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ORIGINALISM—THE FORGOTTEN YEARS

*Frank B. Cross**

Originalism became best known as a Reagan era conservative reaction to the Warren Court era and the desire to restrain what was perceived as judicial activism. Pam Karlan notes that “[o]riginalism as a primary theory of constitutional interpretation had its origin in the conservative attack on various Warren Court decisions.”¹ James Fleming declared that originalism was “a conservative ideology that emerged in reaction against the Warren Court” and “did not exist” prior to that time.² The Warren Court was “accused of ignoring the original meaning of the Constitution.”³ The Court was charged with “abandonment of originalism.”⁴

Few disagree with this story. For the most part liberal critics are happy to accept the thesis and approve of the Warren Court’s “living Constitution.” Jack Balkin’s efforts to defend a liberal originalism have generally not sought to claim that the Warren Court was engaged in authentic originalism. Yet this widespread acceptance of the nature of the Warren Court’s jurisprudence has not been closely examined. In this article, I explore originalism in the Warren Court and its meaning.

* Herbert D. Kelleher Centennial Professor of Business Law, University of Texas School of Law.

1. Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 396 (2009); see also Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 88 (2009) (suggesting that contemporary originalism was “birthed” by “critics of the Warren Court”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599–601 (2004) (describing the development as a reaction to the Warren Court); David S. Law & David McGowan, *There is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86, 100 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/27> (discussing the jurisprudence of the Warren and Burger Courts as “a low point for originalism”);

2. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997).

3. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217, 233 (2004).

4. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 16 (2009).

I. THE PRACTICE OF ORIGINALISM IN THE WARREN COURT

Authentic reliance on originalism can be difficult to measure. Legal commentators have critiqued Supreme Court opinions as non-originalist, but such commentators are not a definitive resource for accurate resolution, and they may be influenced by their own ideological biases. There is, however, a readily available test for whether the Justices are using originalism—the legal materials upon which their opinions rely. I examine the use of originalist sources during the Warren Court.

The potentially relevant originalist sources are myriad, but some stand out as especially important. *The Federalist* has been called “the most important of originalist sources.”⁵ This is certainly true for the Supreme Court, which has cited to this resource more than twice as often as any other originalist source, from 1955 to 1984.⁶ James Madison suggested that *The Federalist* was “the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared & the Authority which accepted it.”⁷ Edwin Meese, the primary author of originalism in response to the Warren Court, declared that it was *The Federalist* “which explained the Founders’ intent.”⁸

A second important originalist resource is Elliot’s Debates, a record of the ratifying discussion for the Constitution.⁹ Contemporary understanding of originalism gives central importance to the ratification of the Constitution and the understanding of the ratifiers. Today’s originalism focuses on original meaning, rather than any subjective intent. The ratifiers are commonly regarded as the best resource on such original meaning.¹⁰ Until

5. 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, 329 (2005).

6. *Id.* at 330.

7. Letter to Thomas Jefferson from James Madison (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 219 (Gaillard Hunt ed., 1910).

8. Edwin Meese III, *Challenges Facing Our System of Justice*, 3 AVE. MARIA L. REV. 303, 307–08 (2005).

9. JONATHAN ELLIOT, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1827).

10. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 551 (1994) (suggesting that originalists find original meaning in “the text of the Constitution, as originally understood by the people who ratified it”); Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 461 (2009) (identifying one form of original meaning as “what the persons who participated in the state ratifying conventions thought that the Constitution meant”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (declaring that originalism “is the idea that the words

very recently, Elliot's Debates was the primary source of ratification records, commonly used by the U.S. Supreme Court.

A third originalist resource worthy of consideration is James Madison's notes on the constitutional convention (Farrand).¹¹ Although originalists tend to place more importance on the ratification of the Constitution than on its drafting, Madison's records of the convention might still have importance in ascertaining the original meaning of the text. These were the second most used source of original intent at the Supreme Court between 1953 and 1984.¹² Some suggest that statements in the privacy of the convention may be more reliable evidence of original meaning than public claims of partisans in the ratification debates.¹³

Numerous other originalist sources are available to the Court, including dictionaries, early court opinions, correspondence among framers, commentaries, actions of the First Congress, and other documents, but *The Federalist*, Elliot's Debates and Farrand are the most prominent originalist resources used by the Court.

