

A CONCISE GUIDE TO THE RECORDS OF THE STATE RATIFYING CONVENTIONS AS A SOURCE OF THE ORIGINAL MEANING OF THE U.S. CONSTITUTION

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On September 17, 1787, the delegates to the Federal Constitutional Convention finished drafting the Constitution. Yet the Constitution could not go into effect until it was ratified in the states, as specified in Article VII. Starting in the fall of 1787, legislatures in the original thirteen states called for conventions for the purpose of deciding whether to ratify the Constitution. Many of the records of these state ratifying conventions have survived. The records reveal some of what the delegates at the state conventions said during their debates and discussions about the proposed Constitution. Accordingly, writers often cite these records as evidence of the original meaning of the Constitution.

Thousands of articles and hundreds of cases have cited the records of the state ratifying conventions to support claims about the original meaning of the Constitution. This Article offers a concise guide to these records, providing the basic information that lawyers, judges, law clerks, and legal scholars ought to have before advancing, contesting, or evaluating claims about the original meaning of the Constitution based on the records of the state ratifying conventions. It explains theories of how the records might help to prove the original intent of the Framers, the original understanding of the ratifiers, and the original objective meaning of the Constitution's text. The Article also considers eight possible grounds for impeaching assertions made about the original meaning, recommending that anyone making

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or evaluating a claim about the original meaning take these eight arguments into account and that anyone using these arguments to impeach claims about the original meaning consider the possible counterarguments.

I. INTRODUCTION

On September 17, 1787, after meeting all summer in Philadelphia, delegates to the Federal Constitutional Convention approved the Constitution.¹ Yet, although the drafting was completed, the Constitution could not go into effect until it was ratified in the states. On this point, Article VII of the Constitution specified: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”²

Starting in the fall of 1787, legislatures in the original thirteen states called for conventions for the purpose of deciding whether to ratify the Constitution. Many records of these state ratifying conventions have survived. These records reveal some of what the delegates at the state conventions said during their debates and discussions about the proposed Constitution. Accordingly, writers often cite these records as evidence of the original meaning of the Constitution. A computer search shows that more than 160 Supreme Court cases and more than 1,750 law review articles have relied on these records in interpreting the Constitution.³ In one decision, *U.S. Term Limits v. Thornton*,⁴ the majority and dissenting opinions cited passages from the records twenty times in deciding whether the Constitution permits states to limit the terms of members of Congress.

James Madison served as one of the chief architects of the Constitution at the federal convention, and he took the most extensive notes of those proceedings.⁵ But when interpreting the Constitution, Madison believed that the records of the state ratification convention provided the best evidence of the original meaning. Madison said:

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the

1. U.S. CONST. art. VII.

2. *Id.*

3. To find cases that cite the leading compilations of records from the state ratifying conventions (described in Part III below), I searched Westlaw's SCT, SCT-OLD, and JLR databases for “(eliot! /10 debate!) (documentary /5 ratification).”

4. 514 U.S. 779 (1995).

5. See generally CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776–1787, at 243–45, 251–53, 255, 270 (Merrill Jensen ed., 1976).

meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.⁶

Yet despite frequent references to the records of the state ratifying conventions, and despite the widely accepted importance of these records,⁷ I suspect that many lawyers, judges, law clerks, and legal scholars feel inadequately prepared to make or evaluate claims about the original meaning of the Constitution that rest on these records. The subject of the state ratification debates is not generally taught in law schools, and a general overview of the subject is not easy to piece together from available sources. For these reasons, many legal professionals could benefit from accessible information about the content of these records, about theories under which the records might provide evidence of the original meaning of the Constitution, and about possible grounds for impeaching claims based on these records.

My goal is to address these needs in this short guide. (I previously have prepared a similar guide to the *Federalist Papers*,⁸ and I borrow liberally from its format here.) I hope to provide the basic information that lawyers, judges, law clerks, and legal scholars ought to have before advancing, contesting, or evaluating claims about the original meaning of the Constitution based on the records of the state ratifying conventions. I have tried to keep the guide concise so that the intended audience will have time to read it. At the same time, I hope that the guide is sufficiently analytical to promote critical thinking.

In Part II of this guide, I address the significant initial question of what the term “original meaning” embraces. I show that legal writers use this generic term to cover three different kinds of historic meaning. These include the original intent of the Framers of the Constitution at the Federal Constitutional Convention in Philadelphia, the original understanding of the delegates to the state ratifying conventions, and the original objective meaning of the Constitution’s text. I do not take sides regarding which type of meaning is the most significant. But understanding the distinctions among these three types of meaning is important because the records of the state ratifying conventions do not provide equal evidence of each kind of meaning.

In Part III, I describe the leading compilations of the records from the state ratifying conventions and several of the best secondary sources on the ratification process. Recently, as I will describe, some of these works have been put on the Internet. Their easy availability is likely to

6. 4 ANNALS OF CONG. 776 (1796), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=384>.

7. 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, 802, 821 (2007).

8. See *id.* at 801.

make references to ratification debates even more common in the future and is therefore likely to increase the need for jurists and other legal writers to understand them.

In Part IV, I provide an overview of the ratification of the Constitution in the original thirteen states. I describe how the states called the conventions, what the delegates debated, and what records were kept. As readers will see, some states engaged in lengthy debates and kept excellent records, while other states considered the question of ratification only briefly and kept almost no records.

In Part V, I explain various theories for believing that the records of the state ratification debates might provide evidence of the original meaning of the Constitution (including the original intent of the Framers, the original understanding of the ratifiers, and the original objective meaning of the Constitution's text). To make the discussion concrete, I have included examples from various judicial opinions.

In Part VI, I address eight potential arguments for impeaching claims about the original meaning based on the records of the state ratifying conventions. These arguments are as follows:

1. The records of the state ratifying conventions are incomplete.
2. The records of the state ratifying conventions are not necessarily verbatim transcripts of the debates.
3. The views of individual delegates may not represent the views of the ratifiers generally.
4. Each of the ratifying conventions may have had a different understanding of the Constitution.
5. Statements made during the ratification debates, in many instances, were not what actually persuaded the ratifiers to support the Constitution.
6. The records provide unreliable and otherwise suspect evidence of the intent of the Framers (as opposed to the ratifiers) of the Constitution.
7. Comments at the state ratification debates are often taken out of context.
8. The ratification debates by themselves cannot provide much guidance for interpreting the Bill of Rights.

As I will show with examples, each of these eight arguments has some merit, but none is so powerful that it should prevent any reliance on the records of the state ratifying conventions. Indeed, all are subject to counterarguments of varying strength. Accordingly, I strongly recommend that anyone making or evaluating a claim about the original

meaning take these eight arguments into account, and that anyone using these arguments to impeach claims about the original meaning consider carefully the possible counterarguments.

In Part VII, I state a brief conclusion.

II. DEFINITIONS OF ORIGINAL MEANING⁹

Before discussing the records of the state ratifying conventions themselves, an essential initial question must be addressed: what does the phrase “original meaning” of the Constitution embrace? This question does not have a single answer. On the contrary, judges and legal scholars attempting to discern the original meaning of the Constitution have recognized that at least three different kinds of original meaning may have existed. Anyone writing about or reading the records of the ratifying conventions should recognize and think carefully about the distinctions among these meanings.

One kind of original meaning, which I will call the “original intent,” is the meaning that the Framers of the Constitution—the delegates who drafted the document in 1787—intended the Constitution to have. It is what the Supreme Court as early as 1838 called the “meaning and intention of the convention which framed and proposed [the Constitution] for adoption and ratification to the conventions of the people of and in the several states.”¹⁰ When historians attempt to discern the original intent, they seek to discover what the delegates at the Constitutional Convention actually thought the Constitution meant, not what reasonable persons should have thought or what the ratifiers of the Constitution later actually did think. Evidence of the original intent may take many forms. But the classic method of determining the original intent is to look at what the Framers said about the Constitution during debates at the Constitutional Convention.¹¹

A second kind of original meaning, which I will call the “original understanding,” refers to what the persons who participated in the state ratifying conventions thought that the Constitution meant.¹² This original understanding may differ somewhat from the original intent for a simple reason: the Constitutional Convention met in secret and its records did not become public until many years after ratification of the Constitution.¹³ As a result, the ratifiers—except for the small percentage

9. The six paragraphs in Part II are adapted from my guide to the *Federalist Papers* previously published in the *Boston University Law Review*. See *id.* at 805–07. I reprise them here in a slightly altered form for the convenience of the readers.

10. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838).

11. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808–09 (1995) (quoting comments of James Madison at the Constitutional Convention as evidence of the original intent of the Framers).

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

13. Max Farrand’s classic *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., rev. ed. 1937) (4 volumes) contains all the notes and records of the Constitutional Convention

who previously had participated in the Constitutional Convention, a subject discussed in depth below—could not know exactly what the Framers intended. The ratifiers accordingly may have attached to the Constitution meanings different from those intended by the Framers. For example, consider the federal treaty power. Notes taken at the Constitutional Convention suggest that some of the Framers intended that treaties normally would be self-executing (i.e., they would not require implementing legislation), but records from the state ratifying conventions indicate that some of the ratifiers of the Constitution had exactly the opposite understanding.¹⁴

A third kind of original meaning, which I call the “original objective meaning” (and which is also known as the “original public meaning”¹⁵), is the reasonable meaning of the text of the Constitution at the time of the framing.¹⁶ This meaning is not necessarily what Hamilton, Madison, or the other Framers subjectively intended and not necessarily what the numerous participants at the ratification debates actually understood, but instead what a reasonable person of the era would have thought. It is a hypothetical meaning that someone reading the Constitution in 1787 or 1788 might have understood the document to mean. Justice Antonin Scalia tends to consider this meaning the most significant. He has written: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”¹⁷ The standard way of discerning this objective meaning is to look at a variety of writings from the founding period to discern the customary meaning of words and phrases in the Constitution.¹⁸

Writers have debated extensively the question of which of these kinds of original meaning has the greatest legal significance. Some assert that the original understanding is more important than the original intent.¹⁹ Others argue that the original objective meaning is the most important.²⁰ The issue has considerable importance because, as explained

known as of 1937. The introduction contains an extremely detailed account of who took the notes, when they were published, and why they may contain inaccuracies. *Id.* at xi–xxv.

14. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2037–40, 2074 (1999) (summarizing conflicting views at the Constitutional Convention and the state ratifying conventions).

15. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 911 (2008).

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

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

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

19. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988).

20. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

above, the three kinds of original meaning conceivably could differ from each other. But I do not address this question here. Rather, I consider separately all three different possible kinds of original meaning on grounds that some users of this guide may be interested in all of them.

A related question is why does the original meaning of the Constitution matter? Certainly readers will have differing opinions on the question of whether or when courts must follow the original meaning of the Constitution.²¹ But I also do not address that debate in this guide. Instead, I simply assume that anyone looking at this guide either wants to cite the records of the state ratifying conventions as a source of the original meaning of the Constitution or needs to assess or respond to someone else's citation of these records. For that, a writer needs to know details about the records, the theories for citing them, and the grounds for impeaching claims based on them—even if the writer disagrees about the extent to which the original meaning of the Constitution binds the courts.

