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THE ORIGINAL UNDERSTANDING OF ORIGINAL INTENT?

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The Attorney General of the United States has called for a "jurisprudence of original intention." In response, Justice Brennan decries "facile historicism."[1] Whichever way the debate goes in its current phase, judges will continue to invoke original intent, legal scholars will evaluate the resulting judicial handiwork, and historians will criticize everyone's answers. But the basic issue will persist: what is the proper role for original intent in constitutional interpretation?

The issue may be considered on its own terms. This is the approach taken by Professor H. Jefferson Powell in an article that has attracted significant attention. What, Powell asks, was "the original understanding of original intent"?[2] In this article, I unabashedly appropriate Powell's central question. My purpose is to offer another reading of major chunks of the evidence that Professor Powell himself cites, although in the following pages I occasionally stray to other materials as well.

As a preliminary matter, it is important to observe that asking about the interpretive status of original intent implicates another issue: whose intent qualifies as the "original" intent? Without having systematically counted instances, I strongly sense that the disputants in the current fray overwhelmingly focus on "framer intent" to the exclusion of "ratifier intent."[3] To be sure, the empha-

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1. E. Meese, Speech to American Bar Association, July 9, 1985, *reprinted in* 2 BENCHMARK 1 (1986); W. Brennan, Text and Teaching Symposium on the Constitution of the United States: Contemporary Ratification 4 (October 12, 1985) (printed text available at Georgetown University).

2. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). On the article's reception, *see, e.g.*, R. DWORKIN, LAW'S EMPIRE 364, 450 n.9 (1986); Dworkin, *The Press on Trial*, N.Y. REV. OF BOOKS, Feb. 26, 1987, at 34 n.11.

3. Not least in reinforcing my thinking in this regard was the occasion of reviewing David Currie's encyclopedic account of the Constitution's first century in the Supreme Court. *See* Lofgren, Book Review, 4 CONST. COMM. 177, 183-84 & nn.16-18 (1987). If Currie's book exemplifies the priority given to "framer intent" within what may be called technical constitutional scholarship, Michael Kammen's sweeping survey of American constitutionalism offers at least suggestive evidence that similarly it is the framing, not the ratification,

sis is not always left unexplained. After conceding that "the intention of the ratifiers, not the Framers, is in principle decisive," Henry P. Monaghan has remarked that "the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it."[4] Sometimes, too, the label "framer" is used in a broad sense. When Justice Rehnquist spoke in 1976 about "the framers" and about "reading the record of the Founding Fathers' debates in Philadelphia," he at least briefly mentioned the ratification debates.[5] Critics of a jurisprudence of original intention have also noted the ratifiers' role. Justice Brennan did so in order to underscore the difficulty of determining an original intent.[6] Paul Brest lumps the framers and ratifiers together under the label of "ratifiers," and then employs the collective term in the course of attacking "originalism" and "intentionalism."[7]

In truth, the questions of original intent's interpretive status and the identity of the originators are closely intertwined. Justice Brennan's remark indicates one connection: ambiguity concerning the identity of the originators lessens the force of arguments based on their understandings and expectations. Another consideration is that equating original intent exclusively or primarily with framer intent (or, alternatively, with ratifier intent), or merging framer intent and ratifier intent, may adversely affect the interpretive status of original intent, depending on whether one form of intent proves an easier target than the other. The close connection between the two issues is especially apparent when one asks about the original understanding of original intent. Who were the originators whose understandings about original intent are of interest? What might seem to be a subsidiary issue—the originators' identity—thus emerges as an integral part of the overall problem.

A second preliminary involves word usage. "Intent" is not the term that I as a historian (or, I suspect, most historians) would have chosen to use in the context of the present debate. "Understanding" or "expectation" (or the respective plurals) might better de-

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which has generally caught the nation's attention. *See* M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

4. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981).

5. *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694, 697, 699 (1976).

6. *See* W. Brennan, *supra* note 1, at 4. Professor Jack N. Rakove, a leading historian of the 1780s and a close student of James Madison, has used Justice Brennan's remark to reiterate the same point. On balance Rakove, too, dismisses ratifier intent. *See* Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, Dec. 1986, at 77, 79 & *passim*, which I discuss further *infra*, text accompanying note 122.

7. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 214 & *passim* (1980).

scribe the subject of interest, as the title of Professor Powell's article itself suggests. But "intent" has emerged as a term of legal art, and so I use it (though not invariably) where I might not otherwise.

Finally, a preview and preemptive clarification: I argue that although the originators rejected the use of framer intent, they did not thereby envisage that constitutional interpretation would exclude consideration of original intent. Instead, they were clearly hospitable to the use of original intent in the sense of ratifier intent, which is *the* original intent in a constitutional sense.[8] In bold outline, this is not far from Professor Powell's conclusion; but in important respects he either obscures or distorts the answer.[9] In any event, as a historian dabbling in a present-day controversy I fully appreciate his disclaimer: "I am . . . unconcerned in this Article with what contemporary interpreters should do . . . ."[10] Yet, just as Professor Powell admits that his conclusions carry implications for the current debate, so perhaps do mine.

I. FRAMERS, RATIFIERS, AND FRAMER INTENT

The members of the Philadelphia Convention were silent about how they expected the Constitution to be interpreted. Noting the silence, Professor Powell contends that they assumed their handiwork would be construed according to then-prevalent common-law canons of statutory interpretation. The common-law tradition, Powell demonstrates, allowed interpreters to go beyond literal words in order to clarify ambiguity, resolve apparent contradictions, cover unforeseen circumstances, and the like, all with the goal of effectuating broad purposes. With respect to statutory interpretation specifically, it permitted reference to "intent," but in a sense which was quite different from that employed by modern "intentionalists." Rather than resorting to legislative history, the common-law courts inferred intent from the text itself, taken against the statute's common-law background and its on-going judicial application. In twentieth century terms, common-law judges employed "objective" or "constructive" intent rather than "subjective" or "historical" intent.[11]

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8. *Cf.* Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57, 58-59 (1987) (discussing "preconstitutional rules").

9. In other respects, I find his discussion highly informative, in particular his explication of the major pre-existing interpretive traditions available to Americans of the late 1780s. *See* Powell, *supra* note 2, at 888-901. Powell's mistake, I believe, is to give too little weight to how the newness of the constitutional settlement of 1787-88 opened the way for and indeed called for new interpretive approaches.

10. *Id.* at 886.

11. *Id.* at 895-904. Powell also explores the differences between common-law approaches to different kinds of documents, finding resort to subjective intent acceptable in

The extant records of the Philadelphia debates contain no explicit remarks on what may be called the framers' "interpretive intent." Professor Powell infers, however, that the framers assumed that the Constitution would be interpreted *exclusively* according to common-law canons. He relies on their attempts to refine the Constitution's language. These, he argues, reveal a realization that the instrument's precise wording would matter, just as in the case of statutes. In the course of several exchanges, the framers also recognized that interpretation could occur through construction.

Whether such evidence warrants the inference of exclusivity is problematical. For one thing, Professor Powell's reading of some of his sources is doubtful,[12] although the result, if not particularly reassuring, is not positively harmful to his argument. More telling, a desire for clarity in language is not antithetical to recognition that future interpreters might resort to subjective or historical intent to clarify any remaining obscurities. The delegates' concern about the scope of a ban on *ex post facto* laws indicates that they realized their own intentions would not *necessarily* control future interpretations[13] but that hardly clinches the point. Also, if I understand it correctly, a part of Professor Powell's argument has a circular quality. The framers' failure to endorse explicitly the use of subjective

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construing wills, and such resort becoming superficially acceptable regarding contracts toward the end of the eighteenth century. But the framers, he contends, "clearly assumed that future interpreters would adhere to then-prevalent methods of statutory construction." *Id.* at 905.

12. Regarding attempts to eliminate vagueness as indicating a commitment to common-law methods of interpretation, two of the episodes Powell cites (*id.* at 903 n.88) seem to me to reflect more a concern that the "vague" language in question was anything but vague in its diminution of state powers, which was precisely why some delegates supported and others opposed it. In any event, the episodes occurred while the Convention was initially reviewing the Virginia Plan—that is, at a time when everyone realized the plan was only a general statement which would need fleshing out if it proved to be the Convention's preferred approach. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53-54 (M. Farrand rev. ed. 1937) [hereinafter RECORDS] (May 31, on granting "Legislative power in all cases to which the State Legislatures were individually incompetent"); *id.* at 164-68 (June 8, on giving the national Legislature "authority to negative all [state] Laws which they shd. Judge to be improper"). In another instance, Powell finds the Convention debating a provision for "impeachment and removal of President in case of 'disability' " (Powell, *supra* note 2, at 903 n.88), whereas the phrase in question referred to "disability to discharge the powers and duties of his office" as a phenomenon *separate from* impeachment and removal. *See* 2 RECORDS *supra*, at 427 (Aug. 27, debating the section); 2 *id.* at 186 (Aug. 6, report of the Committee of Detail). Powell also gives more significance to the phrase "distinctive form of collecting the mind" than its context supports. *Compare* Powell, *supra* note 2, at 903, text associated with note 91, *with* 1 RECORDS *supra*, at 254-55 (June 16, remarks of Oliver Ellsworth). Here and later I cite Farrand's compilation, while Powell cites E. H. Hunt's 1893 edition of Madison's *Notes*. I have cross-checked the pertinent references.

13. See Powell, *supra* note 2, at 904 & n.93. Uncertain whether their wording accurately embodied their intentions, the delegates sought clarification from Blackstone's *Commentaries*. *See* 2 RECORDS, *supra* note 12, at 448-49, 617 (Aug. 29, Sept. 14).

intent, he seems to say, shows that they accepted common-law approaches to construction, which in turn indicates that they rejected subjective intent as a guide to subsequent constitutional interpretation.[14]

Finally, a somewhat different conclusion from Powell's can be squeezed from one bit of evidence that he (like others) relies on.[15] The episode in question is the Convention's decision to keep its journals secret. Professor Powell comments that "there is no indication that [the framers] expected or intended future interpreters to refer to any extratextual intentions revealed in the convention's secretly conducted debates."[16] The only related comments in Madison's notes are these:

> Mr. King suggested that the Journals of the Convention should be either destroyed, or deposited in the custody of the President [of the Convention]. He thought if suffered to be made public, a bad use would be made of them by those who would wish to prevent the adoption of the Constitution[.]
>
> Mr. Wilson prefered [sic] the second expedient. [H]e had at one time liked the first best; but as false suggestions may be propagated it should not be made impossible to contradict them[.]