My study on the use of these originalist sources has Justice-votes for opinions relying on such originalist sources as the unit of analysis in the cases in which at least one opinion utilized this source. For an example of the operation of the coding system, consider *Hamdi v. Rumsfeld*.¹⁴ Justice Souter wrote an opinion concurring in part and dissenting in part, which was joined by Justice Ginsburg, in which he cited *The Federalist*.¹⁵ Justice Scalia wrote a dissenting opinion in which he was joined by Justice Stevens, which also cited *The Federalist* numerous times.¹⁶ Justice Thomas wrote a dissenting opinion, in which he cited *The Federalist* once.¹⁷ The majority opinion, authored by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, did not cite to *The Federalist*.¹⁸

of the Constitution must be understood as they were understood by the ratifying public at the time of enactment").

11. 1–3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1st ed. 1911).

12. Corley, Howard & Nixon, *supra* note 5, at 330.

13. See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1189 (2003) (arguing for ascribing greater interpretive weight to this resource).

14. 542 U.S. 507 (2004).

15. *Id.* at 545 (Souter, J., concurring).

16. *Id.* at 555, 558, 568, 569, 578 (Scalia, J., dissenting).

17. *Id.* at 542 (Thomas, J., dissenting).

Under my coding, Justices Souter, Ginsburg, Scalia, Stevens, and Thomas receive a “1” in the column for this case, for citing *The Federalist*.¹⁹ Justices O’Connor, Rehnquist, Kennedy, and Breyer receive a “0” in this column for this case, because some other Justice relied on *The Federalist* in an opinion in the case and they did not.

Counting Justice-votes is preferable to counting decisions. It reveals the strength of originalism by the number of Justices an opinion commands. Moreover, this approach captures the use (or lack of use) of originalism in concurring and dissenting opinions.

There is no way to discern whether a Justice truly *relied* on originalist sources in reaching a decision. Such sources might simply “decorate” an opinion, for public consumption, without actually playing a role in the Justice’s decision making. But any attempt to evaluate the causative influence of the originalist source would require mind reading. Many constitutional opinions contain no originalist references whatsoever,²⁰ so the presence of such a resource reveals some deference to the interpretive methodology.

All Justice-votes are counted equally. One might suggest that the opinion author be given particular credit for originalist references, as the drafter. The author may not truly control the opinion, though, except for a lone dissent or concurrence. Research shows that an opinion author may be required to make various compromises to retain the coalition behind his or her opinion. For majority opinions, political science research suggests that their content is driven by the preferences of the necessary fifth voter.²¹ Efforts to analyze the question empirically have found that the opinion author has unique influence over the opinion’s content, but that other Justices also have influence.²² I presume that each Justice joining an originalist opinion is additional evidence of the role of originalism.

18. See *id.* at 509–39 (majority opinion).

19. The coding does not take into account the fact that they cited different *Federalist Papers*, or that an opinion may have relatively more citations to the source.

20. See Corley, Howard & Nixon, *supra* note 5, at 330, 334 (noting that *The Federalist* is by far the most used originalist source by the Court but that it appears as a citation in only a small fraction of constitutional opinions).

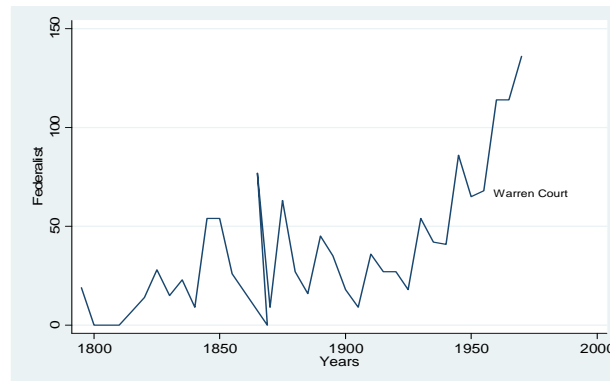
21. See Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 279 (2007).

22. See Chris W. Bonneau, et al., *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 890, 902–03 (2007).

There are occasional cases in which a Justice references an originalist source, such as *The Federalist*, and then holds that it is not helpful to resolve the case before the Court. These are included in my analysis. Recognizing and distinguishing an originalist source is testimony to its importance to the Justice, and an authentic originalist would carefully evaluate the applicability of originalist sources in deciding. My evaluation of originalism is limited to the Founding era. The approach is also relevant to other controversies, such as those involving the 14th Amendment.