III. SOURCES

Anyone who wishes to use, or evaluate someone else's use of, the records of the state ratifying conventions should consult both primary and secondary sources. The primary sources are the records themselves, which are now available in compilations published both in print and on the Internet.²² But determining what happened during the ratification process just by looking at the records of the state ratifying conventions is very difficult because the records are not self-explanatory or complete. Accordingly, I also recommend considering certain secondary sources for background information.

Primary Sources

Legal scholars doing primary research tend to look in three main collections of the records of the state ratification debates. The first important collection is *Elliot's Debates*, which Jonathan Elliot published in four volumes between 1827 and 1830.²³ This collection is readily availa-

21. For classic defenses of originalism—the school of constitutional interpretation advocating that courts must follow the original meaning of the Constitution—see generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (2d Liberty Fund ed. 1997) (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1st Touchstone ed. 1991) (1990); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For classic criticism of originalism, see generally Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); Brest, *supra* note 19; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

22. See *infra* notes 23–35 and accompanying text.

23. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (J. Elliot ed., 1827–1830) [hereinafter ELLIOT'S DEBATES], available at <http://memory.loc.gov/ammem/amlaw/lwed.html>.

ble. Not only do most law school libraries contain versions of the work, but the Library of Congress Web site contains the full text in both searchable and image form.²⁴ Because *Elliot's Debates* has been around for a long time, it has been frequently cited by judges and lawyers.²⁵

But *Elliot's Debates* has some important limitations. The collection contains only minimal descriptions of the documents that it contains, making it difficult to know what weight to give them. In addition, some experts have questioned Jonathan Elliot's qualifications and motives. James H. Hutson, the former chief of the manuscript division of the Library of Congress, explains:

Elliot was not a scholar. Rather, he was a Washington political journalist turned editor, whose press was for sale to the highest bidder. . . . Some scholars believe that one of Elliot's purposes in preparing his *Debates* was to advance Calhoun's cause, for Elliot supplemented proceedings in the conventions with such states' rights classics as the Virginia and Kentucky Resolves and deleted from the 1836 second edition a letter from Madison, which appeared in the first edition, attacking nullification.²⁶

The second important source is the excellent multivolume *Documentary History of the Ratification of the U.S. Constitution*.²⁷ Edited by John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, and Margaret A. Hogan, and published by the Madison State Historical Society of Wisconsin, this remarkable work has several outstanding features. Unlike *Elliot's Debates*, truly expert historians have compiled it. In addition, the collection is far more complete than *Elliot's Debates*, containing all known primary materials. Quite helpfully, the collection also has introductory essays that amply explain the documents it includes.²⁸

But the *Documentary History* has its own limitations. Most importantly, the collection is not yet complete. Since 1976, the editors have prepared twenty-two thick volumes, but forthcoming volumes are still in the works for Rhode Island, North Carolina, Maryland, and New Hampshire. In addition, the collection is not as easily available as *Elliot's Debates*. The printed volumes are expensive, so major libraries often have only one copy. In my own experience, most of the volumes are usually checked out of law school libraries because so many faculty members

24. Library of Congress, Elliot's Debates Home Page, <http://memory.loc.gov/ammem/amlaw/lwed.html> (last visited Feb. 8, 2009).

25. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Briscoe v. Bank of Commonwealth of Ky.*, 36 U.S. 257 (1837); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 13 (1986).

26. Hutson, *supra* note 25, at 13, 20.

27. DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION (John P. Kaminski et al. eds., 1976-2007) [hereinafter DOCUMENTARY HISTORY], available at <http://www.wisconsinhistory.org/ratification/>.

28. See 1 DOCUMENTARY HISTORY, *supra* note 27, at 72.

want to use them. Although the publisher maintains a Web site,²⁹ it unfortunately does not contain the full text of the collection.

The key third source is *The Founders' Constitution*, edited by Philip K. Kurland and Ralph Lerner.³⁰ This superb work collects important excerpts from many different sources of evidence of the original meaning of the Constitution, including records of the state ratifying conventions. The collection organizes the excerpts according to individual clauses in the Constitution. For example, Article I, Section 1 of the Constitution confers all legislative power on Congress.³¹ *The Founders' Constitution* contains the text of ten historical sources that shed light on the meaning of this clause.³² These ten sources include quotations of remarks made by Alexander Hamilton about Article I, Section 1 at the New York ratifying convention³³ and comments that William R. Davie and James Iredell made about it at the North Carolina ratifying convention.³⁴

The Founders' Constitution has three main advantages. First, the collection is very reliable and professionally done. Second, the work is the easiest and fastest of the three collections to use. The editors' careful selection of sources saves the reader the effort of working through hundreds of pages of records to find materials pertinent to the meaning of particular clauses. Third, the work is readily available. Not only do most law school libraries have the collection, but the University of Chicago Press generously has put an edition of the work on the Internet.³⁵

But the *Founders' Constitution* also has limitations. The compilation is not complete. Instead, the editors have chosen to include what they consider, in their expert judgment, the most significant passages from historical sources. In addition, the work contains very little explanation about the sources it includes.

Secondary Sources on the Ratification Process

I recommend three secondary sources that explain the ratification process in depth. The first is volume II of Professor Francis Newton Thorpe's classic, *The Constitutional History of the United States*, published in 1902.³⁶ Although long out of print, the full text is available for

29. Wisconsin Historical Society, The Documentary History of the Ratification of the Constitution, <http://www.wisconsinhistory.org/ratification/> (last visited Feb. 8, 2009) (table of contents showing completed volumes and works still in progress).

30. THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/>.

31. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

32. See 2 THE FOUNDERS' CONSTITUTION, *supra* note 30, at 24–40.

33. *Id.* at 36.

34. *Id.* at 36–37.

35. The Founders' Constitution, <http://press-pubs.uchicago.edu/founders/> (last visited Feb. 8, 2009).

36. 2 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1901), available at <http://books.google.com/books?id=Lew9AAAAIAAJ>.

free in searchable form on the Internet at Google Books.³⁷ The distinguished author recounts, in 170 pages, the story of how the Constitution was ratified in the states from Delaware through Rhode Island. Although the author did not have all of the sources now available, the book still provides a comprehensive and understandable account, with many useful citations to *Elliot's Debates*.

The second recommended secondary source is *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Constitution*.³⁸ This work, published in 1988 as part of the celebration of the Constitution's bicentennial anniversary celebration, contains thirteen essays written by distinguished historians and edited by Patrick T. Conley and John P. Kaminski. Each essay describes, among other things, the ratification process for a state and identifies the available historical sources.

The third recommended secondary source is the *Documentary History of the Ratification of the U.S. Constitution*, discussed above.³⁹ In addition to compiling primary sources, this multivolume work also contains lengthy essays about the ratification process and the available historical sources. It is the reference that serious historians consult, but it may provide more information than legal professionals are seeking.

IV. OVERVIEW OF RATIFICATION IN THE STATES

In February 1787, Congress under the Articles of Confederation called for a convention to be held

for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.⁴⁰

This convention subsequently has become known as the "Constitutional Convention" or "Philadelphia Convention" or simply the federal convention of 1787.⁴¹

The federal convention met from May 14, 1787, to September 17, 1787.⁴² During this time, the delegates departed from the mission that

37. *Id.*

38. THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE CONSTITUTION (Patrick T. Conley & John P. Kaminski eds., 1988) [hereinafter THE CONSTITUTION AND THE STATES].

39. See DOCUMENTARY HISTORY, *supra* note 27.

40. *Report of Proceedings in Congress, Feb. 21, 1787, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 44-45 (Charles C. Tansill ed., 1927) (H.R. Doc. No. 69-398). Some of the states sent deputies under different instructions.

41. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at i-xxv (introductory essay describing the federal convention).

42. *Id.*

Congress had given. The convention did not simply draft “alterations” for the Articles of Confederation as amendments. Instead, it proposed an entirely new Constitution to replace the Articles of Confederation.⁴³ When it completed its work, the federal convention did not ask Congress or the state legislatures to approve the Constitution. Instead, perhaps fearing delay and possible defeat in the legislatures, the federal convention called for ratifying conventions to be held in each state.⁴⁴ Although this arrangement stripped Congress and the state legislatures of some power,⁴⁵ they did not block the procedure. Congress promptly submitted the draft to state legislatures. As discussed in depth below, the state legislatures then debated about whether, when, and how to hold ratifying conventions, and the conventions then began to meet.

Article VII of the Constitution specified that the Constitution would not go into effect until nine states had ratified it.⁴⁶ At that point, it would establish a new government among the ratifying states. In reading the description of the ratification process, keep in mind that in 1787 and 1788, no one knew whether the Constitution would be ratified or not. The issue was contentious, and proponents and opponents each had strong arguments. Delegates who supported the ratification became known as “Federalists,”⁴⁷ while delegates who opposed it were called “Anti-Federalists.”⁴⁸ Table 1 shows the important dates and final votes:

TABLE 1
STATE RATIFYING CONVENTIONS (IN ORDER OF RATIFICATION)

	Convention	Called	Met	Ratified	Vote
1	Delaware	Nov. 10, 1787	Dec. 3–7, 1787	Dec. 7, 1787	30–0
2	Pennsylvania	Sept. 29, 1787	Nov. 20– Dec. 15, 1787	Dec. 12, 1787	46–23
3	New Jersey	Nov. 1, 1787	Dec. 11–19, 1787	Dec. 18, 1787	38–0

(Continued on next page)

43. *Id.* at 1; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 641–50.

44. *See* U.S. CONST. art. VII.

45. If the Convention had proposed mere amendments to the Articles of Confederation, the amendments would have become effective only if the Confederation Congress or the state legislatures unanimously approved them.

46. U.S. CONST. art. VII.

47. Isaac Kramnick, *Editor's Introduction* to JAMES MADISON ET AL., THE FEDERALIST PAPERS 15 (Isaac Kramnick ed., Penguin Books 1987) (1788).

