Introduction
The constitutional theory of originalism begins with the basic foundations of American government. Two factors integral to the operation of the theory must be established: the Constitution which the theory interprets and the Supreme Court which does the interpretation. The Constitution consists of a preamble, seven articles, signatures, and twenty-seven amendments. Through this text, the US federal government is established.

But the text does not exist by itself, it exists in tandem with the unwritten elements of the document, such as the organization of its structure, silences that speak of policy by omission, and the principles and values borne from the explicit text. These factors and more comprise the implicit constitution, with which jurists and citizens alike must grapple to fully understand the scope of constitutional meaning. The Constitution divides analysts over its interpretation, highlighting the depths of division that characterizes constitutional scholarship.

The Supreme Court operates within an inherited system of customs and norms that define it much further than the terse Article III of the Constitution. These norms include the British common law, a system that crucially provides for judges to produce case law and for that case law to exist independently on par with statutory law. This empowers all federal courts as lawmakers as they share equivalent formal authority and normative recognition with the legislature.1

The Supreme Court operates both as the overseer of the US judicial system and as an interlinked member of the federal government, alongside the legislative and executive branches. Through this membership, the Supreme Court upholds the balance of power by giving and receiving checks and balances to and from the other branches. The Court cannot derive all its functional instruction from the text of the Constitution. Instead, it develops doctrines to govern its internal processes, thus establishing the scope and consistency of the institution. These doctrines include judicial review (the sole binding power to determine constitutionality), stare decisis (the normative acceptance of Court precedent barring justifiable reason to overturn), justiciability (rules governing what cases the Court accepts), and interpretation and construction (the two main operations of jurisprudence).2

2 See, e.g., U.S. Const. art. III, § 2.
Interpretation versus construction

The major distinction between interpretation and construction are the very acts that each practice implies. Interpretation is a reading of a legal text. Lawyers and judges interpret legal texts to advance arguments in court. Specifically, Supreme Court lawyers and judges interpret the text of the Constitution. Interpretation in the legal context attempts to determine the linguistic meaning of a text without rendering a legal application.³

Legal application is what is captured through the second process, known as construction. Construction involves the implementation of the law as read into government and society. For instance, consider the First Amendment’s protection of the freedom of speech. To understand what would constitute the speech that the amendment protects is interpretation. Does it rely on the plainly understood definition of speech from the times of the Founding, only verbal communication?⁴ What about a litany of other practices that have developed following the ratification of the Bill of Rights that have come to be associated with speech, such as clothing or signs, physical art, or acts of protest?⁵ Construction would accommodate the agreed-upon interpretation of the statute or Constitutional text into rendering a functional ruling.

For example, in the case Lemon v. Kurtzman, the Supreme Court interpreted the Establishment Clause of the First Amendment, which holds the federal government may not make any law “respecting an establishment of religion,” to prohibit public funding of private religious schools. To provide precedent for future Court cases, the majority constructed a test (known colloquially as “the Lemon test”) that holds a statute must have a “secular purpose,” that “its principal or primary effect must be one that neither advances nor inhibits religion,” and that “the statute must not foster an excessive government entanglement with religion.”⁶ These are constructions since the Constitution does not explicate any of these qualifications, but the Court did judge them necessary to uphold their interpretation of the Establishment Clause.

Other examples of construction include the trimester system for abortion laws introduced in Roe v. Wade and the standards of strict and intermediate scrutiny for different forms of civil rights claims.⁷ The former of these constructions also highlights the temporal nature of construction, since Roe’s trimester system was effectively overturned in a subsequent abortion ruling, Planned Parenthood v. Casey.⁸ Though they may not always stand the test of time, constructions and interpretations serve as important facilitators of the legal process.

The Theory of Originalism

Originalism, while eluding any exact definition, can be understood as a series of elements: an obeisance to the Founding generation, a restrictionist view of stare decisis, and an assertion of judicial restraint. The most significant element of originalism is its “theoretical basis.” This concerns on what specific aspect of the Founding generation an interpretation of the Constitution should be predicated. There are three major bases in the legal literature: original intent, original public meaning, and original expected application.

