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## THE ORIGINAL INTENTION OF ORIGINAL UNDERSTANDING\*

Jack N. Rakove\*\*

In 1985, amid mounting interest in the idea of a return to a “jurisprudence of original intention,” the *Harvard Law Review* published H. Jefferson Powell’s important article on “The Original Understanding of Original Intent.”<sup>1</sup> In this acute and ironic criticism of the theory of originalism, Powell argued that the modern notion which equates the intention of a legal document with the subjective purposes of its author(s) was not part of the interpretive arsenal on which the framers of the Constitution could draw as they tried to imagine how its provisions would be construed. Although some eighteenth-century commentators understood that interpretation should strive to recover the purposes of the parties to a legal document, in practice that intention was almost always both reducible to and discoverable in its explicit language. There was no notion or tradition of construing a statute by examining its legislative history. In case of ambiguity, interpreters might consider the purposes declared in the preamble, but they relied far more on the rules of common law adjudication. Knowledge of the intention of a statute, Powell concluded, was far less a *guide* to interpretation than its *product*, an understanding formed and refined over time through a course of reasoning and practice. And when something like a theory of intention did emerge in the realm of constitutional interpretation, Powell observed, it was tied to the states’-rights “doctrine of 1798,” which made the quasi-sovereign states the contracting parties to the federal union. Powell thus linked the appearance of an intentionalist theory of constitutional interpretation to the great heresy that the Civil War ostensibly laid to rest.

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\* This article is a revised version of Jack N. Rakove, “Madison and the Origins of Originalism,” *Original Meanings: Politics and Ideas in the Making of the Constitution* 339-65 (Alfred A. Knopf 1996). I owe a scholarly debt to H. Jefferson Powell and Charles Lofgren for framing the basic issues I consider here.

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1. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985) in Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent* 53 (Northwestern U. Press, 1990).

Persuasive as it seemed, Powell's argument proved vulnerable to serious criticism. Reviewing Powell's use of sources, Charles Lofgren discovered a cavalier approach to the historical evidence.<sup>2</sup> More important, Lofgren argued that Powell erred in limiting his inquiry to the relevance of the intentions of the framers of the Constitution while ignoring the understandings of its ratifiers. Some disputants in the political debates of the 1790s, Lofgren concluded, clearly thought that the expectations, understandings, and intentions of the ratifiers could serve as a restraint on doubtful constructions of the Constitution. Nor could it be taken for granted, Lofgren implied, that early interpreters thought that the Constitution should be read quite like a statute, contract, or will, subject to the familiar rules of common law adjudication. The Constitution certainly was a kind of law, but not any kind of law; and its true interpretation might plausibly follow other rules. Lofgren agreed with Powell that knowledge of the intentions of the framers at Philadelphia was not thought an appropriate guide to interpretation, but that reservation did not apply to the intentions—or perhaps we should say the *understandings*—of its ratifiers.

No piece of historical evidence looms larger in this ratifier-understanding variant of originalism than a speech that congressman James Madison gave in April 1796, when the House of Representatives was debating its constitutional role in the implementation of the controversial Jay Treaty. In this speech, Madison excluded evidence of the intentions of the framers at Philadelphia from the canon of acceptable sources, but at the same time he affirmed that evidence of what the Constitution meant to its legal ratifiers in the state conventions was pertinent.

But, after all, whatever 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 the expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but

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2. Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const. Comm. 77 (1988) in Rakove, ed., *Interpreting the Constitution* at 117 (cited in note 1).

in the state conventions, which accepted and ratified the constitution.<sup>3</sup>

Madison's statement distills the crucial premise of originalism: The Constitution is supreme law because it rests on the direct imprimatur of a sovereign people, expressed through the extraordinary procedures required for ratification; and its original meaning, whenever it can be recovered, should accordingly prevail over the lesser acts of legislators and the preferences of jurists.

But can Madison's statement indeed be taken by itself, as a sufficient early expression of a valid theory of originalism? While Powell and Lofgren both cite Madison's speech, neither locates it in the political context in which it was originally given. Restoring Madison's speech to the political circumstances of 1796, however, has the effect of converting its apparently robust statement of originalism into a weak, even muddled effort to blunt the Federalist counterattack against Republican criticism of the Jay Treaty. Nor is Madison's endorsement of ratifier-understanding in 1796 easily reconciled with his own original understanding of the character of the ratification debates of 1787-1788, which he had then described in disparaging terms. To trace the path that Madison followed from principal framer of the Constitution to founding father of originalism thus offers a fascinating commentary on the political character of early constitutional interpretation.

In one essential respect, Powell's argument certainly rests on firm historical ground. One searches the voluminous records of the debates of 1787-1788 almost in vain for evidence that the framers and ratifiers imagined that later interpreters would examine the extant documentary sources for the "great national discussion" of 1787-1788 as an aid to determining what the Constitution originally meant.<sup>4</sup> In the rare instances when such references appear, their use tends to confirm Powell's basic point.

Consider, for example, Hamilton's efforts in *Federalist* 33 to answer the "virulent invective and petulant declamation" that Anti-Federalists were directing against the necessary and proper

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3. J. Madison, speech of Apr. 6, 1796, in J.C.A. Stagg, ed., 16 *The Papers of James Madison* 290, 295-96 (U. Press of Virginia, 1989).

4. The phrase is Hamilton's in *Federalist* 1 (Hamilton) in Jacob E. Cooke, ed., *The Federalist Papers* 3, 5 (Wesleyan U. Press, 1961). It was most recently borrowed by Isaac Kramnick for his essay, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 *Wm. & Mary Q.* 3 (1988).

clause.<sup>5</sup> This “sweeping clause”<sup>6</sup> would in fact obviate the need for “construction” without enlarging the powers the Constitution vested in Congress, Hamilton argued. But suppose Congress wrongly impinged the authority of a state. The “forced constructions” needed to support such palpably unconstitutional acts would be so apparent that “the people” could then readily “appeal to the standard they have formed”—the Constitution—“and take such measures to redress the injury done to the Constitution, as the exigency may suggest and prudence justify.”<sup>7</sup> “If there should ever be a doubt on this head,” he concluded, “the credit of it will be entirely due to those reasoners who, in their imprudent zeal of their animosity to the plan of the Convention, have labored to envelop it in a cloud, calculated to obscure the plainest and simplest truths.”<sup>8</sup> In other words, if the people were later confused about the limits of the powers of Congress, it would only be because Anti-Federalist invective, by dint of repetition, had turned the necessary and proper clause into the engine of tyranny it was never meant to be.

James Iredell verged toward a similar argument when he asked the first North Carolina ratification convention to consider the consequences of resting the authority of constitutional rights on the potentially incomplete enumeration of a formal declaration of rights. Iredell asked the delegates to imagine how future rulers bent on invading some fundamental right left unmentioned in such a declaration might reason historically about its omission.

Would they not naturally say, “We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd.”<sup>9</sup>

Later interpreters would naturally assume that their “ancestors,” scrupulous in “their attachment to liberty,” had incorporated every right they deemed worthy of protection.<sup>10</sup> Yet even in this effort to think of interpretation as a process of historical recov-

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5. Federalist 33 (Hamilton) in Cooke, ed., *The Federalist Papers* at 204 (cited in note 4).

6. *Id.* at 205.

7. *Id.* at 206.

8. *Id.* at 206-07.

9. J. Iredell, speech of July 28, 1788, in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* 475, 476 (U. of Chicago Press, 1987).