48. *Id.*

TABLE 1—*Continued*

	Convention	Called	Met	Ratified	Vote
4	Georgia	Oct. 26, 1787	Dec. 25, 1787–Jan. 5, 1788	Jan. 2, 1788	26–0
5	Connecticut	Oct. 16, 1787	Jan. 3–9, 1788	Jan. 9, 1788	128–40
6	Massachusetts	Oct. 25, 1787	Jan. 9–Feb. 7, 1788	Feb. 6, 1788	187– 168
7	Maryland	Nov. 27, 1787	Apr. 21–28, 1788	Apr. 28, 1788	63–11
8	South Carolina	Jan. 18, 1788	May 12–24, 1788	May 23, 1788	149–73
9	New Hampshire	Dec. 14, 1787	Feb. 13–22 & June 18– 21, 1788	June 21, 1788	57–47
10	Virginia	Oct. 31, 1787	June 2–27, 1788	June 25, 1788	89–79
11	New York	Feb. 1, 1787	June 17– July 26, 1788	July 26, 1788	30–27
12	North Carolina	Dec. 6, 1787 & Nov. 30, 1788	July 21– Aug. 4, 1788 & Nov. 16–23, 1789	Nov. 21, 1789	195–77
13	Rhode Island	Jan. 17, 1790	Mar. 1–6, 1790 & May 25–29, 1790	May 29, 1790	34–32

Delaware

Delaware was the first state to ratify the Constitution.⁴⁹ The Delaware legislature voted on November 10, 1787 to hold a ratifying convention.⁵⁰ The convention met in Dover from December 3–7, 1787.⁵¹ On December 7, by a vote of 30–0, the delegates unanimously approved the

49. For more detailed information about Delaware's ratification, see 3 DOCUMENTARY HISTORY, *supra* note 27, at 37–49; Harold Hancock, *Delaware Becomes the First State*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 21, 30–35; 2 THORPE, *supra* note 36, at 18.

50. 3 DOCUMENTARY HISTORY, *supra* note 27, at 28.

51. *Id.* at 105.

Constitution.⁵² These delegates included Gunning Bedford Jr. and Richard Bassett, who had represented Delaware at the federal convention.⁵³

We know very little about what transpired at the Delaware convention because no records of the debates exist. Remarkably, the convention may have discussed the question of whether to ratify the Constitution for only a few hours.⁵⁴ The Delaware convention's rapid decision suggests that the delegates saw the Constitution as a clear improvement over the Articles of Confederation. But given the absence of any record of the state ratifying convention's debate, we can only speculate about the exact reasons leading the delegates to this conclusion. Unlike many other states, Delaware did not propose any amendments to the Constitution.

Pennsylvania

Pennsylvania was the second state to ratify the Constitution.⁵⁵ The Pennsylvania legislature decided on September 29, 1787, to hold a ratifying convention.⁵⁶ The convention met from November 20 to December 15, 1787.⁵⁷ On December 12, 1787, the convention approved the Constitution by a vote of 46–23.⁵⁸ James Wilson was the only member of the federal convention who participated in the Pennsylvania ratifying convention.⁵⁹

One of the most interesting aspects of Pennsylvania's ratification is how the Anti-Federalists tried to block the calling of a ratification convention.⁶⁰ The story begins on the morning of September 28, 1787—just eleven days after the federal convention had completed its work. George Clymer, a member of the state legislature and one of the delegates to the federal convention, moved for the calling of a ratifying convention.⁶¹ That afternoon, before a vote was taken, Anti-Federalist opponents of the proposal departed from the legislature and thus denied the body a quorum.⁶² But the next day, a mob found some of the absent members

52. *Id.* at 110–12.

53. *See* 2 THORPE, *supra* note 36, at 18 n.2.

54. Hancock, *supra* note 49, at 32–35.

55. For more detailed information about Pennsylvania's ratification, see 2 DOCUMENTARY HISTORY, *supra* note 27, at 30–49; Paul Doutrich, *From Revolution to Constitution: Pennsylvania's Path to Federalism*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 37, 48–51; 2 THORPE, *supra* note 36, at 18–32.

56. 2 THORPE, *supra* note 36, at 19.

57. *Id.* at 18, 27.

58. *Id.* at 26.

59. *Id.* at 21.

60. *See* Doutrich, *supra* note 55, at 51.

61. *Id.*

62. *Id.*

and forcibly took them back to the meeting hall, where a quorum was established.⁶³ The legislature then voted to hold a ratifying convention.⁶⁴

Extensive records of the Pennsylvania convention exist. These records include journals of the convention, various newspaper accounts of the proceedings, and notes taken by the participants and observers.⁶⁵ *Elliot's Debates* contains 127 pages of debates.⁶⁶ James Wilson, who had played an important role at the federal convention, took the lead in arguing for ratification of the Constitution in Pennsylvania. Although Wilson made many fine points, he is perhaps best known for his somewhat over-the-top argument for why the Constitution was not deficient despite its lack of a bill of rights. "In a government possessed of enumerated powers," he said, "such a measure would be not only unnecessary, but preposterous and dangerous."⁶⁷ About ten months after ratification, on September 3, 1788, a conference of delegates met in Harrisburg and drafted twelve proposed amendments for correcting perceived problems with the Constitution.⁶⁸

New Jersey

Less than a week after Pennsylvania's convention concluded, New Jersey became the third state to ratify the Constitution.⁶⁹ The New Jersey legislature called for a ratifying convention on November 1, 1787.⁷⁰ The convention met from December 11–19, 1787.⁷¹ On December 18, 1787, the delegates voted to approve the Constitution by a vote of 38–0.⁷² The only delegate who also had served in the federal convention was David Brearly.⁷³

No records exist of the debates in the New Jersey convention.⁷⁴ A newspaper article of the time suggests that the convention analyzed the Constitution section-by-section and then debated the question of ratification.⁷⁵ Although we do not know what the delegates discussed, the shortness of the convention and the unanimous vote for ratification show

63. *Id.*

64. *Id.*

65. See 2 DOCUMENTARY HISTORY, *supra* note 27, at 59.

66. See 2 ELLIOT'S DEBATES, *supra* note 23, at 415–542.

67. *Id.* at 436.

68. See *id.* at 542–46; 2 THORPE, *supra* note 36, at 27.

69. For more detailed information about New Jersey's ratification, see 3 DOCUMENTARY HISTORY, *supra* note 27, at 119–32; Mary R. Murrin, *New Jersey and the Two Constitutions*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 55, 71–74; 2 THORPE, *supra* note 36, at 32–33.

70. 2 DOCUMENTARY HISTORY, *supra* note 27, at 21.

71. See Murrin, *supra* note 69, at 72–73.

72. See 3 DOCUMENTARY HISTORY, *supra* note 27, at 130.

73. See 2 THORPE, *supra* note 36, at 32–33.

74. 3 DOCUMENTARY HISTORY, *supra* note 27, at 127 ("Letters, notes of debates, or diaries written by members of the Convention or by observers are not extant.").

75. See Murrin, *supra* note 69, at 72.

strong support for the Constitution. New Jersey did not propose any amendments to the Constitution.

Georgia

Georgia was the fourth state to ratify the Constitution.⁷⁶ The Georgia legislature called for a ratifying convention on October 26, 1787.⁷⁷ The convention convened on Christmas Day 1787, discussed the Constitution for about a week, and then unanimously ratified it on January 2, 1788.⁷⁸ The only member of the state convention who had participated in the federal convention was William Few.⁷⁹ Interestingly, the Georgia convention did not know that Delaware, Pennsylvania, and New Jersey already had ratified the Constitution; the Georgia delegates may well have thought that they were the first to ratify.⁸⁰

As with New Jersey and Delaware, we have almost no records of the Georgia convention. According to the leading authority, “No diaries or notes of debates by members of the Convention exist, and only one letter, written by Joseph Habersham, sheds any light on the Convention proceedings.”⁸¹ But despite this inadequate record, the reasons for Georgia’s ratification are easily surmised. Georgia was a rural state, having a small population and substantial problems in its security. George Washington himself wrote in reference to Georgia’s pending ratification decision: “[I]f a weak State, with powerful tribes of Indians in its rear, & the Spaniards on its flank, do not incline to embrace a strong *general* Government, there must, I should think, be either wickedness, or insanity in their conduct.”⁸² Georgia did not propose any amendments to the Constitution.

Connecticut

Connecticut’s ratification came fifth.⁸³ The Connecticut legislature called for a ratifying convention on October 16, 1787.⁸⁴ The ratifying convention met from January 3–9, 1788.⁸⁵ The delegates ratified the

76. For more detailed information about Georgia’s ratification, see 3 DOCUMENTARY HISTORY, *supra* note 27, at 201–16; Albert B. Saye, *Georgia: Security Through Union, in THE CONSTITUTION AND THE STATES*, *supra* note 38, at 77, 86–90; 2 THORPE, *supra* note 36, at 33.

77. See 3 DOCUMENTARY HISTORY, *supra* note 27, at 219.

78. *Id.* at 278.

79. See 2 THORPE, *supra* note 36, at 33.

80. See *id.*

81. 3 DOCUMENTARY HISTORY, *supra* note 27, at 213.

82. Saye, *supra* note 76, at 86–87.

83. For more detailed information about Connecticut’s ratification, see 3 DOCUMENTARY HISTORY, *supra* note 27, at 315–38; Christopher Collier, *Sovereignty Finessed: Roger Sherman, Oliver Ellsworth, and the Ratification of the Constitution in Connecticut*, in *THE CONSTITUTION AND THE STATES*, *supra* note 38, at 93, 108–11; 2 THORPE, *supra* note 36, at 33–37.

84. 2 THORPE, *supra* note 36, at 34.

85. *Id.* at 35–36.

Constitution on January 9, 1788, by a vote of 128–40.⁸⁶ Three of the delegates, Roger Sherman, Oliver Ellsworth, and William Samuel Johnson, had represented Connecticut at the federal convention.⁸⁷

The Connecticut convention did not keep an official journal of its proceedings. But some of what was said is recorded because several newspapers reprinted accounts of the debates.⁸⁸ *Elliot's Debates* contains a total of eighteen pages of speeches from the debates⁸⁹ that the editor “[c]ollected from contemporary publications.”⁹⁰

These records suggest that one of the major concerns of opponents of the Constitution in Connecticut was that Congress had excessive taxation power. Oliver Ellsworth eloquently responded to this objection by insisting that taxation was necessary for national defense:

Wars have now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse; otherwise a hostile nation may look into our Constitution, see what resources are in the power of government, and calculate to go a little beyond us; thus they may obtain a decided superiority over us, and reduce us to the utmost distress. A government which can command but half its resources is like a man with but one arm to defend himself.⁹¹

This enduring reasoning about the nature of warfare may have struck the delegates as sound. But it is not clear how much arguments mattered. Seven of the towns that sent delegates to the Connecticut ratifying convention instructed them to reject the Constitution.⁹² Their positions thus already had hardened. Connecticut did not propose any amendments to the Constitution.

Massachusetts

Massachusetts was the sixth state to ratify the Constitution.⁹³ The Massachusetts legislature called for a ratifying convention on October 25, 1787.⁹⁴ The convention met from January 9 to February 7, 1788.⁹⁵ On February 6, 1788, the delegates voted to ratify the Constitution by a vote of 187–168.⁹⁶

86. 1 ELLIOT'S DEBATES, *supra* note 23, at 322 (describing the vote).

87. See 2 THORPE, *supra* note 36, at 34.

88. 3 DOCUMENTARY HISTORY, *supra* note 27, at 336.

89. 2 ELLIOT'S DEBATES, *supra* note 23, at 185–202.

90. *Id.* at 185.

91. *Id.* at 191.

92. See Collier, *supra* note 83, at 109.

93. 6 DOCUMENTARY HISTORY, *supra* note 27, at xix. For more detailed information about Massachusetts's ratification, see 4 DOCUMENTARY HISTORY, *supra* note 27, at xxiv–lxxiii; John J. Fox, *Massachusetts and the Creation of the Federal Union, 1775–1791*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 113, 121–27; 2 THORPE, *supra* note 36, at 37–56.

