 53 (Steven Calabresi ed., 2007).

²⁸ Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 *STAN. L. REV.* 1019, 1024 (1991–1992).

the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.²⁹

Still other Originalists think that the original objective meaning is most important. Justice Antonin Scalia is the leading advocate for this proposition. He has written: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."³⁰ To Scalia, only the text of the Constitution is authoritative; the unwritten and often undisclosed intentions and understandings of the Framers and ratifiers were not ratified and have no legal authority.³¹

The question here is whether Justice Thomas shares the views of the early Supreme Court, the views of James Madison, or the views of Justice Scalia, or has a different opinion about which original meaning is most important.

II. WHY KNOWING JUSTICE THOMAS'S VIEWS MIGHT MATTER

Knowing the kind of original meaning that matters to Justice Thomas could be important for several reasons. At a minimum, the answer may be helpful in predicting the outcome of constitutional issues that come before the Supreme Court. In addition, the answer might aid litigants before the Court in choosing what to emphasize in their briefs and oral arguments. For example, as a hypothetical proposition, if Justice Thomas finds the original intent more important than the original understanding or the original objective meaning, litigants hoping to influence him may focus more on notes from the Constitutional Convention than on the *Federalist Papers*, notes from the state ratifying conventions, or period dictionaries.³²

²⁹ 5 ANNALS OF CONG. 776 (1796) (remarks of James Madison on April 6, 1796), available at Library of Congress, Annals of Congress, <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited April 10, 2009).

³⁰ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

³¹ See *id.*

³² See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 595-96 (2003) (discussing in general terms arguments that Justice Thomas may find persuasive).

The answer also may be significant in scholarly assessments of Justice Thomas's work. As noted above,³³ many writers disagree on the initial question of whether judges should practice originalism in constitutional interpretation. But if they can move beyond this initial point of disagreement, scholars also might debate whether a jurist like Justice Thomas, who has chosen to follow the original meaning, has chosen the correct type of original meaning and whether, in practice, he actually does follow it. (I say a little about these subjects at the end of this essay).³⁴ A first step toward answering these questions is to determine which original meaning matters to Justice Thomas.

When I presented this essay at the New York University School of Law, the distinguished commentators assigned to comment on my thesis politely suggested two shortcomings with my inquiry. Professor Samuel Issacharoff seized on the premise of my essay that the Constitution may have more than one type of original meaning. He argued that this premise, if widely accepted, fundamentally undermines Originalists' claims that the courts can legitimately interpret the Constitution only according to its original meaning. How can that be true, he asked, if more than one original meaning exists and judges must decide for themselves which one to follow? Accordingly, an inquiry merely into which original meaning of the Constitution matters to Justice Thomas is necessarily incomplete; additional thought must be given to how Justice Thomas can justify originalism given the existence of multiple original meanings.

Mr. Tim Sandefur of the Pacific Legal Foundation saw the question addressed in my essay as overly narrow. The important issue to his mind is not whether Justice Thomas follows the original intent, the original understanding, or the original objective meaning. Instead, the crucial question is whether Justice Thomas gives weight to the broad general principles, especially natural law principles, upon which the Constitution was founded. To some extent, Mr. Sandefur extended this criticism of my essay to Justice Thomas's jurisprudence, which he viewed as not wholly compatible with natural law principles as the Framers saw them.

³³ See *supra* text accompanying note 2.

³⁴ See *infra* Part VI.

In response, I must acknowledge that the questions raised by Professor Issacharaoff and Mr. Sandefur are important and that I do not address either of them. But in defense of the limited scope of my inquiry, I would simply point out that the question of which original meaning matters is as old as the Constitution and has traditionally been asked and answered separately from other related issues. The question does not arise from any modern misconception of what was jurisprudentially important to the founding generation. On the contrary, the Framers and ratifiers themselves recognized that the Constitution has more than one original meaning, and they debated which meaning should control. The quotation from James Madison above³⁵ shows that Madison recognized that the original intent might differ from the original understanding, and he offered a justification for why the original understanding should control. Similarly, the quotation from John Marshall above³⁶ shows that he recognized that the original intent might differ from the original objective meaning and that he thought the original intent should control. My essay seeks only to continue in this tradition.