10. *Id.*

ery—one generation reconstructing the purposes of another—Iredell assumed that interpreters would have no useful sources to examine beyond the Constitution itself. Acting “long after all traces of our present disputes were at an end,” they would not examine documentary evidence to reconstruct the debate to which he was now contributing.<sup>11</sup> They would read the Constitution much as Federalists were reading it now, relying on its plain language and structure to ascertain its meaning. If some rights were enumerated and others not, they would need no other evidence to conclude that the omissions were deliberate.

For Federalists, then, the idea that later interpreters might resort to evidence drawn from the ratification debates carried a perverse implication. Repetition of the wild charges that Anti-Federalists were directing against the Constitution might have the effect of fulfilling its adversaries’ bleak predictions that the tyranny of consolidation and the restriction of liberty were the true intentions of the document. By insisting that their extreme readings of its clauses were correct, Anti-Federalists risked making the Constitution a far more dangerous document than it was meant to be.

Anti-Federalists, by contrast, generally argued that the language of the Constitution was so malleable as to invite the open-ended “construction” they dreaded. In a sense, Anti-Federalists did imagine that this process of interpretation would be faithful to the purposes of the framers. Rather than portray the latent dangers of the Constitution as the unintended consequences of inadequate deliberation and sloppy draftsmanship, they suggested that the “dark conclave” at Philadelphia had conspired to fasten a charter of tyranny on their unsuspecting countrymen. And once delegate Luther Martin began to publish his *Genuine Information* about the debates in the Federal Convention, Anti-Federalists had a plausible basis for thinking these suspicions well founded.<sup>12</sup>

Nevertheless, Anti-Federalists rarely if ever implied that evidence of what was being said about the Constitution in 1787-1788 would provide later interpreters with a useful guide to its mean-

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11. *Id.*

12. Philadelphiaensis, no. X, *Philadelphia Freeman's Journal*, Feb. 20, 1788, in John P. Kaminski and Gaspare J. Saladino, eds., 16 *Documentary History of the Ratification of the Constitution* 158, 159 (State Historical Society of Wisconsin, 1986). Luther Martin's serial history of the Convention first appeared in the *Middlesex Gazette* and was reprinted as *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia* (Eleazer Oswald, 1788); for convenience, it may be read most easily in Herbert J. Storing, ed., 2 *The Complete Anti-Federalist* 19 (U. of Chicago Press, 1981).

ing. Insofar as Anti-Federalists protested that the advocates of the Constitution were misrepresenting its deeper intentions, they could hardly have credited Federalist positions as accurate statements of the true meaning of the Constitution. From their point of view, such interpretations were necessarily deceptive. Presumably their own dissents would provide better predictions of what the Constitution really meant—though should it be adopted, their comments must represent the skeptical views of the non-ratifying minority, rather than the presumably more authoritative judgments of the approving majority.

In only one respect did some Anti-Federalists belatedly stumble upon a formula that might enable their expressed concerns to serve as a possible brake on erroneous interpretations of the Constitution. In those states where the Constitution was hotly debated or closely contested, Anti-Federalist strategy typically wavered between merely *recommending* amendments to the early consideration of the new Congress, or somehow making the ratification by their particular state *contingent* upon the prior adoption of specific amendments. Federalists struggled hard and, on the whole, successfully, to restrict their opponents to the former alternative. But in the New York convention, the final maneuvers surrounding the act of ratification included the adoption of two sets of amendments: one, essentially a bill of rights, offering “Explanations” of these rights “consistent with the said Constitution”; the other recommending substantive changes to the main text. Had Anti-Federalists in other states hit upon this explanatory expedient at an earlier point, they conceivably could have developed it into a device to convert expressions of opinion into statements with some interpretative authority. But New York was the eleventh state to endorse the Constitution, and its action came too late to leave a legacy for subsequent interpreters.<sup>13</sup>

Intriguing as these scattered references may be, their very paucity tends to confirm what Powell argues and Lofgren would probably concede: that neither the framers nor the ratifiers had any notion that documentary evidence of their intentions and understandings would provide interpreters with a useful guide to the true meaning of the Constitution. The text and structure of the

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13. I discuss the variety of ways in which Federalists and Anti-Federalists jockeyed over the character of the decision the state conventions would take in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 114-115 (Alfred A. Knopf, 1996). For the text of the New York instrument of ratification, with its multiple forms of amendments, see Linda Grant DePauw, *The Eleventh Pillar: New York State and the Federal Constitution* 293-302 (Cornell U. Press, 1966).

document would provide the locus of interpretation; historical evidence of the debates would not be relevant.

There is no reason to think that James Madison held any different view during the debates of 1787-1788, and good reason to suspect that he privately believed that misrepresentation and demagoguery were the chief currencies in which they had been conducted. Madison did the best he could to elevate the tone of debate in *The Federalist* and at the Richmond convention, but he did not hold a high opinion of much of the polemical literature and speech-making that ratification occasioned, or of the capacity of most citizens to form independent opinions on as complicated a subject as the Constitution.<sup>14</sup> In the Virginia convention, he had to contend with the erratic tactics of his chief adversary, Patrick Henry, whose rambling if brilliant oratory made an orderly discussion of the Constitution difficult.

Even after the Constitution was ratified, Madison feared that "the feverish state of the public mind" had to be carefully reduced to a more placid condition.<sup>15</sup> He was upset when Hamilton and other New York Federalists endorsed their opponents' call for a second general convention. "The delay of a few years will assuage the jealousies which have been artificially created by designing men and will at the same time point out the faults which really call for amendment," he wrote Jefferson. "At present the public mind is neither sufficiently cool nor sufficiently informed for so delicate an operation."<sup>16</sup> When his friend Edmund Randolph endorsed this idea,<sup>17</sup> Madison replied that "an *early* convention" would "be the offspring of party & passion, and will probably for that reason alone be the parent of error and public injury."<sup>18</sup> The fact of ratification suggested that "a greater proportion" of the American people were content with the Constitution. "Should radical alterations take place they will not result from the deliberate sense of the people," he concluded, "but will be obtained by management, or extorted by menaces."<sup>19</sup>

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14. On this point, see especially his revealing letter to E. Randolph of Jan. 10, 1788, in Robert A. Rutland, et al., eds., 10 *The Papers of James Madison* 354 (U. of Chicago Press, 1977).

15. Letter of J. Madison to T. Jefferson, Sep. 21, 1788, in Robert A. Rutland, et al., eds., 11 *The Papers of James James Madison* 257, 258 (U. Press of Virginia, 1977).

16. Letter of J. Madison to T. Jefferson, Aug. 10, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 226 (cited in note 15).

17. See letter of E. Randolph to J. Madison, Aug. 13, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 231-32 (cited in note 15).

18. Letter of J. Madison to E. Randolph, Aug. 22, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 237 (cited in note 15).