94. 4 DOCUMENTARY HISTORY, *supra* note 27, at lxxiii.

95. *Id.*

96. *Id.*

The Massachusetts convention was the largest in terms of the number of delegates. These delegates included many prominent figures. John Hancock, who at the time was also the governor of Massachusetts, led the convention, and John and Samuel Adams both took part.⁹⁷ Three of the delegates, Rufus King, Nathaniel Gorham, and Caleb Strong, had participated in the federal convention.⁹⁸ In addition, the convention invited Elbridge Gerry to speak.⁹⁹ Gerry had participated in the federal convention as a delegate from Massachusetts but had refused to sign the Constitution; predictably, he spoke against ratification.¹⁰⁰

Although the campaign for ratification succeeded, the result easily might have been different. As Francis Newton Thorpe has observed, nine Anti-Federalist delegates were absent, and forty-six towns (most of which probably were Anti-Federalist in sentiment) did not send delegates.¹⁰¹ Failure of the Constitution in Massachusetts, a large and politically important state, might have scuttled the chance for ratification in subsequent states.

The Massachusetts convention kept extensive records of the proceedings. Official documents include the records of the votes taken, copies of many speeches, and accounts of debates. In addition, newspapers reported various aspects of the convention. And the delegates themselves kept notes of some of their speeches. The *Documentary History of the Ratification of the U.S. Constitution* identifies and contains these sources.¹⁰² *Elliot's Debates* includes 183 pages of debates.¹⁰³

As in other states, many Anti-Federalists objected to the lack of a bill of rights. Some delegates at the Massachusetts convention, however, also opposed the Constitution because it sanctioned slavery:

Mr. NEAL (from Kittery) [repeated the objection] that the slave trade was allowed to be continued for twenty years. His profession, he said, obliged him to bear witness against any thing that should favor the making merchandise of the bodies of men, and, unless his objection was removed, he could not put his hand to the Constitution. Other gentlemen said, in addition to this idea, that there was not even a proposition that the negroes ever shall be free; and Gen. THOMPSON exclaimed, Mr. President, shall it be said that, after we have established our own independence and freedom, we make *slaves* of others? O! [George] Washington, what a name has he had! How he has immortalized himself! But he holds those in slavery who have as good a right to be free as he has.¹⁰⁴

97. See 2 THORPE, *supra* note 36, at 38.

98. See *id.*

99. See *id.* at 41.

100. See *id.* at 39, 41.

101. See *id.* at 54.

102. 4 DOCUMENTARY HISTORY, *supra* note 27, at lviii–lxi.

103. See generally 2 ELLIOT'S DEBATES, *supra* note 23, at 1–183.

104. *Id.* at 107.

In the end, though, these sentiments did not prevail, and Massachusetts ratified the Constitution. The ratifying document included proposed amendments aimed at correcting perceived problems in the Constitution (but nothing related to slavery).¹⁰⁵

Maryland

Maryland was the seventh state to ratify the Constitution.¹⁰⁶ The Maryland legislature called for a ratifying convention on November 27, 1787.¹⁰⁷ The convention met from April 21–28, 1788.¹⁰⁸ On April 28, 1788, its delegates ratified the Constitution by a vote of 63–11.¹⁰⁹ The outcome, as in some other states, was somewhat foreordained by the delegate selection process. In elections, sixty-four Federalist delegates were chosen but only twelve Anti-Federalists.¹¹⁰ The delegates included all three of Maryland's representatives at the federal convention: James McHenry, Luther Martin, and John F. Mercer. Of these men, only McHenry voted for ratification; Martin and Mercer opposed it.¹¹¹

Few records exist from the Maryland convention. *Elliot's Debates* contains only ten pages.¹¹² But the absence of more records probably is not very significant. Very little discussion actually occurred in Maryland. The Federalist majority, sensing victory from the outset, blocked debate over individual sections of the Constitution and discussions about the need to amend the Constitution.¹¹³ The Federalists' only concession was to allow the leading Anti-Federalist in Maryland, former Governor William Paca, to submit some proposed amendments to a committee in exchange for his agreeing to vote for ratification.¹¹⁴ But the convention adjourned without voting on these amendments.¹¹⁵

105. See 1 ELLIOT'S DEBATES, *supra* note 23, at 322–23.

106. For more detailed information about Maryland's ratification, see Gregory Stiverson, *Necessity, the Mother of Union: Maryland and the Constitution, 1785–1789*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 131, 144–72; 2 THORPE, *supra* note 36, at 56–60. The volume of the DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION that will contain materials from the Maryland ratifying convention is not yet complete. See Wisconsin Historical Society, *supra* note 29.

107. The vote took place on April 26, 1788. See 2 THORPE, *supra* note 36, at 56. Maryland's ratification document is dated April 28, 1788. See 1 ELLIOT'S DEBATES, *supra* note 23, at 324.

108. 2 THORPE, *supra* note 36, at 57 n.2.

109. See *id.* at 59.

110. Stiverson, *supra* note 106, at 146.

111. 2 THORPE, *supra* note 36, at 59.

112. 2 ELLIOT'S DEBATES, *supra* note 23, at 547–56.

113. Stiverson, *supra* note 106, at 147.

114. *Id.* at 149.

115. 2 THORPE, *supra* note 36, at 59–60.

South Carolina

South Carolina's ratification came eighth.¹¹⁶ The South Carolina legislature called for a ratifying convention on January 18, 1788.¹¹⁷ The convention met from May 12–24, 1788.¹¹⁸ On May 23, 1788, the delegates ratified the Constitution by a vote of 149–73.¹¹⁹ Three delegates at the state ratifying convention also had participated in the federal convention: Charles Cotesworth Pinckney, Charles Pinckney, and John Rutledge.¹²⁰

Some records of the South Carolina convention exist. *Elliot's Debates* contains eighty-nine pages of speeches, debates, and records of votes.¹²¹ Discussion at the convention mostly focused on trade and economic matters.¹²² Many speakers repeated the common idea that the Articles of Confederation simply did not give the federal government sufficient power to raise and spend money and regulate commerce. Consider, for example, these remarks:

Hon. E. RUTLEDGE . . . thought that Confederation so very weak, so very inadequate to the purposes of the Union, that, unless it was materially altered, the sun of American independence would indeed soon set—never to rise again. What could be effected for America under [the Articles of Confederation]? Could it obtain security for our commerce in any part of the world? Could it force obedience to any one law of the Union? Could it obtain one shilling of money for the discharge of the most honorable obligations? . . . Was there a single power in Europe that would lend us a guinea on the faith of that Confederation?¹²³

Perhaps the most interesting feature of the South Carolina ratifying convention is that the delegates did not fairly represent the people of the state. The low-lying areas on the coast, which were more concerned with trade and supported ratification, were entitled to a disproportionate number of delegates.¹²⁴ According to historian Jerome Nadelhaft, “The delegates opposed to the Constitution . . . probably represented a majority of the state population, and Antifederalism was stronger in the state at large than the ratification vote indicated.”¹²⁵ The South Carolina conven-

116. For more detailed information about South Carolina's ratification, see Jerome J. Nadelhaft, *South Carolina: A Conservative Revolution*, in *THE CONSTITUTION AND THE STATES*, *supra* note 38, at 153, 172–75; 2 THORPE, *supra* note 36, at 60–73. The volume of the *DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION* that will contain materials from the South Carolina ratifying convention is not yet complete. See Wisconsin Historical Society, *supra* note 29.

117. 2 THORPE, *supra* note 36, at 68 n.5.

118. 13 *DOCUMENTARY HISTORY*, *supra* note 27, at xlii.

119. Nadelhaft, *supra* note 116, at 175.

120. 2 THORPE, *supra* note 36, at 69.

121. 4 *ELLIOT'S DEBATES*, *supra* note 23, at 253–342.

122. *See id.*

123. *Id.* at 274–75.

124. Nadelhaft, *supra* note 116, at 159.

125. *Id.* at 175.

tion at the time of ratification also proposed four amendments to the Constitution.¹²⁶

New Hampshire

New Hampshire was the ninth state to ratify the Constitution,¹²⁷ causing the Constitution to go into effect under the terms of Article VII. The New Hampshire legislature voted to hold a convention on December 14, 1787.¹²⁸ The convention met in two sessions, the first from February 13–22, 1788, and the second from June 18–21, 1788.¹²⁹ On June 21, 1788, the delegates voted to approve the Constitution by a vote of 57–47.¹³⁰ These delegates included John Langdon, who had participated at the federal convention.¹³¹

Unfortunately, very few records of the New Hampshire convention exist. *Elliot's Debates* contains only one speech, of questionable provenance, on the subject of the slave trade.¹³² But some accounts suggest that the convention was mostly concerned about the length of terms of office, the broad powers of Congress, the limitations on state power, and the prohibition on religious tests (which would allow non-Protestants to serve in the government).¹³³ At the time of ratification, New Hampshire recommended various amendments.¹³⁴

Virginia

Virginia was the tenth state to ratify.¹³⁵ Although the Constitution already had the ratifications of the nine states necessary for it to go into effect, Virginia's vote still had great importance. The Union would have had great difficulty functioning without the support of Virginia, a large

126. See 1 ELLIOT'S DEBATES, *supra* note 23, at 325 (reprinting amendments).

127. For more detailed information about New Hampshire's ratification, see Jere Daniell, *Ideology and Hardball: Ratification of the Federal Constitution in New Hampshire*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 181, 186–98; 2 THORPE, *supra* note 36, at 73–78. The volume of the DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION that will contain materials from the New Hampshire convention is not yet complete. See Wisconsin Historical Society, *supra* note 29.

128. See 1 ELLIOT'S DEBATES, *supra* note 23, at 326 (New Hampshire's ratification document describes the legislature's resolution).

129. See Daniell, *supra* note 127, at 191–98.

130. *Id.* at 198.

131. 2 THORPE, *supra* note 36, at 73.

132. See 2 ELLIOT'S DEBATES, *supra* note 23, at 203; Hutson, *supra* note 25, at 21 (explaining that the document “appears to have been composed by parties unknown in 1827, when it was first published as antislavery propaganda in a New Hampshire newspaper”).