The first analysis is for the number of Justice-votes citing *The Federalist* in Supreme Court opinions. Figure 1 displays the numbers of Justices joining opinions that cited this source over five year period averages throughout history before and during the Warren Court.

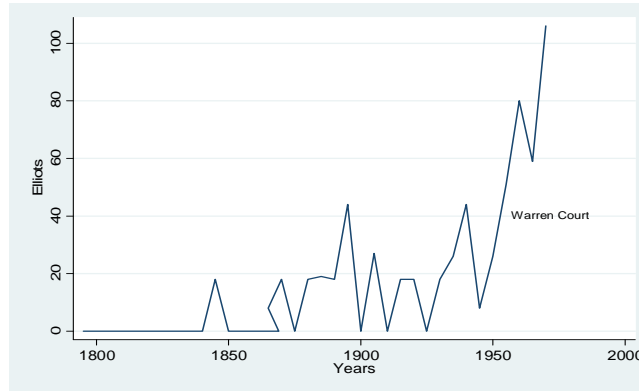
FIGURE 1
USE OF *THE FEDERALIST* OVER TIME



The Federalist had seen intermittent use through history, until the beginning of the Warren Court era, when its use consistently and dramatically expanded to heights never before reached at the Court. By the end of the Warren Court, use of *The Federalist* was more than twice as high as at any prior time.

The next analysis adopts the same method for examining the use of Elliot's Debates by the Court. This resource became available early in the 19th Century. Figure 2 displays the numbers of Justice-votes citing the resource, again with five-year averages.

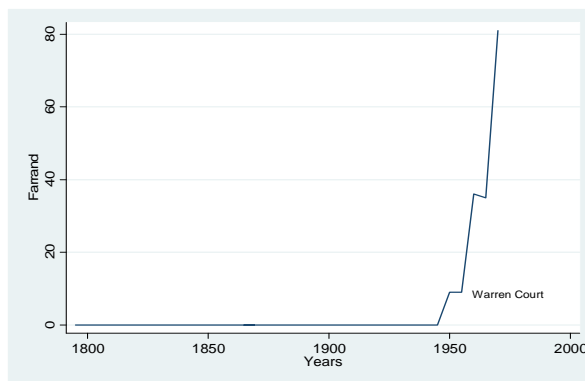
FIGURE 2
USE OF ELLIOT’S DEBATES OVER TIME



The pattern for citations to Elliot’s Debates is similar to that for *The Federalist*. The source had been intermittently relied upon, with peaks and valleys over the history of the Court. With the Warren Court era, however, its usage grew dramatically. There was another steady increase in use, more than doubling the number of Justice-votes citing the ratification debates at any time in history.

As for Farrand’s publication of Madison’s convention notes, this resource was unavailable for much of our history. It was first published in 1911. The pattern of its usage by Justices of the Court is displayed in Figure 3.

FIGURE 3
USE OF FARRAND OVER TIME



Until the Warren Court era, the Farrand records were seldom used. In the Warren Court, however, use of this source exploded. All three of the primary originalist resources saw considerably expanded use by the Warren Court.

Overall uses of originalism grew considerably during the Warren Court era. Originalist reliance was not uniform among the Justices. Table 1 displays the total number of opinions in which major Warren Court Justices used one of the three sources (*The Federalist*, Elliot's Debates, or Farrand).

TABLE 1
JUSTICES' USE OF ORIGINALISM

Justice	Originalist Sources
Black	28
Brennan	30
Douglas	32
Harlan	38
Stewart	29
Warren	26
White	17

The numbers are not directly comparable, because some justices served for briefer periods under Chief Justice Warren (Justice Marshall, for example, was not appointed until near the end of the Warren Court era and had little opportunity to cite originalist sources). We can see from these numbers that Justice Harlan was probably the greatest originalist but that all the Justices used originalism with roughly comparable frequency.

If one judges originalism by reliance on originalist materials, the Warren Court was a time of much expanded originalism, as compared to prior constitutional history, and all the Justices joined in using originalist sources. Originalism was not “submerged and marginalized”²³ as commonly claimed. Rather than a departure from a history of originalism, as suggested by Robert Bork and others,²⁴ the Warren Court saw the interpretive method's efflorescence. Judged simply by invocation of the

23. JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 39 (2005).

24. See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 5 & n.10 (1971). See also Berman, *supra* note 1, at 88; Karlan, *supra* note 1, at 396; Law & McGowan, *supra* note 1, at 100; Whittington, *supra* note 1, at 599–601.

primary originalist resources, the Warren Court was much more originalist than any prior Court.