19. Id. Writing to Jefferson on August 23, 1788, Madison again noted that "[a]n early Convention is in every view to be dreaded in the present temper of America. A



These concerns were not confined to Madison's private writings, for he voiced much the same sentiments in *Federalist* 49 and 50. Here Madison went out of his way to discuss a proposal that was *not* before the American public in 1787-1788: Jefferson's scheme, as sketched in *Notes on the State of Virginia*,<sup>20</sup> to allow periodic or occasional appeals to the sovereign authority of the people to remedy situations in which one branch of government encroached on the constitutional duties of another. Madison faulted this proposal on three grounds. First, "frequent appeals" of this kind would "deprive the government of that veneration which time bestows on every thing," sapping "[the] reverence for the laws" and the useful "prejudices of the community" that even "the most rational government" requires. Second, Americans would not always act under the favorable circumstances that during the Revolution had "repressed the passions most unfriendly to order and concord" and "stifled the ordinary diversity of opinions on great national questions." Constitutional "experiments are of too ticklish a nature to be unnecessarily multiplied," especially if they risked "disturbing the public tranquillity by interesting too strongly the public passions."<sup>21</sup> Third, and most important, Madison feared that a public decision on a constitutional dispute

could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character, and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions*, therefore, not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controlled and regulated by the Government.<sup>22</sup>

On constitutional questions, then, as on ordinary political issues, Madison believed that any coherent expression of public opinion

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very short period of delay would produce the double advantage of diminishing the heat and increasing the light of all parties." 11 *The Papers of James Madison* at 238 (cited in note 15).

20. For Jefferson's proposal in *Notes on the State of Virginia*, see the excerpt printed in Kurland and Lerner, eds., 1 *The Founders' Constitution* at 639-42 (cited in note 9).

21. *Federalist* 49 (Hamilton) in Cooke, ed., *The Federalist Papers* at 340-41 (cited in note 4).

22. *Id.* at 342-43.

would nearly always flow from the volatile forces of passion and interest that he was eager to "control."

All of these arguments were *prospective*: all anticipated the role that public opinion would play in future constitutional disputes. Arguably Madison might have believed that the special circumstances attending this original moment of constitution-making of 1787-1788 were operating to allow public reason to ground its decision on "the true merits of the question." But again, little if anything in his private writings of this period indicates that he held a more exalted opinion of the character of the original debate on the adoption of the Constitution. To suggest that he would have regarded the entire corpus of this public debate as a reliable and authoritative index of what the Constitution originally meant, or an evidentiary resource to which later interpreters could confidently turn, stretches the boundaries of plausibility.

Did Madison have a positive theory of his own to explain how the clauses of the Constitution might be interpreted to preserve its essential equilibrium? Three principles best encapsulate the interpretive norms to which Madison originally subscribed. First, it is plausible to assume that his approach to constitutional interpretation would have been cautiously conservative and even originalist in this sense: that the aim of interpretation should be to preserve the original boundaries between departments and jurisdictions laid out in the text of the Constitution. But, in the second place, Madison's approach to the complementary problems of federalism and separation of powers rested on the recognition that these lines were not neatly or unambiguously drawn. As he put the crucial point in *Federalist* 37:

Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity that reigns in these subjects, and which puzzle the greatest adepts in political science.<sup>23</sup>

If that was the case, it followed that a more precise surveying of constitutional boundaries would depend on some course of interpretation and adjustment.

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23. *Federalist* 37 (Madison) in Cooke, ed., *The Federalist Papers* at 235 (cited in note 4).

As Madison went on to observe, “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>24</sup> Because a constitution was more than a statute, “liquidating” its meaning might require other forms of review than those customarily applied to legislation. Yet no statute adopted in America had ever undergone “more mature” deliberation than the Constitution itself, and though Madison did not develop the point explicitly, the same maxim would surely govern its interpretation as well. In this sense, Madison’s original expectations about interpretation probably lay fairly close to H. Jefferson Powell’s account: the intended meaning of the Constitution would only become evident over time, as a course of “discussions and adjudications” set the precedents required to illuminate and clarify exactly where the boundaries and landmarks of power lay.

There was, however, a third and arguably more important expectation about the problem of constitutional interpretation that Madison harbored in 1787-1788, and which becomes all the more striking when it is juxtaposed with the positions he took in the years ahead. Madison did not believe that the most likely sources of encroachment which interpretation would have to address and correct were evenly or symmetrically distributed throughout the constitutional system. The danger that alarmed him most—especially within the national realm of government—would emanate from the House of Representatives, the one institution where the factious passions and interests of the people would be felt most immediately. Madison fittingly pursued this point in the final lines he wrote as Publius. “[T]he irresistible force possessed by that branch of a free government, which has the people on its side,” he wrote in *Federalist* 63, made the common Anti-Federalist prediction that the Senate might “transform itself, by gradual usurpations, into an independent and aristocratic body” utterly frivolous. Should it ever seek to do so, “the [H]ouse of [R]epresentatives, with the people on their side will at all times be able to bring back the constitution to its primitive form and principles.” Not so the obverse situation. “Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the [s]enate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legisla-

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24. *Id.* at 236.

ture, the affections and support of the entire body of the people themselves."<sup>25</sup>

Nothing that transpired during the ratification debate or the first federal elections shook this opinion. While waiting for Congress to assemble, Madison predicted that the new government would share many of the same democratic "features" of "the State Governments."<sup>26</sup> When Congress conducted its first serious constitutional debate, he wrote Randolph that he favored a sole presidential power over the removal of executive officials because "I see, and *politically feel* that that will be the weak branch of the Government."<sup>27</sup> This concern recurs in a letter to his mentor, Edmund Pendleton. "In truth, the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself," Madison almost sighed. "And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the Encroachments of the Legislative department." If the choice of evils lay between the Senate and the President, Madison added, there was more to fear from the upper house. But "I am fully in the opinion," he concluded, "that the numerous and immediate representatives of the people, composing the other House, will decidedly predominate in the Government."<sup>28</sup>

Over the next seven years, however, Madison had to reassess these underlying premises of his thought. His movement toward the endorsement of a form of originalism was not the product of a speculative effort to fashion a proper model of interpretation, but a response to the events that generated the great partisan conflicts of the 1790s: the dispute over the bank in 1791, the outbreak of European war in 1793, and the prolonged debate over the Jay Treaty in 1795-1796. That does not mean, however, that Madison's reassessments were driven by politics alone, or that his constitutional positions were purely instrumental means to pursue political ends. For one thing, the boundary between the political and the constitutional cannot be so tidily drawn; for another, it would be an error to assume that agreement upon norms and procedures of constitutional interpretation accompa-

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25. Federalist 63 (Hamilton) in Cooke, ed., *The Federalist Papers* at 430-31 (cited in note 4).

26. Letter of J. Madison to T. Jefferson, Mar. 29, 1789, in Charles F. Hobson, et al., eds., 12 *The Papers of James Madison* 37, 38 (U. Press of Virginia, 1979).

27. Letter of J. Madison to E. Randolph, May 31, 1789, in Hobson, et al., eds., 12 *The Papers of James Madison* at 190 (cited in note 26).

28. Letter of J. Madison to E. Pendleton, June 21, 1789, in Hobson, et al., eds., 12 *The Papers of James Madison* at 253 (cited in note 26).

nied the adoption of the Constitution in 1788. It may well have been that the inclination to read the Constitution as a statute or contract might be read was the most natural course that Americans could follow after 1789; but that did not preclude the emergence of other norms of interpretation as Americans worked out the implications of treating popularly ratified constitutions as supreme law.