The Convention then voted, ten states against one, to entrust the journals to the Convention's president, George Washington, and, after a query by Washington, further resolved (unanimously) that Washington should hold the journals "subject to the order of Congress, if ever formed under the Constitution."[17]

This episode indicates that the delegates intended that the journals not be made public during the ratification debates. They probably feared that publication would *politically* complicate the task of gaining the requisite approval by state conventions. (Perhaps they surmised that general knowledge of the disagreements that emerged during the Philadelphia meeting would lead to questions about the wisdom of various provisions.) They *may* also have feared that knowledge of the Convention's debates (or at least of its motions and votes, which is about all the journals contain) would influence interpretations of the meaning of the completed document during the ratification process, although this is not an obvious gloss on King's and Wilson's remarks. Whether the framers thought it important to keep the journals secret from *post*-ratification interpreters is even less certain from this scrap of evidence. But grant that the debate and decision to entrust the journals to General Washington show an intent to keep their content from entering into future

14. *See* Powell, *supra* note 2, at 903-04.
15. *Id.* at 903-04 (text associated with notes 91-93).
16. *Id.* at 903.
17. 2 RECORDS, *supra* note 12, at 648 (Sept. 17).

interpretations of the Constitution. This strongly hints that the delegates feared that if the journals were published, they could affect subsequent interpretation. Put differently, the delegates understood that even if common-law hermeneutics eschewed the use of subjective intent and legislative history in statutory interpretation, Americans might still resort to such sources in interpreting the Constitution.[18] It thus becomes problematic to say that the delegates had *no* expectations that future interpreters would turn to "any extratextual intentions revealed in the convention's secretly conducted debates."

A solid reason nonetheless exists for concluding that the framers intended that the Convention's proceedings *should* not enter into future interpretation. But the reason does not run against the use of *ratifier* intent.

The original Virginia Plan, submitted by Edmund Randolph on May 29, provided for ratification by state conventions "expressly chosen by the people, to consider & decide" upon the Constitution.[19] This arrangement was included in the final document in article VII, but not without debate over the alternative of ratification by state legislatures. In part the decision turned on the expectation that conventions chosen specifically to consider the Constitution were more likely than state legislatures to approve the document. More important, legislative ratification would give the Constitution only treaty status—that is, morally binding, but legally subject within individual states to subsequent legislative action.[20] As Madison expressed it, "the most unexceptionable form" of ratification was "by the supreme authority of the people themselves." Rufus King saw "a reference to the authority of the people expressly delegated to [state] Conventions, as the most certain means of obviating all disputes & doubts concerning the legitimacy of the new Constitution . . . ."[21]

Although the idea of a constitution drawing its legal force from the people may seem commonplace today, it was a relatively new notion in 1787. An advocate of legislative ratification, Oliver Ellsworth, "observed that a new sett [sic] of ideas seemed to have crept

18. A comparable conclusion comes from James Madison's later comment about his own intentions in keeping secret his notes, which he knew were far more detailed than the Convention's journals. *See* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 71-72 (G. Hunt ed. 1910) [hereinafter WRITINGS].

19. 1 RECORDS, *supra* note 12, at 22 (May 29, Virginia Plan).

20. *See* 1 RECORDS, *supra* note 12, at 122-23 (June 5); 1 *id.* at 379 (June 22); 2 *id.* at 88-94 (July 23). But not everyone agreed that state conventions were more likely to ratify. *See* 1 *id.* at 335 (June 20).

21. 1 RECORDS, *supra* note 12, at 123 (June 5, Madison); 2 *id.* at 92 (July 23, King).

in since the articles of Confederation were established. Conventions of the people, or with power derived expressly from the people, were not then thought of."[22] Ratification by conventions provided a way around the shoal of indivisible sovereignty, that potent abstraction of eighteenth century political-constitutional thought which had helped sink the first British Empire and threatened to scuttle a two-tiered governmental system in the United States. Recognition of the people as the political sovereign obviated the objection that coexisting state and central governments embodied the solecism of divided sovereignty, of *imperium in imperio*. Premised on popular sovereignty, convention ratification also comported with both the logic of the decision for independence and trends in state constitution making in the 1780s.[23]

During the Philadelphia Convention, explanations of this position did not display the fullness and clarity that they soon would. Still, the debates in Philadelphia over ratification by state conventions, when taken in the context of shifting thinking on the true nature of constitutional authority, provide the most persuasive basis for concluding that the framers themselves did not envisage framer intent as properly having a role in subsequent constitutional interpretation. Although they were the originators of the Constitution in an indubitable sense, the framers recognized that they were not the original source of the legal authority that the instrument might come to possess.

Confronted with wide-ranging public opposition when the Constitution came before the state ratifying conventions, its supporters refined their explanations of the document's source. When the Antifederalists charged that the Philadelphia Convention had exceeded its powers in elaborating a dangerous new compact between rulers and the ruled, Federalists responded that the Convention had simply *proposed* a constitution. The instrument would become binding only when it received the approbation of the people. Defending the Constitution in Pennsylvania in December 1787, James Wilson explained:

> [T]he late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of men. By their FIAT, it will become of value and authority; without it, it will never receive the character of

22. 2 RECORDS, *supra* note 12, at 91 (July 23).

23. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 306-43, 524-36 (1969).

> authenticity and power.[24]

The following month, James Madison in *The Federalist* No. 39 elaborated his partly federal-partly national analysis of the Constitution, which diverged from Wilson's straightforward assignment of sovereignty to the people of the United States.[25] Yet, in *The Federalist* No. 40, Madison substantially agreed with Wilson on the place of the Philadelphia Convention itself in the constitutional process, writing:

> It is time now to recollect, that the powers [of the Convention] were merely advisory and recommendatory; that they were so meant by the States, and so understood by the Convention; and that the latter have accordingly planned and proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.[26]

In mid-1788, North Carolina Federalists illustrated the pervasiveness of the argument. Challenged to explain how the Philadelphia Convention could appropriate the phrase "We, the People," William R. Davie, who had attended the 1787 meeting, paraphrased Wilson: "The act of the Convention is but a mere proposal, similar to the production of a private pen." "If the people approve of it," added Archibald Maclaine, "it becomes their act. . . . When that is done here, is it not the people of the state of North Carolina that do it, joined with the people of the other states who have adopted it?"[27]

Such a defense of the Constitution again left no place for *framer* intent as an authoritative guide to interpretation. The framers assuredly gave the document its words; they did not determine the meaning of those words as understood by the ratifiers, by those people whose views were crucial to legitimating the document as

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24. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION [RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA] 483-84 (M. Jenson ed. 1976) [hereinafter DOCUMENTARY HISTORY] (Wilson's speech in the Pennsylvania Ratifying Convention, Dec. 4, 1787).

25. *Compare* THE FEDERALIST No. 39, at 253-57 (J. Madison) (J. Cooke ed. 1961) *with* 2 DOCUMENTARY HISTORY, *supra* note 24, at 348-49, 555, 558 (Wilson's speeches in the Pennsylvania Ratifying Convention, Nov. 24, Dec. 11, 1787). On Wilson's views, *see generally* Rossum, *James Wilson and the Pyramid of Government*, in THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION 62-79 (R. Rossum & G. McDowell eds. 1981).

26. THE FEDERALIST No. 40, at 263-64 (J. Madison) (J. Cooke ed. 1961).

27. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 23, 25 (J. Elliot rev. ed. 1836) [hereinafter DEBATES]. *See generally* 4 *id.* at 16-26 (debate in the North Carolina Ratifying Convention, July 24, 1788). Although the North Carolina Convention did not ratify at this time (and the State remained briefly out of the Union), its debates are a good gauge of the direction Federalist arguments had taken over the preceding months. In the episode under discussion here, if Davies echoed Wilson's earlier formulation, Maclaine's remark better mirrored Madison's more subtle view of the ratification process in THE FEDERALIST No. 39, *supra* note 25.

fundamental law. Indeed, even if the proceedings of the Philadelphia Convention had been available to the ratifiers, the explanations of the Constitution's supporters regarding the Convention's role would have precluded the founders, framers and ratifiers alike, from giving dispositive weight to the framers' intentions as an interpretive guide.

Yet the same explanations and defenses of the Constitution cast substantial doubt on the conclusion that the founders, as they refined their thinking, took their interpretive bearings solely from then-prevalent canons of common-law interpretation. To have done so would have required them to view the Constitution as, or to analogize it to, a conventional legal document. What became increasingly apparent, however, was that the Constitution was fundamentally different; it was not a statute, but rather elaborated a new system of government which rested crucially on the sovereignty of the people.

Framer intent is at best a straw man in the argument over the interpretive intent of the founders. Can the same be said about ratifier intent?

II. THE RATIFIERS ON RATIFIER INTENT

Comments made during the ratification proceedings, both in the state conventions themselves and in the accompanying public debate, provide a less-than-direct answer to what the Constitution's proponents positively understood to be guides to constitutional interpretation. In surveying available clues, Professor Powell is, I readily concede, partly on target.