III. MY INITIAL HYPOTHESIS REJECTED

In attempting to determine which original meaning matters to Justice Thomas, I started with a definite hypothesis. Given that Justice Scalia concentrates his attention on the original objective meaning of the Constitution,³⁷ and knowing that Justice Thomas and Justice Scalia usually agree on the outcome in constitutional cases,³⁸ I presumed that Thomas would share Scalia's views. I then went about looking for information that would support or disprove this theory.

Finding cases in which Justice Thomas gave weight to evidence of the original objective meaning of constitutional terms was not difficult. Indeed, in one of his most famous constitutional opinions, his concurrence in *United States v. Lopez*, Justice Thomas sought to

³⁵ See *supra* text accompanying note 29.

³⁶ See *supra* text accompanying note 21.

³⁷ See *supra* notes 30–31 and accompanying text.

³⁸ See Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 4 (1997) (showing that during Justice Thomas's first five years on the Court, he and Justice Scalia agreed more than 90% of the time in civil rights and liberties cases).

discern the original objective meaning of the term “commerce” in the Commerce Clause.³⁹ He asserted, “At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”⁴⁰ Thomas followed this statement immediately with definitions of the word “commerce” from three period dictionaries: an edition of Samuel Johnson’s *A Dictionary of the English Language* from 1773, an edition of Nathan Bailey’s *An Universal Etymological English Dictionary* from 1789, and an edition of Thomas Sheridan’s *A Complete Dictionary of the English Language* from 1796.⁴¹ These dictionaries provide some evidence of the original objective meaning of the word “commerce” because they reveal the word’s general usage at the time of the adoption of the Constitution. This objective meaning is not necessarily what the Framers subjectively intended the word to mean or what the ratifiers subjectively understood it to mean.

In various other cases, Justice Thomas also has consulted period dictionaries and other secondary sources to determine the original objective meaning of terms in the Constitution. In his dissent in *Kelo v. City of New London*, he again turned to Samuel Johnson’s dictionary, this time to determine the meaning of the noun “use” in the Fifth Amendment.⁴² In his dissent in *Rothgery v. Gillespie County*, he looked at Blackstone’s *Commentaries* and Noah Webster’s 1828 dictionary for evidence of the original objective meaning of the word “prosecution” in the Sixth Amendment.⁴³ In his concurrence in judgment in *Baze v. Rees*, Justice Thomas looked at Samuel Johnson’s and Noah Webster’s dictionaries for evidence of the meaning of the word “cruel” in the Eighth Amendment.⁴⁴ In his majority

³⁹ See *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring).

⁴⁰ *Id.* at 585.

⁴¹ See *id.* at 585–86 (citing SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)).

⁴² 545 U.S. 469, 508 (2005) (Thomas, J., dissenting) (citing 2 DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 41, at 2194).

⁴³ 128 S. Ct. 2578, 2596–97 (2008) (Thomas, J., dissenting) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *289; NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

⁴⁴ 128 S. Ct. 1520, 1558 (2008) (Thomas, J., concurring) (citing 1 DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 41, at 459; WEBSTER, *supra* note 43, at 52).

opinion in *United States v. Bajakajian*, he used the same two dictionaries to determine the meaning of the term “excessive” in the Eighth Amendment.⁴⁵ And in his dissenting opinion in *Tennessee v. Lane*, Justice Thomas looked at two dictionaries from the 1860s for evidence of the meaning of the term “enforce” in section 5 of the Fourteenth Amendment.⁴⁶

