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## Book Review of Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (2001)

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## JUSTICE KENNEDY'S USE OF SOURCES OF THE ORIGINAL MEANING OF THE CONSTITUTION

By Gregory E. Maggs<sup>1</sup>

### I. Introduction

Justice Kennedy became an Associate Justice of the U.S. Supreme Court on February 18, 1988.<sup>2</sup> During the nearly one quarter of a century in which he now has held this august office, the Supreme Court has decided numerous significant cases, has established important legal tests and doctrines in many fields, and has employed various principles for interpreting statutes and the Constitution. This symposium serves a valuable purpose in investigating the many ways in which Justice Kennedy has contributed to the Court's work.

My essay concerns one aspect of Justice Kennedy's jurisprudence, namely, his use of some of the principal sources of the original meaning of the Constitution in his written opinions. By the term "sources of the original meaning of the Constitution," I refer to the records from the Federal Constitutional Convention of 1787, the records of the state ratifying conventions, the Federalist Papers, dictionaries showing usage of language during the Founding period, and the acts of the First Congress. The goals of this essay are first to identify, quote, and describe passages in which Justice Kennedy has cited these sources, and second to draw conclusions about what these passages show. Although I clerked for Justice Kennedy in the October 1989 term, and have spoken with him regularly since then, he and I have not discussed this particular subject. My assessment is based solely on his written opinions.

My observations lead me to three conclusions: First, Justice Kennedy believes that sources of the original meaning of the Constitution are important, but he does not rely on them frequently. I found only 22 opinions written by Justice Kennedy that cite on the Federalist Papers, the records of the Constitutional Convention, the records of the state ratifying conventions, or the Acts of the First Congress. Second, when Justice Kennedy cites sources of the original meaning of the Constitution, he usually uses the sources to confirm background principles rather than to resolve the specific issues before the Court. Third, Justice Kennedy is

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<sup>1</sup> Professor of Law, The George Washington University Law School. Law Clerk to Justice Kennedy, 1989-1990. This essay was written for the *McGeorge Law Review's* Symposium on "The Evolution of Justice Anthony Kennedy's Jurisprudence," held at the McGeorge Law School on April 5, 2012. I am very grateful to the *McGeorge Law Review* for including me in this symposium, and to Justice Kennedy for the great assistance he has given me in many ways over the past 25 years.

<sup>2</sup> U.S. Supreme Court, Biographies of Current Justices of the Supreme Court, <<http://www.supremecourt.gov/about/biographies.aspx>> (last visited May 6, 2012).

not opposed to using sources of the original meaning of the Constitution to resolve specific issues, but he has done it in very few cases.

## II. Why the Subject Might be Important

Why might it be important to investigate Justice Kennedy's reliance on sources of the original meaning of the Constitution? I see three potential reasons. First, writers have disagreed about whether to describe Justice Kennedy as an "originalist" in constitutional interpretation. An originalist judge, as I understand the term, is one who decides constitutional issues based on the original meaning of the Constitution. Prominent scholars have expressed different views on how to characterize Justice Kennedy. For example, Dean Erwin Chemerinsky labels Justice Kennedy an originalist,<sup>3</sup> while others such as Professors Jamal Greene and Steven Calabresi say that he is not an originalist.<sup>4</sup> This essay assessing his record of citing sources of the original meaning may contribute to resolving this disagreement.

Second, Justice Kennedy is widely described as the "swing vote" on the Supreme Court.<sup>5</sup> On this view, the Court has two blocks of four justices who commonly vote together in constitutional cases. One block includes Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito, and the other block includes Justice Breyer, Justice Ginsburg, Justice Sotomayor, and Justice Kagan. As the swing vote, Justice Kennedy belongs to neither block, but "swings" between them, ultimately deciding which group will be in the majority in many cases. If this characterization is accurate, then knowing the kinds of arguments that might persuade Justice Kennedy should be very important to litigants because persuading Justice Kennedy may be the key to winning many cases. Among other things that may be important to winning Justice Kennedy's vote in constitutional cases may be understanding the manner in which Justice Kennedy does or does not rely on sources of the original meaning of the Constitution.

Third, over the past twenty-five years, the Supreme Court has cited sources of the original meaning of the Constitution more frequently than in any comparable period.<sup>6</sup> Numerous important decisions, like *U.S. Term Limits v. Thornton*,<sup>7</sup> have involved disputes between the majority and dissent about the original meaning of constitutional provisions. In assessing

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<sup>3</sup> See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (discussing "originalists such as Justices Scalia and Kennedy").

<sup>4</sup> See Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1190 (2011) ("neither of the Court's swing Justices for the last quarter century, Justice O'Connor and Justice Kennedy, is an originalist."); Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325 (2009) ("Justice Kennedy . . . has never been an originalist and disagrees with Justice Scalia as often as not in divided cases."); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008) ("Kennedy is thus a Burkean, not an originalist.").

<sup>5</sup> See Adam Liptak, *The Roberts Court*, N.Y. TIMES, Jul. 25, 2010, at A1.

<sup>6</sup> See Antonin Scalia, Foreword to STEVEN G. CALABRESI, ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43 (2007); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 491 (2012)

<sup>7</sup> 514 U.S. 779 (1995).

Justice Kennedy's record over the past 25 years, a significant question is therefore the extent to which Justice Kennedy has contributed to the Supreme Court's originalist jurisprudence. This essay also may help with this issue.

Now for a disclaimer: Beyond describing my observations with respect to how Justice Kennedy uses sources of the original meaning the Constitution, and arguing about why these observations may be important, I do not offer a normative assessment of Justice Kennedy's decision-making. While the issue of whether or to what extent judges must follow the original meaning of the Constitution is an important and controversial issue, this issue is beyond the scope of this essay. Many other works, of course, address this question in great detail.<sup>8</sup> And the normative question is separate from, and in my view, should not affect inquiries into whether Justice Kennedy is or is not an originalist, about what kinds of arguments influence Justice Kennedy, or the extent to which Justice Kennedy has contributed to the Supreme Court's originalist jurisprudence.