One incident from the well-known House debate of June 1789 over the removal power of the president does suggest that recourse to the documentary evidence relating to the adoption of the Constitution was *not* part of the interpretative quiver from which its first interpreters could readily draw.<sup>29</sup> One pole in this debate was occupied by William L. Smith of South Carolina, who argued that the president had no discretionary authority to remove subordinate officials, that impeachment was the only constitutionally recognized mode of removal, and that this entire issue was probably best left to judicial resolution the first time a displaced official sued to retain his position. After failing to prove that removal required impeachment, Smith insisted that the consent of the Senate was constitutionally required to remove as well as appoint.<sup>30</sup> This opinion was supported by “[a] publication of no inconsiderable eminence, in the class of political writings on the constitution,” Smith told the House on June 16. He then read a passage from *Federalist 77* affirming that “[t]he consent of [the Senate] would be necessary to displace as well as appoint.”<sup>31</sup> But a rude shock awaited Smith. As he wrote Edward Rutledge shortly thereafter:

the next day [Egbert] Benson [of New York] sent me a note across the house to this effect: that *Publius* had informed him since the preceding day’s debate, that upon mature reflection he *had changed his opinion* & was now convinced that the President alone should have the power of removal at pleasure; He is a Candidate for the office of Secretary of Finance!<sup>32</sup>

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29. For the initial debate on this issue, see Charlene Bangs Bickford, et al., eds., 10 *Documentary History of the First Federal Congress of the United States of America* 718 (John Hopkins U. Press, 1992) (recalling the debate of May 19, 1789) and Charlene Bangs Bickford, et al., 11 *Documentary History of the First Federal Congress of the United States of America* 842-1036 (John Hopkins U. Press, 1992) (continuing the debate from June 16-22, 1789). For analysis of the issues in this debate, see Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* 49-57 (Belknap Press, 1966).

30. W. L. Smith, speech of June 16, 1789, in Bickford, et al., eds., 11 *Documentary History* at 860, 861-64 (cited in note 29).

31. *Id.* at 861.

32. Letter of W. Smith to E. Rutledge, June 21, 1789, in 69 *South Carolina Historical Magazine* 6, 8 (South Carolina Historical Society, 1968).

The candidate was, of course, Hamilton; and Smith may well have known that Madison was the other of the "two gentlemen of great information" who had written as "Publius."<sup>33</sup>

As an exercise in interpretation, the removal debate followed the prevailing rules of construction that emphasized the manifest language of the text, internal consistency, and fidelity to general principles. Congressmen disagreed not about these rules per se, but rather about matters of definition and the weight to be given to specific passages and principles.

As interesting as the removal debate may be to scholars as the first example of constitutional interpretation under the new government, it was, of course, the debate of 1791 over the bill to charter a national bank that first opened the great fissure that widened every year thereafter—and which arguably resonates still.<sup>34</sup> Curiously, neither Powell nor Lofgren pays any attention to the arguments Madison advanced in opposing the bank during the debate in the House; Powell instead examines the rival opinions of secretaries Hamilton and Jefferson,<sup>35</sup> while Lofgren looks ahead to Madison's reasoning on the process whereby precedent and popular acceptance made acceptable what was originally dubious.<sup>36</sup> In fact, in the hunt for the origins of originalism, Madison's major speech of February 2, 1791, is noteworthy for several reasons.

First, Madison clearly indicated that his knowledge of the deliberations at the Federal Convention, and thus of the framers' intentions, was a material factor informing his constitutional objections to the bank. His reservations were "the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected."<sup>37</sup> That proposal was in fact his own, numbered among a list of "proper" powers referred to the committee of detail on August 18, 1787. When no such power was reported, Madison renewed his motion (on September 14) to authorize Congress "to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States

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33. W. L. Smith, speech of June 16, 1789, in Bickford, et al., eds., 11 *Documentary History* at 861 (cited in note 29).

34. For the debate as a whole, see Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 *J. of the Early Republic* 19 (1990); and Stanley Elkins and Eric McKittrick, *The Age of Federalism* 223-34 (Oxford U. Press, 1993).

35. Rakove, ed., *Interpreting the Constitution* at 69-70 (cited in note 1).

36. *Id.* at 139-40.

37. J. Madison, speech of Feb. 2, 1791, in Charles F. Hobson, et al., eds., 13 *The Papers of James Madison* 372, 374 (U. Press of Virginia, 1984).

may be incompetent.” Rufus King and James Wilson clearly thought this proposal embraced banks, for they disagreed whether its approval would damage the prospects for ratification by exciting the financial rivalries of Philadelphia and New York. The proposal was abandoned after the delegates rejected a test vote on a “modified” motion “limited to the case of canals.” Nothing in Madison’s notes indicates that the motion was thought superfluous because the necessary-and-proper clause already reached the power in question. That is, his very purpose in proposing the power in question presumed that without such explicit authority, the new Congress could not readily issue charters of incorporation. On the other hand, just as Wilson thought that a power to create “mercantile monopolies” was “already included in the power to regulate trade,” so other framers may have reasoned that a power to charter banks could derive from other clauses.<sup>38</sup>

Madison did not claim that this tidbit of history was conclusive in itself; he merely sought to demonstrate that his scruples were not contrived for the moment.<sup>39</sup> Instead, as “preliminaries to a right interpretation,” he proceeded to offer several “rules.” The first two argued that when the “meaning” of a provision was “doubtful, it is fairly triable by its consequences,” especially when “the very characteristic of the government” might be threatened. Madison’s next two rules laid the groundwork for an originalist method of construction:

In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

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38. Debate of Sept. 14, 1787, in Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* at 325, 615-16 (Yale U. Press, rev. ed., 1966) (“Records”). In 1798, Abraham Baldwin recounted to Jefferson a conversation he had had with Wilson when the bank bill was under discussion, in which Baldwin recalled and Wilson agreed that Robert Morris had moved in Convention to give Congress a specific power to incorporate banks, but Gouverneur Morris had opposed the idea with the political arguments that Madison’s notes ascribe to King. Farrand, ed., 3 *Records* at 375.

39. It is noteworthy, too, that Madison had reasoned similarly about the Constitution a year earlier, when Tench Coxe proposed a scheme to set aside national lands as a fund to lure European inventors to bring their machinery to America. Letter of T. Coxe to J. Madison, Mar. 21, 1790, in Hobson, et al., eds., 13 *The Papers of James Madison* at 112-13 (cited in note 37). Though Madison had proposed an appropriate provision at the Convention, it had been whittled down to the sole incentives of limited patents and copyrights. “This fetter on the National Legislature tho’ an unfortunate one, was a deliberate one,” Madison concluded. “The Latitude of authority now wished for was strongly urged and expressly rejected.” Letter of J. Madison to T. Coxe, Mar. 30, 1790, in Hobson, et al., eds., 13 *The Papers of James Madison* at 128 (cited in note 37).

Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.<sup>40</sup>

Here, then, a second and more important originalist implication of Madison's speech leaps into view (though overlooked by Powell and Lofgren): Madison was already prepared to suggest that historical evidence drawn from the ratification debates did provide a legitimate, relevant basis for interpretation. Ignoring *The Federalist*, which offered little support for his position, Madison looked elsewhere, reading passages from the debates in the Pennsylvania, Virginia, and North Carolina conventions to affirm that Federalists had repeatedly argued "that the powers not given" to the national government "were retained; and that those given were not to be extended by remote implications"; and further, "that the terms necessary and proper gave no additional powers to those enumerated." Madison did not describe these opinions as anything more than expositions; they only confirmed arguments that could be advanced on more familiar grounds. But the germ of an interpretive theory of original understanding was nonetheless present.<sup>41</sup>

That this theory was something of a novelty seems to be corroborated by the thorough rebuke it elicited from Elbridge Gerry, the non-signing framer of the Constitution who later became Madison's vice-president. Dismissing Madison's rules as "being made for the occasion," Gerry invoked the "sanctioned" authority of Blackstone to propose that the House follow more settled rules. "[T]he fairest and most rational method to interpret the will of the legislator," Blackstone had written, "is, by exploring his intention at the time when the law was made, by *signs* the most natural and probable; and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law."<sup>42</sup> Gerry did not identify the "legislator" whose "will" and "intention" he was analyzing, but he offered telling objections that grasped the problem of recovering a coherent collective intention by aggregating individual opinions. As for Madison's appeal to the Federal Convention, Gerry asked,

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40. J. Madison, speech of Feb. 2, 1791, in Hobson, et al., eds., 13 *Papers of James Madison* at 374 (cited in note 37).