133. Daniell, *supra* note 127, at 193.

134. See 1 ELLIOT'S DEBATES, *supra* note 23, at 325–27.

135. For more detailed information about Virginia's ratification, see Alan V. Briceland, *Virginia: The Cement of the Union*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 201, 210–21; 8 DOCUMENTARY HISTORY, *supra* note 27, at xxiii–liv; 2 THORPE, *supra* note 36, at 79–130.

and populous state in the middle of the East Coast.¹³⁶ The Virginia legislature called for a ratifying convention on October 31, 1787.¹³⁷ The convention met from June 2–27, 1788.¹³⁸ On June 25, 1788, the delegates ratified the Constitution by a vote of 89–79.¹³⁹ These delegates included John Blair, James Madison, George Mason, Edmund J. Randolph, and George Wythe, all of whom had represented Virginia at the federal convention.¹⁴⁰ They joined other important men, including future President James Monroe, former governor Patrick Henry, and future members of the Supreme Court John Marshall and Bushrod Washington.¹⁴¹

Extensive records of the Virginia ratifying convention exist. They include the official journal of the convention, various committee reports, and contemporary newspaper accounts.¹⁴² *Elliot's Debates* devotes an entire volume of 663 pages to votes and debates of the Virginia convention.¹⁴³ These records are of very high quality and cover discussions of a wide range of constitutional issues. For this reason, scholars and judges very frequently consult the Virginia records for evidence of the original meaning.¹⁴⁴

The leading Federalist speakers were Governor James Randolph, James Madison, and John Marshall. The leading Anti-Federalists were George Mason and Patrick Henry. Henry spoke more than anyone else. In reading Henry's remarks, one cannot help but notice how accurately he predicted the future. He envisioned heavy federal taxes, a standing Army, difficulty amending the Constitution, claims by Congress that the Constitution grants implied legislative powers, the eventual liberation of the slaves, and more.¹⁴⁵ But Henry's style of debate must have exasperated his opponents. According to Thorpe, "[I]t was useless to try to answer Henry in any way, because of his manner of attack; no man could tell at what point he would make assault or what provision he would discuss."¹⁴⁶

James Madison, who led much of the Federalist response, offered a learned justification for the Constitution.¹⁴⁷ John Marshall later said, "Mr. Henry had without doubt the greatest power to persuade," while

136. See Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25–26 (2001) (quoting speakers of the era who recognized that a United States that did not include Virginia and New York would exist in name only).

137. See 8 DOCUMENTARY HISTORY, *supra* note 27, at liii.

138. *Id.* at liv.

139. *Id.*

140. See 2 THORPE, *supra* note 36, at 83.

141. See *id.*

142. See 8 DOCUMENTARY HISTORY, *supra* note 27, at xlv.

143. See 3 ELLIOT'S DEBATES, *supra* note 23, at 1–663.

144. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2804 (2008) (referencing *Elliot's Debates* while explicating the Second Amendment in a recent landmark case).

145. See 3 ELLIOT'S DEBATES, *supra* note 23, at 586–96.

146. 2 THORPE, *supra* note 36, at 93.

147. See 3 ELLIOT'S DEBATES, *supra* note 23, at 616–22.

‘Mr. Madison had the greatest power to convince.’¹⁴⁸ But Madison’s remarks did not succeed in completely swaying the delegates. Ultimately, the Federalists proposed a compromise that led to ratification: the convention would vote to ratify, but it would then send a list of proposed amendments to Congress.¹⁴⁹ Virginia proposed the adoption of a bill of rights and numerous amendments.¹⁵⁰

New York

New York was the eleventh state to ratify the Constitution.¹⁵¹ Its ratification, like that of Virginia, was not essential for the Constitution to go into effect, but the Union would have been substantially weakened without New York’s support. The New York legislature called for a convention on February 1, 1787.¹⁵² The convention met from June 17 to July 26, 1788.¹⁵³ It ultimately ratified the Constitution on July 26, 1788, by a vote of 30–27.¹⁵⁴ The delegates included Alexander Hamilton, John Lansing, and Robert Yates, who had represented New York at the federal convention.¹⁵⁵

Extensive records preserve the debates at the New York convention. Several newspapers published accounts of the convention, and various delegates and observers took substantial notes.¹⁵⁶ *Elliot’s Debates* contain 210 pages of materials.¹⁵⁷

When the New York delegates were selected, it appeared that there were nearly twice as many Anti-Federalist delegates as there were Federalist delegates.¹⁵⁸ Governor George Clinton and John Lansing led the Anti-Federalist opposition to ratification,¹⁵⁹ while Alexander Hamilton and John Jay led the Federalists in support.¹⁶⁰ Before the convention, Hamilton, Jay, and James Madison famously tried to draw support for

148. JOSEPH ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 120 (2007).

149. *See id.* at 125.

150. *See* 3 ELLIOT’S DEBATES, *supra* note 23, at 657–61.

151. For more detailed information about New York’s ratification of the Constitution, see 19 DOCUMENTARY HISTORY, *supra* note 27, at xxii–lxxxvi; John P. Kaminski, *Adjusting to Circumstances: New York’s Relationship with the Federal Government 1776–1788*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 225, 242–48; 2 THORPE, *supra* note 36, at 131–80.

152. *See* Kaminski, *supra* note 151, at 240.

153. *Id.* at 242–46.

154. *Id.* at 246.

155. *See* 2 THORPE, *supra* note 36, at 134–35. Lansing and Yates left the federal convention early because they believed that it had departed from its objective of merely amending the Articles of Confederation. *See id.* at 139.

156. 19 DOCUMENTARY HISTORY, *supra* note 27, at lxix–lxx.

157. *See* 2 ELLIOT’S DEBATES, *supra* note 23, at 205–414.

158. *See* RALPH VOLNEY HARLOW, SAMUEL ADAMS, PROMOTER OF THE AMERICAN REVOLUTION 331 (1923).

159. *See* CHARLES EMANUEL MARTIN, AN INTRODUCTION TO THE STUDY OF THE AMERICAN CONSTITUTION 80 (1926).

160. *See id.*

ratification by publishing a series of newspaper essays now called the *Federalist Papers*.¹⁶¹

At the convention, the delegates debated many important topics. As one example, Lansing moved that New York should insist, if it were to ratify the Constitution, that the state would have a right to secede from the Union.¹⁶² Hamilton opposed this motion, which ultimately failed, on grounds that New York could not make a conditional ratification.¹⁶³

Although the Federalists made strong arguments, Alexander Hamilton believed that it was really the “circumstances” that had persuaded the Anti-Federalists to support ratification.¹⁶⁴ The delegates knew that most other states had ratified the Constitution, that New York would have difficulty remaining outside the Union, and that some localities in New York might even attempt to secede from the state if the convention did not ratify the Constitution.

North Carolina

North Carolina was the twelfth state to ratify the Constitution.¹⁶⁵ The North Carolina legislature first called for a ratifying convention on December 6, 1787.¹⁶⁶ A convention met in Hillsborough from July 21 to August 4, 1788.¹⁶⁷ On August 2, 1788, the Anti-Federalists prevailed on a resolution proposing amendments to the Constitution, but the convention left the issue of ratification to be decided at a later time.¹⁶⁸

The North Carolina legislature called for a second convention on November 30, 1788.¹⁶⁹ The second convention met in Fayetteville from November 16–23, 1789, long after the new federal government under the Constitution had already come into existence.¹⁷⁰ On November 21, 1789, the delegates ratified the Constitution by a vote of 195–77.¹⁷¹ The delegates at the second convention included Hugh Williamson, William

161. See Maggs, *supra* note 7, at 801–02.

162. 2 ELLIOT’S DEBATES, *supra* note 23, at 412.

163. See Kaminski, *supra* note 151, at 245.

164. See *id.* at 246.

165. For more detailed information about North Carolina’s ratification, see 2 THORPE, *supra* note 36, at 180–85; Alan D. Watson, *States’ Rights and Agrarianism*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 251, 259–67. The volume of the DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION that will contain materials from the North Carolina convention is not yet complete. See Wisconsin Historical Society, *supra* note 29.

166. See Paul J. Scudiere, “*In Order to Form a More Perfect Union*”: *The United States, 1774–1791*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 3, 18–20.

167. 4 GORDON DENBOER ET AL., THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790, at 313 (1990).

168. Watson, *supra* note 165, at 262.

169. 4 DENBOER ET AL., *supra* note 167, at 313.

170. MARTHA HELEN HAYWOOD ET AL., THE NORTH CAROLINA BOOKLET: GREAT EVENTS IN NORTH CAROLINA HISTORY 30–31 (1909).

171. *Id.* at 30.

Blount, and William R. Davie, who had represented South Carolina at the federal convention.¹⁷²

Elliot's Debates contains 252 pages of records of the first North Carolina convention.¹⁷³ But the second North Carolina convention, which actually decided to ratify the convention, unfortunately did not keep any records of its debates.¹⁷⁴ North Carolinians may have decided to ratify in part because the new federal government had made an impressive start with George Washington as the President.¹⁷⁵ In addition, North Carolina realistically may have thought that it could not remain outside the Union. Like other states, North Carolina proposed amendments to the Constitution along with its ratification.¹⁷⁶

Rhode Island

Rhode Island, which had not sent any delegates to the federal convention, was the last of the original thirteen colonies to ratify the Constitution.¹⁷⁷ The legislature initially declined to hold a ratifying convention, but instead called for a popular referendum on ratification.¹⁷⁸ In the referendum, held in March 1788, ratification was defeated by a vote of 2,711–243.¹⁷⁹ This lopsided vote against ratification did not accurately reflect the true sentiment of the state; many Federalists refused to participate in the referendum because they believed that the state legislature should have called a ratifying convention.¹⁸⁰

Not until January 17, 1790, about a year after the new federal government had begun its operations, did the Rhode Island legislature finally call for a ratifying convention.¹⁸¹ The ratifying convention met in two sessions. The first session ran from March 1–6, 1790.¹⁸² This session produced proposed amendments, which citizens of Rhode Island voted on during town meetings.¹⁸³ The second met from May 25–29, 1790.¹⁸⁴ The delegates ratified the Constitution on May 29, 1790, by a very close vote

172. See 2 THORPE, *supra* note 36, at 181.

173. See 4 ELLIOT'S DEBATES, *supra* note 23, at 1–252.

174. See Watson, *supra* note 165, at 265.

175. See *id.* at 264.

176. See 4 ELLIOT'S DEBATES, *supra* note 23, at 249.

177. For more detailed information about Rhode Island's ratification, see Patrick T. Conley, *First in War, Last in Peace: Rhode Island and the Constitution, 1786–1790*, in THE CONSTITUTION AND THE STATES, *supra* note 38, at 269, 271–79; 2 THORPE, *supra* note 36, at 185–91. The volume of the DOCUMENTARY HISTORY OF THE RATIFICATION OF THE U.S. CONSTITUTION that will contain materials from the Rhode Island convention is not yet complete. See Wisconsin Historical Society, *supra* note 29.

178. See 2 THORPE, *supra* note 36, at 185.

179. See Conley, *supra* note 177, at 274.

180. See 2 THORPE, *supra* note 36, at 186.

181. *Id.* at 188–89.

182. See Conley, *supra* note 177, at 276–77.

183. 2 THORPE, *supra* note 36, at 190–91.