### **III. Description of the Cases**

What follows is a description of the Supreme Court cases in which Justice Kennedy has written opinions—including majority opinions, concurring opinions, and dissents—that cite sources of the original meaning of the Constitution. It does not include descriptions of opinions written by other members of the Court even if Justice Kennedy joined those opinions. In conducting research for this essay, I looked for instances in which Justice Kennedy referred to the Federalist Papers, the records of the Federal Constitutional Convention, the records of the state ratifying conventions, the acts of the First Congress, and dictionaries from the founding period. These sources are commonly cited in support of claims about the original meaning of the Constitution. I limited my inquiry to these five sources solely to make the research more manageable. To be sure, other sources also exist, including very importantly sources that address the original meaning of constitutional amendments. Yet, these are the most commonly cited sources, and I have assumed that looking for citations of these sources will provide a sufficient sample for making generalizations about Justice Kennedy's use of all sources of the original meaning.

#### **A. The Federalist Papers**

In 1787 and 1788, Alexander Hamilton, James Madison, and John Jay wrote a total of 85 essays urging the state of New York to ratify the Constitution.<sup>9</sup> Courts have cited these essays

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<sup>8</sup> For well-known writings arguing that judges should follow the original meaning of the Constitution, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); 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 the opposite view, see Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

<sup>9</sup> See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 801-02 (2007).

as evidence of the original meaning of the Constitution in more than 1700 cases.<sup>10</sup> Although claims made about the original meaning based on the Federalist Papers are subject to challenge on various grounds, the Federalist Papers are a popular source because they are easily accessible and because they systematically address nearly every aspect of the Constitution.

Justice Kennedy has cited the Federalist Papers in 21 of his opinions.<sup>11</sup> In two of these cases, *Missouri v. Jenkins*<sup>12</sup> and *Public Citizen v. U.S. Department of Justice*,<sup>13</sup> Justice Kennedy relied greatly on the Federalist Papers in reaching his conclusion on the specific issues before the Court. In *Missouri v. Jenkins*, the Supreme Court invalidated a federal district court order that had increased property taxes within a school district to pay for the desegregation of the district's schools. Justice Kennedy wrote an opinion concurring in part and concurring in the judgment, in which he concluded that federal courts cannot issue remedial orders imposing taxes. He based this conclusion both on the text of Article III of the Constitution and on what the Federalist Papers said about judicial power. Justice Kennedy wrote:

The description of the judicial power nowhere includes the word “tax” or anything that resembles it. This reflects the Framers’ understanding that taxation was not a proper area for judicial involvement. “The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.” The Federalist No. 78, p. 523 (J. Cooke ed. 1961) (A. Hamilton).<sup>14</sup>

In *Public Citizen v. U.S. Department of Justice*,<sup>15</sup> the Supreme Court held that as a matter of statutory interpretation the Federal Advisory Committee Act (FACA)<sup>16</sup> did not apply to the American Bar Association (ABA) when the ABA provided advice to the Justice Department on federal judicial nominees.<sup>17</sup> Justice Kennedy wrote an opinion concurring in the judgment.<sup>18</sup> He concluded that, as a matter of statutory interpretation, the FACA would apply to the ABA, but he

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<sup>10</sup> *See id.* at 802.

<sup>11</sup> I did not count two cases, *Granholm v. Heald*, 544 U.S. 460 (2005), and *Idaho v. Coeur d’Alene Tribe of Idaho*. In each of these cases, Justice Kennedy cited other decisions and merely noted in a parenthetical phrase following the citations that these other cases had relied on the Federalist papers. In *Granholm*, Justice Kennedy cited *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994). In *Idaho v. Coeur d’Alene Tribe*, Justice Kennedy cited *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934).

<sup>12</sup> 495 U.S. 33 (1990).

<sup>13</sup> 491 U.S. 440 (1989).

<sup>14</sup> *Id.* at 65 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>15</sup> 491 U.S. 440 (1989).

<sup>16</sup> 86 Stat. 770, *as amended*, 5 U.S.C. App. § 1 *et seq.* (1982 ed. and Supp. V).

<sup>17</sup> 491 U.S. at 443.

<sup>18</sup> 491 U.S. at 467 (Kennedy, J., concurring in the judgment).

concluded that such application would violate the Appointments Clause in Article II.<sup>19</sup> Justice Kennedy began by asserting that “[t]he Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers. *See, e.g.,* The Federalist Nos. 47-51 (J. Madison).”<sup>20</sup> He then cited the Federalist Papers again to explain his concern about using the “absurd result” canon of statutory construction to resolve the case: “I believe the Court’s loose invocation of the ‘absurd result’ canon of statutory construction creates too great a risk that the Court is exercising its own ‘WILL instead of JUDGMENT,’ with the consequence of ‘substitut[ing] [its own] pleasure to that of the legislative body.’ The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (A. Hamilton).”<sup>21</sup> Turning to the constitutional issue, Justice Kennedy relied heavily on what the Federalist Papers said about presidential appointments. Justice Kennedy wrote: “No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.”<sup>22</sup> He then quoted three specific statements by Hamilton in the Federalist Papers which also supported the view that the President alone would choose nominees.<sup>23</sup> These quotations weighed heavily in Justice Kennedy’s decision that applying the FACA to the ABA when the ABA provides advice on nominees would violate the Appointments Clause.

In the other 19 cases in which Justice Kennedy cited the Federalist Papers, he did not rely directly on them in deciding the issue before the court. Instead, Justice Kennedy cited the Federalist Papers to confirm generally accepted background principles about the nature of the United States government and about the concerns of the Framers. Explication of these background issues help to introduce the questions about which Justice Kennedy was writing but

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<sup>19</sup> *Id.* at 482. The Appointments Clause says that the President “by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .” U.S. Const. Art. II, § 2, cl. 2.

<sup>20</sup> *Id.* at 468.

<sup>21</sup> *Id.* at 471.

<sup>22</sup> *Id.* at 483.

<sup>23</sup> The first quotation said: “ ‘In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment.’ ” *Id.* at 483 (quoting The Federalist No. 76, 456-457 (C. Rossiter ed. 1961) (emphasis added)).” The second quotation said: “ ‘It will be the office of the President to nominate, and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice he may have made.’ ” *Id.* (quoting The Federalist No. 66, at 405 (emphasis in original)). The third quotation said: “ ‘“The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.’ ” *Id.* at 483 n.4 (quoting The Federalist No. 76, at 455-456.).

did not decide the questions. With the hope that I do not overwhelm anyone reading this essay with detail, I include here a brief description of each of these additional 19 cases and quote what Justice Kennedy said about the Federalist Papers. I feel this is the best way to convey the difference between these cases and *Missouri v. Jenkins* and *Public Citizen v. U.S. Department of Justice*.