These cases confirm that Justice Thomas considers evidence of the original objective meaning of the Constitution to be very important. But these examples do not tell the full story. On the contrary, Thomas’s opinions in other cases make clear that he does not look exclusively to evidence of the original objective meaning. Sometimes he gives weight to evidence of the original intent of the Framers. For example, in his majority opinion in *United States v. International Business Machines Corp.*,⁴⁷ Justice Thomas consulted the records of the Constitutional Convention to determine the meaning of the Export Clause in Article I, section 9, clause 5.⁴⁸ Based on these sources, he explicitly drew a conclusion about the Framers’ original intent. Justice Thomas asserted: “[T]he Framers sought to alleviate their concerns [that Congress would enact discriminatory taxes] by completely denying to Congress the power to tax exports at all.”⁴⁹ Similarly, in his dissent in *U.S. Term Limits, Inc. v. Thornton*,⁵⁰ Justice Thomas looked at records of the Constitutional Convention in deciding whether states could impose additional qualifications on candidates for congressional office beyond those listed in the so-called “Qualifications Clauses,” Article I, section 2, clause 2 and Article I, section 3, clause 3.⁵¹ Again, Thomas made an explicit conclusion about the original intent

⁴⁵ 524 U.S. 321, 334–35 (1998) (citing WEBSTER, *supra* note 43; 1 DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 41, at 680).

⁴⁶ 541 U.S. 509, 559 (2004) (Thomas, J., dissenting) (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 396 (1860); JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 484 (1860)).

⁴⁷ 517 U.S. 843, 859–61 (1996) (citing 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 95, 305–08, 359–63 (rev. ed. 1966)).

⁴⁸ U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

⁴⁹ *Int’l Bus. Machs. Corp.*, 517 U.S. at 861.

⁵⁰ 514 U.S. 779, 877 (1995) (Thomas, J., dissenting).

⁵¹ U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); *id.* § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United

of the Framers: “[T]he Qualifications Clauses are merely straightforward recitations of the minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet. They restrict state power only in that they prevent the States from abolishing all eligibility requirements for membership in Congress.”⁵²

In still other cases, Justice Thomas has relied on evidence of the original understanding of the ratifiers. For instance, in his concurring opinion in *Missouri v. Jenkins*,⁵³ Thomas agreed that a federal district court in a school desegregation case had ordered a remedy in excess of its equitable powers. In the course of his opinion, Justice Thomas observed that the Anti-Federalists had objected to the Constitution in part because they read it to grant overly broad equitable powers to the federal courts, but that the Federalists had denied this charge.⁵⁴ Expressly addressing the understanding of the ratifiers, Thomas reasoned, “When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.”⁵⁵

States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”).

⁵² *Thornton*, 514 U.S. at 866.

⁵³ 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

⁵⁴ *Id.* at 126–27.

⁵⁵ *Id.* at 126. Whether Anti-Federalist statements provide reliable evidence of the original understanding of the ratifiers is a complicated question. In my view, in situations where Anti-Federalists and Federalists each understood the provisions of the Constitution to have the same meaning (but perhaps disagreed about the wisdom of these provisions), their shared views presumably reflect the original understanding of the ratifiers. After all, some of the Federalist and Anti-Federalist essayists were themselves ratifiers, and others wrote expressly for the purpose of influencing ratifiers. In contrast, when the Anti-Federalists and Federalists disagreed about the meaning of the Constitution, different inferences are possible. One is the inference that Justice Thomas makes in this opinion. See also Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 259 (2004) (contending that Anti-Federalist interpretations might also be relevant “to demonstrate that the delegates at the state ratification conventions would never have voted to ratify the Constitution unless it accommodated their concerns”). But another possible inference is that the majority of the ratifiers rejected the views of the Anti-Federalists and adopted the views of the Federalists. *Id.* This inference seems especially justified when the Anti-Federalists ascribed a meaning to the Constitution that would have deleterious consequences that ratifiers would have been unlikely to support.

Justice Thomas used the same kind of reasoning in his dissent in *Gonzales v. Raich*.⁵⁶ The issue in the case was whether Congress could criminalize a person's medical use of home-grown marijuana under the Commerce Clause. Part of the answer concerned the meaning of the Necessary and Proper Clause. Thomas observed that Anti-Federalists had objected to the Necessary and Proper Clause precisely because it would allow Congress to create new kinds of crimes, but the Federalists had denied this charge.⁵⁷ This evidence tends to show what delegates to the state ratification convention understood the Constitution to mean on the theory that the arguments of the supporters and the opponents of ratification influenced the ratifiers' views.⁵⁸

I believe that these counterexamples contradict my initial hypothesis that Justice Thomas shares Justice Scalia's preference for evidence of the original objective meaning of the Constitution. Although Justice Thomas does consider evidence of the original objective meaning, he does not appear to give it more weight than evidence of the original intent or the original understanding.