41. *Id.* at 380.

42. E. Gerry, speech of Feb. 7, 1791, in M. St. Clarke and D.A. Hall, eds., *Legislative and Documentary History of the Bank of the United States* 75-81 (Augustus M. Kelley, reprint ed., 1967).



are we to depend on the memory of the gentleman for an history of their debates, and from thence to collect their sense? This would be improper, because the memories of different gentlemen would probably vary, as they have already done, with respect to those facts; and, if not, the opinions of the individual members, who debated, are not to be considered as the opinions of the convention.<sup>43</sup>

Gerry then demonstrated the fallibility of his own memory by wrongly claiming that the proposition the Convention had entertained was one “to erect *commercial* corporations.” But his objection grew stronger when he turned to Madison’s use of the ratification conventions. It was well known that these records were “partial and mutilated,” Gerry noted. Even if that bias was discounted, the speech “of one member” could not be taken “as expressing the sense of a convention.” Finally, Gerry recalled how the urgency of the ratification proceedings led both “parties to depart from candor, and to call in the aid of art, flattery, professions of friendship” and other doubtful tactics. “Under such circumstances,” he concluded, “the opinions of great men ought not to be considered as authorities, and, in many instances, could not be recognised by themselves.”<sup>44</sup>

Madison did not answer these points in his second speech of February 8—except to marvel at how far Gerry had come since 1787. “[T]he powers of the constitution were then dark, inexplicable and dangerous,” Madison observed, recalling Gerry’s objections to the Constitution, “but now, perhaps as the result of experience they are clear and luminous!”<sup>45</sup> After Congress approved the bank bill, the President asked Attorney General Randolph, Jefferson, and Hamilton to brief the issue. Only Jefferson followed Madison’s lead in looking to the evidence of 1787-1788, and he did so merely to note that the Convention had rejected the power in question. But Randolph, while also opposing the bill, thought that neither the “almost unknown history” of the Convention nor opinions given during ratification could be regarded.<sup>46</sup> Hamilton refuted the argument even more vigorously. “[N]o inference whatever can be drawn” from the unauthenti-

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43. *Id.* at 79.

44. *Id.* at 80.

45. J. Madison, speech of Feb. 8, 1791, in Hobson, et al., eds., 13 *Papers of James Madison* at 385 (cited in note 37). Madison was, of course, referring to Gerry’s objections to the Constitution. Gerry had been one of the three delegates to the Convention who had declined to sign the completed Constitution (along with Madison’s Virginia colleagues, George Mason and Edmund Randolph).

46. Opinion of E. Randolph, Feb. 12, 1791, in Clark and Hall, eds., *Legislative and Documentary History* at 90 (cited in note 42).

cated and “very different accounts” that might be given of the Convention’s action. Hamilton concluded this discussion by restating the familiar rule of interpretation.<sup>47</sup> Jefferson could “not deny, that, whatever may have been the intentions of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.”<sup>48</sup> Washington signed the bill.

Hamilton’s opinion and Gerry’s speech certainly confirm, as Powell argues, that the prevailing rules of interpretation did not yet permit the recourse to historical evidence that a sound theory of originalism would require. Even for Madison, arguments drawn from the text and structure of the Constitution seemed to weigh more heavily in his opposition to the bank than did his corroboratory appeals to the intentions and understandings of 1787-1788. Yet his use of historical evidence indicates that as early as 1791 he was prepared to argue that the understandings of the ratifiers could erect a legitimate fence around the limits of construction. Nor was Madison’s originalism wholly contrived to meet expedient political needs. He would not have proposed adding a power to grant charters of incorporation to Article I had he believed that the necessary and proper clause would work to the same effect. More important, his criticism of an open-ended interpretation of this clause, however dubious it appears to scholarly commentators, was clearly consistent with the critique of legislation on which his constitutional theory rested. The great problem of republicanism was to develop constitutional mechanisms and political understandings to limit the plasticity of legislative power and the irresistible force of public opinion behind it.<sup>49</sup> Licensing Congress to make its discretion the test of its authority was the last precedent Madison wished to set while the process of ascertaining the meaning of the Constitution was still far from complete.

This fundamental premise of Madison’s theory became increasingly problematic, however, after 1791, when foreign affairs overtook domestic policy as the chief source of partisan conflict. The imperatives of diplomacy placed a premium on the energy and dispatch the framers had envisioned for the presidency; they also gave the administration a political initiative to which the opposition Republicans in Congress could only react. The constitu-

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47. Opinion of A. Hamilton, Feb. 23, 1791, in Clark and Hall, eds., *Legislative and Documentary History* at 101 (cited in note 42).

48. *Id.*

49. For further commentary on this point, see Rakove, *Original Meanings* at 46-54, 310-16, 330-36 (cited in note 13).

tional implications of this dispute were first laid out in a famous exchange between Hamilton (writing as "Pacificus") and Madison (writing as "Helvidius"). Defending the administration's April 1793 decision to issue a proclamation of neutrality without consulting Congress, then in recess, Hamilton argued that the conduct of foreign relations was inherently executive in nature, except in those cases (treaties, diplomatic appointments, declarations of war) where the Constitution explicitly dictated otherwise.<sup>50</sup>

Madison replied that this improper view of executive power seemed to derive from two sources. One was the ideas of such authorities as Locke and Montesquieu, whose views were "evidently warped" by their admiration for the British constitution.<sup>51</sup> The other was the model of executive prerogative that British theory and practice placed in the crown. In preference to these sources, Madison concluded, one need only read the works of a recent American writer: Hamilton himself—or rather Publius, though the authors of *The Federalist* were now publicly known. Drawing on *Federalist* 69 and 75, Madison quoted passages which contradicted the claims of "Pacificus," noting that they were "made at a time when no application to *persons* or *measures* could bias: The opinion given was not transiently mentioned, but formally and critically elucidated: It related to a point in the constitution which must consequently have been viewed as of importance in the public mind."<sup>52</sup> Had the Federalists of 1788 been privy to the analysis of "Pacificus," Madison concluded, they could only have thought it "'an experiment on public credulity.'"<sup>53</sup>

Madison's recourse to *The Federalist* was made largely for rhetorical effect; he did not suggest that "Pacificus" was wrong *because* he contradicted Publius, only that these essays exposed the fallacy in Hamilton's reasoning. Originalism itself was not at stake in 1793. But it did become a serious question in 1795-1796, after the Senate narrowly approved the controversial treaty that Chief Justice John Jay brought back from Britain. Only then was the treaty published, eliciting a storm of protest that alarmed

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50. See Letter of "Pacificus," No. I, June 29, 1793, in Harold C. Syrett and Jacob E. Cooke, eds., 15 *The Papers of Alexander Hamilton* 33-43 (Columbia U. Press, 1969).