(1) In *Citizens United v. Federal Election Commission*,<sup>24</sup> the Supreme Court considered the constitutionality of a federal campaign finance law that, among other things, attempted to limit corporate financing of elections.<sup>25</sup> In his opinion for the Court, Justice Kennedy wrote about the problem of political power and whether limiting the speech of corporations was a proper remedy.<sup>26</sup> He said:

Factions will necessarily form in our Republic, but the remedy of “destroying the liberty” of some factions is “worse than the disease.” The Federalist No. 10, p. 130 (B. Wright ed. 1961) (J. Madison). Factions should be checked by permitting them all to speak, *see ibid.*, and by entrusting the people to judge what is true and what is false.<sup>27</sup>

In this passage, Justice Kennedy is not interpreting the First Amendment, but setting the context for his opinion in the case by explaining James Madison’s understanding of the power of political parties and Madison’s support for free speech.

(2) In *Caperton v. A.T. Massey Coal Co., Inc.*,<sup>28</sup> the Supreme Court held that a state supreme court justice should have recused himself under the circumstances of a particular case.<sup>29</sup> In his opinion for the Court, Justice Kennedy started by discussing the leading precedent of *Tumey v. Ohio*.<sup>30</sup> Justice Kennedy wrote: “The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has ‘a direct, personal, substantial, pecuniary interest’ in a case.”<sup>31</sup> Immediately after this sentence, Justice Kennedy explained: “This rule reflects the maxim that ‘[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.’ The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison).”<sup>32</sup> Again in this instance, Justice Kennedy is not using the Federalist Papers to decide the issue in the case, but instead to frame the issue with an accepted basic principle.

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<sup>24</sup> 130 S. Ct. 876 (2010).

<sup>25</sup> *See id.* at 886.

<sup>26</sup> *Id.* at 970 (Kennedy, J., concurring).

<sup>27</sup> *Id.*

<sup>28</sup> 129 S. Ct. 2252 (2009).

<sup>29</sup> *Id.* at 2257.

<sup>30</sup> 273 U.S. 510 (1927).

<sup>31</sup> 129 S. Ct. at 2259.

<sup>32</sup> *Id.*

(3) In *Boumediene v. Bush*,<sup>33</sup> the Supreme Court considered the constitutionality of a provision of the Military Commissions Act of 2006<sup>34</sup> that sought to prevent federal courts from exercising jurisdiction over habeas corpus petitions filed by suspected enemy belligerents confined at the U.S. Navy Base in Guantanamo Bay, Cuba.<sup>35</sup> In his opinion for the Court, Justice Kennedy provided considerable background about the writ of habeas corpus.<sup>36</sup> In one passage, Justice Kennedy noted that “Alexander Hamilton [like others] explained that by providing the detainee a judicial forum to challenge detention, the writ [of habeas corpus] preserves limited government.”<sup>37</sup> Justice Kennedy then quoted at length a statement from Federalist No. 84, written by Alexander Hamilton that supported this proposition.<sup>38</sup> The citation served to support a general proposition about the purpose of writs of habeas corpus, rather than to decide the particular issue before the Court, namely, whether federal courts could assert habeas corpus jurisdiction over detainees in Cuba.

(4) In *Department of Revenue of Kentucky v. Davis*,<sup>39</sup> the Supreme Court upheld a Kentucky income tax law that exempted interest on bonds issued by the Kentucky government and its subdivisions but did not exempt interest on bonds issued by other states. The Court ruled that the difference in treatment did not violate the Dormant Commerce Clause doctrine.<sup>40</sup> Justice Kennedy wrote a dissenting opinion in which he made the following statement:

The object of creating free trade throughout a single nation, without protectionist state laws, was a dominant theme of the convention at Philadelphia and during the ratification debates that followed. *See, e.g.*, The Federalist No. 22, pp. 143–144 (C. Rossiter ed. 1961) (A. Hamilton) (“It is indeed evident, on the most

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<sup>33</sup> 553 U.S. 723 (2008).

<sup>34</sup> 10 U.S.C. § 948a *et seq.* (Supp. 2007)

<sup>35</sup> *Id.* at 732.

<sup>36</sup> *See id.* at 739-752.

<sup>37</sup> *Id.* at 744-745.

<sup>38</sup> The passage that Justice Kennedy cited said: “[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone ... are well worthy of recital: ‘To bereave a man of life ... or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.’ And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls ‘the BULWARK of the British Constitution.’ “ C. Rossiter ed., p. 512 (1961) (quoting 1 Blackstone \*136, 4 *id.*, at \*438).” 553 U.S. at 744-745.

<sup>39</sup> 553 U.S. 328 (2008).

<sup>40</sup> *Id.* at 331.

superficial view, that there is no object, either as it respects the interest of trade or finance, that more strongly demands a federal superintendence”).<sup>41</sup>

As in the previous examples, the quotation from the Federalist Papers is important in establishing context, and it confirms a general proposition which is largely uncontroversial: the Framers supported free-trade among the states. The quotation was not intended to resolve the specific issue under consideration.

(5) In *Roper v. Simmons*,<sup>42</sup> the Supreme Court held that imposing capital punishment on individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments.<sup>43</sup> Justice Kennedy, who wrote the majority opinion, made the following general statement about how Americans view the Constitution: “Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. *See* The Federalist No. 49, p. 314 (C. Rossiter ed. 1961).”<sup>44</sup> This statement merely established background, and was not used to resolve the specific issue before the Court.

(6) In *United States v. Locke*,<sup>45</sup> the Court held that a federal statute governing ports and waterways preempted a Washington State law that attempted to regulate oil tankers. Justice Kennedy also wrote the majority opinion in this case.<sup>46</sup> In discussing the state legislation, Justice Kennedy made the following general remarks: “The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution. *E.g.*, The Federalist Nos. 44, 12, 64.”<sup>47</sup> This general principle did not resolve the issue before the Court.

(7) In *Alden v. Maine*,<sup>48</sup> state probation officers sued the State of Maine in state court to recover overtime pay under the Fair Labor Standards Act.<sup>49</sup> The Court held that Congress could not subject Maine to liability for damages in a state court without the consent of the state.<sup>50</sup> Justice Kennedy, who wrote the majority opinion, cited the Federalist Papers three times in a

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<sup>41</sup> *Id.* at 364 (Kennedy, J., dissenting).