184. *Id.*

of 34–32.¹⁸⁵ Three delegates, who apparently opposed ratification, missed the vote and thus may have allowed those supporting ratification to prevail.¹⁸⁶

Elliot's Debates includes Rhode Island's final ratification document and proposed amendments to the Constitution, but no records exist of the debates at either the first or second session of the Rhode Island convention.¹⁸⁷ But Thorpe reports, without citation, that the delegates formed a committee that went through the Constitution paragraph by paragraph.¹⁸⁸ One delegate apparently complained about the taxation provisions, while another expressed concern about the continuation of slavery.¹⁸⁹

Summary

The foregoing discussion shows that extensive records of debates exist for four state ratifying conventions: Pennsylvania, Massachusetts, Virginia, and New York. Fragmentary records of debates exist for four states: Connecticut, Maryland, South Carolina, and New Hampshire. No records of debates exist for Delaware, New Jersey, Georgia, North Carolina (i.e., the second North Carolina convention, which ratified the Constitution), and Rhode Island. Eight states proposed amendments to the Constitution at the time of ratification: Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. Delegates to the federal convention participated in all of the state conventions except Rhode Island (which did not send any delegates to the federal convention).

V. HOW RECORDS OF THE STATE RATIFYING CONVENTIONS MIGHT PROVIDE EVIDENCE OF THE ORIGINAL MEANING

Judges, lawyers, and legal scholars have cited the records of the state ratification conventions for several different purposes. Some have looked to remarks at the state conventions for evidence of the original understanding of the ratifiers. Others have cited state convention records to show the original intent of the Framers who drafted the Constitution at the federal convention. Still others have used the records as evidence of the original objective meaning of the Constitution's text. Finally, many have looked to the records of the state conventions for context in which to understand the subsequent amendment of the Constitution by the Bill of Rights. The following discussion provides examples of each of these practices and describes the theories supporting them. (Part

185. *Id.* at 191.

186. *See* Conley, *supra* note 177, at 278.

187. *See* 1 ELLIOT'S DEBATES, *supra* note 23, at 334–37.

188. *See* 2 THORPE, *supra* note 36, at 190.

189. *See id.*

VI of this Article then addresses possible grounds for impeaching claims about the original meaning.)

Original Understanding of the Ratifiers

As discussed above, one form of the original meaning of the Constitution is the meaning that the delegates at the state ratifying conventions understood the Constitution to have. Probably no evidence could help to establish this meaning more clearly than the records of the state ratification conventions. Put simply, statements by the delegates in the ratifying conventions generally indicate what the delegates understood the Constitution to mean.

One example concerns the important question of whether the ratifiers of the Constitution understood Article III to allow state governments to assert sovereign immunity in federal court. Article III of the Constitution expressly grants the federal courts jurisdiction in cases “between a State and Citizens of another State.”¹⁹⁰ The word “between” creates an important ambiguity. In saying “between,” does Article III mean any lawsuit between a state and a citizen of another state, regardless of whether the state is the plaintiff or the defendant? Or does it instead mean only a lawsuit between a state and a citizen of another state in which the state is the plaintiff?

At the Virginia ratifying convention, delegate John Marshall, who later became Chief Justice of the United States, addressed this question:

With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words.¹⁹¹

The Supreme Court has repeatedly cited this statement from the Virginia convention as evidence that the original understanding of the Constitution was that states would have sovereign immunity and that they could not be held liable to citizens of other states in Article III courts.¹⁹²

Original Intent of the Framers

The records of the state ratifying conventions also may provide evidence of the original intent of the Framers of the Constitution. In other

190. U.S. CONST. art. III, § 2, cl. 1.

191. 3 ELLIOT'S DEBATES, *supra* note 23, at 555.

192. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 267 (1985); *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); *Hans v. Louisiana*, 134 U.S. 1, 14 (1890).

words, the records may show what the delegates to the federal convention intended the Constitution to mean. This is possible because, as described in Part IV above, delegates to the federal convention also served as delegates to the state ratifying conventions in every state except Rhode Island.

In some instances, delegates to the state ratification conventions who had previously participated in the federal convention made statements in which they explicitly discussed what the Framers at the federal convention had intended. At the Pennsylvania convention, for example, James Wilson spoke at length about why the federal convention had not included a bill of rights.¹⁹³ Wilson explained that some delegates at the federal convention had not considered the issue and that others thought that including a bill of rights was unnecessary because the federal government had limited powers.¹⁹⁴ Wilson also argued against the suggestion that Congress's power to regulate elections¹⁹⁵ "was intended to carry on [the federal] government after the state governments should be dissolved and abrogated."¹⁹⁶ James Madison, likewise, found it helpful in the Virginia convention to mention the Framers' intent briefly when a dispute arose over the manner of electing the President under Article II.¹⁹⁷ He explained that each elector had two votes because "one vote was intended for the Vice-President."¹⁹⁸ Madison also addressed the purpose of the Census Clause,¹⁹⁹ saying that it "was intended to introduce equality in the burdens to be laid on the community."²⁰⁰

Even when delegates to the state ratifying conventions who had participated in the federal convention did not make explicit representations about what the Framers at the federal convention had intended, their statements may reflect the original intent. For example, when Wilson, Madison, and Hamilton spoke at the Pennsylvania, Virginia, and New York conventions, everyone knew that they previously had participated in the federal convention. They were seen as Framers, and they spoke as Framers. They did not need to preface their remarks by saying that they were representing the views of the federal convention because that was likely taken for granted.

193. See 2 ELLIOT'S DEBATES, *supra* note 23, at 435–36.

194. See *id.*

195. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

196. 2 ELLIOT'S DEBATES, *supra* note 23, at 440.

197. See U.S. CONST. art. II, § 1, cl. 3 ("The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.").

198. 3 ELLIOT'S DEBATES, *supra* note 23, at 495.

199. U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

200. 3 ELLIOT'S DEBATES, *supra* note 23, at 458.

For this reason, when describing the Framers' intent, some writers look not only to the notes from the federal convention, but also to what the Framers subsequently said at the state ratifying conventions. For example, in *Nixon v. United States*,²⁰¹ Justice White wrote a concurrence in the judgment in which he addressed what "the Framers" intended with respect to impeachment proceedings. In attempting to discern the Framers' intent, Justice White looked at Hamilton's positions during the federal convention and also later at the New York ratification convention.²⁰²

Original Objective Meaning

The records of the state ratifying conventions also may provide evidence of the original objective meaning of the Constitution: the reasonable meaning of the text of the Constitution at the time of the framing. The records may supply this information because they contain many examples showing how words and phrases—especially the legal and political expressions contained in the Constitution—were used in 1787 and 1788. In other words, the records of the state conventions comprise a large corpus of speech from the era. This corpus, when examined for linguistic clues, may help us more than two centuries later to understand what the text of the Constitution objectively meant when it was written.

For example, in *INS v. St. Cyr*, Justice Antonin Scalia wrote a dissent in which he interpreted the Constitution's Suspension Clause.²⁰³ This clause says, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁰⁴ Attempting to discern the original objective meaning, Justice Scalia reasoned, "A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended."²⁰⁵ To support this conclusion, Justice Scalia cited dictionaries from the founding era and other sources as evidence showing how a reasonable person might have interpreted the language.²⁰⁶ In addition, Justice Scalia asserted, "Indeed, that [straightforward meaning] was precisely the objection ex-

201. 506 U.S. 224 (1993).

202. *Id.* at 244 (White, J., concurring) ("While at the Convention, Hamilton advocated that impeachment trials be conducted by a court made up of state-court judges. Four months after publishing the Federalist Nos. 65 and 66, however, he urged the New York Ratifying Convention to amend the Clause he had so ably defended to have the Senate, the Supreme Court, and judges from each State jointly try impeachments." (citations omitted)).

203. 533 U.S. 289, 336–41 (2001) (Scalia, J., dissenting).

204. U.S. CONST. art. I, § 9, cl. 2.

205. *St. Cyr*, 533 U.S. at 337.

206. *Id.* (citing dictionaries from 1789 and 1773).

pressed by four of the state ratifying conventions—that the Constitution failed affirmatively to guarantee a right to habeas corpus.”²⁰⁷

In this passage, Justice Scalia was citing the records of the state ratifying conventions not because he thought that the ratifiers’ subjective beliefs should control the interpretation of the Constitution, but instead to buttress his contention that a reasonable person of the time would have interpreted the clause in the manner that he suggests.

A similar illustration comes from Justice Clarence Thomas’s dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.²⁰⁸ Justice Thomas looked at a variety of texts from the founding era to determine whether the words “duty,” “impost,” and “import” were used with reference to interstate trade in addition to trade with foreign countries.²⁰⁹ After observing how newspapers, statute books, and other sources used the terms in connection with interstate commerce, he added, “These references to duties on *interstate* imports and exports are bolstered by several more in the ratification debates.”²¹⁰

In this passage, Justice Thomas is not citing the records of the state ratifying conventions to prove the subjective intentions of the ratifiers, but instead to show more broadly the original objective meaning of the Constitution’s words.

Ratification Debates and the Bill of Rights

Objections to the original Constitution as expressed at the state ratifying conventions also may help to identify the purpose of the subsequent protections afforded by the Bill of Rights. For example, in *Crawford v. Washington*,²¹¹ a criminal defendant argued that introduction into evidence of a recorded statement that he made to the police violated his rights under the Confrontation Clause of the Sixth Amendment.²¹² For guidance on the meaning of the Confrontation Clause, the Supreme Court considered history. The Court explained that the Sixth Amendment was added in part because delegates to state ratification conven-

207. *Id.* (citing Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 342 & nn.38–41 (1952)).

208. 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

209. *Id.* at 624 (concluding “based on this common 18th-century usage of the words ‘import’ and ‘export,’ and the lack of any textual indication that the Clause was intended to apply exclusively to foreign goods, it seems likely that those who drafted the Constitution sought, through the Import-Export Clause, to prohibit States from levying duties and imposts on goods imported from, or exported to, other States as well as foreign nations, and that those who ratified the Constitution would have so understood the Clause”).

210. *Id.* at 628–31 (citing 2 ELLIOT’S DEBATES, *supra* note 23, at 57–58 (“As to commerce, it is well known that the different states now pursue different systems of duties in regard to each other. By this, and for want of general laws of prohibition through the Union, we have not secured even our own domestic traffic that passes from state to state.” (emphasis omitted))).

211. 541 U.S. 36, 38 (2004).

212. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

tions had complained about the omission of a right to confrontation.²¹³ The Court said,

At the Massachusetts ratifying convention, Abraham Holmes objected to this omission [of a right to confrontation] precisely on the ground that it would lead to civil-law [as opposed to common law] practices: “The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.”²¹⁴

The Court used this evidence from the state ratification debates to interpret the subsequently adopted Sixth Amendment.²¹⁵

VI. POSSIBLE GROUNDS FOR IMPEACHING CLAIMS ABOUT THE ORIGINAL MEANING BASED ON THE RECORDS OF THE STATE RATIFICATION CONVENTIONS

Many writers making constitutional arguments rely on the state ratification debates for evidence to support their positions. When they find remarks by delegates that reinforce their claims, they quote the pertinent passages from *Elliot's Debates* or other collections of the debates. Often, their readers will find evidence from the state ratification debates helpful and persuasive. As the foregoing part has shown, the records of the state conventions may help to prove the original understanding of the ratifiers, the original intent of the Framers, or the original objective meaning of the Constitution's text.