51. Letter of "Helvidius," No. 1, Aug. 24, 1793, in Thomas A. Mason, et al., eds., 15 *The Papers of James Madison* 68 (U. Press of Virginia, 1985).

52. *Id.* at 72.

53. Letter of "Helvidius," No. 3, Sep. 7, 1793, in Mason, et al., eds., 15 *The Papers of James Madison* at 97 (cited in note 51). This last uncredited quotation came from *Federalist* 24, as only Madison and (perhaps) its author, Hamilton, were likely to know.

Washington but failed to deter his ratification of the treaty in August 1795. Barred from blocking the treaty politically, the Republican opposition fashioned constitutional barriers to its implementation, hoping to capitalize on their majority in the House when the Fourth Congress convened in December.

Treaty opponents made three claims on behalf of the constitutional authority of the House in treaty-making. Should not a treaty which affected foreign trade require the approval of the House (which shared the congressional power to regulate commerce)? If public funds had to be expended to implement the treaty, should the House not judge those appropriations on their merits? And how could it exercise this traditional power without considering the treaty proper, which might in turn justify examining other records relating to its negotiation?<sup>54</sup> Though Madison was reluctant to take this ground, he was also the principal author of a widely reprinted petition to the Virginia assembly whose fourth major complaint held that "The President and Senate by ratifying this Treaty, usurp the powers of regulating commerce, of making rules with respect to aliens, of establishing tribunals of justice, and of defining piracy"—all powers of Congress.<sup>55</sup>

The burden of defending the treaty fell largely to Hamilton, now retired to his legal practice. In thirty-eight numbers of "The Defence," Hamilton and Rufus King justified the Jay Treaty largely on its merits, reaching the constitutional questions only in the final three essays published just after the new year. In the first of these essays, Hamilton argued that the plain text of the supremacy clause bound the House no less than the states to adhere to duly ratified treaties.<sup>56</sup> The next essay argued that the claims made for the House would render the formal treaty power of the President and Senate "altogether nominal,"<sup>57</sup> thereby vio-

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54. For an introduction to the constitutional questions, see Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 85-93 (Ballinger Publishing Co., 1976), and the fascinating article by Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229, 260-68 (1990).

55. Petition to General Assembly by J. Madison, Oct. 12, 1795, in Stagg, ed., 16 *The Papers of James Madison* at 102 (cited in note 3). This point does not appear in the draft version of this petition which the editors of *The Papers of James Madison* have recently identified, and it is possible its addition came at the urging of Jefferson, whom the Madisons visited only days before the petition was first printed. Draft of Petition to the General Assembly by J. Madison, Sep. 1795, in Stagg, ed., 16 *The Papers of James Madison* 62-69 (cited in note 3).

56. See "The Defence No. XXXVI," Jan. 2, 1796, in Harold C. Syrett, ed., 20 *The Papers of Alexander Hamilton* 3 (Columbia U. Press, 1974).

57. "The Defence No. XXXVII," Jan. 6, 1796, in Syrett, ed., 20 *The Papers of Alexander Hamilton* at 13 (cited in note 56).

lating the rule of construction which required “that every instrument is so to be interpreted, that all the parts may if possible consist with each other.”<sup>58</sup> If the claims made for the House were allowed, pretexts could always be found to assert that a treaty trenched upon some aspect of legislation, thereby emptying the language of the treaty clause of *any* meaning.<sup>59</sup>

The last essay was addressed to Madison. Here Hamilton asked how the treaty power “was understood by the Convention, in framing it, and by the people in adopting it.” No “formal proof of the opinions” of the framers existed, Hamilton conceded. “But from the *best opportunity of knowing the fact*”—thus intimating that the author of “The Defence” was himself a framer—it was evident that they thought the treaty power was comprehensive in its reach.<sup>60</sup> For the truth of this claim he appealed to the two former framers—Madison and Abraham Baldwin—expected to “obstruct . . . execution” of the Jay Treaty in the House. Hamilton then cited George Mason’s and Gerry’s objections to the Constitution as proof that the treaty power vested “an *exclusive power of legislation*” in the President and Senate.<sup>61</sup> Nor was this an Anti-Federalist opinion alone, for in a lengthy footnote, Hamilton quoted two of Madison’s essays in *The Federalist* to confirm that Federalists had argued that the joint role of the President and Senate left the treaty power “sufficiently guarded.”<sup>62</sup> Where “Publius” was concerned, turn-about was fair play.

In March, Washington asked the House to appropriate funds to implement the treaty. Republicans then introduced a resolution asking the President to provide the executive papers that would enable the House to view the treaty in its proper light. Federalists answered this request by applying the conventional norms of legal construction. “Are we to explain the Treaty by private and confidential papers, or by any thing extraneous to the instrument itself?” asked Daniel Buck of Vermont.<sup>63</sup> A challenge to a treaty “should be determined from the face of the instrument,” William L. Smith argued; “a knowledge of the preparatory steps which led to its adoption, could throw no light

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58. *Id.* at 19.

59. See *id.* generally.

60. “The Defence No. XXXVIII,” Jan. 9, 1796, in Syrett, ed., 20 *The Papers of Alexander Hamilton* at 22 (cited in note 56).

61. *Id.* at 22-23.

62. *Id.* at 24 and n.\*.

63. W. Seaton and J. Gales, Jr., eds., 4th Cong., 1st Sess. *Debates and Proceedings in the Congress of the United States* 432 (Gales and Seaton, 1834-1856) (“*Annals of Congress*”).

upon it." The President would not "examine the Journals of the House" to test the constitutionality of a law, Smith added, nor would the Supreme Court do so in its imminent decision determining whether the federal carriage tax should be classed as a direct tax to be apportioned according to the three-fifths rule (the first case in which the Court clearly tested the constitutionality of a congressional statute).<sup>64</sup>

When the Republicans persisted, however, the focus of debate shifted from the treaty to the Constitution. Though Madison had misgivings about this strategy, he joined the fray in a lengthy speech on March 10, 1796. His argument rested on text and inference alone, not history. If Federalist arguments were given full force, he asserted, the House would be obliged to forfeit its "deliberation & discretion" and to support indefinitely a war triggered by a treaty of alliance framed by the President and Senate alone, regardless of its power over war, armies, and appropriations. Acknowledging some role for the House was the only way to give "signification to every part of the Constitution," even if the designated holders of the treaty power had to cope with the difficulties created.<sup>65</sup>

The immediate response to Madison's delayed entrance into the debate came from Smith, well known as Hamilton's spokesman. Smith "appeal[ed] to the general sense of the whole nation at the time the Constitution was formed," noting that through these "contemporaneous expositions," formed "when the subject was viewed only in relation to the abstract power, and not to a particular Treaty, we should come at the truth." Madison had made the same claim for *The Federalist* in his "Helvidius" letters, but Smith went one step further. Had the Virginia convention in which Madison served thought that the legislative authority of the House could check the treaty power, it would not have proposed an amendment to require commercial treaties to be ratified by two-thirds of all senators (rather than a quorum).<sup>66</sup> Theodore Sedgwick also made Madison his target. Did not Madison's "known caution and prudence" oblige him to explain, Sedgwick wondered, how the Federal Convention could have neglected to express the "true meaning" he had so belatedly discovered? Madison and other framers "certainly knew what they had so recently intended" at Philadelphia when they defended the

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64. Gales and Seaton, eds., *Annals of Congress* at 439-40 (cited in note 63).