<sup>42</sup> 543 U.S. 551 (2005).

<sup>43</sup> *See id.* at 575.

<sup>44</sup> *Id.* at 578.

<sup>45</sup> 529 U.S. 89 (2000).

<sup>46</sup> *See id.* at 94.

<sup>47</sup> *Id.* at 99.

<sup>48</sup> 527 U.S. 706 (1999).

<sup>49</sup> 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.* (1994 ed. and Supp. III).

<sup>50</sup> *See* 527 U.S. at 771.

passage outlining the nature and importance of state sovereignty under the Constitution. First, Justice Kennedy reminded readers that “The States ‘form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.’ The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).”<sup>51</sup> Second, Justice Kennedy observed that in creating a federal government that could regulate individuals directly (and not through the states) “the Founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had ‘exploded on all hands’ the ‘practicality of making laws, with coercive sanctions, for the States as political bodies.’ 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison); accord, The Federalist No. 20, at 138 (J. Madison and A. Hamilton).”<sup>52</sup> Third, Justice Kennedy concluded: “The States thus retain ‘a residuary and inviolable sovereignty.’ The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”<sup>53</sup> These general propositions framed the issue before the court but were not sufficient to decide the issue before the Court. (As discussed below, however, Justice Kennedy made much more specific use of the statements made by James Madison and John Marshall at the Virginia ratifying convention in deciding the issue before the court.<sup>54</sup>)

(8) In *City of Boerne v. Flores*,<sup>55</sup> the Supreme Court held that the Religious Freedom Restoration Act of 1993<sup>56</sup> exceeded Congress’s power under section 5 of the Fourteenth Amendment.<sup>57</sup> The Religious Freedom Restoration Act sought to prohibit state governments from “substantially burden[ing]” an exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.”<sup>58</sup> Justice Kennedy began his constitutional analysis with the following statement: “Under our Constitution, the Federal Government is one of enumerated powers. *M’Culloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison).”<sup>59</sup> Again, this is an important background principle, but it was not cited for the purpose of directly resolving the issue before the Court.

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<sup>51</sup> *Id.* at 714.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 715.

<sup>54</sup> See *infra* part III.A.

<sup>55</sup> 521 U.S. 507 (1997).

<sup>56</sup> 107 Stat. 1488, 42 U.S.C. § 2000bb et seq.

<sup>57</sup> Section 5 of the Fourteenth Amendment empowers Congress to enforce the guarantees of section 1 of the Fourteenth Amendment, which includes that guarantee of Due Process. See U.S. Const. amend. 14, §§ 1, 14.

<sup>58</sup> 42 U.S.C. § 2000bb–1.

<sup>59</sup> *Id.* at 516.

(9) In *Loving v. United States*,<sup>60</sup> the Supreme Court upheld the system for adjudging death sentences in the military courts. At issue was whether it was proper for the President rather than Congress to promulgate the list of aggravating factors for courts-martial to consider when sentencing service members convicted of capital offenses.<sup>61</sup> In the majority opinion, Justice Kennedy wrote: “Though faithful to the precept that freedom is imperiled if the whole of legislative, executive, and judicial power is in the same hands, The Federalist No. 47, pp. 325–326 (J. Madison) (J. Cooke ed. 1961), the Framers understood that a ‘hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively,’ *Buckley v. Valeo*, 424 U.S. 1, 12 (1976) (per curiam).”<sup>62</sup> As in the previously discussed cases, the basic principle cited (i.e., here, that the separation of powers prevents tyranny) was not in dispute. The citation provided only background.

(10) In *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>63</sup> the Supreme Court held that a town’s ordinance discriminating against non-local waste processors violated the Dormant Commerce Clause doctrine.<sup>64</sup> Justice Kennedy explained the Dormant Commerce Clause doctrine by articulating this well-accepted principle: “The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent. *See* The Federalist No. 22, pp. 143-145 (C. Rossiter ed. 1961) (A. Hamilton).”<sup>65</sup>

(11) In *Clinton v. City of New York*,<sup>66</sup> the Supreme Court invalidated a federal act that would have given the President a “line-item veto,” allowing the President to veto spending provisions and tax breaks in subsequently passed legislation.<sup>67</sup> Justice Kennedy wrote a concurring opinion in which he cited the Federalist Papers in two near-by passages. Justice Kennedy first said:

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all

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<sup>60</sup> 517 U.S. 748 (1996).

<sup>61</sup> *See id.* at 759.

<sup>62</sup> *Id.* at 753. The Court also cited *Mistretta v. United States*, 488 U.S. 361, 380–381 (1989), and noted parenthetically that it had quoted The Federalist No. 47).

<sup>63</sup> 511 U.S. 383 (1994).

<sup>64</sup> *See id.* at 386. The Dormant Commerce Clause Doctrine precludes states from discriminating against interstate commerce, from enacting laws on subjects where a uniform national standard is necessary, or from imposing an excessive burden on interstate commerce, even if Congress has not legislated in the area. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-90 (1987) (considering each of these bases for invalidating a state law).

<sup>65</sup> *Id.* at 390.

<sup>66</sup> 524 U.S. 417 (1998).

<sup>67</sup> *See id.* at 436.

powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. The Federalist No. 84, pp. 513, 515 . . . .<sup>68</sup>

Justice Kennedy then added:

. . . In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions. Quoting Montesquieu, the Federalist Papers made the point in the following manner:

“ ‘When the legislative and executive powers are united in the same person or body,’ says he, ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.’ Again: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.’ ” The Federalist No. 47, *supra*, at 303.<sup>69</sup>

The aim of this extended passage was to frame the issue before the Court, and not to decide the issue.

(12) In *Crawford-El v. Britton*,<sup>70</sup> the Supreme Court held that a state prison inmate need not present clear and convincing evidence of improper motive to withstand a summary judgment motion in an action against state prison officials under 40 U.S.C. § 1983.<sup>71</sup> Justice Kennedy wrote a concurring opinion, in which he said: “We must guard against disdain for the judicial system. As Madison reminds us, if the Constitution is to endure, it must from age to age retain ‘th[e] veneration which time bestows.’ James Madison, The Federalist No. 49, p. 314 (C. Rossiter ed. 1961).”<sup>72</sup> Justice Kennedy made this important point only to establish background for deciding the issue in the case.