The Federalists sought to give the instrument a reasonable construction. They paid close attention to its words. They examined it in light of its purposes and the deficiencies it was designed to remedy; they analyzed its structure and harmonized its parts. Consistent with the common-law notion that meaning might flow from a series of decisions, Madison seemed to imply, in *The Federalist* No. 37, that some aspects of the document's division of authority between the state and central governments would only be determined by future adjudication.[28] Drawing even more attention from Professor Powell is the attack mounted against judicial construction by the Antifederalist "Brutus," along with Alexander Hamilton's response in *The Federalist* Nos. 78-83. According to Brutus, constructive interpretation of the Constitution was sure to render the judiciary supreme over the legislature, to extend national power

28. *See* THE FEDERALIST No. 37, at 236 (J. Madison) (J. Cooke ed. 1961).

generally, to effect "an entire subversion of the legislative, executive and judicial powers of the individual states," and to intimidate and beggar the citizenry.[29] Hamilton then "offered the most coherent Federalist rebuttal of the arguments of 'Brutus,' " as Professor Powell accurately observes. In the process, Hamilton treated the Constitution as a "quasi-statute, a command from a legal superior to those under its authority," open to interpretation through application of common sense.[30]

In the remarks of both Madison and Hamilton, Professor Powell discovers the endorsement of common-law hermeneutics. The key passage from Madison reads as follows: "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 meanings be liquidated and ascertained by a series of particular discussions and adjudications."[31] Powell explains that "Madison's argument, which Hamilton had anticipated in *The Federalist* No. 22, was of course a restatement in somewhat abstract terms of the old common law assumption, shared by the Philadelphia framers, that the 'intent' of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document's text at the outset."[32]

This seems an overstatement. Madison was not yet focusing on the problem of interpreting the Constitution; instead, he was providing a transition from Publius's discussion of the weaknesses of the Confederation and the general requirements of good government, to the actual provisions of the document itself. The context of the quoted passage from Madison was a plea to Americans to realize the difficulty any drafters would face in committing to writing the proper delineation of federal and state jurisdiction. The passage itself says nothing about *how* future interpreters would give the Constitution its meaning.[33] Contrary to Professor Powell's gloss, moreover, the framers in Philadelphia had not already evinced an exclusive commitment to common-law approaches as a guide to constitutional interpretation, and in fact had given some evidence that they positively understood that Americans would resort to sub-

29. *Essays of Brutus, reprinted in* 2 THE COMPLETE ANTIFEDERALIST 420 (H. Storing ed. 1981). *See id.* at 417-42.

30. Powell, *supra* note 2, at 909-12.

31. THE FEDERALIST No. 37, at 236.

32. Powell, *supra* note 2, at 910.

33. *See* THE FEDERALIST NO. 37, at 234-37.

jective intent if the requisite evidence were available.[34] Nor had a commitment to common-law approaches to *constitutional* interpretation appeared in *The Federalist* No. 22.[35]

Regarding Hamilton, Professor Powell finds that while rejecting Brutus's portrayal of the document as a plan that was sure to lead to tyranny, he "accepted the validity of the common law's hermeneutical techniques as means to discovering a document's 'intent.' " In particular, in *The Federalist* Nos. 78-83 "[h]e steadfastly reiterated *The Federalist*'s earlier claims that it was appropriate and necessary for the courts to 'liquidate and fix [the] meaning and operation' of laws, including the Constitution."[36] As explained above, however, the proposition that Publius had earlier advanced claims of this sort respecting interpretation of the Constitution needs careful qualification.

In any event, Hamilton did not specifically write in *The Federalist* No. 78 that courts would have to "liquidate and fix [the] meaning and operation" of the Constitution. The quoted phrase instead appears in Hamilton's discussion of the way courts deal with conflicting statutes. If it proved impossible to harmonize them, then the judges gave effect to the most recent. "But this," wrote Hamilton, "is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing."[37] In the case of conflict between a law and a constitutional provision, however,

> the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of judicial tribunals to adhere to the latter and disregard the former.

He had already provided the reason for the rule: "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under

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34. For the Philadelphia Convention's decision to keep its journals secret, see *supra* notes 15-18 and accompanying text.

35. While surveying the weakness of the Confederation, Hamilton in THE FEDERALIST No. 22 explained why lack of a federal judiciary to enforce *treaties* created difficulties with foreign nations. In the process, he wrote: "The treaties of the United States[,] to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." *Id.* at 143, *quoted in* Powell, *supra* note 2, at 910 n.134. He then argued that "one SUPREME TRIBUNAL" was necessary to avoid the problem of courts in each state rendering different interpretations of treaties. He gave no indication of what would guide the supreme tribunal in its treaty interpretations, for that was not his concern. Even less did he address the issue of how to interpret the Constitution.

36. Powell, *supra* note 2, at 912, 910.

37. THE FEDERALIST No. 78, at 525-26 (A. Hamilton) (J. Cooke ed. 1961).

which it is exercised, is void."[38]

In other words, Hamilton's argument in No. 78 did not address the question of *how* judges should interpret constitutional provisions, but rather stressed "that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[39] Hamilton thus defended constitutional supremacy rather than judicial supremacy or judicial review. His object was to deflect Brutus's argument that the Constitution would produce judicial supremacy through constitutional construction by the courts.[40]

Hamilton did concede that the courts would necessarily have to determine the meaning of the Constitution. "The interpretation of the laws is the proper and peculiar province of the courts," he wrote. "A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[41] But he deemphasized the likelihood that interpretation of the Constitution would involve intricate construction. The courts would declare void "all acts contrary to the *manifest* tenor of the constitution." "If there should happen to be an *irreconcilable* variance between the two [that is, the Constitution and a law], that which has the superior obligation and validity ought of course to be preferred . . . ."[42]

One might argue, of course, that a little interpretation is still interpretation, and that, alas, construction is construction. Hamilton nonetheless rejected exclusive use of technical common-law rules. The pertinent text is *The Federalist* No. 83. There Hamilton described Antifederalist attacks on the Constitution's treatment of jury trials:

> The maxims on which [the Antifederalists] rely are of this nature: "a specification of particulars is an exclusion of generals"; or, "the expression of one thing is the exclusion of another." Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

Countering that "[t]he rules of legal interpretation are rules of com-

38. *Id.* at 526.

39. *Id.* at 524-25.

40. For a similar reading of Hamilton's supposed defense of judicial review, see G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 127-50 (1981).

41. THE FEDERALIST NO. 78, at 525.

42. *Id.* at 524-25 (emphasis added). As to what constituted a manifest contradiction, Hamilton mentioned bills of attainder, *ex post facto* laws, "and the like." *Id.* at 524.

mon sense," Hamilton explained how reason and common sense ran against the Antifederalists' application of common-law rules to the jury trial issue. Then came a significant addendum: "Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them upon the present occasion, which however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, *apart from any technical rules*, is the true criterion of construction."[43]

Hamilton undoubtedly had his private views about constitutional interpretation, but it was Hamilton as Publius who entered the public debate in the judicial numbers of *The Federalist*. That the latter Hamilton—the public Hamilton—observed a difference between techniques of constitutional interpretation and the ordinary or technical business of courts is further underscored by juxtaposing the defense in *The Federalist* No. 78 of life tenure for judges with the foregoing remarks from No. 83. Judges needed to "be bound down by strict rules and precedents"; and that, combined with the "voluminous code of laws [which] is one of the inconveniences necessarily connected with the advantages of a free government," made life tenure necessary in order to insure the requisite judicial experience and expertise. But elaborate education in the "artificial reason" of the law, to use Sir Edward Coke's revealing phrase, would be superfluous in constitutional interpretation, for "the natural and obvious sense of [the Constitution's] provisions, apart from any technical rules, is the true criterion of [its] construction."[44] As part of their professional training, that is, judges might imbibe the canons of statutory construction, which eschewed resort to subjective intent, as disclosed for example in legislative history; but by implication from Hamilton's expressed view, a key question in interpreting the *Constitution* becomes whether common sense and reason would direct attention to ratifier intent in order to determine the "will . . . of the people declared in the Constitution."[45]

In elaborating the ratifiers' reliance on common-law hermeneutics (including eschewal of subjective intent) in constitutional interpretation, Professor Powell arguably misreads or overextends still other pieces of evidence from the ratification controversy.[46] While it quickly becomes tedious to dissect citations, examination of several of his sources suggests the scope of the problem.

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43. THE FEDERALIST No. 83, at 559-60 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added).

44. *See, e.g.*, THE FEDERALIST No. 78, at 529-30; THE FEDERALIST No. 83, at 560.

45. THE FEDERALIST No. 78, at 525.

46. *See* Powell, *supra* note 2, at 907 nn.112-16.

One reference is to a remark by John Jay in the New York Convention. Powell writes: "As John Jay explained, Federalist statements of the document's meaning were not products of a suspect hermeneutical process; they involved 'no sophistry; no construction; no false glosses, but simple inferences from the obvious operation of things.' "[47] In fact, in the debate in question, Jay was not discussing the Constitution's meaning or interpretation. "I argue from plain facts," he protested, and in that he was correct, for he took the Constitution to mean what surely no one contested, namely, that it established a bicameral legislature. The point in dispute was rather how the new Congress would operate, given its bicameral arrangement. Jay claimed—and this was his referent in saying, "Here is no sophistry, no construction, no false glosses, but simple inferences from the obvious operation of things"—that the two-house Congress would turn out vastly more difficult to corrupt than the Confederation Congress had proved to be.[48]

Or take this description by Professor Powell of the Federalists' interpretive intent: "When interpretation was necessary, it would take place in accord with the rules of 'universal jurisprudence,' subject to correction by the amendment process provided for in article V."[49] Two of the citations in the accompanying footnote are particularly troublesome. One reference is to John Steele in the North Carolina Convention. Antifederalists had charged that congressional control over the manner of elections to the House of Representatives would extend to setting the qualifications of voters. Steele countered that the clause in question had to be read in light of the constitutional requirement that qualifications for electors of congressmen correspond to the qualifications for electors of the most numerous branch of the state legislature. He asked, "Is it not a maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving absurdity?" He added: "By construing it [the Constitution] in the plain, obvious way I have mentioned, all parts will be valid."[50] This may indicate the influence of common-law canons of interpretation, although the reference to "universal jurisprudence" suggests a

47. *Id.* at 907 (quoting in part from 2 DEBATES, *supra* note 27, at 285) (John Jay in the New York Ratifying Convention, June 23, 1788). For readers doing their own checking, it should be noted that Powell's citations are to the first edition of Elliot's DEBATES; I have used the more readily available second (revised) edition, which is paginated differently.

48. *See* 2 DEBATES, *supra* note 27, at 284-85.

49. Powell, *supra* note 2, at 907.

50. 4 DEBATES, *supra* note 27, at 71. Steele went on to claim that judicial invalidation of laws violating the Constitution provided a check not available under the Confederation.

broader referent, but the comment hardly establishes a restriction running against resort to historical intent in appropriate cases.