65. See J. Madison, speech of Mar. 10, 1796, in Stagg, ed., 16 *The Papers of James Madison* at 255-63 (cited in note 3).

66. Gales and Seaton, eds., *Annals of Congress* at 495 (cited in note 63).

treaty power in the state conventions. But they had never answered objections to the treaty clause with the theory Madison now maintained; they had instead argued that the power was well secured by the mutual check of the President and Senate. And responding to a complaint that Smith “had not quoted any part of the proceedings on the subject, or of the reasons that led to the amendment,” Sedgwick read at length from the Virginia records, citing speakers on both sides to recreate the structure of its debate.<sup>67</sup>

Sedgwick thus implied that the intentions of the framers *were* relevant, and one other major Federalist speech developed the point further. It was well known that the politics of the Convention revolved around the compromise between small and large states over the Senate, Benjamin Bourne of Rhode Island reminded the House. That, too, indicated that the House did not possess the authority claimed. But Bourne also relied on speeches in the ratification conventions to make his point; he agreed, with Sedgwick, that “the real inquiry was, what opinion was entertained on this subject by those who ratified the Constitution.”<sup>68</sup> That was the question which engaged the other speakers who examined the evidence of 1787-1788. In this inquiry, both Federalists and Republicans suggested that the ratifiers and, beyond them, the American people had in some sense consented to the particular interpretation each side was now advancing. “The people have declared that the President and Senate shall make Treaties, without a single exception,” Isaac Smith observed, “and, lest there should be any mistake or cavilling about it, they have put it in written words, as they thought, too plain to be doubted, too positive to be contradicted.”<sup>69</sup> On the other side, Republicans argued that the Constitution itself might never have been ratified had the people realized that the President and Senate would possess this “uncontrollable power.”<sup>70</sup> Several speakers asked whose original understandings were to be treated as more authoritative, the majority’s or the minority’s? William Findley, the leading Pennsylvania Anti-Federalist now turned Republican, even found himself ironically reflecting that he did

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67. Gales and Seaton, eds., *Annals of Congress* at 519-20, 522-27 (cited in note 63); the complaint that no recourse had been made to the actual debates came from William Branch Giles, a leading Republican from Virginia. *Id.* at 502-03.

68. For Sedgwick’s quotation, see Gales and Seaton, eds., *Annals of Congress* at 526-27 (cited in note 63). For Bourne’s comments see *id.* at 567.

69. Gales and Seaton, eds., *Annals of Congress* at 627 (Smith) (cited in note 63). See also *id.* at 516 (expressing similar views).

70. Gales and Seaton, eds., *Annals of Congress*, at 543-46 (Holland) (cited in note 63). See also *id.* at 635 (stating similar views by Livingston).

not “expect the sentiments of a minority, acting under peculiar circumstances of irritation, and consisting of but about one-fifth of the members [at Harrisburg], to be quoted as a good authority for the true sense of the Constitution.”<sup>71</sup>

From these remarks, it seems apparent that the House was prepared to entertain interpretations reconstructing the positions of framers, ratifiers, and “the people.” The ensuing disagreements prompted a few representatives, on both sides, to suggest that recourse to historical evidence was futile. Edward Livingston, the author of the original motion seeking the treaty papers, even declared that “we were now as capable at least of determining the true meaning of that instrument as the Conventions were; they were called in haste, they were heated by party, and many adopted it from expediency, without having fully debated the different articles.”<sup>72</sup> But that did not stop him from undertaking his own originalist analysis, nor did it recall the House to traditional rules of construction. In these exchanges, Federalists gained the upper hand, leading Republicans to rely on the analogical reasoning to the British constitution that Madison had spurned in “Helvidius.” If the British king submitted treaties to Parliament when they required further legal action, they reasoned, did it not follow that the American House retained at least equal authority? Federalists dismissed this reasoning in the same terms that Madison had condemned “Pacifcus” in 1793. “[T]he practice and prerogatives of that despotic Court” were irrelevant, Daniel Buck exclaimed. “What have they to do with a Constitution, which is the express will of the great body of the people of America, prescribing rules for her own self-government?”<sup>73</sup>

Notwithstanding the problems they faced in rebutting such blunt remarks, the Republican majority approved the call for the treaty papers. In his short but cogent reply, Washington made little use of the extended memorandum that he had solicited from Hamilton—with the exception of one point. Hamilton had reminded Washington that the Convention had “overruled” a motion to involve the House in treatymaking, and the President made this the concluding point of his reply. If one consulted the

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71. Gales and Seaton, eds., *Annals of Congress* at 591-92 (Findley) (cited in note 63). See also *id.* at 578-80 (stating remedies by Brent).

72. Gales and Seaton, eds., *Annals of Congress*, at 635 (Livingston). See also *id.* at 647 (stating the views of Milledge, a Republican, citing the necessary and proper clause to uphold the authority of the House!), 657-58 (citing Coit, a Federalist, then proceeding to reflect on conduct of Baldwin and Madison).

73. Gales and Seaton, eds., *Annals of Congress* at 703-10 (quotations at 709-10) (cited in note 63). This analogy had been made frequently since the start of the debate, especially by the rising Republican star, Albert Gallatin. See *id.* at 464.



Convention journal, which Washington (its custodian) had since deposited in the Department of State, “it will appear” that a motion to require treaties to be “ratified by a Law” had been “explicitly rejected.”<sup>74</sup> Had Hamilton been present at Philadelphia when Gouverneur Morris made this motion on August 23, 1787, he might also have reminded Washington that Madison had first “suggested the inconvenience of requiring a legal *ratification* of treaties of alliance for purposes of war,” then wondered whether the Convention should distinguish types of treaties which might or might not require “the concurrence of the whole Legislature.”<sup>75</sup> If that evidence implied that the exclusion of the House from treaty-making troubled Madison in 1787, it also confirmed the crucial point of how the Constitution as written, was to be interpreted *now*—for, of course, no such distinction had been made.

When the House continued to pursue the issue after learning of the President’s refusal, Madison felt compelled to reenter a debate he had worriedly observed since early March. His speech of April 6, 1796, offers perhaps the clearest (and most frequently cited) statement of his acceptance of a version of originalism. It was framed partly in response to Washington’s appeal to the journal of the Convention, which Madison now judged improper even though he had reasoned much the same way in 1791. But Madison had also been stung by the criticism he had personally suffered when William Vans Murray, a young congressman from Maryland, appealed directly to him during a lengthy speech of March 23. In what must have been a dramatic moment, Murray first praised Madison as the man to whose “genius and patriotism, in a great degree, he had always understood, were we indebted for the Constitution.” But he then urged Madison to rescue the House from its confusion.

If the Convention spoke mysterious phrases, and the gentleman helped to utter them, will not the gentleman aid the expounding of the mystery? If the gentleman was the Pythia in the temple, ought he not to explain the ambiguous language of the oracle? To no man’s exposition would he listen with more deference.

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74. For the Republican approval of the call for the treaty papers, see letter of A. Hamilton to G. Washington, Mar. 29, 1796, in Syrett, ed., *20 The Papers of Alexander Hamilton* 85, 100. For Washington’s reply, see letter of G. Washington to A. Hamilton, Mar. 31, 1796, in Syrett, ed., *20 The Papers of Alexander Hamilton*, 103 (cited in note 56).

75. Farrand, ed., *2 Records* at 392-94 (cited in note 38). Hamilton was away in New York at the time.

Yet Murray could not have disguised the mocking taunt that lurked beneath the praise, the implication that Madison had said little because the evidence did not sustain his position.