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<sup>68</sup> *Id.* at 450.

<sup>69</sup> *Id.* at 450-51 (Kennedy, J., concurring).

<sup>70</sup> 523 U.S. 574 (1998).

<sup>71</sup> *See id.* at 594. The statute in question, 42 U.S.C. § 1983, creates a federal civil cause of action against state officials who violate the constitution, stating: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

<sup>72</sup> *Id.* at 601 (Kennedy, J., dissenting).

(13) In *U.S. Term Limits, Inc. v. Thornton*,<sup>73</sup> the Supreme Court struck down a state law that effectively would have imposed term limits on members of the House of Representatives and Senate by restricting access to the ballot after successive terms of office.<sup>74</sup> Justice Kennedy wrote a concurring opinion in which he said: “A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it. It must be remembered that the National Government, too, is republican in essence and in theory. John Jay insisted on this point early in *The Federalist Papers*, in his comments on the government that preceded the one formed by the Constitution.”<sup>75</sup> Justice Kennedy then quoted at length from *The Federalist No. 2*.<sup>76</sup> Immediately afterwards, Justice Kennedy wrote: “Once the National Government was formed under our Constitution, the same republican principles continued to guide its operation and practice. As James Madison explained, the House of Representatives ‘derive[s] its powers from the people of America,’ and ‘the operation of the government on the people in their individual capacities’ makes it ‘a national government,’ not merely a federal one. *Id.*, No. 39, at 244, 245 (emphasis deleted).”<sup>77</sup> Further into the opinion, Justice Kennedy added: “Of course, because the Framers recognized that state power and identity were essential parts of the federal balance, *see The Federalist No. 39*, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province.”<sup>78</sup> These references to the *Federalist Papers* confirmed important background principles for understanding what was at stake in the case, but they did not resolve the issue of whether the qualifications for office stated in the Constitution were the minimum qualifications or both the minimum and maximum qualifications.

(14) In *United States v. Lopez*,<sup>79</sup> the Supreme Court held that Congress lacked power under the Commerce Clause<sup>80</sup> to enact the Gun-Free School Zones Act of 1990,<sup>81</sup> which made it a federal crime for any person knowingly to possess firearm at place that the person knows or has reasonable cause to believe is a school zone.<sup>82</sup> The case was significant because it was the

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<sup>73</sup> 514 U.S. 779 (1995).

<sup>74</sup> *See id.* at 783.

<sup>75</sup> *Id.* at 839 (Kennedy, J., concurring).

<sup>76</sup> *Id.* The quotation was: “To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection. . . . A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it. They formed it almost as soon as they had a political existence. . . .” *Id.* (quoting *The Federalist No. 2*, pp. 38-39 (C. Rossiter ed. 1961)).”

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 841.

<sup>79</sup> 514 U.S. 549 (1995).

<sup>80</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>81</sup> 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

<sup>82</sup> *See* 514 U.S. at 551.

first decision in 60 years holding that Congress lacked power to pass a law.<sup>83</sup> In a concurring opinion, Justice Kennedy cited the Federalist Papers in addressing basic principles of federalism:

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. . . .

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered," *ibid.* Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.<sup>84</sup>

Again in this instance, Justice Kennedy relied on the Federalist Papers in explicating background principles that framed the issue in the case. But what the Federalist Papers said was not used to resolve the specific question of whether bringing guns in the schools was a matter that Congress could regulate under its Commerce Power.

(15) In *American Dredging Co. v. Miller*,<sup>85</sup> the Supreme Court held that federal admiralty law does not preempt state law forum *non conveniens* principles in cases filed in state court. Justice Kennedy wrote a dissenting opinion in which he said: "At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other. See The Federalist No. 22, pp. 143-145 (C. Rossiter ed. 1961) (Hamilton). . . . Federal admiralty and maritime jurisdiction was the solution. See . . . The Federalist No. 80, *supra*, at 478 (Hamilton)."<sup>86</sup> This

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<sup>83</sup> The previous case was *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935), in which the Supreme Court struck down regulations concerning the hours and wages of persons employed in intrastate businesses.

<sup>84</sup> *Id.* at 576-77 (Kennedy, J., concurring).

<sup>85</sup> 510 U.S. 443 (1994).

<sup>86</sup> *Id.* at 466 (Kennedy, J., dissenting).

statement serves to explicate the purposes of federal admiralty jurisdiction; Justice Kennedy did not cite the Federalist Papers to resolve the preemption issue before the Court.

(16) In *Dennis v. Higgins*,<sup>87</sup> the Supreme Court held that 42 U.S.C. § 1983,<sup>88</sup> provided a cause of action against state officials for violating the Dormant Commerce Clause doctrine.<sup>89</sup> Justice Kennedy wrote a dissenting opinion in which he cited the Federalist papers to establish a general and uncontroverted principle regarding a defect in the Articles of Confederation:

The lack of a national power over commerce during the Articles of Confederation led to ongoing disputes among the States, and the prospect of a descent toward even more intense commercial animosity was one of the principal arguments in favor of the Constitution. *See, e.g.*, The Federalist No. 7, pp. 62-63 (C. Rossiter ed. 1961) (A. Hamilton); *id.*, No. 11, pp. 89-90 (A. Hamilton); *id.*, No. 22, pp. 143-145 (A. Hamilton); *id.*, No. 42, pp. 267-269 (J. Madison); *id.*, No. 53, p. 333 (J. Madison).<sup>90</sup>

(17) In *Patterson v. McLean Credit Union*,<sup>91</sup> the Supreme Court held that a federal civil rights statute, 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of private contracts,<sup>92</sup> did not address racial harassment in the course of employment.<sup>93</sup> Part of the case concerned the principle of *stare decisis*. On this point, writing for the majority, Justice Kennedy wrote: “Although we have cautioned that ‘*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision,’ *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 241 (1970), it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’ The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).”<sup>94</sup> This reference to the Federalist Papers again concerned general principles and was not used to decide a particular issue in the case.

(18) In *Austin v. Michigan Chamber of Commerce*,<sup>95</sup> the Supreme Court upheld a state statute prohibiting corporations from making independent expenditures to support or oppose election candidates. Justice Kennedy filed a dissenting opinion in which he said: “It is a

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<sup>87</sup> 498 U.S. 439 (1991)

<sup>88</sup> For the text of 42 U.S.C. § 1983, see *supra* note \_\_\_\_.