Now, it is true that Justice Scalia also cites records of the Constitutional Convention, the *Federalist Papers*, and other sources that might provide evidence of the original intent or original understanding.⁵⁹ But Scalia has made clear that he looks at these sources solely for linguistic clues as to the original objective meaning, not because he thinks that the original intent or original understanding is authoritative:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal

⁵⁶ 545 U.S. 1, 57 (2005) (Thomas, J., dissenting).

⁵⁷ *Id.* at 66 n.5.

⁵⁸ See Maggs, *Federalist Papers*, *supra* note *.

⁵⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 910–24 & n.9 (1997).

weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framers.⁶⁰

In the cases cited above, Justice Thomas does not appear to have limited his use of these sources in the same manner. He does not just look for evidence of the original objective meaning. On the contrary, he has explicitly cited these sources for evidence of the original intent of the Framers or the original understanding of the ratifiers.

IV. TWO OTHER HYPOTHESES REJECTED

Having concluded that Justice Thomas does not look only for the original objective meaning of the Constitution, I also considered but ultimately rejected two other hypotheses. The first is that Thomas, like some other Supreme Court Justices, cites historic sources for reasons other than solely determining the original meaning of the Constitution.⁶¹ Consider what Professor William N. Eskridge, Jr. has said about some judges' use of the *Federalist Papers*:

[J]udicial interpreters of the Constitution often rely heavily upon the *Federalist Papers*, surely not because anyone can demonstrate that Madison, Hamilton, and Jay represented the views of the Philadelphia convention or of the state ratifying conventions, but instead because they are authoritative statements, because they have become focal points, and (perhaps most of all) because they are intelligent analysis based upon sophisticated political theory.⁶²

Professor Eskridge's statement appears to describe accurately the practice of several current members of the Supreme Court. For instance, Justices Souter, Ginsburg, and Breyer all cite the *Federalist*

⁶⁰ Scalia, *supra* note 30, at 38.

⁶¹ See David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 755-56 (2001); William N. Eskridge, Jr., *Cycling Legislative Intent*, 12 INT'L REV. L. & ECON. 260, 261 (1992).

⁶² Eskridge, *supra* note 61, at 261.

Papers in their opinions.⁶³ But no one would characterize them as Originalist jurists.⁶⁴ These Justices therefore appear to consider the *Federalist Papers* to be an authoritative source, not a binding source.

Yet Professor Eskridge's theory does not appear to apply to Justice Thomas. Thomas is an avowed Originalist. In his dissents, he often specifically criticizes the Supreme Court for straying from the original meaning of the Constitution.⁶⁵ Accordingly, when he cites the *Federalist Papers* and other historic documents, he is in fact looking for the original meaning of the Constitution.

I also rejected the hypothesis that Justice Thomas might simply be insensitive to the possibility that some sources of the original meaning might be weightier than others. Although Justice Thomas—unlike Justice Scalia⁶⁶—has not announced that he considers one type of original meaning to be more significant than another, he does recognize at least some hierarchy among sources of the original meaning. For example, in *U.S. Term Limits, Inc. v. Thornton*, Justice Stevens wrote a generally Originalist majority opinion on the issue of whether states may impose qualifications on candidates for congressional office.⁶⁷ In this opinion, Stevens relied heavily on Justice Joseph Story's historic *Commentaries on the Constitution* in concluding that states could not impose additional qualifications beyond those specified in Article I.⁶⁸

As noted above,⁶⁹ Justice Thomas dissented. He, like Justice Stevens, took an Originalist view of the issue but was concerned with

⁶³ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Souter, J.); *Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting); *Utah v. Evans*, 536 U.S. 452, 477–78 (2002) (Breyer, J.).

⁶⁴ See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1046 (2006) (identifying Justices Scalia and Thomas as “the Court’s self-proclaimed originalists”).