But anyone citing the records of the state ratifying conventions should recognize that these records often do not provide perfect proof of the original meaning of the Constitution. On the contrary, various significant grounds may exist for impeaching claims about the original meaning based on these records. The following discussion considers eight possible arguments that skeptics might raise in challenging originalist claims.

In listing these eight arguments, I do not mean to suggest that the records of state ratifying conventions cannot provide any useful evidence of the original meaning. Indeed, all of the arguments listed below are themselves subject to some counterarguments. It is a subject involving shades of gray rather than black-and-white answers—which is why law-

213. *Crawford*, 541 U.S. at 48.

214. *Id.* at 48–49 (quoting 2 ELLIOT'S DEBATES, *supra* note 23, at 110–11).

215. *Id.* at 50–56. In a dissenting opinion in another case, Justice Scalia observed that the Seventh Amendment was a “response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure the right to trial by jury in civil actions in federal court.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 450 (1996) (Scalia, J., dissenting).

yers, judges, and legal scholars continue to refer to the records when attempting to interpret the Constitution. I suggest only that anyone making or evaluating claims about the original meaning take these possible grounds for impeaching the claims into account.

1. *The Records of the State Ratifying Conventions Are Incomplete*

One potential ground for impeaching claims about the original meaning of the Constitution based on the records of the state ratification conventions is that the records are simply incomplete.²¹⁶ As explained in Part IV above, extensive records exist only for the Pennsylvania, Massachusetts, Virginia, and New York conventions. Although we have a few records from the conventions in Connecticut, Maryland, South Carolina, and New Hampshire, we have no records of debates for the conventions that ratified the Constitution in Delaware, New Jersey, Georgia, North Carolina (i.e., the second North Carolina convention), and Rhode Island. As a result, just looking at the records cannot provide a complete picture of what the ratifiers said and thought.

Two consequences flow from the incompleteness of the record. First, in general, drawing inferences from a silence in the records is highly risky. The ratifiers may have discussed a subject at length, but the records simply may not include their discussion. As Justice Clarence Thomas said in his dissent in *U.S. Term Limits v. Thornton*, “The fact is that arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary.”²¹⁷

Second, even when records address a particular point, they may not provide a complete account. For example, in the Massachusetts convention, a delegate named Widgery addressed the clause in the Constitution that requires Congress to publish a journal of its proceedings “excepting such Parts as may in their judgment require secrecy.”²¹⁸ The Massachusetts records say, “Mr. WIDGERY read the paragraph, and said, by the words, ‘except such parts as may require secrecy,’ Congress might withhold the whole *journals* under this pretence, and thereby the people be kept in ignorance of their doings.”²¹⁹ From this statement, we know how Mr. Widgery interpreted the clause, but we do not know what delegates in Delaware, New Jersey, Georgia, North Carolina, or Rhode Island thought because we do not have records from those conventions.

216. Hutson, *supra* note 25, at 21–24 (describing incompleteness of the historical record).

217. 514 U.S. 779, 900 (1995) (Thomas, J., dissenting); see also Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 370 (2002) (discussing whether “a meaningful interpretive clue [can] be drawn from silence—from the fact that no one spoke about the particular problem” at state ratifying conventions).

218. U.S. CONST. art. I, § 5, cl. 3.

219. 2 ELLIOT’S DEBATES, *supra* note 23, at 52.

These observations, although important, should not wholly preclude reliance on the records of the state ratification debates. The objection of incompleteness of the records mostly pertains to efforts to discern the original understanding of the ratifiers and the original intent of the Framers: we cannot determine these meanings with confidence unless we have a thorough record of what the ratifiers and Framers thought. But the objection has less significance for the original objective meaning because the records' text can provide evidence of the typical meaning of words and phrases at the time of ratification even if the records are incomplete.

Even more significantly, it is important to realize that history is never a precise science. Gaps always will exist in historic records. But that does not mean that we can never know anything about history. Perhaps the best advice on this point comes from the esteemed constitutional scholar, Henry Paul Monaghan. Candidly recognizing that the records of state ratification debates are incomplete, he says, "We proceed as best we can."²²⁰ Greater expectations simply are unrealistic.

2. *The Records of the State Ratifying Conventions Are Not Necessarily Verbatim Transcripts of the Debates*

The records of the state ratifying conventions purport to capture what individual speakers said at the ratification debates. But these reports are generally not verbatim accounts for two reasons. First, the reporters lacked the technical capacity to produce verbatim transcripts. Audio recording devices did not exist in the eighteenth century. Although some reporters attempted to use early forms of shorthand, they could not take down all of the comments accurately.²²¹ True, in some instances, the compilers of the convention records may have had access to copies of prepared speeches. But for the most part, the records at best consist of approximate reconstructions of what was said based on incomplete notes taken in longhand. Indeed, despite what Madison said in the quotation at the start of this Article about the debates in the state conventions being the best evidence of the original meaning, Madison also said that he "wished not to be understood as putting entire confidence in the accuracy of them."²²² He explained, "Even those of Virginia, which had probably been taken down by the most skilful hand, . . . contained internal evidence in abundance of chasms and misconceptions of what was said."²²³

220. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 151 (1996).

221. See Hutson, *supra* note 25, at 20 (arguing that "the technique of shorthand was in its infancy in the United States and did not provide the means of recording public discourse accurately").

222. 4 ANNALS OF CONGRESS 777 (1796) (remarks of James Madison), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=385>.

223. *Id.*

Second, many of the reporters were too incompetent or too politically biased to make accurate reports of the debates. For example, according to one scholar, the official reporter for the Pennsylvania and Maryland ratifying conventions was regularly inebriated.²²⁴ James Hutson identifies numerous and almost equally shocking facts about the incompetence and political biases of reporters in New Hampshire, Massachusetts, Connecticut, and New York.²²⁵

Because the records are not verbatim, they may not provide precise evidence of what the ratifiers or Framers understood the Constitution to mean. For example, Governor Edmund Randolph is reported to have said at the Virginia ratifying convention that “no power is given expressly to Congress over religion.”²²⁶ Some scholars have focused on the word “expressly” in this quotation.²²⁷ They have inferred from it that Randolph may have believed that Congress might possess implied power to regulate the subject of religion.²²⁸ This inference is certainly plausible if the records of the convention accurately report what Randolph said. But we do not know for certain that Randolph actually used the word “expressly.” Whoever took the notes might simply have added that word. Scholars quoting the records thus must exercise great caution before drawing conclusions.²²⁹

This potential ground for impeaching claims made about the original meaning of the Constitution, however, should not be carried too far. Although the records of the state ratifying conventions may not be verbatim and may be inaccurate and politically biased, they still may have some value in determining the original meaning of the Constitution. They might provide general evidence of what the ratifiers thought without being exact quotations. For example, as noted above, at the Virginia convention, a question arose about whether the grant to federal courts of jurisdiction over cases “between a State and Citizens of another State” means that a citizen could sue a state in federal court despite the usual rule of sovereign immunity. The records contain quotations by both Madison and Marshall saying that the clause does not have this mean-

224. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1802 n.405 (1996) (“Thomas Lloyd, who served as the official reporter for the Pennsylvania and Maryland ratifying conventions, was often too drunk to take anything down, much less take anything down accurately.”).

225. See Hutson, *supra* note 25, at 21–24.

226. 3 ELLIOT’S DEBATES, *supra* note 23, at 204.

227. See, e.g., Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 91 (2005) (“At the Virginia ratifying convention, Governor Edmund Randolph let the feline slip from the sack: in stating that ‘no power is given expressly to Congress over religion,’ he implicitly admitted that Congress would enjoy implied powers on the subject.” (footnote omitted)).

228. *Id.* at 91–92.

229. See John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 988 n.89 (1993) (arguing that “speeches and letters made during the constitutional ratifying conventions . . . should be used carefully in interpretation due to their unreliability and our ignorance of the speaker’s motives”).

ing.²³⁰ We might not know exactly what words these two ratifiers used, but might still infer from their remarks what their general position was.

In addition, if researchers are looking for evidence of the original objective meaning of the Constitution, then the paraphrasing of speakers' remarks probably does not matter very much. The language of the records may serve as evidence of eighteenth century linguistic usage whether the words and phrases in the records came from the delegates themselves or from the persons who took notes on what they said. Thus, although the records may not be verbatim, they are not useless simply for that reason.

3. *The Views of Individual Delegates May Not Represent the Views of the Ratifiers Generally*

Claims about the original meaning of the Constitution sometimes rely on statements made by individual ratifiers. In many instances, these claims might be impeached on grounds that the views of individual delegates may not represent the understanding of the ratifiers generally. Or as one scholar pointedly has asked, "There were over 1,600 men who attended the State ratifying conventions—whose intent is to prevail?"²³¹

For example, in *Clinton v. Jones*,²³² the Supreme Court had to decide whether the federal courts could exercise jurisdiction in a civil case against the President. The Court relied on James Wilson's statement at the Pennsylvania convention that "far from being above the laws, [the President] is amenable to them in his private character as a citizen."²³³ This quotation makes clear that James Wilson understood the Constitution to have this meaning. But we do not know whether the other delegates at the Pennsylvania convention shared his views. The Pennsylvania convention never took a vote on the specific issue.²³⁴ Even more significantly, we do not know whether any of the delegates at the other state ratifying conventions even thought about the issue. In all of the records of the state ratifying debates, no one else appears to have addressed it.

The question thus arises whether it is possible to infer, in the absence of contrary evidence, that other ratifiers agreed with Wilson's position on this issue of presidential immunity. This question has no simple

230. See 3 ELLIOT'S DEBATES, *supra* note 23, at 533 (quoting Madison as saying, "It is not in the power of individuals to call any state into court."); *id.* at 555 (quoting Marshall as saying, "I hope that no gentleman will think that a state will be called at the bar of the federal court.").

231. Stephen A. James, *Original Intent: The Judicial Uses of History and Constitutional Interpretation in Australia and the United States*, 12 IN PUB. INTEREST 23, 28 (1992).

232. 520 U.S. 681, 684 (1997).

233. *Id.* at 696 (quoting 2 ELLIOT'S DEBATES, *supra* note 23, at 480).

234. A few conventions did express views on specific issues. For example, the Rhode Island Convention's formal ratification document includes this statement: "It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state . . ." 1 ELLIOT'S DEBATES, *supra* note 23, at 336.

answer. On one hand, we know that the Constitution ultimately was ratified, and something must have influenced the delegates to vote for ratification. It does not stretch the imagination to suppose that the arguments of supporters of the Constitution were persuasive in most instances.²³⁵ This reasoning tends to support the inference that other delegates agreed with Wilson. Although the Supreme Court did not explain its thinking, it may have had this rationale in mind when it relied on Wilson's statement in *Clinton v. Jones*.