In support of the same statement, Professor Powell also cites comments by Edmund Randolph in Virginia. Randolph, who now supported ratification after flip-flopping on the issue, allowed that Federalist reassurances regarding the necessary-and-proper clause were overly sanguine. Taken alone, the clause was an ambiguous provision that squinted toward consolidated government at the expense of the states. Yet when viewed in context, it did not subvert the principle of limited government, for otherwise the enumeration of which it was a part would be superfluous. Randolph would have preferred more careful drafting, but to disapprove the Constitution because of a few defective parts risked "the anarchy which must happen if no energetic government be established." In any event, he conceived "no danger." The vigilance of state governments in choosing senators constituted one barrier. "I trust that the members of Congress themselves will explain the ambiguous parts," he continued, "and if not, the states can combine in order to insist on amending the ambiguities. I would depend on the present actual feeling of the people of America, to introduce any amendment which may be necessary."[51]

Embedded in Randolph's remarks is a striking conclusion. To spot it, one must recognize that Randolph here looked to mechanisms other than judicial review to insure constitutional purity. One of these was the amendment process. Through it, he argued, the Constitution guaranteed that if the ambiguities of the document were not resolved in accordance with "the present actual feeling of the people of America," then the people themselves could achieve that end. This was not a bad formulation of the idea of taking guidance from ratifier intent, considering that the phrase itself was not then a term of constitutional art. At a minimum, anyway, Randolph's comments, like Steele's in North Carolina, do not indicate endorsement of common-law hermeneutics to the exclusion of original intent in the sense of subjective ratifier intent.

Finally, there is an intriguing episode that Professor Powell does not examine. At the beginning of the ratification process, the Federalists held a clear majority in the Pennsylvania Convention. Sensing defeat and seeking ways to salvage something from the situation, their opponents tried unsuccessfully to enter their objections to various provisions into the meeting's journal. One of the Federalists speaking against the insertion of objections was Dr. Benjamin Rush, who argued that to do so would obscure and confuse the rec-

51. 3 DEBATES, *supra* note 27, at 463-64, 470-71.

ord, which was "stamped with authenticity."[52]

Like the Philadelphia Convention's decision to keep its journals at least temporarily secret, the episode is open to varying interpretations. The Federalists may have feared that to publish the Antifederalist objections in the official journal would give them greater weight in other states (a view made more realistic in light of the Pennsylvania Antifederalists' powerful critique of the Constitution). Or they may have feared a lessening of popular attachment to the new government once it went into operation. These other readings of the brief exchange are possible, but the debate suggests, I think, at least some sense on the part of the Pennsylvanians that the record of the ratification process might help to shape future understandings. As Robert Whitehill put it while arguing for inclusion of the reasons for negative votes, "the people at large will acknowledge, with thanks, the resulting information upon a subject so important to themselves and their latest posterity." Both sides were saying, in effect, that contemporary explanations would tell the people, then and later, about "the nature and tendency of the government," to quote Whitehill again. At one level the Federalists agreed; they simply did not wish the wrong explanations to "derive from [the Convention's] countenance a stamp of authenticity," to use James Wilson's variation of the phrasing.[53]

Despite the hints about ratifier intent provided by Edmund Randolph and the Pennsylvanians, it must be conceded that they remain hints. To the extent that I have examined the literature—and I cannot claim full familiarity with the outpouring of material in 1787-88, which is in the process of becoming more accessible[54]—the Federalists never explicitly and unambiguously stated that future interpreters should resort to ratifier intent. At the very least, this reticence needs attention.

Three interrelated reasons suggest themselves. First, there could be no ratifier intent until the disputants in the ratification controversy developed understandings about the instrument's meaning. Second, the pressing and primary problem was not to provide a basis for future interpretation or construction, but to explain how the Constitution would meet present and future needs. Finally, the ratifiers' endorsement of reason and common sense as guides made an explicit endorsement of ratifier intent redundant,

52. 2 DOCUMENTARY HISTORY, *supra* note 24, at 372 (Nov. 27, 1787). *See generally id.* at 370-79.

53. *Id.* at 377.

54. *See* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (work of 17 or 18 vols., plus microfiche supplements, 1976- , in progress) (pub. by State Historical Society of Wisconsin).

for the former constituted a kind of proxy for the latter. Given an unchanging human nature, reason and common sense would reveal in the the future what reason and common sense revealed in 1787-88. Questioned about the future status of ratifier intent, one can imagine a puzzled Federalist exclaiming, "What? Are you hinting that the Constitution will not mean in the future what it says and what its structure implies? That's a strange position. I don't understand the suggestion that we are ratifying something other than the system that common sense discloses to us. Yes, there may be a few ambiguities. Remember, though, that if the officials of the new government fail to give effect to what we ratifiers see in the document, there are correctives." Which is, of course, very nearly what some Federalists did say.

The meaning of the Constitution as it was ratified corresponded to its meaning for the people who gave the document its binding status. A truism? Perhaps. But it returns our focus to the obvious. It also reminds us that there is another issue to be addressed. What did the instrument's content—its general and specific provisions—mean to the ratifiers? This further issue can be conceived of, alternatively, as an evidentiary problem or as a problem in intellectual history. Beyond the ratification debates *per se*, it involves the accompanying public debates and the still fuller range of sources that shed light on how people in 1787-88 read those aspects of the document that the ratifiers did not explicitly address. It is a difficult practical problem, but it should not be confused with the narrower question of the interpretive intent of the ratifiers.[55]

III. REFLECTED LIGHT ON THE ORIGINAL INTERPRETIVE INTENT

Additional insight into views on constitutional interpretation in 1787-88 comes from later commentary by participants in and observers of the ratification controversy. Professor Powell surveys a number of useful sources in this regard. Receiving brief attention are the 1789 debate over the president's removal power and the conflict in 1791 among President Washington's executive officers over the constitutionality of the Bank of the United States.[56] Powell finds some participants in the removal debate denying the legitimacy of any attempt to move beyond the Constitution's words, while others accepted interpretation through construction. What passes unnoticed are comments implicating historical intent, such

55. Put differently, asking about the original understanding of original intent is only one aspect of deciphering the understandings and expectations of 1787-88.

56. *See* Powell, *supra* note 2, at 913-17.

as the remark by Alexander White of Virginia that if the principle of enumerated powers "had not been successfully maintained by [the Constitution's] advocates in the [Virginia ratifying] convention . . . , the constitution would never have been ratified."[57] Alexander Hamilton's clear rejection of framer intent in his 1791 Bank opinion gets mentioned, but not his use therein of evidence from the ratification process.[58]

Two other sources of reflected light on American understandings in 1787-88 deserve and receive fuller attention. One is the 1796 debate in the House of Representatives on how to interpret the House's role in treatymaking, "[t]he most sustained early congressional discussion of constitutional hermeneutics," writes Professor Powell.[59] The second source is James Madison, who participated in the 1796 debate and commented further in later years.

A. THE HOUSE DEBATE OF 1796

The 1796 debate occurred when House Republicans wanted access to diplomatic papers before approving appropriations to implement the Jay Treaty with England. At least some members on each side of the issue accepted the propriety of turning to the ratification controversy as a guide to constitutional interpretation in suitable cases. Professor Powell relates these comments, but contends:

> This use of history was related but not identical to that of modern intentionalism.

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57. 1 ANNALS OF CONGRESS col. 535 (June 18, 1789) (J. Gales & W. Seaton eds. 1834). *See also id.* at cols. 474-75, 545, 547-48, 551-52 (June 16 and 18, 1789, remarks by Representatives Smith, Lee, Boudinot, and Jackson). White went on to quote the Virginia proceedings and to discuss the ratification process in North Carolina.

58. Powell quotes Hamilton's attack on Jefferson's reference to the refusal by the delegates in Philadelphia to grant Congress the power of incorporation. *See* Powell, *supra* note 2, at 915. Hamilton certainly used language at this point in his opinion that is interpretable as running against *any* use of historical intent, and concluded:

> Nothing is more common than for laws to *express* and *effect*, more or less than was intended. If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.

Hamilton, Opinion on the Constitutionality of an Act to Establish a National Bank, Feb. 23, 1791, *reprinted in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 248, 258 (M. Frisch ed. 1985). Yet, in context, Hamilton closely linked his strictures against subjective intent to use of framer intent; and he himself later resorted to ratifier intent, commenting:

> It is remarkable, that the State Conventions who have most, if not all of them, expressed themselves nearly thus—"Congress shall not grant monopolies, or *erect any company* with exclusive advantages of commerce"; thus at the same time expressing their sense, that the power to erect trading companies or corporations, was inherent in Congress, & objecting to it no further, than as to the grant of *exclusive* priviledges [*sic*].

Id. at 273.

59. Powell, *supra* note 2, at 917.

> The 'contemporaneous expositions' on which . . . [the members] relied were not confined to the debates at Philadelphia, or at the state conventions, but included the defenses of the Constitution published by its proponents and even the critical interpretations of its opponents.

He goes on to indicate that use of extraneous sources came under attack, but he responds that "[r]esort to materials from the ratification era as one species of evidence as to the Constitution's context was in fact only mildly innovative, although proponents of the House resolution strove to make it appear a flagrant violation of the established canons of construction."[60] In fact, Professor Powell's exegesis of the debate in 1796 scarcely does justice to the clear evidence of acceptance of ratifier intent that the debate discloses. Again, my focus is primarily on the evidence that he himself cites.

William Smith, a South Carolina Federalist, was one of those opposing the call for papers. His argument emphasized "that the Treaty power was solely delegated to the PRESIDENT and Senate by the Constitution . . . ." To make the point, he stated,

> he should not confine himself to a mere recital of the words, but he should appeal to the general sense of the whole nation at the time the constitution was formed . . . . By referring to the contemporaneous expositions of that instrument, when the subject was viewed only in relation to the abstract power, and not to a particular Treaty, we should come at the truth.[61]

He then reviewed evidence purportedly showing that during ratification the Federalists defended the decision to place the treaty power with the president and the Senate, while their opponents had charged that the document unwisely excluded the House of Representatives. His evidence included remarks in the state conventions, amendments proposed in the conventions, and comments in other meetings at the time.[62] He turned, that is, to materials that reasonably might indicate the ratifiers' expectations and understandings.

With respect to Smith's comments and similar statements, however, Professor Powell claims that "those who cited evidence from the ratification period almost invariably linked it with other expressions of constitutional opinion."[63] But observe Smith's supposed qualification in this regard, as recorded by the reporter: "Having stated the general opinion of the public, as manifested by the friends as well as the enemies of the Constitution [in 1787-88], Mr. S[mith] said he would proceed to show that the practice of Congress had, from the commencement of its existence, been con-

60. *Id.* at 918-20.