<sup>89</sup> For a description of the Dormant Commerce Clause doctrine, see *supra* note \_\_\_\_.

<sup>90</sup> *Id.* at 453 (Kennedy, J., dissenting).

<sup>91</sup> 491 U.S. 164 (1989).

<sup>92</sup> 42 U.S.C. § 1981 provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .”

<sup>93</sup> 491 U.S. at 176.

<sup>94</sup> *Id.* at 172.

<sup>95</sup> 494 U.S. 652 (1990).

distinctive part of the American character for individuals to join associations to enrich the public dialogue. . . . The theme of group identity is part of the history of American democracy. *See, e.g.,* The Federalist No. 10 (J. Madison).”<sup>96</sup> This statement provided a general background for Justice Kennedy’s interpretation of the First Amendment, but was not decisive in his resolution of the issue in the case.

(19) In *City of Richmond v. J.A. Croson Co.*,<sup>97</sup> the Court struck down a city plan requiring general contractors who were awarded city construction contracts to use “minority business enterprises” for 30% of their subcontracts. The Court held that the plan violated the Equal Protection Clause because the city did not have a compelling justification for favoring minority businesses.<sup>98</sup> In an opinion concurring in the judgment, Justice Kennedy wrote: “An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.”<sup>99</sup> He then quoted at length remarks by James Madison about parties and factions.<sup>100</sup> As in the other nineteen cases described above, this statement helped to frame but was not intended to decide the issue before the Court.

## **B. Records of the Federal Constitutional Convention**

The Constitution was drafted at the Federal Constitutional Convention that met in Philadelphia during the summer of 1787.<sup>101</sup> An appointed secretary kept an official journal of the convention proceedings, and James Madison and at least eight others kept notes about what was said and done at the Convention.<sup>102</sup> Madison’s notes were published in 1840.<sup>103</sup> Half a century later, Professor Max Farrand gathered and chronologically organized both Madison’s notes and all of the other known records in his classic work, *The Records of the Federal*

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<sup>96</sup> *Id.* at 710 (Kennedy, J., dissenting).

<sup>97</sup> 488 U.S. 469 (1989).

<sup>98</sup> *See id.* at 505.

<sup>99</sup> *Id.* at 523 (Kennedy, J., concurring in the judgment).

<sup>100</sup> The quotation was: “ ‘The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.’ ” *Id.* (quoting The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961)).

<sup>101</sup> *See* 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 33-34 (2005)

<sup>102</sup> *See id.* 665-66.

<sup>103</sup> *See id.* at 666.

*Convention of 1787*.<sup>104</sup> Courts now have relied on these records in hundreds of cases. Justice Kennedy has cited the records in two of his opinions.<sup>105</sup>

In one of these cases, *United States v. International Business Machine Corp.*,<sup>106</sup> the Supreme Court held that the Export Clause, which says “No Tax or Duty shall be laid on Articles exported from any State,”<sup>107</sup> prohibited imposing a generally applicable, non-discriminatory federal tax on insurance premiums for insurance policies covering exported goods.<sup>108</sup> Justice Kennedy wrote a dissenting opinion in which he asserted that the Framers understood the Export Clause to prohibit only taxes on exports, and not taxes on insurance covering exported goods.<sup>109</sup> In reaching this conclusion, Justice Kennedy emphasized that “specific taxes on exported goods were the only taxes mentioned in the debate at the Constitutional Convention over the Export Clause.”<sup>110</sup> To support this proposition, he cited numerous specific statements made at the Convention about the Export Clause.<sup>111</sup> In this instance, Justice Kennedy relied directly on what was said at the Convention in his reasoning about the specific issue before the Court.

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<sup>104</sup> See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

<sup>105</sup> My search of WestLaw’s ALLCASES database for “Farrand w/10 records” yielded 304 cases.

<sup>106</sup> 517 U.S. 843 (1996).

<sup>107</sup> U.S. Const. art. I, § 9, cl. 5.

<sup>108</sup> See 517 U.S. at 845.

<sup>109</sup> 517 U.S. at 873 (Kennedy, J., dissenting).

<sup>110</sup> *Id.*

<sup>111</sup> Justice Kennedy wrote:

For example, Gouverneur Morris of Pennsylvania, opposing the Clause, favored taxing exports as an alternative to direct taxes on individuals.

“He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing Tobacco. All Countries having peculiar articles tax the exportation of them; as France her wines and brandies. A tax here on lumber, would fall on the W. Indies & punish their restrictions on our trade. The same is true of live-stock and in some degree of flour. In case of a dearth in the West Indies, we may extort what we please. Taxes on exports are a necessary source of revenue. For a long time the people of America will not have money to pay direct taxes. Seize and sell their effects and you push them into Revolts.” 2 M. Farrand, Records of the Federal Convention of 1787, p. 307 (rev. ed. 1966).

See also *id.*, at 306 (Mr. Madison: taxes on exported goods, like tobacco, in which Americans were unrivalled would shift the tax burden to foreigners); *id.*, at 360 (Gouverneur Morris: taxes on goods are essential to embargoes, while taxes on ginseng and ship masts would shift the tax burden abroad, and taxes on skins, beavers, and other raw materials might encourage American manufactures); *id.*, at 361 (Mr. Dickenson [sic]: suggesting exemption of certain articles from the Export Clause); *id.*, at 362 (Mr. Fitzimmons: discussing duties imposed on wool by Great Britain). Proponents of the

In the other case, *Alden v. Maine*,<sup>112</sup> which is discussed above,<sup>113</sup> Justice Kennedy observed that the Constitution differs from the Articles of Confederation in that it empowers the national government to regulate individuals.<sup>114</sup> He wrote (as also quoted above<sup>115</sup>): “In this the Founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had ‘exploded on all hands’ the ‘practicality of making laws, with coercive sanctions, for the States as political bodies.’ 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison).”<sup>116</sup> This citation resembles the citation of the Federalist Papers in the nineteen cases above in which Justice Kennedy uses a source of the original meaning of the Constitution for background and framing purposes but not to resolve the specific issue before the Court.