⁶ 403 US 602, 603 (1971).
Original intent, or intentionalism, seeks to discern how the Framers of the Constitution understood constitutional clauses to operate. Though formatively similar to “legislative intent,” the underlying designs of members of Congress that provide a means to interpret statutes, originalists disavow legislative intent given the distinctions of history and legitimacy between normal congressional statutes and the Constitution.

The second basis is original public meaning which considers the semantic definitions of constitutional texts as they would be understood by the public at the time of ratification. This method more directly upholds the democratic nature of the ratification as an act that endowed the Constitution power through the sovereign act of its creators, the people.

A third means is original expected application, through which a judge considers an intentionalist reading of an issue and pursues an actualized policy outcome in line with the intent. The similarity to intentionalism results from this basis largely serving as an academic theory. However, this does serve to raise the idea of post hoc results influencing Court behavior, since per this basis the personal politics of justices serve as a counterweight to objective historical and factual review.

Originalism connects to some leading canons of legal theory, including Natural Law and Legal Positivism. Natural Law’s connection to the philosophical foundations of the Founding generation raises questions over its appropriateness as a fundamental element of originalism. Yet the objectivity and resistance toward reform of Legal Positivism provides an analytical foil. Originalism interacts in unique ways with the aforementioned implicit and explicit constitutions, as it most effectively manages the strict rules and structural purposes of the Constitution. The interaction with the implicit constitution provides for greater debate, as the standards (e.g. due process) and principles (e.g. liberty) of the Constitution prove much more consequential for the variation in jurisprudence in the long run. Originalism also derives from certain historical Supreme Court practices, especially some decisions from the court of Chief Justice John Marshall.

Yet the modern practice of originalist interpretive theory only developed in the 1960s as a response to the selective incorporation doctrine of the Warren Court. Alexander Bickel and Robert Bork co-developed the theory, which soon found prominent supporters in Supreme Court Justices William Rehnquist and Antonin Scalia. From the Rehnquist Court onward, originalism has commanded a sizable bloc of Supreme Court supporters and remains a dominant interpretive ideology today.

The ideology faces criticism and competition from detractors that spur the debate over originalism and its propriety. Supporters of originalism argue the normative benefits of the ideology, specifically that it produces the most accurate rulings to the text and purpose of the Constitution, it restrains judges from overstepping their legitimate boundaries, and it promotes

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14 Balkin, Living Originalism, 6.
15 See Marbury v. Madison, 5 US 137 (1803).
respect for democracy by upholding the contractual democratic compact in the Constitution that was forged through ratification.

The criticisms of originalism can be broadly categorized into theoretical, practical, and moral deficits. The theoretical flaws include the lack of clarity in defining who exactly are the “Founders,” since many include Antifederalist perspectives. Additionally, individual Founders changed their opinions over time. Last, the theory inconsistently manages the implicit factors of the Constitution. The practical flaws involve the infeasibility of implementing a completely originalist jurisprudence, and the inconsistent use of originalism such as their fallibility to contemporaneity, a lack of judicial restraint, and the inherent limits to intentionalism. Finally, the moral deficits are the righteousness of originalism as a binding constraint on modern democracy and its rejection of aspirational possibility.

Originalism, much like the Constitution that it interprets and the Supreme Court that it serves, does not operate in isolation. It exists alongside a spectrum of variants that from the legal and academic realms help to redefine originalism. Some of these alternatives purport themselves to be contrary to originalism, including Living Constitutionalism and Legal Realism. Living Constitutionalism perceives the Constitution as justifiably open to fundamental interpretation by each generation that could diverge from the findings of the last. Legal Realism concerns the absolutely subjective approach to jurisprudence through which interpretation solely exists as a means to produce whatever judges want.