II. THE MEANING OF WARREN COURT ORIGINALISM

The expanded use of originalism in the Warren Court is striking, as is the fact that the Justices of the era received no credit for originalism. The Justices made much greater use of originalist sources in reaching their decisions than in past years. Why did they not get credit for doing so? Why were they attacked for being non-originalist?

Those critics who recognized the Warren Court's use of originalism often disregarded it as inauthentic. The Justices of the era may have cited to originalist sources, but the critic would argue that they did not rely upon them but merely used originalism to "decorate" opinions grounded in other rationales. While Justice Brennan often used originalist sources, the theory that he was truly influenced by the theory was derided as "fanciful."²⁵

A famous historian's review of the Supreme Court's reliance on originalism was quite critical.²⁶ While not limited to the Warren Court, it focused on the Court's opinions in cases on reapportionment, church and state, and other opinions of the era. The author concluded that the Court too often reached "conclusions that are plainly erroneous."²⁷ In one case, Justice Black relied on sources that "were so stale and inadequate that a properly trained historical scholar would hesitate to suggest that an undergraduate student rely on them for anything more than 'a once important, although now outdated view.'"²⁸ Perhaps the Justices are simply poor at historical analysis, as some have suggested.²⁹ Alternatively, the Justices are simply not committed

25. Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *LAW & SOC'Y REV.* 113, 118 (2002).

26. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119 (1965).

27. *Id.* at 155.

28. *Id.* at 121 (quoting Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 *AM. HIST. REV.* 64, 64-65 (1963)).

29. E.g., GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 97 (1992) (contending that judges "routinely botch history when they set their hands to it"); Buckner F. Melton Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 *MINN. L. REV.* 377, 384 (1998) (suggesting that lawyers and judges are "ill-equipped to understand the rudiments of the process of historical research"); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication*, 67 *U. CHI. L. REV.* 573, 595 (2000) (arguing that "[l]egal professionals are not competent to umpire historical disputes").

to getting history right but instead seek to use it as a support for decisions reached on different grounds.³⁰

The Court's use of originalism may thus be dismissed as a rhetorical flourish aimed at providing greater legitimacy to the Court's ruling. Americans have an "almost religious adoration" of the Framers.³¹ Invoking them in support of an opinion may enhance that opinion's appeal. Some suggest that originalism has an innate populist appeal.³² Its use "can evoke emotional responses that alternatives to originalism cannot directly match."³³

As a result, the Justices may strategically reference originalist sources in support of their decisions, even if they did not rely on those sources in reaching their decisions. A study of the Court's use of *The Federalist* found that it was most commonly used in controversial outcomes, such as those striking down a statute, formally altering precedent, or decided by a minimum winning coalition (5-4).³⁴ The authors suggested that citing this source was tactical, "to bolster the legitimacy of the court when opinions assert judicial power."³⁵ Another study of use of *The Federalist* reached similar results.³⁶

The research is by no means conclusive, though, and it is certainly possible that a Justice might sincerely rely on originalist sources. Perhaps the fundamental appeal of originalism is that "if judges don't follow the original understandings, they will be free to do whatever they want."³⁷ A central concern of originalism "is that judges be *constrained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless."³⁸ The "best response"

30. See Kelly, *supra* note 26, at 131 (concluding that historical reliance was merely a "rationale for politically inspired activism").

31. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 181 (1969).

32. See generally Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

33. R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 689 (2008).

34. Corley, *supra* note 5, at 334.

35. *Id.* at 336.

36. See Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOC'Y REV. 817, 838 (2006).

37. David A. Stauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. PUB. POL'Y 969, 973 (2008).

38. Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989).

to judicial discretion is to “lash judges to the solid mast of history.”³⁹ But this may be a futile endeavor.

The historical originalist record is quite incomplete. The ratifiers of the Constitution were largely unaware of the content of *The Federalist* when approving the text and some were published only after ratifications.⁴⁰ The ratification records are incomplete and often unreliable,⁴¹ and often conflicted on the meaning of the ratified text.⁴² Madison’s notes recorded in Farrand were quite an incomplete record of the constitutional convention and may have been biased.⁴³ The records that exist may be fatally compromised by “the editorial interventions of hirelings and partisans.”⁴⁴ Given the indeterminacy, originalism has been described as “questing after a chimera.”⁴⁵

In addition, developments over the past two centuries obscure the application of originalism. Technological and societal developments mean that the originalist record requires some translation to be applied to contemporary controversies, and such translation requires subjective judgment. The translation to changed circumstances typically involves the identification of the principles underlying the original text. Yet the proper level of generality to be ascribed to those principles is quite uncertain. When deciding whether protections against search and seizure apply to various modern circumstances, unknown centuries ago (*e.g.*, thermal imaging), the Justices identify the purpose of the constitutional provision to apply it to the question. Yet this identification may be quite indeterminate, freeing the Justices to adopt whatever conclusion they wish.