61. 5 ANNALS OF CONGRESS col. 495 (March 10, 1796) (History of Congress ed. 1849) [hereinafter ANNALS OF CONGRESS].

62. *Id.* at cols. 495-96.

63. Powell, *supra* note 2, at 918.

formable to that opinion." Simply put, the remark does not run against or qualify use of ratifier intent, which is not surprising because Smith had just disparaged "*ex post facto* construction."[64]

Similarly, Federalist Theodore Sedgwick twitted James Madison for only recently having discovered a role for the House of Representatives in the treaty process. He noted Madison's silence on the subject during the Virginia ratification debates and inquired "how it happened that, if such was really the intention of the instrument, that such was the meaning of the people, no man had heard of it until the discovery was produced by the British [Jay] Treaty. Strange national intention, unknown for years to every individual." If the proponents of the call for diplomatic papers were "right in their construction [of the House's role], *if this was the understanding of the people at the time they deliberated on and ratified the Constitution*, the power of the PRESIDENT and Senate of making Treaties, which then created the most serious deliberation and alarming apprehensions, was the most innocent thing in nature."[65] Sedgwick went on to quote extensively from the Virginia proceedings of 1788 and then more briefly showed that interpretations by Congress and the Supreme Court provided corroboration.[66]

So, too, agreed Benjamin Bourne, who declared that "[i]f a doubt existed as to what was the true construction of the Constitution, it ought to be conformed to the opinion which prevailed when the Constitution was adopted . . . ."[67] Professor Powell indicates that Bourne regarded subsequent interpretations by state legislatures as constitutionally authoritative, but Bourne instead turned to such legislative comments for evidence that the President and Senate had acted wisely in making the Jay Treaty. Only then did he offer the comment just quoted. In short, he maintained that the Treaty represented sound policy, and that if questions arose about constitutional powers, the understandings of 1787-88 should be

64. 5 ANNALS OF CONGRESS, *supra* note 61, at col. 496. Smith's full remark, which examined the implications of a proposed Antifederalist amendment in Pennsylvania that would have limited the force of treaties as internal law unless approved by the House of Representatives, ran thus: "This amendment was the most satisfactory evidence that the proposers of it did then believe that, without that amendment, such Treaty would be valid and binding, although not assented to by this House, and that they had, at that day, no idea that there existed in the Constitution the check which is now discovered by this *ex post facto* construction."

65. *Id.* at cols. 520, 522 (March 11, 1796) (emphasis added).

66. *Id.* at cols. 523-28. Sedgwick in fact came close to endorsing use of *framer* intent, which subsequently drew James Madison's ire, but his emphasis was not so much on framer intent *per se* as on framer intent as an especially valuable species of "co[n]temporaneous exposition." *Id.* at col. 523.

67. *Id.* at col. 574.

dispositive.[68]

Or take the comments of Uriah Tracy, which, according to Professor Powell, typified "the caution with which these Representatives advanced historical materials as evidence of the Constitution's meaning."[69] As Powell correctly notes, Tracy explored the Constitution's text and Confederation practice. He then endorsed Benjamin Bourne's suggestion that small state jealousy contributed to the exclusion of the proportionally constituted House of Representatives from the treaty process. To clinch the point, he observed: "If any proof could be necessary, he thought the almost unanimous understanding of the members of the different Conventions in the States, who were called to discuss the Constitution for adoption, was in favor of the construction he had given," which he then summarized. He allowed, it is true, "that, from such debates, the real state of men's minds or opinions may not always be collected with accuracy,"[70] but his use of the ratification proceedings indicates that he considered them in this instance to be conclusive evidence against the Republicans' expansive interpretation of the treaty role of the House. He recognized, that is, that historical intent might not be easily reconstructed. Where it could be determined, however, it was dispositive in the resolution of textual ambiguities.[71]

In the course of the arguments surveyed in the preceding paragraphs, Federalist speakers also hypothesized what the members of the Philadelphia Convention hoped to accomplish by giving the treaty power its final form. William Vans Murray of Maryland appeared the most forthright in directing attention to the framers; in Professor Powell's view, therefore, he "seems to have come much closer to modern intentionalism."[72] Vans Murray called on James Madison and Abraham Baldwin, who was also a delegate to the 1787 meeting, to reveal what they surely knew about the treaty-related proceedings in Philadelphia. In making his challenge, he came close to asserting that framer intent had a role in constitutional interpretation. But just as the other Federalists who referred

68. *Id.* Bourne had already briefly surveyed the state convention proceedings, a survey which he concluded with the comment: "Now . . . if this was the construction of the Constitution when it was adopted in the several States, would it not be a trick on the small States [which had equal representation in the Senate] now to construe it differently . . . ?" *Id.* at cols. 572-73.

69. Powell, *supra* note 2, at 918.

70. 5 ANNALS OF CONGRESS, *supra* note 61, at col. 616-17 (March 17, 1796). Professor Powell quotes parts of these remarks, but does not, I think, convey their full force.

71. Powell sees Tracy's exploration of Confederation practice as further qualifying the weight he gave to the ratifiers' intent. *See* Powell, *supra* note 2, at 918 n.173. It is more accurate to say that Tracy argued that if the text, examined in light of pre-ratification practice, proved at all ambiguous, then the understanding of the ratifiers might settle the dispute.

72. *Id.* at 920.

to the framers made clear that they saw the understandings of the *ratifiers* as conclusive, so Vans Murray's willingness to put Madison and Baldwin in an embarrassing position came after he admitted that other speakers had completely described "the opinions that were entertained at [sic] the *adoption* of the Constitution."[73] On balance, he saw the proceedings in Philadelphia as one more source of contemporaneous opinion, not dispositive, but potentially useful as another indication of how people possessed of common understandings in 1787-88 had read the document.[74]

Republicans, it should come as no surprise, rejected Federalist conclusions regarding the limited role of the House in the treaty process. They did so partly by attacking the Federalists' approach to constitutional interpretation. Professor Powell notes a number of these retorts, giving special attention to those by Albert Gallatin and James Madison. It was Gallatin who used the phrases that Powell quotes when he asserts that Federalist speakers "were vigorously attacked by the resolution's supporters for 'conjur[ing] up' such 'extraneous sources.' "[75] Gallatin assuredly disparaged the opposition's "train of arguments, drawn not from the letter or spirit of the Constitution, either directly or by implication, but from a vari-

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73. 5 ANNALS OF CONGRESS, *supra* note 61, at col. 700 (emphasis added). His full statement, as recorded by the reporter, is instructive:

> Other gentlemen, with whom he agreed in opinion, had rendered it unnecessary for him to say anything upon the opinions that were entertained at the adoption of the Constitution, upon the question now before the Committee. He believed that, from one end of America to the other, it was taken for granted that this House had nothing to do in the making of Treaties, and that this power was exclusively in the Senate and PRESIDENT. The [other] gentlemen just up . . . had placed the interests of the small States, in this construction, in so forcible and correct a point of view, that he would not say a word upon that very interesting part of the subject. But, of the contemporaneous opinions, that were supported in the Convention which framed the Constitution, he would make a remark or two.

Id. Vans Murray *then* issued his challenge to Madison and Baldwin.

74. *See id.* at cols. 701-02.

75. Powell, *supra* note 2, at 919. Powell states in his next sentence: "Their [the Federalists'] opponents contended that the proper method of interpretation was 'to attend to and compare' the text's various provisions in accordance with the 'ancient' rules for 'the interpretation and construction of laws or Constitutions.' " The phrase "to attend to and compare" also comes from Gallatin, but Gallatin made no reference to "ancient" rules; he directly stated the rule of construction he preferred—"that construction which would give full effect to all the clauses and destroy none." 5 ANNALS OF CONGRESS, *supra* note 61, at col. 727 (March 24, 1796). The later quotations within Powell's sentence come from William Lyman, who eight days earlier had elaborated rules for textual construction, including *one* "maxim" that he labeled "ancient." *Id.* at col. 603 (March 16, 1796). Regarding his reading of the treaty power, Lyman also declared that "[i]t had appeared, from the extracts of publications of the [ratification] period, that whatever might have been the diversity of opinion in other respects relative to the Constitution, that, in this construction, at least, both its friends and opposers perfectly agreed." *Id.* at col. 604. Indeed, Lyman did not reject ratifier intent, but only read it as pointing to conclusions different from those that the Federalists now found in it.

ety of extraneous sources," but assuredly, too, he accused no one of "conjur[ing] up" the sources in the sense of inventing them or calling them into existence. Rather, he argued that the extraneous sources (which were real enough that he himself soon analyzed them) "had been conjured up as united in ascribing to the power of making Treaties the most unlimited and unbounded effect."[76] Saying that an improper meaning had been attributed to the sources is different from suggesting that the sources had been invented.

Particularly noteworthy is an omission by Gallatin. It came after he charged that the Federalists, having failed to support their interpretations by reference to the law of nations and to practice in Great Britain and under the Articles of Confederation, "have recurred to the opinions of individuals, of State Conventions, and finally, of the general Convention which framed the Constitution." Taking direct aim at William Vans Murray, he then limited his attack to the doctrine "that the opinions and constructions of those persons who had framed and proposed the Constitution, opinions given in private, constructions unknown to the people when they adopted the instrument, should, after a lapse of eight years, be appealed to . . . ."[77] Gallatin did not condemn the retreat to ratifier intent.

Nor is the omission strange. Gallatin had already contended that recourse to practice in Great Britain and under the Articles was appropriate in interpreting the treaty clause because those were "the two Governments which had served as a basis and model to our present Constitution, *which were mostly contemplated by the people who adopted it* . . . ."[78] By contrast, he caricatured the Federalists as telling the people that "[they] have had a Constitution for eight years, and have adopted it under such impressions as must have resulted from the face of the instrument; but it was the design of those who framed it, that it should have a different construction from that it naturally bears . . . ." Through analogy, he distinguished ratifier intent from framer intent: "The intention of a Legislature who pass a law may perhaps, though with caution, be resorted to, in order to explain or construe the law; but would any person recur to the intention, opinion, and private construction of the clerk who might have been employed to draft the bill?" Moving beyond analogy, he explained directly:

> In the present case, the gentlemen who formed the general Convention, however respectable, entitled as they were to the thanks and gratitude of their country for

76. *Id.* at col. 727 (March 24, 1796).
77. *Id.* at cols. 733-34.
78. *Id.* at col. 733 (emphasis added).