Nor did Murray halt there. In language that carried Madison back to his researches of 1787, Murray noted that “the historian and the commentator” who studies other constitutions have “to resort to records unintelligible” or “to the uncertain lights of mere tradition.” But Americans no longer had to settle for this obscurity. They had known “the Constitution from its cradle” and “its infancy,” better than any other society had ever known its constitution. But if the perplexing “doubts” the House now faced could be raised “upon some of its plainest passages,” what hope was there that posterity would maintain the boundaries of power?

One hundred years hence, should a great question arise upon the construction, what would not be the value of that man’s intelligence, who, allowed to possess integrity and a profound and unimpaired mind, should appear in the awful moments of doubt, and, being known to have been in the illustrious body that framed the instrument, should clear up difficulties by his contemporaneous knowledge? Such a man would have twice proved a blessing to his country.

Again, the younger man’s homage could not conceal a hint of mockery.<sup>76</sup>

Madison answered both Murray and the President on April 6. His speech was less an affirmation of the possibilities of using the understandings of the ratifiers to fix the meaning of the Constitution than an attempt to nullify any appeal to the authority and intentions of the framers. Madison disclaimed having either the resources or the obligation to speak for “the intention of the whole body” of the Convention. That would be a matter of some “delicacy,” because the framers had disagreed in their opinions (though some, he added, supported his current position). Moreover, he had a personal reason to avoid this mode of argument, for had he not been roundly criticized when he “incidentally” referred to the Convention during the bank debate of 1791? Nor had any other dispute yet been settled this way. And then Madison reached the critical transition:

But, after all, whatever 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 the

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76. Gales and Seaton, eds., *Annals of Congress* at 700-02 (cited in note 63).

expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.

This conclusion was entirely consistent with the great political and theoretical insight that had enabled Madison to persuade the Convention to follow his agenda. But as he then applied the evidence of ratification to the issue at hand, his qualified conclusions revealed more of the limitations attending this mode of interpretation than the blinding light it would shed on the true meaning of the Constitution.<sup>77</sup>

Again ignoring *The Federalist*, Madison limited his analysis to two categories of evidence. As to the first category—the published record of the conventions (Pennsylvania, Virginia, and North Carolina) where the treaty power was debated seriously—he had little to say. While noting that the speakers had regarded the treaty power as “limited” in nature, Madison ignored the *Federalist* objection that this limitation inhered in the division between President and Senate. Instead he pursued the analogy to the British constitution, which he weakly corroborated with an irrelevant allusion to the pardoning power. Madison concluded this part of the argument by conceding that even the Virginia debates, as published, “contained internal evidences in abundance of chasms, and misconceptions of what was said.”<sup>78</sup>

The second category—the amendments proposed by the state conventions—were a “better authority,” but not free of liabilities. No one could “expect a perfect precision and system” in these measures, given “the agitations of the public mind on that occasion, with the hurry and compromise which generally prevailed in settling the amendments to be proposed.”<sup>79</sup> Madison nonetheless plunged ahead to consider the amendments as they related to the allocation of the treaty power. Here, again, his argument did little more than speculate that the framers of those amendments would have favored the construction now advanced by the Republican majority. Madison then considered two other

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77. J. Madison, speech of Apr. 6, 1796, in Stagg, ed., 16 *The Papers of James Madison* at 294-96 (cited in note 3).

78. *Id.* at 296.

79. *Id.* at 297.

classes of amendments: those which had denied that laws could be suspended without the assent of the legislature, and those to require supermajorities for legislation relating to war, commerce, and appropriations. He concluded this analysis with another speculative question. Could the authors of these amendments, all of which touched upon powers whose exercise could be constrained by the treaty power, have supposed that they had given the President and Senate “an absolute and unlimited power” free of any control by the House?<sup>80</sup>

At no point did Madison explain how proposals designed to remedy perceived defects in the Constitution—proposals that he himself had ignored in compiling his amendments of 1789, and which went unadopted—could prevail over the explicit language of the treaty clause. He never explained how criticisms of the Constitution could be transformed into interpretations of its meaning, when the opposite inference was more logical. Nor did he explain how partial and hasty expressions of opinion in individual states could trump the contrary position that Federalists occupied in this debate when they treated the language of the Constitution as an expression of the “intention” of a sovereign people. At only one point did Madison briefly stumble upon an answer to these seemingly fatal objections, when he described an amendment to the treaty power proposed by North Carolina as “intended to ascertain, rather than to alter the meaning of the constitution.”<sup>81</sup> But developing this point would only have exposed his position to another powerful objection. How could an unadopted amendment proposed by a state rejoining the union *after* the Constitution had taken effect be regarded as authoritative?

When this prospect was raised in 1788, Madison vehemently denied that states might ratify the Constitution conditionally in the expectation that specific amendments would be adopted later. Where else could such a process end except in a second general convention whose prospects for success must be far worse than that of the meeting at Philadelphia?<sup>82</sup> Madison could hardly have drafted his speech of April 6 without recalling this concern; the manifest problems he now encountered in articulat-

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80. *Id.* at 297-99.

81. *Id.* at 298.

82. For example, see Letter of J. Madison to E. Randolph, Apr. 10, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 18-19 (cited in note 15); Letter of J. Madison to A. Hamilton, July 20, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 189 (cited in note 15); and Letter of J. Madison to T. Jefferson, Aug. 11, 1788, in Rutland, et al., eds., 11 *The Papers of James Madison* at 225-26 (cited in note 15).

ing his ideas may have been a mark of the intellectual embarrassment he felt.

If this was originalism, then, Madison was not yet prepared to make the most of it. His best known statement of the theory was marred by unresolved problems. Whatever clarity he gained by distinguishing framers from ratifiers was clouded by the difficulty of using the ambiguous debates and failed amendments of 1787-1788 to offset an express constitutional provision. After balking at using these sources in his first speech on the Jay Treaty, he was later driven to invoke their authority less by his belief that they provided a viable method of interpretation than by the arguments of other speakers, the President's message, and Murray's pointed appeal. In this debate, the more successful originalists were the Federalists whom Madison elsewhere accused of using the loose canon of Hamiltonian construction to enlarge the meaning of the Constitution. When Smith, Sedgwick, Bourne, and Murray appealed to the evidence of 1787-1788, they could plausibly argue that these opinions merited consideration because they were formed at a moment when partisan wrangling over a particular treaty was not a bias.<sup>83</sup> But if originalism could thus be defended as a neutral mode of interpretation, the temptation to resort to it was manifestly political. It was dictated not by the prior conviction that this was the most appropriate strategy to ascertain the meaning of the Constitution, but by considerations of partisan advantage.

That did not prevent commentators from forming opinions with greater or lesser degrees of neutrality, nor did it banish the ideal of neutrality from the temples of constitutional judgment. It merely demonstrated that neutrality could rarely be attained when the Constitution was so highly politicized, or when politics were so highly constitutionalized. This was not what Madison had intended in 1787, nor what he desired a decade later; but he contributed as much to this result as any of his colleagues and contemporaries, and he lived long enough to foresee its most tragic implications.

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83. Even this claim might be considered problematic. In 1788, concern over the potential negotiation of a treaty of commerce with Spain, in which the United States might abjure its rights to navigate the Mississippi and have free access to the Gulf of Mexico, was a major impediment to ratification of the Constitution in both Virginia and North Carolina.