⁶⁵ See, e.g., *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2595 (2008) (Thomas, J., dissenting) (“Because the Court’s holding is not supported by the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents, I respectfully dissent.”); *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (“Our cases have strayed from the Clause’s original meaning, and I would reconsider them.”).

⁶⁶ See *supra* notes 30–31 and accompanying text.

⁶⁷ See 514 U.S. 779 (1995).

⁶⁸ See *id.* (citing JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (3d ed. 1858)).

⁶⁹ See *supra* text accompanying notes 50–52.

the weight that Stevens had given to Justice Story's treatise. Finding other evidence more persuasive, Justice Thomas wrote:

Justice Story was a brilliant and accomplished man, and one cannot casually dismiss his views. On the other hand, he was not a member of the Founding generation, and his *Commentaries on the Constitution* were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding.⁷⁰

Thus, Justice Thomas has decided that some evidence of the original meaning is more significant than other evidence.

V. MY "GENERAL ORIGINAL MEANING" THEORY

Although the three hypotheses discussed above are invalid, I have noticed a significant pattern in Justice Thomas's opinions. Typically, when Thomas makes claims about the original meaning of the Constitution, he relies on multiple sources of evidence. These sources do not just show the original intent, original understanding, or original objective meaning. Instead, taken together, these sources are capable of showing all of these different meanings. My conclusion is that Justice Thomas routinely seeks what might be called a "general original meaning" — a meaning best supported by all of the available historic evidence.

To see this point, consider the following five prominent examples:

(1) In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Supreme Court struck down a Maine tax law that penalized institutions that did principally interstate business on the grounds that the law violated the Dormant Commerce Clause doctrine.⁷¹ Justice Thomas dissented. He asserted that the Import-Export Clause in Article I, section 10,⁷² rather than the judicially created Dormant Commerce Clause doctrine, is what limits the States' power to levy

⁷⁰ *Thornton*, 514 U.S. at 856 (Thomas, J., dissenting).

⁷¹ 520 U.S. 564, 575–77 (1997).

⁷² U.S. CONST. art. I, § 10, cl. 2 ("No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws.").

discriminatory taxes on the commerce of other States, and he saw no violation of the Import-Export Clause.⁷³ In reaching this conclusion, Justice Thomas relied in part on comments by George Mason and James Madison at the Constitutional Convention.⁷⁴ These comments, in my view, best show the original intent of the Framers. But Thomas also relied in part on remarks by Alexander Hamilton in the *Federalist Papers* in support of ratification, writings of Brutus and other anti-Federalists in opposition to ratification, and comments by Thomas Dawes at the Massachusetts ratifying convention.⁷⁵ These sources, in my view, tend to shed light on the original understanding of the ratifiers. In addition, Justice Thomas also looked at a 1790 newspaper article and Nathan Bailey's 1789 dictionary for evidence of the original objective meaning of the term "impost" in the Import-Export Clause.⁷⁶ Although Thomas did not articulate this point in his opinion, the diversity of his sources suggest that he was looking for a general original meaning rather than any one specific type of original meaning.

(2) In a concurring opinion in *United States v. Lopez*, Justice Thomas agreed with the Court that Congress lacked power under the Commerce Clause to enact a particular statute regulating guns within school zones.⁷⁷ As noted above, Justice Thomas cited eighteenth-century dictionaries for evidence of the original objective meaning of the term "commerce" in the Constitution.⁷⁸ But Thomas did not look only to dictionaries; he also cited various statements by Alexander Hamilton and John Jay in the *Federalist Papers* and additional statements by two Anti-Federalists.⁷⁹ From these and other sources, he

⁷³ *Camps Newfound/Owatonna*, 520 U.S. at 630–32 (Thomas, J., dissenting).

⁷⁴ *Id.* at 630–31 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 588–89).

⁷⁵ *Id.* at 631–32 (citing J. ELLIOT, 2 DEBATES ON THE FEDERAL CONSTITUTION 57–58 (2d ed. 1891); Brutus 1, Oct. 18, 1787, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (J. Kaminsky & G. Saladino eds., 1981); THE FEDERALIST NO. 32 (Alexander Hamilton)).