> their services in general, and especially on that important occasion, were not of those who made, who passed the instrument; they only drew it and proposed it. The people and the State Conventions who ratified[,] who adopted the instrument, are alone parties to it, and their intentions alone might, with any degree of propriety, be resorted to.[79]

It is true that Gallatin next questioned resort to the ratification controversy, but his concerns were evidentiary. In the debate at hand, the Federalists had referred both to Antifederalist remarks and to amendments proposed during the process. He found these to be a poor guide to pertinent understandings in 1787-88, maintaining instead that only the views of the Constitution's supporters should carry weight.[80] He then offered his own gloss on several state debates, concluding: "After such pointed contemporaneous expositions of the true meaning and spirit of the Constitution, would it still be asserted, that the opinion now expressed [by the Republicans] were a new-fangled doctrine . . . ?"[81]

Before turning to James Madison, three of Professor Powell's lesser Republican witnesses from the 1796 debate deserve mention. One unequivocally did reject ratifier intent. "As to the construction generally received when the Constitution was adopted," Edward Livingston

> did not conceive it to be conclusive, even if admitted to be contrary to what now [the Republicans] contended for; because he believed we were now as capable at least of determining the true meaning of [the Constitution] as the [State] Conventions were: they were called in haste, they were heated by party, and many adopted it from expediency, without having fully debated the several articles.[82]

After quoting Livingston, Professor Powell focuses on two other disputants from 1796 when he comments that "[t]he House, it was argued, *must* seek 'the intrinsic meaning of the Constitution . . . from the words of it,'[182] while recognizing that the text was unavoidably ambiguous on *many* issues and that its framers had anticipated that those questions would 'be settled by practice or by amendments.'[183]"[83] The first internal quotation, identified by Powell's footnote 182, is from a speech by William Branch Giles. What Giles actually said, at least as eventually compiled into the *Annals of Congress*, was this:

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79. *Id.* at col. 734.

80. *See id.* at cols. 734-35.

81. *Id.* at cols. 735-37.

82. *Id.* at col. 635 (March 18, 1796). Livingston cautioned that if one were to look to the ratification debates, then it was the remarks of the Constitution's supporters, not its opponents, that were conclusive.

83. Powell, *supra* note 2, at 919 (emphasis added; the ellipsis and internal footnote numbers are Powell's).

> Having examined the objections to the [constitutional] construction contended for by the friends of the motion [that is, the motion that the President produce papers], drawn from collateral sources, he should turn his attention next, he said, to the intrinsic meaning of the Constitution. He would attempt to interpret the Constitution from the words of it.[84]

Compare this with Professor Powell's statement, which uses a "must" and inserts an ellipsis to connect portions of two sentences. Powell's combination mangles Giles's meaning by suggesting that he rejected collateral or extrinsic sources, which he did not do.

The citation for the remainder of Powell's sentence (in footnote 183) is to a speech in which Abraham Baldwin conceded that the framers probably knew

> that *some* objects were left *a little* ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. If they could all be agreed in, it would compact the Government. The *few* that were left *a little* unsettled might, without any great risk, be settled by practice or by amendments in the progress of Government.[85]

Baldwin misjudged the Constitution's clarity, but that is slight warrant for Powell to paraphrase the congressman's "some," "a little," and "few" as "many." In fact, contrary to Powell's implication, Baldwin did not contrast (a) adjustment through practice and amendment with (b) clarification by reference to extrinsic sources from 1787-88. Instead, he soon said that "[h]e was willing to allow due force" to "the reasons of members of the Convention, the proposed amendments of several States [during the ratification proceedings], &c," even though he detected an undue reliance on these materials in the instant debate. Such evidence, he explained, "was not of sufficient force to be a ground of absolute certainty that the thing [that is, the House's role in the treaty process] is definitely settled," particularly because the 1796 debate marked the first sustained analysis of the question, not excluding the ratification debates.[86] In sum, Baldwin carefully qualified his position.

Politics obviously shaped the debate in 1796, which may raise suspicions about conclusions drawn from it. Yet politics provides the context for most comments on constitutional issues; if all such remarks were ignored, the record would indeed be barren. (Even the confidential debates in Philadelphia were assuredly political.) The key is to evaluate the evidence while keeping context in mind. From the standpoint of deciphering the original understanding of original intent, one feature of the exchanges over the Jay Treaty is remarkable. *Both* Federalists *and* Republicans accepted use of orig-

84. 5 ANNALS OF CONGRESS, *supra* note 61, at col. 505 (March 11, 1796).
85. *Id.* at col. 537 (March 14, 1796) (emphasis added).
86. *Id.* at cols. 538-39.

inal intent in the form of ratifier intent. More precisely, to use terms pertinent to Professor Powell's article, they accepted subjective or historical ratifier intent and sought out the actual expectations and understandings of the ratifiers.

B. JAMES MADISON'S VIEWS

And then there is James Madison. It may be partly because of the hold of framer intent on constitutional scholars and judges that Madison tops just about everyone's list of founders. Once framer intent is discounted, Madison's notes and recollections of the proceedings in Philadelphia have less importance in reconstructing the original understanding of original intent. Beyond being a leader in the Philadelphia Convention, however, Madison participated in the ratification controversy and was a careful observer of—and reflective thinker about—the entire founding period. As a result, just as Professor Powell is on solid ground in surveying the 1796 debate in Congress (if not always in the conclusions he draws from it), so he is unassailable for paying substantial attention to Madison. As he remarks, "Although [Madison] would have been quick to distinguish his personal opinions from the public meaning of the Constitution, the coherent interpretive theory Madison expressed in speeches and letters over many years has special value for anyone seeking to discern the 'interpretive intent' underlying the Constitution."[87]

Not least, Madison contributed to the 1796 debate. After the House finally resolved to request papers relating to the Jay Treaty negotiations, George Washington refused to comply. In addition to prudential reasons, the President relied on the Constitution. "Having been a member of the General Convention, and knowing the principles on which the Constitution was formed," he found that the document excluded the House from treatymaking. His view, he argued, accorded with practice and "with the opinions entertained by the State Conventions, when they were deliberating on the Constitution . . . ." "If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration," he added, "they may be found in the Journals of the General Convention, which I have deposited in the office of the Department of State."[88]

Washington's foray into interpretation triggered a response

87. Powell, *supra* note 2, at 935.

88. 5 ANNALS OF CONGRESS, *supra* note 61, at cols. 761-62 (Washington's Message of March 30, 1796). In summarizing Washington's avowed constitutional authorities, Professor Powell omits the reference to the state ratification debates. *See* Powell, *supra* note 2, at 921.

from Madison, who argued along several lines.[89] One was to question the President's interpretation of the deliberations of the Philadelphia Convention. Madison concluded, though, that whatever their meaning, "the sense of that body could never be regarded as the oracular guide in expounding the Constitituion."

> As the instrument came from them [he continued] 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 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.[90]

Professor Powell remarks that from 1796 onwards, Madison was "remarkably consistent" in his views on interpretation,[91] and so he was.[92] In 1821, for example, he wrote Thomas Ritchie:

> As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the [Philadelphia] Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt.[,] the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be, not in the opinions of the body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses.[93]

This position accorded with Madison's earlier explanation, during the ratification controversy, of the respective roles of the Philadelphia Convention and the ratifying conventions.

Professor Powell concedes that "Madison thought it proper . . . to consult the direct expressions of state intention available in the

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89. *See* 5 ANNALS OF CONGRESS, *supra* note 61, at cols. 774-76 (April 6, 1796).

90. *Id.* at col. 776.

91. Powell, *supra* note 2, at 939 n.278.

92. However, to say that Madison was remarkably consistent is not to say that he was entirely consistent. In 1827, for example, he endorsed use of the journals of the Philadelphia Convention, although his wording was careful enough to allow the inference that he only meant that they would support a particular interpretation, not that they were entitled to dispositive weight. *See* Letter from James Madison to Joseph C. Cabell (March 22, 1827), *reprinted in* 9 WRITINGS, *supra* note 18, at 284, 286. For another example, see Letter from Madison to Thomas Jefferson (June 27, 1823), *reprinted in* 9 *id.* at 137, 142. So far as I have determined, the closest Madison came to directly explaining such usages was in 1830, when he described the Philadelphia Convention "as [only] presumptive evidence of the general understanding at the time of the language used." Letter from Madison to M. L. Hurlbert (May 1830), *reprinted in* 9 *id.* at 370, 372; *see infra* note 117 and accompanying text.

93. Letter from Madison to Ritchie (Sept. 15, 1821), *reprinted in* 9 WRITINGS, *supra* note 18, at 71, 72. *Accord*, Letter from Madison to M.L. Hurlbert (May 1830), *reprinted in* 9 *id.* at 370, 372; letter from Madison to Nicholas P. Trist (Dec. 1831), *reprinted in* 9 *id.* at 471, 477.

resolutions of the ratifying conventions."[94] The force of the concession is mitigated, however, by the fact that in quoting Madison in Congress in 1796 and Madison's letter to Ritchie in 1821, Powell omits the sentences in which Madison explicitly endorsed ratifier intent.[95] In a footnote, Powell does quote a comparable endorsement, but merely to support his unexceptionable contention that Madison rejected framer intent; he does not draw out Madison's clear meaning regarding ratifier intent.[96]

In much the same vein, Professor Powell states that Madison found the ratification debates "to be of real yet limited value" and explains that

> evidentiary problems with the surviving records and Madison's insistence on distinguishing the binding public intention of the state from the private opinions of any individual or group of individuals, including those gathered at a state convention, led him to conclude that the state debates could bear no more than indirect and corroborative witness to the meaning of the Constitution.[97]

Again, however, the cited materials raise questions about Powell's conclusion. To Jonathan Elliot, Madison allowed that the extant records of the proceedings might be "defective . . . in some respects & inaccurate in others," but he found them to be "highly interesting in a political as well as Historical view" and had only encouragement for Elliot's plan to publish them. In the letter, he did not conclude that the interpretive value of the ratification debates was only indirect and corroborative.[98]

Nor does such a conclusion reasonably flow from the cited letter to Andrew Stevenson, in which Madison discussed the meaning of the terms "common defence" and "general welfare." Here Madison demonstrated, as he did on other occasions, that he, too, could probe the journals of the Philadelphia Convention; but he put both the journals and the ratification debates in perspective when he commented: "Passing from this view of the sense in which the terms common defence & general welfare were used by the Framers of the Constitution, let us look for that in which they must have been understood by the Conventions, or rather by the people, who thro' their Conventions, accepted & ratified it."[99] At the very least, this letter does not suggest that Madison had "conclude[d] that the

94. Powell, *supra* note 2, at 937.

95. *See id.* at 938, 936, 921.