On the other hand, much of what the supporters of the Constitution at the ratification debates said seems unpersuasive and implausible. For example, as described in Part IV above, James Wilson suggested at the Pennsylvania convention that enumerating rights in the Constitution would be dangerous because it would suggest that the federal government has implied powers.²³⁶ Most of the delegates probably did not agree with this position. Indeed, several states recommended adding a bill of rights to the Constitution, and the first Congress immediately proposed amendments for this purpose. Thus, writers should take caution in making generalizations about what the ratifiers collectively understood based on comments of individual delegates.

4. *Each of the Ratifying Conventions May Have Had a Different Understanding of the Constitution*

A closely related ground for impeaching claims about the original meaning based on the records of the state ratifying conventions is that the various state conventions may have had different understandings of the Constitution at the time of ratification. Each state convention acted separately in ratifying the Constitution. They did not all meet and vote at the same time. For this reason, the delegates in one state did not necessarily know what the delegates at conventions in other states thought.²³⁷ The Delaware convention, for example, could not know what the other state conventions believed because the Delaware convention acted first. And the other state conventions could not know what the Delaware delegates thought because of the absence of any records from Delaware. In addition, four of the original thirteen states—Virginia, New York, North Carolina, and Rhode Island—ratified the Constitution after it already had gone into effect among the other nine states.²³⁸ It is

235. However, as Part VI.5 below demonstrates, in some instances we can surmise that factors other than the arguments of the supporters of the Constitution persuaded delegates to vote for ratification.

236. 2 ELLIOT'S DEBATES, *supra* note 23, at 436–37.

237. George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1037–38 (1991) (observing that some state conventions ratified without knowing what had been said at other conventions).

238. See Kesavan & Paulsen, *supra* note 217, at 370 (arguing that evidence from the New York and North Carolina ratifying conventions is less probative because “[t]hese ratifying conventions met after the requisite nine States had adopted the Constitution”).

difficult to see how the debates in these four states could have shaped (or rather reshaped) the Constitution's meaning. Indeed, taking a very strict view, some scholars have argued that "it is not the understanding of one, two, or even three ratifying conventions that should constitute sufficient evidence of constitutional meaning, but the understanding of nine state ratifying conventions, or perhaps, all thirteen state ratifying conventions."²³⁹

The observation that the conventions in different states may have attached different meanings to the Constitution at a minimum suggests caution in attempting to discern the original understanding of the Constitution based on comments from a single state convention. A corollary, though, would seem to be that evidence from multiple state conventions generally makes arguments about the original understanding stronger. For example, in arguing that the ratifiers did not understand the Constitution to impose term limits on members of Congress, the Supreme Court, in *U.S. Term Limits, Inc. v. Thornton*, stressed that "at least three States proposed some form of constitutional amendment supporting term limits," suggesting that they believed term limits were not otherwise possible.²⁴⁰ Evidence from three states simply carries more weight than evidence from only one or two states.

The possibility that state conventions may not have had the same understanding of the Constitution does not necessarily affect claims about the original intent of the Framers or the original objective meaning of the Constitution. Statements at state conventions by delegates who formerly had served at the federal convention may accurately reflect the intent of the Framers, regardless of whether other delegates adopted the same understanding of the Constitution. And in determining the original objective meaning of the Constitution, the subjective beliefs of delegates at particular conventions is not tremendously relevant. More important is the manner in which speakers in 1787 and 1788 used the words and phrases in the Constitution.

5. *Statements Made During the Ratification Debates in the State Conventions, in Many Instances, Were Not What Actually Persuaded the Ratifiers to Support the Constitution*

A fifth possible ground for impeaching claims about the original meaning based on the records of the state ratifying conventions is that statements made during the ratification debates were not necessarily what persuaded delegates to support the Constitution. In some of the state conventions, the debates resembled staged theater more than actual deliberation. In Maryland and South Carolina, for example, more Fede-

239. Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1162 (2003).

240. 514 U.S. 779, 826 n.40 (1995).

ralists were elected to serve as delegates than Anti-Federalists.²⁴¹ The delegates may have debated various points, but it was almost surely the delegate elections that determined the outcome of the ratification process. In Massachusetts, the result might have differed if more Anti-Federalists had shown up for the final vote. In other states, arguments about the Constitution's meaning probably gave way to practicality. New York, North Carolina, and Rhode Island—the last three states to ratify—clearly felt pressure to join the Union because they did not want to be left out after all of the other states had ratified the Constitution. As Alexander Hamilton said in the quotation mentioned in Part IV above, “circumstances,” rather than persuasive arguments, convinced the New York convention to support the Constitution.²⁴²

These observations suggest that readers should not assume, in all instances, that statements at the state ratifying conventions affected the delegates' understanding of the Constitution. But two points deserve mention. First, in some states, arguments at the state conventions probably did make a difference. In Virginia, for example, the outcome was uncertain and the final vote was very close. Observers at the time, including John Marshall, certainly thought that Madison's remarks helped to win passage of the Constitution.²⁴³ Second, even if the delegates already had made up their minds before they arrived at the state conventions, the arguments they made during debates probably reflected reasoning that they previously had found persuasive. The records thus may serve as an accurate repository of the delegates' thoughts on the Constitution even if the debates did not change many minds at the conventions.

6. *The Records Provide Unreliable and Otherwise Suspect Evidence of the Intent of the Framers (as Opposed to the Ratifiers) of the Constitution*

The records of the state ratification debates in theory may provide evidence of the original intent of the Framers at the federal convention. For example, as shown above, James Wilson and James Madison sometimes made explicit representations about what the Framers intended when they included particular clauses in the Constitution.²⁴⁴ But this evidence of the original intent of the Framers is somewhat suspect. Delegates to the federal convention had agreed not to discuss the proceedings.²⁴⁵ For this reason, Wilson and Madison should not have revealed the internal thoughts of the federal convention. Even more to the point,

241. Nadelhaft, *supra* note 116, at 173; Stiverson, *supra* note 106, at 146.

242. See *supra* note 164 and accompanying text.

243. See *supra* note 148 and accompanying text.

244. See *supra* Part V.

245. Madison's notes for May 29 report the rule: “That nothing spoken in the House be printed, or otherwise published, or communicated without leave.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 15.

though, statements by former delegates to the federal convention are not necessarily reliable because few other delegates realistically could contradict their assertions. Most delegates to the state conventions had not attended the federal convention and did not know what had transpired there, and those who had been to the federal convention generally took the requirement of secrecy more seriously.

Perhaps most untrustworthy are representations about the Framers' intent by delegates to state conventions who had not participated at the federal convention. For example, in the Virginia convention, William Grayson explained the Framers' intent in including Article IV, Section 3, Clause 2, which gives Congress the power to dispose of territorial property.²⁴⁶ Grayson said,

This clause was inserted for the purpose of enabling Congress to dispose of, and make all needful rules and regulations respecting, the territory, or other property, belonging to the United States, and to ascertain clearly that the claims of particular states, respecting territory, should not be prejudiced by the alteration of the government, but be on the same footing as before; that it could not be construed to be a limitation on the power of making treaties.²⁴⁷

In this statement, Grayson appears to be representing why the Framers included this clause. But Grayson was not a delegate to the federal convention and thus had no obvious basis for making his statement. Perhaps his beliefs were pure speculation. Anyone citing the records of the state ratifying conventions for evidence of the original intent of the Framers should take these considerations into account.

7. *Statements from the State Ratification Debates Are Often Taken out of Context*

A seventh possible ground for impeaching claims about the original meaning based on records of the state ratifying conventions is that the cited statements have been taken out of context. This potential problem has three causes. First, our concerns about issues today are not necessarily the same as those of delegates to the state ratifying conventions more than two hundred years ago. Second, the records of the state ratification debates are so sparse that they often contain little that is directly relevant to a disputed issue. Third, lawyers (and some judges) often must grasp for anything that might possibly be helpful because they need to resolve issues that do not necessarily have clear answers.

246. U.S. CONST. art. IV, § 3, cl. 2 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

247. 3 ELLIOT'S DEBATES, *supra* note 23, at 505.

Consider this example. In *Wesberry v. Sanders*,²⁴⁸ the Supreme Court held that unevenly apportioned congressional districts violated a constitutional requirement that representatives be chosen by the people. In reaching this conclusion, the Court relied on a statement by Charles Cotesworth Pinckney at the South Carolina convention.²⁴⁹ Pinckney said that representatives in the House would “be so chosen as to represent in due proportion the people of the Union.”²⁵⁰ But the dissent contended that the Court had taken this comment out of context. The dissent said, “[Pinckney] had in mind only that other clear provision of the Constitution that representation would be apportioned among the States according to population. None of his remarks bears on apportionment within the States.”²⁵¹ I do not take sides on this particular issue, but merely present the disagreement as an example of how claims based on the records of the state ratifying conventions might be impeached on grounds that they are not what they initially appear to be. Anyone making or evaluating such claims should take the full meaning and context of any cited statements into account.

8. *The Ratification Debates by Themselves Cannot Provide Much Guidance for Interpreting the Bill of Rights*

As explained above, the Supreme Court sometimes looks at the records of the state ratifying conventions for evidence of the original meaning of the Bill of Rights, the first ten amendments to the Constitution. This practice rests on the theory that Congress acted to add the Bill of Rights in response to criticisms raised at the state ratifying conventions. But this theory has limits. In a concurring opinion in *Cutter v. Wilkinson*,²⁵² Justice Thomas concluded that a statement by James Madison at the Virginia convention and a statement by James Iredell at the North Carolina convention could not prove the original meaning of the Establishment Clause in the First Amendment.²⁵³ Though the statements might reflect the original meaning of the Constitution before its amendment, the litigants had not “shown that the Establishment Clause codified Madison’s or Iredell’s view.”²⁵⁴ To put this reasoning in more general terms, records from the state conventions by themselves cannot show the meaning of the Bill of Rights. Although the records may reveal a desire by the delegates for amendment, other evidence must show that Congress and the states specifically adopted the views of the state ratify-

248. 376 U.S. 1, 7–8 (1964).

249. *See id.* at 16.

250. 4 ELLIOT’S DEBATES, *supra* note 23, at 257.

251. 376 U.S. at 34 n.19 (Harlan, J., dissenting) (emphasis omitted).

252. 544 U.S. 709, 730 (2005) (Thomas, J., concurring).

253. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

254. 544 U.S. at 730.

ing conventions when they amended the Constitution to include the Bill of Rights.

VII. CONCLUSION

Thousands of articles and hundreds of cases have cited the records of the state ratifying conventions to support claims about the original meaning of the Constitution. Anyone reading these sources needs to know what records exist, why they might provide evidence of the original meaning of the Constitution, and what weaknesses claims about the original meaning which rest on them might have. I have attempted here to offer a concise guide to these records. In addition to explaining theories of how the records might help to prove the original intent of the Framers, the original understanding of the ratifiers, and the original objective meaning of the Constitution's text, I have also included a list of eight important possible grounds for impeaching assertions made about the original meaning. The grounds all have some merit, but they do not totally negate the value of the records of the state conventions. Authors should continue to cite these documents, but they should proceed with care, knowing the strengths and weaknesses in their arguments.