### C. Records of the State Ratifying Conventions

By its terms, the Constitution could not go into effect until it was ratified by nine states in ratifying conventions.<sup>117</sup> Some records of these debates were made and preserved.<sup>118</sup> Courts often cite these debates as evidence of the original meaning of the Constitution.<sup>119</sup> I could find, however, only one reference to these debates by Justice Kennedy. In *Alden v. Maine*,<sup>120</sup>

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Export Clause also focused on taxes on goods. *Id.*, at 307 (Mr. Mercer: a tax on exported goods encourages the raising of articles not meant for exportation); *id.*, at 360 (Mr. Williamson: discussing taxation of North Carolina tobacco by Virginia); *id.*, at 361 (Mr. Sherman: general prohibition on power to tax exports necessary because “[a]n enumeration of particular articles would be difficult invidious and improper”); *id.*, at 363 (Colonel Mason: discussing Virginia tax on tobacco; Mr. Clymer: discussing middle States’ apprehensions of taxes on products like wheat flour and provisions that, unlike tobacco and rice, were sold in competitive markets). Oliver Ellsworth of Connecticut even contended that he opposed export taxes in part because “there are indeed but a few articles that could be taxed at all; as Tobo. rice & indigo, and a tax on these alone would be partial & unjust.” *Id.*, at 360.

*Id.* at 873-75.

<sup>112</sup> 527 U.S. 706 (1999).

<sup>113</sup> See *supra* part III.A.(7).

<sup>114</sup> See 527 U.S. at 715.

<sup>115</sup> See *supra* part III.A.(9).

<sup>116</sup> *Id.* at 715.

<sup>117</sup> See U.S. Const. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

<sup>118</sup> See 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, 466-481 (describing the known records).

<sup>119</sup> See *id.* at 458.

<sup>120</sup> 527 U.S. 706 (1999).

discussed above,<sup>121</sup> the Court held that state sovereign immunity prevented a government employee from recovering damages from the state under the federal Fair Labor Standards Act. In writing the majority opinion, Justice Kennedy relied heavily on statements that James Madison and John Marshall made at the Virginia ratifying convention to resolve the specific issue before the Court.<sup>122</sup> Justice Kennedy cited Madison’s statement that “[i]t is not in the power of individuals to call any state into court” and Marshall’s statement that “I hope no gentleman will think that a state will be called at the bar of a federal court.”<sup>123</sup> As in the three previous cases, Justice Kennedy is using a source of the original meaning of the Constitution to resolve a specific issue, rather than merely to establish background principles.

#### **D. Acts of the First Congress**

After ratification of the Constitution in the state ratifying conventions, the First Congress under the Constitution met from March 1789 to March 1791.<sup>124</sup> In the First Congress, a total of 29 persons served as senators, and 66 served as representatives.<sup>125</sup> Many of these senators and representatives justifiably could consider themselves experts on the Constitution. Ten of the senators and eleven of the representatives had served as delegates to the Federal Constitutional Convention.<sup>126</sup> Some of them, like James Madison, Oliver Ellsworth, and Roger Sherman, had played especially prominent roles in the Constitution’s drafting. Other members of the First Congress, like Richard Henry Lee<sup>127</sup>, had participated at state ratifying conventions even though they had not participated in the Federal Constitutional Convention. During its two-year term, the First Congress passed an astounding 96 acts.<sup>128</sup> Courts often use these acts to make inferences

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<sup>121</sup> See *supra* part III.A.(7) & III.B.

<sup>122</sup> See *id.* at 717.

<sup>123</sup> See *id.* at 717 (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 533, 555-556 (J. Elliot 2d ed. 1854)).

<sup>124</sup> The first session was held in New York from March 4, 1789 to September 29, 1789 (although Congress did not have a quorum until April 1, 1789). The second session, also in New York ran from January 4, 1790 to August 12, 1790. The third session was held in Philadelphia from December 6, 1790 to March 3, 1791. See 1 & 2 ANNALS OF CONG. (Joseph Gales, ed. 1790) (collecting the debates of the First Congress).

<sup>125</sup> See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1789 at 51-52 (1989) (listing all members).

<sup>126</sup> In the Senate, the former delegates included Oliver Ellsworth (CT), William S. Johnson (CT), Richard Bassett (DE), George Reed (DE), William Few (GA), Caleb Strong (MA), John Langdon (NH), William Paterson (NJ), Robert Morris (PA), and Pierce Butler (SC). In the House, the former delegates were Roger Sherman (CT), Abraham Baldwin (GA), Daniel Carroll (MD), Elbridge Gerry (MA), Nicholas Gilman (NH), Hugh Williamson (NC), George Clymer (PA), Thomas Fitzsimmons (PA), Pierce Butler (SC), and James Madison (VA). The Supreme Court listed these persons in *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1986), but overlooked or for reason omitted Nicholas Gilman.

<sup>127</sup> See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1789, *supra* note \_\_\_, at 1449.

<sup>128</sup> See 1 Stat. xvii-xxi (listing these acts by name); *id.* at 23-226 (providing the full text of these acts).

about the original meaning of the Constitution, assuming that the First Congress would have known the original meaning and would not have violated the Constitution.<sup>129</sup>

Justice Kennedy has written two opinions in which he has cited the acts of the First Congress. In *United States v. Locke*,<sup>130</sup> as discussed above,<sup>131</sup> the Supreme Court held that a federal law regarding shipping preempted a state law attempting to regulate the safety of oil tankers. After citing the Federalist Papers for the proposition that a major goal of the Constitution was to allow Congress regulate interstate navigation, Justice Kennedy observed that Congress immediately exercised this power: “In 1789, the First Congress enacted a law by which vessels with a federal certificate were entitled to ‘the benefits granted by any law of the United States.’ Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55.”<sup>132</sup> In *Loving v. United States*,<sup>133</sup> as discussed above,<sup>134</sup> the Supreme Court rejected a challenge to capital punishment sentencing in the military. Justice Kennedy mentioned without placing much weight on the matter that the “Articles [of War] adopted by the First Congress placed significant restrictions on court-martial jurisdiction over capital offenses.”<sup>135</sup> These citations provided background information, but were not aimed at resolving specific issues before the Court.

## E. Dictionaries from the Founding Era

Judges and Justices sometimes consult dictionaries from the Founding period to discern the original meaning of the Constitution. For example, in *United States v. Lopez*, Justice Thomas cited them to determine the meaning of “commerce” in the Commerce Clause:

At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes. *See* 1 S. Johnson, *A Dictionary of the English Language* 361 (4th ed. 1773) (defining commerce as “Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick”); N. Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789) (“trade or traffic”); T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) (“Exchange of one thing for another; trade, traffick”).<sup>136</sup>

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<sup>129</sup> *See* *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)).