96. *See id.* at 939 n.278 (quoting Letter from Madison to M.L. Hurlbert (May 1830), *reprinted in* 9 WRITINGS, *supra* note 18, at 370, 372).

97. Powell, *supra* note 2, at 937-38.

98. Letter from Madison to Jonathan Elliot (Feb. 14, 1827), *reprinted in* 9 WRITINGS, *supra* note 18, at 270, 271.

99. Letter from Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in* 9 *id.* at 411, 421.

state debates could bear no more than indirect and corroborative witness to the meaning of the Constitution."

As for "contemporaneous expositions of the document by its supporters," the Madison described by Professor Powell accorded them "some value, but he cautioned that such statements were to be regarded strictly as private opinions, useful chiefly in shedding light upon the meaning of words and phrases that the fluidity of language might gradually change over time."[100] In fact, a letter from Madison to Henry Lee that supposedly contains or implies this qualification does not. The relevant passage reads as follows:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it [that is, the Constitution as construed] is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful[,] exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living language are constantly subject.[101]

Nor does such a qualification appear in the cited letters to Andrew Stevenson and Nicholas P. Trist.[102]

Rather than resort to historical or subjective intent, Professor Powell's Madison "consistently thought that '*usus*,' the exposition of the Constitution provided by actual governmental practice and

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100. Powell, *supra* note 2, at 938.

101. Letter from Madison to Henry Lee (June 25, 1824), *reprinted in* 9 WRITINGS, *supra* note 18, at 190, 191. That Madison disapproved such a change is evident in his immediately following comments. See *id.* at 191-92.

102. Madison commended Stevenson's "industry" in "search[ing] for a key to the sense of the Constitution, where alone the true one can be found; in the proceedings of the Convention, the co[n]temporary expositions, and above all in the ratifying Conventions of the States." Letter from Madison to Andrew Stevenson (Mar. 25, 1826), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON . . . , 520, 521-22 (1884) [hereinafter LETTERS]. (If anything remarkable emerges from the letter, it is not doubts about resorting to the public expositions of 1787-88, but Madison's mention of the Philadelphia Convention.) As for the Trist letter, Powell in his parenthetical footnote elaboration correctly explains it as recognizing that the "Constitution [was] affected by the imprecision and mutability of language." Powell, *supra* note 2, at 938 n.293. The letter says *nothing*, however, about the proper role for ratifier intent or anything else about how properly to interpret the document. To be sure, one phrase might be pulled out of context to suggest the propriety of settling word meaning through "a long course of application," but context indicates that Madison, without discussing proper interpretation, only recognized the Constitution unavoidably used some terms "the precise import of which has not been settled by a long course of application." (Reading the full sentence suggests in fact that he probably meant to write "had" rather than "has," which further underscores that he was only describing the document.) He recognized, too, that changes in word meaning had produced debates over the Constitution's meaning, a development he clearly disapproved. If anything, the reasonable inference from Madison's remarks to Trist on this occasion is that he would have welcomed clarification from the debates in 1787-88; but in its terms the letter simply does not take up the issue. *See* Letter from Madison to Nicholas P. Trist (Mar. 2, 1827), *reprinted in* 3 LETTERS, *supra*, at 565.

judicial precedents, could 'settle its meaning and the intention of its authors.' "[103] But Madison himself complicated his gloss on *usus* when, discussing the extent of Congress's power over foreign commerce in an unposted letter to Professor Davis, he wrote:

> After all, we must be guided . . . by the intention of those who framed, or, rather, who adopted the Constitution; and must decide that intention by the meaning attached to the terms by the "*usus*" which is the *arbitrium*, the *jus* and the *norma loquendi*, a rule as applicable to phrases as to single words. It need scarcely to be observed that, according to this rule, the intention, if ascertained by contemporaneous interpretation and continued practice, could not be overruled by any latter [later?] meaning put on the phrase, however warranted by the grammatical rules of construction[,] were these at variance with it.[104]

Regarding the interpretive problem at hand—that is, the extent of the commerce power—Madison surveyed difficulties regarding foreign trade in the 1780s, as well as contemporary comment on them and the Constitution's solutions for them. "That the power of regulating foreign commerce was expected to be given to, and used by, Congress in favour of domestic manufactures," he explained, "may be seen in the debates in the Convention of Massachusetts."[105] He then quoted extensively from deliberations in the first Congress, which he followed with the observation:

> It deserves particular attention, that the Congress which first met contained sixteen members, eight of them in the House of Representatives, fresh from the Convention which framed the Constitution, and a considerable number who had been members of the State Conventions which had adopted it, taken as well from the party which opposed as from those who had espoused its adoption.[106]

To Professor Davis, Madison also cited "a continued use of it [the commerce power as a basis for protection of domestic manufactures] for a period of forty years, with the express sanction of the executive and judicial departments, and with the positive concurrence or manifest acquiescence of the State authorities and of the people at large, with a very limited exception during a few late years."[107] After reviewing several pertinent examples, Madison concluded: "If all these authoritative interpretations of the Constitution on a particular point cannot settle its meaning and the intention of its authors, we can never have a stable and known Constitution."[108]

In his letter to Professor Davis, Madison may have partly used

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103. Powell, *supra* note 2, at 939.

104. Letter from Madison to Professor Davis (ca. 1832, not posted), *reprinted in* 4 LETTERS, *supra* note 102, at 232, 242.

105. *Id.* at 244.

106. *Id.* at 247.

107. *Id.* at 246-47.

108. *Id.* at 249.

the term "intention" in the sense of a meaning assigned to a document by later interpreters, as Professor Powell argues. If so, he did not conceive of the pertinent *usus* as simply "the exposition of the Constitution provided by actual governmental practice and judicial precedents," as Professor Powell parenthetically defines the word, citing, with questionable regard for context, two other Madison letters.[109] Madison himself turned to practice and precedent only for *additional* proof of the correctness of his interpretation of the foreign commerce power; and the most reasonable interpretation of his purpose in adducing such further evidence is that he saw practice and precedent as confirming his reading of original intent. Congressmen, executive officers, and judges, that is, had found the same intent that Madison did.

At minimum, Madison explicitly rejected modification of the Constitution's meaning through new constructions, lamenting that "[s]ome of the terms of the Federal Constitution have already undergone perceptible deviations from their original import." Despite "the authority of the precedents regularly continued for thirty or forty years," some still argued "that the true character of a political system might not be disclosed even within such a period." But he cautioned that "this would not disprove the intention of those who made the Constitution. It would show only that it was made liable to abuses not foreseen nor soon to appear; and that it ought to be amended, but by the authority which made it, not by the authority subordinate to it . . . ."[110] In short, if the document as interpreted according to the intentions of those who made it an authoritative instrument ceased to be adequate, then formal amendment, not novel construction, was the remedy. This remedy had to be used

109. Powell, *supra* note 2, at 939. In one of the cited letters, Madison remarked: "I have always supposed that the meaning of a law, and for a like reason, of a Constitution, *so far as it depends on Judicial interpretation*, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject." Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* 8 WRITINGS, *supra* note 18, at 447 (emphasis added). The qualification here italicized indicates a more restricted view than that conveyed by Powell's phrase. Also diminishing the force of the letter to Judge Roane as authority for the phrase in question is the fact that in it Madison was arguing *against* aspects of a judicial precedent. In the other letter cited as support for Powell's definition of "*usus*," Madison accepted the practical necessity of federal judicial review in federal-state disputes, which is also a rather narrow assertion. *See* Letter from Madison to Joseph C. Cabell (Sept. 7, 1829), *reprinted in* 9 WRITINGS, *supra* note 18, at 346. Professor Powell's footnote explanations for each letter acknowledge their restricted compass.

110. Letter from Madison to Professor Davis, *reprinted in* 4 LETTERS, *supra* note 102, at 232, 249. Madison's use herein of "made" is a little puzzling, but unless he was remarkably inconsistent with his views otherwise, he meant the term in the sense of "gave it force." Note the comment by his colleague Albert Gallatin, in 1796, that the framers "were not those who *made*, who passed the instrument; they only drew and proposed it." 5 ANNALS OF CONGRESS, *supra* note 61, at 734 (Mar. 24, 1796) (emphasis added).

sparingly, however, and only upon due consideration.[111]

Undeterred, Professor Powell finds Madison's position on the power of Congress to incorporate the Bank of the United States to be an example of his acceptance of practice and *judicial* precedent in opposition to historical intent.[112] As President, Madison signed into law the Second Bank of the United States twenty-five years after opposing the First Bank on constitutional grounds. Dodging the charge of inconsistency, he later claimed that whatever his private view of the meaning of the Constitution, it was superceded by "a course of authoritative expositions sufficiently deliberate, uniform, and settled" as to be "an evidence of the public will necessarily overruling individual opinions."[113] Of course, when he approved the Bank Bill in 1816, Madison had before him only *legislative* precedent. Later, when he questioned Andrew Jackson's veto of the rechartering of the Second B.U.S., he again focused on legislative interpretation of the Constitution. The need for stability, he explained, required that, in all but the most exceptional instances, legislators should be guided by legislative precedent in interpreting the Constitution in the same way that judges are guided by precedent in the interpretation of laws. He defended this view, using analogy and unequivocal statements, on two grounds. First, he argued that stability was essential to the rule of law; second, and arguably more fundamental, he maintained that a consistent line of legislative precedent established a presumption that the sovereign people approved the interpretation. With evident reference to the president's participation in the legislative process through the veto power, Madison thought that interposition of personal conclusions was particularly suspect "when no prospect existed of a change of construction by the public or its agents."[114]

With respect to the Bank issue, Madison conceded to Nicholas P. Trist in 1831 that "a course of authoritative, deliberate, and continued decisions" could serve to "fix the interpretation of a law," but the context of his remarks again indicates that he had legislative decisions in mind, decisions which were "an evidence of the Public

111. *See* Letter from Madison to John M. Patton (March 24, 1834), *reprinted in* 9 WRITINGS, *supra* note 18, at 534, 536.