⁷⁶ *Id.* at 637 (citing *The Observer—No. XII*, CONN. COURANT & WEEKLY INTELLIGENCER, Jan. 7, 1790, at 1; BAILEY, *supra* note 41).

⁷⁷ 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

⁷⁸ See *id.* at 585–86 (citing 1 DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 41, at 361; BAILEY, *supra* note 41; SHERIDAN, *supra* note 41).

⁷⁹ *Lopez*, 514 U.S. at 586–87 (citing THE FEDERALIST NO. 4 (John Jay), NO. 7 (Alexander Hamilton), NO. 40 (James Madison); Lee, *Letters of a Federal Farmer No. 5*, in

concluded that it was “widely understood that the Constitution granted Congress only limited powers.”⁸⁰ Thus, Justice Thomas considered both the original objective meaning and the apparent original understanding, suggesting that he was looking for a general original meaning.

(3) In his dissenting opinion in *Gonzales v. Raich*, as mentioned above,⁸¹ Justice Thomas disagreed with the Court’s conclusion that Congress could regulate certain medical marijuana using its Commerce Power.⁸² This time, Thomas expressly noted a general consensus among historic sources: “Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, the *Federalist Papers*, and the ratification debates, the term ‘commerce’ is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.”⁸³

(4) In his dissenting opinion in *U.S. Term Limits, Inc. v. Thornton*, as explained above,⁸⁴ Justice Thomas disagreed with the Court’s conclusion that states cannot impose qualifications on candidates for congressional office.⁸⁵ Justice Thomas did not limit himself to dismissing Justice Story’s treatise as a reliable source of the original meaning.⁸⁶ On the contrary, Justice Thomas also cited a collection of historic sources including quotations from the Constitutional Convention, the *Federalist Papers*, and early state legislation.⁸⁷ These

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 319 (P. Ford ed. 1888); Smith, *An Address to the People of the State of New York*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 107).

⁸⁰ *Lopez*, 514 U.S. at 599.

⁸¹ See *supra* text accompanying notes 56–57.

⁸² 545 U.S. 1, 58 (2005) (Thomas, J., dissenting).

⁸³ *Id.* at 58. A counterargument might be that, in this statement, Justice Thomas is referring only to the original objective meaning of the term “commerce.” The argument would be that Justice Thomas is observing a consistent linguistic usage, not making claims about the subjective views of the Framers and the ratifiers. But I reject this contention because the Justice prefaced the statement by summarizing the Commerce Clause’s “text, structure, and history.” *Id.* The history of the clause would include its drafting and ratification.

⁸⁴ See *supra* text accompanying notes 50–52, 67.

⁸⁵ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (Thomas, J., dissenting).

⁸⁶ See *supra* text accompanying notes 50–52, 67.

⁸⁷ See *Thornton*, 514 U.S. at 869 & n.11 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 375; 3 THE RECORDS OF THE FEDERAL

sources individually could show a variety of different kinds of original meaning. In citing all of them together, Justice Thomas again appears to have been looking for a general original meaning.

(5) In his concurring opinion in *Missouri v. Jenkins*, Justice Thomas wrote at length about the scope of the equitable powers of federal courts.⁸⁸ In addressing the original meaning of the Constitution, he looked in part at what Federalists and Anti-Federalists argued in debating the merits of ratification. This evidence, as noted above,⁸⁹ might show the original understanding of the ratifiers. But Justice Thomas also cited what Blackstone's treatise said about equitable powers generally.⁹⁰ This treatise provides evidence of the original objective meaning of the judicial power.

These examples show that Justice Thomas does not just look for evidence of only one type of original meaning. Instead, he considers multiple types of original meaning. What he apparently finds most persuasive is agreement among historical sources.

VI. ASSESSMENT

How should we assess Justice Thomas's tendency to look for a general original meaning instead of the original intent, original understanding, or original objective meaning? I see two significant difficulties, one theoretical and the other practical. On the other hand, I also perceive certain clear judicial virtues in Thomas's approach.