Other alternatives present different versions of originalism. New Originalism presents a public meaning originalism designed to promote proactive adjudication rather than reactive, while Living Originalism combines the engagement of living constitutionalism with the deference to historicity of originalism. Finally, the modern debate of originalism concerns the internationality of the theory, with consequences for how interchangeable the legal practices of other legal systems may be with the American, as well as their respective practices of originalism.

Originalism is not only a tool for adjudication but also serves a purpose in politics. The political significance spans across the judiciary, legislative, and executive branches, and the politics of the general public. Originalism is characterized as an inherently conservative concept due to the combination of avowed Supreme Court originalists all being conservatives and the results of originalist jurisprudence leading to conservative policy outcomes.

While some of the normative associations of originalism (such as its net positive view of early America) may bias it toward acceptance by conservatives, there is nothing intrinsic to the theory that prevents liberal or moderate judges from employing the theory on their own. Furthermore, I assert that an examination of the jurisprudence of the Supreme Court may identify a more even split to the partisan usage of originalism.

**Quantitative Analysis**

The lack of a comprehensive definition for what constitutes an originalist argument hinders
any effort to measure it. Instead, I examine the usage of originalist rhetoric as seven terms associated with early America and/or the Constitution. Examining how often justices consider these hallmarks of early constitutional America in their decisions is one fair way to assess these originalist commitments.

My analysis found significant usage of the seven terms of interest. In total, 347 opinions written during the twenty-one-year timeframe included the terms. These 347 opinions were written as parts of 231 cases, meaning that out of the total 1,837 cases decided during the timeframe, 12.6 percent of all cases employed originalist rhetoric. These cases in total used the select terms 2,644 times.

Table 1:

<table>
<thead>
<tr>
<th>Term</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Convention</td>
<td>269</td>
<td>10.2%</td>
</tr>
<tr>
<td>Federalist</td>
<td>392</td>
<td>14.8%</td>
</tr>
<tr>
<td>Founder/ing</td>
<td>171</td>
<td>6.5%</td>
</tr>
<tr>
<td>Framer</td>
<td>986</td>
<td>37.3%</td>
</tr>
<tr>
<td>Hamilton</td>
<td>304</td>
<td>11.5%</td>
</tr>
<tr>
<td>Madison</td>
<td>522</td>
<td>19.7%</td>
</tr>
</tbody>
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The key statistic of the analysis, however, is this: of the 347 opinions containing the select terms, 199 were written by a conservative justice — meaning that the originalist rhetoric was employed by conservatives 57.4 percent of the time. While this does suggest a slight bias toward conservative usage, one additional statistic may further contextualize this finding. Throughout this analysis, the Supreme Court maintained a five to four ideological split in favor of the conservatives. Conservatives composed 55.6 percent of all justices during the timeframe. Reconsider the aforementioned statistic that conservatives wrote 57.4 percent of the terms of interest in the timeframe. That finding is less than two percent greater than the likelihood of any random opinion of the Court being written by a conservative.

My findings support the notion that originalist rhetoric is utilized irrespective to partisanship, suggesting that this academic notion of an originalism suited to all partisan proclivities may, in fact, already be reality.

Conclusion

“We are all originalists now.”21 While this perspective is not unique to Justice Elena Kagan, she is perhaps the highest-ranking liberal judicial official to voice such an opinion. Proclaiming a universal originalism in some circles may be akin to heresy. In others, it may be considered pejorative, to label oneself with such a sullied legal term. Such a reactionary state of discourse on originalism only disservices the theoretical and philosophical value that originalism provides once abstracted from the modern debate. To operate one's jurisprudence with consideration for the Founding generation does not necessarily entail regression or stasis, but rather an appreciation for the values and heritage of America. Adjudicating with respect to tradition should not be viewed as a pragmatic or forbidden exercise; it should be viewed as a right, a privilege of living in a time in a place that permits we, the people, to form our own government, nation, and identity. As demonstrated in this article, originalism varies greatly in its function, its purposes, and its contours, since preceding jurists brought their own conceptualizations of originalism into the literature. We are all originalists now because we have the mandate and motivation to each define what it means to maintain fidelity to our values.