These three features, the somewhat obscure historical record, changed circumstances, and uncertain level of generality conspire to render originalism indeterminate in its findings. Justice Scalia has conceded that in a case there may be “plenty of room for disagreement as to what original meaning was, and

39. Whittington, *supra* note 1, at 599.

40. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the U.S. Constitution*, 87 B.U. L. REV. 801, 826–29 (2009).

41. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986).

42. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 586 (2003) (“If the Constitution means whatever its ratifiers understood it to mean, then different conventions arguably ratified different things.”).

43. See Hutson, *supra* note 41, at 25; LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 287 (2000).

44. Hutson, *supra* note 41, at 2.

45. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222 (1980).

even more as to how that original meaning applies to the situation before the [C]ourt.”⁴⁶

As a result, originalism may be manipulated to suit the ends of the deciding Justice. This is the originalist critique of the Warren Court. The Justices of the Warren Court may have used originalist sources, even at a high rate, but they did so selectively in pursuit of an ideological agenda. This claim can be checked by examining the nature of the decisions supported by originalist sources.

Political scientists commonly categorize the direction of Supreme Court opinions as liberal or conservative.⁴⁷ While this coding is imperfect, the resource is commonly used and has facial validity in its results (*e.g.*, Scalia and Thomas appear as conservatives, Douglas and Marshall as liberals). The effect of originalist sources might be seen in a comparison between the ideology of Justice-votes in cases involving use of these sources and the ideology of such votes in other cases. Table 1 reports this comparison for leading members of the Warren Court.

TABLE 2
ORIGINALIST SOURCES AND IDEOLOGY IN THE WARREN
COURT

Justice	Liberal Originalism	All Liberal
Black	64.3%	81.7%
Brennan	76.2%	83.5%
Douglas	78.0%	88.7%
Harlan	35.0%	37.2%
Stewart	37.0%	44.5%
Warren	80.8%	79.2%
White	41.1%	44.4%

When liberal Justices used originalism, their votes on the merits were consistently liberal. Such votes tended to be slightly more conservative than their overall voting record in all cases, so originalism may have had some conservative directional tug. But during the Warren Court era, Justices who relied on originalism produced results roughly in accord with their ideological

46. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 45 (1997).

47. The source commonly used for this categorization is the U.S. Supreme Court Database. THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org> (last visited Sept. 23, 2011).

preferences. There is at best mild evidence that originalism constrained some of the Justices.

This lends some support to claims that the Justices of the period did not sincerely use originalism to decide cases but merely employed originalist resources to add legitimacy to results reached on other grounds. So there may be some validity to the conservative critique of Warren Court originalism. The Justices may have simply invoked originalism to legitimize decisions reached on other grounds.

The use of originalism to support predetermined ideological outcomes may be more of an indictment of originalism, though, than an indictment of the Warren Court Justices. To examine this possibility, I considered the voting record of post-Warren Court conservative Justices and their use of originalism. Table 3 displays the liberal votes of various Justices, including the modern conservative stalwarts, in cases using originalist sources, as compared with all cases.

TABLE 3
ORIGINALIST SOURCES AND IDEOLOGY OUTSIDE THE
WARREN COURT

Justice	Liberal Originalism	All Liberal
Scalia	25.0%	24.3%
Thomas	21.7%	17.8%
Rehnquist	21.8%	18.5%
Kennedy	40.0%	35.3%
Stevens	67.5%	63.9%
O'Connor	30.5%	32.9%
Breyer	82.6%	62.8%

As with the Justices of the Warren Court, the ideological direction of these Justices' votes using originalism closely parallel the ideology of all their votes. The slight differences are likely attributable to random variation. The only dramatic difference is for Justice Breyer, and this could have been attributable to his desire to legitimate liberal constitutional decisions.