112. *See* Powell, *supra* note 2, at 939-42.

113. Letter from Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* 9 WRITINGS, *supra* note 18, at 442, 443. *Accord*, Letter from Madison to the Marquis de LaFayette (Nov. 1826), *reprinted in* 3 LETTERS, *supra* note 102, at 538, 542; Letter from Madison to Nicholas P. Trist (Dec. 1831), *reprinted in* 9 WRITINGS, *supra* note 18, at 471, 476-77. *See also* Letter from Madison to Thomas Jefferson (Feb. 17, 1825), *reprinted in* 3 LETTERS, *supra* note 102, at 483.

114. *See* Letter from Madison to C.J. Ingersoll (June 25, 1831), *reprinted in* 4 LETTERS, *supra* note 102, at 183, 185.

Judgment, necessarily superseding individual opinions." It was fallacious, moreover, to confound "a question whether precedents could expound a Constitution, with a question whether they could alter a Const[itution]." It is significant, too, that he added:

> Another error has been in ascribing to the *intention* of the *Convention* which formed the Constitution, an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention[,] it is clear, that if the meaning of the Constitution is to be sought out of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions which gave it all the validity & authority it possesses.[115]

A comparable conclusion about the relative priority of ratifier intent emerges from an earlier letter involving the Bank issue. Writing to Judge Spencer Roane of Virginia after the decision in *McCulloch v. Maryland*, Madison attacked John Marshall's gratuitously broad construction of congressional authority. He admitted that words sometimes failed the founders, observing:

> It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; *more especially those which divide legislation between the General & local Governments*; and that it might require a regular course of practice to liquidate & settle the meaning of some of them.

The clause italicized here, which Powell excises from his rendition of the quotation, qualifies it. This qualification, however, is less significant than the stronger qualification provided both by general context and by the two sentences that immediately followed (which Powell also omits). In them, Madison explained further:

> But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such rule would not have prevented its ratification.[116]

Overall it is difficult to find Madison conceding that the original "interpretive intent" gave construction, including construction based on *usus*, a priority over resort to ratifier intent. Instead, he invoked ratifier intent in opposition to construction: original history (as it may be labeled) put limits on adaptation. He accepted

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115. Letter from Madison to Nicholas P. Trist (Dec. 1831), *reprinted in* 9 WRITINGS, *supra* note 18, at 471, 477.

116. Letter from Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* 8 WRITINGS, *supra* note 18 at 447, 450-51. Over a century later, Justice Sutherland offered a remarkably similar argument: "It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936).

that as a private individual he lacked the authority to substitute his interpretations for the meanings accepted by the sovereign public as time passed; but that was an issue of *who* could authoritatively explain the document, not of *how* it should be done.

Writing to M.L. Hurlbert in 1830, Madison satisfactorily summarized his views on interpretation. The letter needs quoting at length:

> [T]he real measure of the powers meant to be granted to Congress by the [Philadelphia] Convention, as I understood and [still] believe, is to be sought in the [Constitution's] specifications to be expounded indeed nor with the strictness applied to an ordinary statu[t]e by a Court of Law; not on the other hand with a latitude that under the name of means for carrying into execution a limited Government, would transform it into a Government without limits.
>
> But whatever respect may be thought due to the intention of the Convention, which prepared & proposed the Constitution, *as presumptive evidence of the general understanding at the time of the language used*, it must be kept in mind that the *only authoritative* intentions were those of the people of the States, as expressed thro' the Conventions which ratified the Constitution.
>
> That in a Constitution, so new, and so complicated, there should be occasional difficulties & differences in the practical expositions of it, can surprize [*sic*] no one; and this must continue to be the case, as happens to new laws on complex subjects, until a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings.
>
> As there are legal rules for interpreting laws, there must be analogous rules for interpreting const[itutio]ns and among the obvious and just guides to the Const[itutio]n of the U.S. may be mentioned—
>
> 1. The evils & defects for curing which the Constitution was called for & introduced.
>
> 2. The comments prevailing at the time it was adopted.
>
> 3. The early, deliberate & and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendencies.[117]

This summary, along with his other remarks on the subject (including his own occasional use of the views of the *framers*), suggests a capsule restatement of Madison's views. For him, the essential guidelines to interpretation were these:

> (1) The text, viewed always with an eye on the dictates of limited government;
>
> (2) The deliberations in Philadelphia, insofar as they offer insight into the way contemporaries not present, and not privy to the debates, would generally have understood the final language of the text;
>
> (3) The commentaries and debates accompanying ratification, and most especially (but by no means exclusively) those within the state conventions; and
>
> (4) Early and continued practice, particularly as a check on (but not an invariable barrier to) subsequent reinterpretation.

And what might be the exceptional occasion that would war-

117. Letter from Madison to M.L. Hurlbert (May 1830), *reprinted in* 9 WRITINGS, *supra* note 18, at 370, 371-72 (emphasis added).

rant subsequent reinterpretation at variance with the early and continued practice embraced within the fourth guideline? Presumably such a shift might come about when there existed a widespread, sustained, and hence persuasive conviction that reinterpretation was necessary in order to adhere even more faithfully to the first three guidelines, and especially in order to observe the "authoritative intentions . . . of the people of the States, as expressed thro' the Conventions which ratified the Constitution." If practice at variance with an original understanding nonetheless continued, surviving with the long-term acquiescence of Congress, this then evidenced the will of the sovereign people.

IV. THE ORIGINAL INTERPRETIVE INTENT

Madison understood the theoretical base of the new constitutional order and appreciated both the logic of the ratification process and the force of related Federalist defenses of the Philadelphia Convention against the charge of usurpation. He accordingly condemned resort to framer intent. So too did most of his contemporaries when they seriously weighed its authority. Viewed from the perspective of the founding period, framer intent is easily dismissed—a bogus issue which is best forgotten by both "intentionalists" and their critics. Yet it was not subjective or historical intent itself that was troublesome to the founders. The reasons running against framer intent supported the use of ratifier intent.

The issue of the status of subjective or historical ratifier intent for the founders should not be confounded with the question of the *extent* to which such intent soon provided a guide to constitutional interpretation, in comparison with familiar common-law hermeneutics. In constitutional disputes during the first years of the new government, arguments based on construction of the document eclipsed reliance on subjective intent. Thus in *Chisholm v. Georgia* the Supreme Court drew on treatise writers and contextual analysis in reading the judicial article to allow suits by individuals against states, ignoring Publius's fairly clear assurance to the contrary.[118] As another example, both Hamilton and Jefferson emphasized construction according to common-law rules in their exchange over the Bank of the United States.

Nonetheless, resolution of the issue of extent may be more complex. For example, aside from the possibility that the historical

118. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *discussed in* Powell, *supra* note 2, at 921-23; THE FEDERALIST No. 81, at 548-49 (A. Hamilton) (J. Cooke ed. 1961). *Cf.* 3 DEBATES, *supra* note 27, at 533, 555-56 (remarks of James Madison and John Marshall in the Virginia Ratifying Convention, June 20, 1788).

intent relevant to the *Chisholm* case was not so readily determined as is now commonly assumed, a higher authority soon corrected the Court regarding the amenability of states to suit, much in keeping with Edmund Randolph's explanation in 1788 of the recourse available if officials lost sight of "the present actual feelings of the people of America."[119] Then, too, Hamilton himself used ratifier intent in his bank opinion, in a matter-of-course fashion, notwithstanding the opinion's strong condemnation of resort to framer intent.[120] And in 1796, when the ratification debates provided arguably germane evidence on the role of the House of Representatives in treatymaking, disputants on both sides accepted the legitimacy of turning to the debates, however much they disagreed about what specifically qualified as evidence and about what it meant. Happily, however, the issue of extent need not be resolved here.

There is also the issue raised by Edward Livingston when he charged that the ratifiers acted with haste and felt the goad of party.[121] As a modern student of Madison asks, "Why should we assume that those who *merely* ratified the Constitution grasped its meaning better than those who wrote it—or those who have since seen how it works in practice?"[122] The answer from an "intentionalist" perspective is that whether the ratifiers better grasped the instrument's meaning is beside the point; rather, how the ratifiers understood the Constitution, and what they expected from it, *defines* its meaning. The act of ratifying cannot be dismissed with the adverb "merely."

The more fundamental point with respect to "the original understanding of original intent" is that by jettisoning framer intent, the founders did not throw constitutional interpretation exclusively into the grip of readily available common-law approaches, including use of constructive intent. If modern intentionalists focus on the framers, as Professor Powell alleges with considerable accuracy, they have scant theoretical or historical grounds for their history-based hermeneutics. When correctly reconstructed and understood,

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119. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 27-40 (1972) (reviewing the state ratification debates and arguing that Antifederalists claimed and some Federalists admitted that the judicial article made the states amenable to suits by individuals); U.S. Const., amend. XI; 3 DEBATES, *supra* note 27, at 471 (Randolph in the Virginia Ratifying Convention). *See supra* text accompanying note 51. Of course, to the extent that the ratifiers had recognized the amenability of states to suit, it becomes difficult to see the eleventh amendment as an attempt to restore the original intention. *See generally* C. JACOBS, *supra*, at 67-74.

120. *See supra* note 58 and accompanying text.

121. 5 ANNALS OF CONGRESS, *supra* note 61, at col. 635 (quoted *supra*, text accompanying note 82).

122. Rakove, *supra* note 6, at 79 (emphasis added).

however, the original understanding of original intent most emphatically does not rule out a resort to the understandings and expectations of the ratifiers in 1787-88, or to the range of materials that may illuminate their views. Indeed, it is not too much to say that at least some of the founders saw the ratifiers' historical or subjective intent as a check on constructions which cut loose from the original understandings of the sovereign people.