<sup>130</sup> 529 U.S. 89 (2000).

<sup>131</sup> *See supra* part III.A.(6).

<sup>132</sup> *Id.* at 99.

<sup>133</sup> 517 U.S. 748, 753 (1996).

<sup>134</sup> *See supra* part III.A.(9).

<sup>135</sup> *Id.* at 753.

<sup>136</sup> 514 U.S. 549, 585-86 (1996) (Thomas, J., concurring).

Justice Kennedy, however, does not appear to have relied on period dictionaries in any of his opinions; I could find no case in which he had cited one.

#### **IV. Analysis of How Justice Kennedy Uses Sources of the Original Meaning**

The foregoing description of how Justice Kennedy has cited sources of the original meaning of the Constitution leads to several observations. First, Justice Kennedy does not cite sources of the original meaning of the Constitution very frequently. In his nearly 25 years on the bench, Justice Kennedy has cited the Federalist Papers, the records of the Constitutional Convention, the records from the state ratifying conventions, and the acts of the First Congress in only 22 cases (21 of which cited the Federalist Papers and one of which cited the records of the Constitutional convention but not the Federalist Papers). This comes to an average of less than one citation per year.

Second, Justice Kennedy uses sources of the original meaning of the Constitution mostly to frame the issues before the Court, not to resolve those issues. He followed this pattern in 18 of the 22 cases described above. Justice Kennedy cited the sources to support general principles, such as the federal government is a government of limited powers, the separation of powers protects individual liberty, Congress has the power to regulate interstate commerce including navigation, the Constitution seeks to prevent states from discriminating against interstate commerce, and so forth. These principles were not contested in the cases, and Justice Kennedy did not suggest that they answered the specific questions before the Court.

Third, although Justice Kennedy does not often use sources of the original meaning to resolve the specific issues in constitutional cases, he is not categorically opposed to the practice. As indicated above, in *Missouri v. Jenkins*, he relied on a statement in the Federalist Papers indicating that courts cannot impose taxes.<sup>137</sup> In *Public Citizen*, he relied on a passage in the Federalist Papers, which indicated that Congress could not regulate presidential nominations.<sup>138</sup> In *International Business Machines*, he relied on specific statements at the Federal Constitutional Convention to determine the meaning of the Export Clause.<sup>139</sup> In *Alden v. Maine*, he relied on a statement at a state ratifying convention in determining the immunity of states from lawsuits in federal court.<sup>140</sup>

These observations relate directly to the three reasons identified above for why it might be important to know how Justice Kennedy has relied on sources of the original meaning of the Constitution.<sup>141</sup> One question was whether Justice Kennedy can be properly characterized as an originalist. The cases quoted above do not fully answer the question. A complete answer would require a survey to see whether Justice Kennedy's conclusions match the original meaning in all

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<sup>137</sup> See *supra* part III.A.

<sup>138</sup> See *id.*

<sup>139</sup> See *supra* part III.B.

<sup>140</sup> See *supra* part III.C.

<sup>141</sup> See *supra* part II.

of his cases, regardless of the sources that he cited in reaching his conclusions. But the citations do shed light on the question. Justice Kennedy clearly thinks that sources original meaning are important for setting the framework for constitutional issues. At times he relies on them to decide the meaning of cases. But it does not appear that he considers evidence from sources of the original meaning of the Constitution to be the most important grounds upon which to make constitutional decisions. A judge more committed to originalist methodology presumably would rely on the sources original meaning of the Constitution to decide the specific issue before the Court in more than four cases over 25 years.

A second question concerned the sorts of arguments might be persuasive to Justice Kennedy. Here we can make conclusions about which sources to cite and most the purposes for which sources should be cited. The observations about how Justice Kennedy uses sources of the original meaning of the Constitution suggest that Justice Kennedy feels more comfortable with the Federalist Papers than with other sources. Litigants therefore should consult the Federalist Papers for principles that might help their cases. Justice Kennedy apparently does not see records from the Federal Constitutional Convention or state ratifying conventions or the Acts of the First Congress as pertinent nearly as often. This may be because these other sources typically do not state general background principles of the kind Justice Kennedy often finds in the Federalist Papers. And given that Justice Kennedy has not cited Founding-era dictionaries, litigants might infer that he does not find them very persuasive. Finding evidence in such dictionaries therefore is probably not a priority for litigants seeking Justice Kennedy's vote.

With regard to the use of sources of the original meaning, it appears that it would be helpful to cite them to establish background principles and to frame issues. These kinds of citations evidently appeal to Justice Kennedy because he uses them frequently. Justice Kennedy does not appear to be opposed to relying on sources of the original meaning to resolve specific issues. But he apparently has not found them to be persuasive in many cases. Litigants should feel free to make such arguments but should not rely exclusively on them if they want to obtain Justice Kennedy's vote.

The third and final question concerns the extent to which Justice Kennedy has contributed to the large increase in reliance by the Supreme Court on sources of the original meaning of the Constitution over the past quarter-century. Here again the answer is mixed. Justice Kennedy has made a contribution. He has cited these sources in his opinions in 22 cases. But his contribution is limited. He refers to the sources of the original meaning the Constitution in less than one case per year, on average. And when he cites sources of the original meaning the Constitution, he generally is explicating general background principles. The sources aid readers in understanding the issues before the Court, which is important, but Justice Kennedy seldom uses them for more than that.

## **V. Conclusion**

Justice Kennedy now has served on the Supreme Court for almost 25 years, about one ninth of the Court's 223 years of existence. For many of these years, he has been the swing vote between two groups on the Court which have differing judicial philosophies. Accordingly,

Justice Kennedy arguably has had more influence than any of the other justices. For these reasons, analyzing the work of Justice Kennedy seems highly appropriate. It may help litigants before the Court in crafting their arguments, and it may help observers of the Court to understand the Court's recent history.

Justice Kennedy has written 22 opinions that cite the most common sources of the original meaning of the Constitution. He relies on the Federalist Papers more frequently than other sources. He typically uses sources of the original meaning to introduce constitutional issues and establish basic principles, rather than to resolve specific issues before the court. These observations come directly from looking at the cases Justice Kennedy has decided as described in this essay.