We do not know the Justices internal ideological preferences for particular cases. Perhaps they vote ideologically in every case (and Justices Scalia and Thomas happen to prefer the

liberal result about twenty percent of the time). Perhaps they are constrained sometimes by legal materials, but there is no evidence that originalism is any more constraining than any alternative legal materials.⁴⁸ In any case, it is clear that liberal Justices who use originalism reach distinctly liberal results, while conservative Justices employing originalism reach quite conservative results. This need not be evidence of bad faith, it may simply be testimony to the psychological power of motivated reasoning.⁴⁹

CONCLUSION

The wide perception that the Warren Court rejected originalism for a living constitution is unsupported by the data. The Warren Court deployed originalist sources more than any prior Court in history. It may not have been maximally originalist,⁵⁰ but in context it was certainly a relatively originalist Court.

It is fair to question whether the Warren Court's originalism was truly sincere. The Justices may simply have used originalist sources to decorate results grounded in other bases. But this effect is not limited to the Warren Court. Subsequent Justices, including professed originalists show a similar pattern of

48. This is consistent with a study of federalism opinions. See Smith, *supra* note 3, at 284. A study of votes on the Seventh Circuit reached a similar conclusion. See Sara C. Benesh & Jason J. Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U. J.L. & POL'Y 113, 114–15 (2009) (“[A]rguments suggesting that legal interpretation is determinative and hence alleviates room for attitudinally-motivated outcomes are overstated.”). In addition, a nonempirical examination of cases citing *The Federalist* suggested that the citations were primarily for the sake of appearances and that it was “hard to come up with more than a small handful of cases where *The Federalist* even arguably played a decisive role in the Court's decision.” Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 313 (2005).

49. Motivated reasoning is simply the tendency for people's perceptions of facts to be influenced by their underlying values or ideology. Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning?: Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 941 (2007). The concept is well-established in psychology and has been applied to legal decisions. See generally *id.*

50. In many constitutional cases, the Justices use no originalist sources. Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 87 (2010) (“[T]he vast majority of Supreme Court decisions interpreting the Constitution have been nonoriginalist in their methodology.”). However, a comparison of the data for the Warren Court and subsequent Courts, such as the Rehnquist Court, considered more originalist, shows that later Courts have made significantly more use of *The Federalist* but not Farrand or Elliot's *Debates*. The Warren Court was not strikingly less originalist than the Rehnquist Court.

convenient ideological outcomes. Any problem of insincerity seems associated with originalism itself, not the Justices of the Warren Court.

These findings do not wholly dispel the potential influence of originalism at the Court. I study only outcomes, and it is possible that originalism had a material influence on the content of the Court's opinions and decision rules that they laid down.⁵¹ There is no apparent way to measure this, however, and one would expect that a powerful originalist decision would affect outcomes—conservative critics of the Warren Court certainly so profess.

The decision in *District of Columbia v. Heller*⁵² is considered by some to represent an apotheosis of originalism at the Court. Yet it aptly illustrates the findings of this Article. All of the Justices relied heavily on originalism, yet the outcome split on predictable ideological valences. Consequently, it seems fair to question whether it was truly originalism that drove the Justices' opinions, as opposed to their policy preferences. *Heller* is not unique in this regard.⁵³

Moreover, while the opinions were flush with originalist sources, a key portion of the majority opinion totally ignored originalism. Justice Scalia cited instances where the government could regulate arms notwithstanding the Second Amendment but offered zero originalist basis for these exceptions. Nelson Lund has argued that this aspect of the opinion departed so far from originalism that the opinion should be considered poor.⁵⁴ The opinions in *Heller* look suspiciously like policy driven opinions, decorated with originalist support.

Some time ago, Justice Scalia suggested, "It would be hard to count . . . on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the

51. See Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. PUB. POL'Y 217, 237 (2010) (contending that originalism restricts the possible bases for decisions).

52. 554 U.S. 570 (2008).

53. See Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. SEE ALSO 79, 79 (2010) (observing that the Justices "frequently divide on questions of original meaning, and the divisions have a way of mapping what we might suspect are the justices' leanings about the merits of the cases irrespective of originalist considerations").

54. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009).

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judges currently thought it desirable for it to mean.”⁵⁵ While he would resort to originalism to combat this effect, originalism appears to offer no restraining influence. Justices may simply cloak their ideological biases with materials from the ratification era that are available. It is difficult to find a professed originalist, in the judiciary or in the academy, who believes that the original meaning of the Constitution is significantly different from his or her personal policy preferences.

55. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).