The principal theoretical difficulty with Thomas's method is the lack of any apparent or articulated rationale for it. As noted above, Professor Graglia, James Madison, and Justice Scalia have given reasons for why courts should follow the original intent, the original understanding, or the original objective meaning, respectively.⁹¹ Justice Thomas, in contrast, has not offered a comparable theory for why courts should strive to discern and follow a general original meaning,

CONVENTION OF 1787, *supra* note 7, at 147; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 216; THE FEDERALIST NO. 56 (James Madison); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 381).

⁸⁸ 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

⁸⁹ See *supra* text accompanying notes 53-55.

⁹⁰ See *Jenkins*, 515 U.S. at 127 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *436, *438, *440).

⁹¹ See *supra* text accompanying notes 28-31.

and a good rationale behind his thinking is not immediately evident. If Justice Thomas shares Justice Scalia's view that nothing but the text has legal authority, then the views of the Framers and ratifiers are irrelevant. If he shares James Madison's theory that the ratifiers are the ones who gave legal effect to the Constitution, then the original objective meaning and the original intent are irrelevant. And similarly, if Justice Thomas believes, as Professor Graglia has suggested,⁹² that judicial interpretation is a process of determining the intent of the author, then only the views of the Framers should matter.

The practical difficulty with Thomas's approach is understanding how it will apply in the rare, but possible, situations when evidence of the original intent, original understanding, and original objective meaning point in divergent directions. It is easy for Justice Thomas to dismiss the views of Joseph Story as unsound evidence of the original intent, as he did in *U.S. Term Limits, Inc. v. Thornton*.⁹³ But suppose in a future case, the notes from the Constitutional Convention ascribe a meaning to terms in the Constitution that is contrary either to the original understanding as shown by notes from the state ratification debates or to the original objective meaning as shown by period dictionaries and other sources. Justice Thomas cannot easily dismiss any of these sources as unreliable because he has relied on all of them in other cases. And he also cannot easily say that one type of source is intrinsically weightier than another without some kind of theory, which to date he has not articulated. Because of these problems, I predict that Thomas's practice of seeking the general original meaning at some point in the future will require some further thinking and refinement.

At the same time, I see several distinct virtues in Justice Thomas's approach. A fundamental criticism of originalism is that it often requires judges to make decisions based on a vague and uncertain historical record.⁹⁴ This criticism has less weight in cases where someone can show agreement among all sources on a subject. So far, that is what Justice Thomas has strived to accomplish.

⁹² See Graglia, *supra* note 28, at 1024.

⁹³ See 514 U.S. 779, 856 (1995) (Thomas, J., dissenting); see also *supra* text accompanying note 70.

⁹⁴ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS 10 (1996); David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008).

In addition, the approach may help to build consensus among Justice Thomas's present or future Originalist colleagues. Originalists currently disagree about which type of original meaning is the most significant. If Justice Thomas can show that his views accord with multiple kinds of original meaning, he is likely to gain more support. In addition, his opinions will have greater appeal to future generations of Justices that might have to decide whether to follow them.

Finally, a fundamental principle of judicial restraint is that judges should not decide any issues before they have to decide them.⁹⁵ Although in the future a case may arise in which Justice Thomas must develop a theory for deciding among different types of original meaning, that case has not yet come before the Court. Justice Thomas therefore has good reason for not already having articulated which type of original meaning matters most to him.

VII. CONCLUSION

Justice Thomas is clearly an Originalist, a jurist who insists that the Court should decide constitutional issues on the basis of the Constitution's original meaning. And yet, Thomas does not appear to share the same view of other Originalists about how to determine original meaning. Rather than focusing on the original intent of the Framers, the original understanding of the ratifiers, or the original objective meaning of the Constitution, Justice Thomas appears to look for what I have called the general original meaning. He considers a variety of historic sources on point, regardless of what specific type of meaning they might show. This approach has theoretical difficulties and ultimately may also have practical problems. But the method addresses an important criticism of originalism, and it may help to foster unity among other Originalists now on the Court or in the future. In addition, principles of judicial restraint suggest that Justice Thomas need not revise or further develop his practice until confronted with a case that actually challenges it.

⁹⁵ See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995) (noting the "policy of avoiding unnecessary adjudication of constitutional issues").